THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 404/08

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

and

KWESTA MNGOMA RESPONDENT

Neutral citation: *Director of Public Prosecutions v Mngoma* (404/08) [2009] ZASCA 170 (1 December 2009)

Coram: Mthiyane, Lewis, Malan, Bosielo JJA et Griesel AJA

Heard: 23 NOVEMBER 2009
Delivered: 1 DECEMBER 2009

Summary: Criminal Law – Sentence – Accused sentenced to five years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 – On appeal by State sentence held to be disturbingly inappropriate and replaced with sentence of ten years' imprisonment.

ORDER

On appeal from: **Eastern Cape** High Court Grahamstown (A R Erasmus J sitting as court of first instance).

1. The appeal is upheld.
2. The sentence imposed on the respondent by the high court is set aside and replaced with the following:
   'The accused is sentenced to imprisonment for a period of 10 years.'

JUDGMENT

Bosielo JA (Mthiyane, Lewis, Malan, JJA et Griesel AJA concurring)

[1] The respondent (to whom I shall refer as the accused) was charged and convicted of murder with on 22 August 2007 in the Eastern Cape Division of the High Court, sitting in Grahamstown. He was sentenced to imprisonment for five years in terms of s 276(1) (i) of the Criminal Procedure Act 51 of 1977. The appellant (to whom I shall refer as the State) was granted leave to appeal against the sentence to this court in terms of s 316B.

[2] The question to be answered in this appeal is whether a sentence of five years' imprisonment in terms of s 276(1) (i) for the murder of the accused's live-in lover by strangling her is appropriate. Section 276(1) (i) provides for 'imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.' The State contends that, given the circumstances under which the deceased was killed, the sentence is startlingly inappropriate and induces a sense of shock. On the other hand, the accused contends that the sentence is appropriate and should be left undisturbed.

[3] In order to answer this question, a brief outline of the facts of this case is necessary. The tragic facts of this matter are common cause. These are captured succinctly in the accused's written plea explanation tendered in terms of s 112(2), which was accepted by the State. The accused was involved in a love relationship with the deceased, spanning a period of some six years. From this relationship one child was born. On 8 August 2006, whilst on his way home the accused saw a man emerging from his home. Upon arrival at home, the accused confronted the deceased and asked who had been sleeping on his bed which was untidy. Instead of responding the deceased hid her face. The accused concluded that the deceased was unfaithful to him. Angered by this discovery, he then assaulted the deceased and chased her away from his home.

[4] Four days later, the respondent and the deceased were walking together to Cathcart. The deceased was leading the way when all of a sudden the accused, who apparently had been seething with anger at the deceased for cheating on him, threw a stone at her head causing her to fall to the ground. He then strangled her with a lace from his soccer boot until she stopped breathing. He then tied her to a tree and left the scene. He later wrote a note and left it with her to create the impression that she had committed suicide.

[5] In his plea explanation, the accused admitted that when he was choking her, he realised she might die. Notwithstanding this, he continued to strangle her until she stopped breathing. The accused further admitted that he knew that his actions were unlawful. His explanation for this behaviour was that he was under severe provocation and emotional stress caused by his suspicion that the deceased was cheating on him. The situation was exacerbated by serious doubt that he suddenly entertained as to whether the child that she was carrying was his. The deceased was seven months pregnant at the time.

[6] The main contention advanced on the State's behalf on appeal was that, given the nature of the offence and the circumstances under which the

murder was committed, a sentence of five years' imprisonment in terms of s 276(1) (i) is shocking and startlingly inappropriate. It was submitted that the judge *a quo* failed to have regard to the gravity of the offence committed by the accused and that the sentence imposed was too lenient in the circumstances.

[7] On the other hand, counsel for the accused, relying on the judgment of this court in *S v Mvamvu* 2005 (1) SACR 54 (SCA), contended that his personal circumstances and the peculiar circumstances under which the offence was committed called for the imposition of a sentence which would give recognition to the individualisation of punishment. We were urged to take cognizance of the accused's lack of skills in anger management. On the evidence his anger was 'bottled' up for four days before it exploded into the commission of the murder. It was contended that the accused acted under an extreme state of emotional stress caused by the deceased's infidelity. This affected the respondent so much that he lost control of himself so it was argued. Counsel contended further that it was clear from a combination of the accused's personal circumstances that he is a person endowed with positive attributes and who has the potential to be rehabilitated.

[8] In answering the question whether the sentence imposed on the accused is disturbingly disproportionate, it is crucial to bear in mind that the deceased was murdered four days after the accused had caught her under suspicious circumstances. In other words the accused did not act on the spur of the moment. It is common cause that the accused chased the deceased away on that day (which was a Tuesday). The accused and the deceased met on Wednesday and Thursday. Notably the accused did not assault the deceased. On Saturday, four days later, the accused suddenly flared up and assaulted the deceased before killing her.

