



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO.CA&R 80/2022

In the matter between:

SIYANDA VETO

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

NORMAN J:

[1] This is an appeal against sentence only. The appellant is before this court having been granted leave to appeal by the regional court, against sentence, on 8 July 2021. Mr Geldenhuys appeared for the appellant and Mr Nohiya for the respondent.

Background facts

- [2] The appellant and Ms Ntombethemba Tokwe (Ms Tokwe) were in a romantic relationship for a period of about fifteen years. A minor child was born out of that relationship.
- [3] On 16 June 2019, in the evening, the appellant approached Ms Tokwe, who was walking from a tavern in the company of the deceased, Mr Khanyile Helebe and her brother Mr Khululekani Tokwe. Ms Tokwe was also involved romantically with the deceased. The appellant had a verbal altercation with Ms Tokwe and insisted that she should go with him. It appears that when Ms Tokwe and the appellant were arguing, the deceased moved away and stood a few meters away from them. Ms Tokwe refused to go with the appellant. Mr Khululekani Tokwe intervened and walked away from the appellant with his sister. The appellant went to the deceased and stabbed him. The deceased died as a result of the injuries sustained on his chest.
- [4] The evidence of Dr Dwyer, a district surgeon for Sarah Baartman area, found three wounds on the deceased's body, one of which had been inflicted on his chest next to the collar bone, penetrating through the rib just underneath the collar bone. He described it as follows: *'it went through the rib so the rib that is just underneath the collar bone, it went through that rib then it went to the left lung.'* Dr Dwyer found that that it was that wound that caused the deceased's death.
- [5] The appellant was charged with the murder of the deceased. At the conclusion of his trial he was convicted and sentenced to a term of fifteen years imprisonment. He applied for leave to appeal against both conviction and

sentence. The trial court refused leave to appeal in respect of the conviction but granted it in respect of sentence, as aforementioned.

Grounds of appeal

[6] The appellant relied on several grounds of appeal which may be summarized as follows:

6.1 That when considering an appropriate sentence, the personal circumstances of the accused, the nature and seriousness of the crime, and the interests of society must be considered. None of those aspects must be unduly over emphasized at the expense of others. The sentence imposed is disproportionate to the personal circumstances of the appellant, the seriousness of the offence and the interests of society and is therefore unjust.

6.2 The trial court ought to have taken into account the fact that the appellant must have experienced emotional turmoil upon seeing his girlfriend, who at the time had not broken up with him, together with the deceased in a romantic relationship. Instead of the court taking that aspect as a mitigating factor, it used it as an aggravating factor.

6.3 On these bases it was submitted that, having regard to all the grounds, the trial court misdirected itself and thus, this court, is at large to interfere with the sentence.

6.4 Mr Geldenhuys submitted that there were substantial and compelling circumstances present which justified a deviation from the prescribed

minimum sentence. He submitted that the appellant stabbed the deceased shortly after the altercation with Ms Tokwe. These two events were closely connected. The appellant must have experienced emotional turmoil as a result of Ms Tokwe's infidelity and the deceased became the object of his anger. He submitted that even though the appellant did not testify in mitigation, there was some turmoil caused by jealousy. He accordingly submitted that the sentence should be set aside and substituted with a less severe sentence.

[7] The appellant relied on several decisions where the various courts had reduced sentences imposed on similar matters. Those matters are, in my view, distinguishable from the facts of this case. I shall deal with those decisions briefly.

[8] The facts in ***S v Malijane***¹ the accused in that case was sentenced to undergo eight years imprisonment which was reduced to five years imprisonment , on appeal, in terms of section 276(1)(i) of the Criminal Procedure Act. In that case the appellant had stabbed his wife to death after he found his wife in a compromising position with another man. She refused to return home with him. He stabbed her five times with a knife.

[9] The other decision is ***S v Mnisi***² where a correctional services officer , was found by the court to have acted with diminished responsibility when he found his wife in an embrace with the deceased in a car . He shot the deceased. His wife and the deceased had previously been involved in an adulterous relationship and his wife promised that she will no longer see the deceased.

¹ 1991 (1) SACR 279 (O).

² 2009 (2) SACR 227 (SCA).