[9] However, it is necessary in the evaluation of an appropriate punishment that due and proper consideration be given to all mitigating circumstances which are in accused's favour. This is particularly important in the present matter because of the applicability of the minimum sentence

provisions which require that a sentence of fifteen years' imprisonment be imposed unless we find substantial and compelling circumstances to be present. (See *S v Mvamvu* para 3.) The accused was 24 years old at the time; he had only progressed up to standard 5 in his scholastic career; for all intents and purposes he can be described as uneducated and unsophisticated; because of his low level of education, he was only able to do odd jobs; he had been living with the deceased as a live-in lover for 6 years and they had one child together. Importantly, the accused was a first offender. He pleaded guilty to the charge and showed genuine penitence. The court below found the form of intent to be *dolus eventualis* and not *dolus directus.* There is no doubt that these are positive factors in favour of the accused.

[10] In considering an appropriate sentence, the court below acknowledged the fact that violence is prevalent in our society, particularly violence committed by men against women. It described the accused's conduct as deplorable. Furthermore, the court acknowledged that the interests of society dictate that our courts should send a strong message to the public that violence will not be tolerated. I can find no fault with this approach. However, the court found that a combination of the accused's personal circumstances and in particular the circumstances which led to this tragic event are sufficiently weighty and cogent to qualify as substantial and compelling circumstances justifying a lesser sentence than the prescribed one. In argument before us the State conceded that there were substantial and compelling circumstances present which justified a lesser sentence. However, the State contended that even with the presence of substantianal and compelling circumstances the sentence imposed by the trial court on the respondent is shockingly inappropriate. The state urged this court to set the sentence aside and to substitute a sentence of between 10 to 12 years' imprisonment.

[11] The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial court. As to when an appellate court

may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) at p 478 d-g:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly in appropriate".'

[12] During argument before us, counsel for the State did not argue that there was any misdirection on the part of the trial court. The major thrust of the argument on behalf of the State, was that the sentence of imprisonment for five years subject to s 276(1)(i) is shockingly inappropriate. It was furthermore argued that the sentence imposed is a radical departure from the benchmark of 15 years prescribed in s 52(1)(a)(i) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[13] I agree with the trial court's finding regarding the existence of substantial and compelling circumstances. It cannot be denied that at the time of the murder, the accused was under serious provocation, hurt and anger caused by the deceased's infidelity. This is understandable. However, this does not excuse the accused's conduct. Viewed against the grim facts of this case, I agree with the State's contention that the sentence imposed on the accused is shocking and startlingly disproportionate to the gravity of the crime that he committed. The sentence imposed on the accused is in my view inappropriate and distorted in favour of the accused without giving sufficient weight to the gravity of the offence and the interests of society. For a sentence to be appropriate it must be fair to both the accused and society. Such a sentence must show a judicious balance between the interests of the

accused and those of society.

[14] A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic. Courts should take due cognisance of the salutary warning expressed by Marais JA in *S v Roberts* 2000 (2) SACR 522 (SCA) para 20 where he stated:

'It [the sentence] fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.'

The sentence imposed on the accused in the present appeal fails to reflect an appreciation of this warning.

[15] I accept that the circumstances in which the accused found himself evoke a measure of sympathy for him. His trust in the deceased was shattered. In all likelihood, he felt seriously betrayed by the deceased. However, one should not allow 'maudlin sympathy' for the accused to unduly influence one's objective and dispassionate consideration of an appropriate sentence. I am of the view that the sentence imposed is so disturbingly lenient that it has the effect of trivialising violence. Moreover, the sentence imposed on the accused differs markedly from the sentence which I would have imposed had I been sitting as the trial court. In my view, the disparity is so striking that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate.' Accordingly this court is at large to interfere with the sentence and impose what it considers to be an appropriate sentence.

[16] Having given proper and due consideration to all the circumstances, I am of the view that the aggravating features of this case far outweigh the mitigating circumstances. A sentence of imprisonment for 12 years appears to me to be appropriate. However, the accused has already served some 10 months in prison. He was sentenced on 27 August 2007 and released into

correctional supervision by the Commissioner in terms of s 276(1)(i) on 28 June 2008. It is fair and appropriate that this period as well as that served while under correctional supervision be taken into account in considering an appropriate sentence.

[17] 1. The appeal upheld.

2. The sentence imposed on the respondent by the high court is set aside and replaced with the following:
'The accused is sentenced to imprisonment for a period of 10 years.'

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L O BOSIELO
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	Mr D Els
	Instructed by Director of Public Prosecutions, Grahamstown Director of Public Prosecutions, Bloemfontein
FOR RESPONDENT:	Ms S Kruger (attorney)
	Instructed by Grahamstown Justice Centre, Grahamstown Bloemfontein Justice Centre, Bloemfontein