The sentence of five (5) years was deemed to be appropriate by the majority of the court.

[10] The Supreme Court of Appeal in **DPP v Mngoma**³, where the accused killed a pregnant woman with whom he lived. He suspected that she was unfaithful to him and entertained some doubts as to whether the child that she was carrying was his. He 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. The Court found that a sentence of ten years imprisonment was an appropriate sentence after emphasizing the fact that the accused was convicted of murder with *dolus eventualis*, he was a first offender and was uneducated and unsophisticated.

[11] In **S v Mathe**⁴ the accused was a Correctional Services officer who killed the mother of his child and attempted to kill a colleague shortly after the former had informed him that she was leaving him for the latter. A sentence of ten years imprisonment was imposed.

[12] In **S v N**⁵ the accused was sentenced to correctional supervision in terms of section 276(1)(i) for shooting and killing a married man with whom she had a love relationship.

[13] The State opposed the appeal and advanced the following grounds:

13.1 The sentence of fifteen years imprisonment is not shockingly inappropriate if one has regard to the following facts:

³ 2010 (1) SACR 427 (SCA).

⁴ 2014 (2) SACR 298 KZN.

⁵ 2016 (2) SACR 436 KZN.

- (i) That when the appellant found the deceased, Ms Tokwe and other people walking together, he wanted to force Ms Tokwe to go with him. The deceased did not provoke the appellant in any way and there was no reason for the appellant to attack him.
- (ii) The killing of the deceased was a senseless act. The conduct of the appellant on that day displayed a sense of entitlement and belief on his part that he owned Ms Tokwe.
- (iii) The facts of this case are distinguishable from the case law relied upon by the appellant in his heads of the argument, because in those cases the accused had pleaded guilty and had placed facts before those courts. As a result of those facts it was found that those accused persons had diminished responsibility. However, in this case, he argued, there are no facts that the appellant had placed before the trial court and there were no findings of diminished responsibility.
- (iv) After the intervention of Mr Tokwe, the appellant had all the time to control and restrain himself. It was submitted that his powers of restraint and self-control were not diminished because he managed to leave Ms Tokwe and he went to the deceased who was a few meters away.
- (v) The trial court properly considered the appellant's personal circumstances, the nature of the crime and the interests of the community. The mitigating factors must be weighed against the aggravating circumstances of the offence in question and the

expectations of the society. As properly acknowledged in sentence by the trial court, murder is unquestionably a serious offence. In this matter the deceased posed no physical threat to the appellant and had no interaction with him at all.

- (vi) The trial court correctly found that there are no substantial and compelling circumstances present and correctly imposed the sentence of fifteen years imprisonment. On those bases this court should dismiss the appeal against the sentence.

The test

[14] In **S v Malgas**⁶ Marais JA articulated the test in the following terms:

“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 inappropriate”.

⁶ 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220 at 478 d-g.

Discussion

- [15] The appellant was sentenced based on the Criminal Law Amendment Act ,105 of 1997. The trial court found that there were no substantial and compelling circumstances to deviate from the minimum sentence of fifteen years.
- [16] I wish to refer to the remarks of the trial court when it granted the appellant leave to appeal against the sentence. The court stated the following:

‘As far as the application for leave to appeal against the sentence is concerned I note the argument that the sentence is shockingly inappropriate or shockingly severe. The sentence can never be shocking severe if the prescribed minimum sentence of 15 years is imposed because that is the sentence that is prescribed by the legislature for a first offender. As far as the question regarding the substantial and compelling circumstances is concerned, I will agree that another court might come to a different finding as far as that is concerned. Taking the person(sic) circumstances into account cumulatively, another court might find that 15 years imprisonment is then unreasonable in the circumstances of this particular matter. I will thus grant the accused leave to appeal against the sentence on him.’

- [17] The trial court having received evidence in respect of both the conviction and sentence clearly stated in this matter that there were no substantial and compelling circumstances when it sentenced the appellant. However, in the application for leave to appeal, she found that this court may find those substantial and compelling circumstances and find the sentence to be unreasonable. It would not be prudent to simply reject those findings which are made by a trial court that had the full facts ventilated before it, had observed the witnesses, had questioned some of them for clarity and thus had the benefit

of *viva voce* evidence before it. However, that finding, is not binding on this court, but it is a matter for consideration as regards, the appropriateness of the sentence, and in particular the presence of substantial and compelling circumstances.

[18] The non- existence of substantial and compelling circumstances is an issue that the trial court applied its mind to. This is evident in its judgment for sentence. It, *inter alia*, treated the appellant as a first offender since his previous conviction was not related to the murder charge. It found that that fact does not in itself constitute substantial and compelling circumstances. It also found that the appellant was not a primary caregiver of the minor child who receives social grant. He was unemployed. In 2008 he was convicted on a charge of housebreaking with intent to commit a crime and was sentenced to 12 months' imprisonment which was wholly suspended. It considered his personal circumstances and the fact that liquor had a role to play during the commission of the offence. It also considered the seriousness of the offence, the interests of the Port Alfred community and the community at large, the prevalence of violent crimes in that area and in the country, the appropriateness of a lengthy term of imprisonment.

[19] These factors that the trial court considered when it sentenced the appellant had not changed when it entertained the application for leave to appeal. Considering the finding that the trial court made in the ruling for leave to appeal, I must record the following factors as factors that, despite the finding, they militate against interference with the sentence. They are:

19.1 Unlike all the cases relied upon by the appellant, above, the appellant maintained throughout in his evidence that he did not see the deceased that night.

19.2 He heard for the first time after his arrest that Ms Tokwe was dating another person.

19.3 On his version, the argument between him and Ms Tokwe was that she refused to go with him and she complained that he was no longer maintaining the child. When she refused, she raised her voice and her brother intervened. He then left and walked away.

[20] What is common in all the above mentioned cases relied upon by the appellant, is that, in each one of those cases, the accused or appellant had placed factors that led to commission of the offences. The trial court and the appeal court, having been armed with those facts were able to deviate from the minimum sentence or interfere with sentence on appeal and alter it. The trial courts were in a position to make a finding of diminished responsibility based on those facts. The dearth of relevant facts herein from the appellant fortifies the findings of the trial court and there is accordingly no basis to interfere with the sentence.

[21] Having regard to the facts that he placed before Court in his evidence and those placed in mitigation by his legal representative, any suggestion of emotional turmoil or jealousy, does not come from the appellant. The only person who would know whether he was emotionally affected by the infidelity, in any way, would be the appellant himself. He said nothing about that. A court on appeal cannot speculate on how the appellant felt unless he has put out facts in that regard. I do not find that the trial court in its exercise of its discretion, misdirected

itself. I also find the trial court was correct in its finding that there were no factors that qualify as substantial and compelling circumstances.

[22] I agree with Mr Nohiya that this was a senseless killing. The appellant attacked a man who was simply standing and stabbed him to death. No provocation and no argument but simply a brutal attack with a sharp object.

[23] It appears from the decisions relied upon by the appellant that the courts including the Supreme Court of Appeal have found that where offences committed which relate to matters of passion, the courts impose lenient sentences. Of course this is not the general principle but one can find that the reason for that is because matters of passion are informed largely by emotions. Be that as it may, society expects every man or woman to be able to control his or her emotions when confronted with matters of infidelity. The circumstances under which this particular offence was committed, was taken into account by the trial court.

[24] On the evidence it is apparent that the stabbing of the deceased happened soon after the altercation between the appellant and Ms Tokwe. The brutality of the offence and the manner in which it was carried out and the interests of society far outweigh the appellant's personal circumstances. There is accordingly no merit in all the grounds upon which the appeal is based. In the circumstances the appeal must fail.

[25] I accordingly make the following Order:

“The appeal against sentence is dismissed.”

T.V. NORMAN

JUDGE OF THE HIGH COURT

I agree.

V. P. NONCEMBU

JUDGE OF THE HIGH COURT

Appearances:

For the APPELLANT : ADV.D.P .GELDENHUYS

JUSTICE CENTRE

MAKHANDA

For the RESPONDENT : ADV. A.A. NOHIYA

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTIONS

MAKHANDA

DATE OF HEARING : 12 OCTOBER 2022

DATE OF JUDGMENT : 18 OCTOBER 2022