

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Phatshoane ADJP and Nxumalo AJ sitting as court of appeal):

The appeal against the sentence is dismissed.

JUDGMENT

Siwendu AJA (Petse DP and Mothle and Hughes JJA and Chetty AJA concurring);

[1] This appeal is against the substituted sentence of the Northern Cape Division of the High Court, Kimberley (the high court) of the sentence imposed by the Northern Cape Regional Court sitting in Carnarvon. It involves an appropriate sentence in the context of reciprocal intimate partner violence and domestic violence.¹

[2] The regional court convicted Ms Dawida Solomons (the appellant) for the murder of Mr Barnwell Sebenja (the deceased), her partner of 15 years. The deceased was 34 years old and the father of two of the appellant's children.

[3] The conviction carried a prescribed minimum sentence of 15 years as the crime falls within Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. However, on 8 November 2018, the trial court sentenced the appellant to 8 years' imprisonment. Accordingly, it found that there were substantial and compelling circumstances, based on her personal circumstances, justifying a lesser sentence.

¹ The World Health Organization's definition of the term 'domestic violence' is used in many countries to refer to partner violence but the term can also encompass child or elder abuse, or abuse by any member of a household. On the other hand, 'Intimate partner violence' includes physical, sexual, and emotional abuse and controlling behaviours by an intimate partner (see the information sheet by the World Health Organization and Pan American Health Organization 'Understanding and addressing violence against women: intimate partner violence' 2012 page 1).

[4] The appellant successfully petitioned the high court for leave to appeal against the conviction and sentence. The high court confirmed her conviction, but set aside the sentence. It imposed a sentence of 8 years' imprisonment, 3 years of which were conditionally suspended for 5 years, rendering an effective 5-year imprisonment.

[5] The high court found that the evidence of domestic violence and abuse at the hands of the deceased, as alleged by the appellant, was scant. She had not adduced any medical evidence of hospital treatments to support the allegations of assault by the deceased. It found that the domestic violence interdict she had obtained did not mention the physical abuse. It criticised the appellant for not laying charges against the deceased.

[6] Throughout the proceedings, the State placed emphasis on the events of the day of the incident, contending that the appellant's conduct was consistent with the conduct of 'a woman scorned'. The high court found the assessment a logical one. Despite the identified shortcomings, the high court concluded there was some evidence of abuse in the protection order obtained by the appellant, which could not be ignored. It ameliorated the sentence in light of the perpetual violence which had marred the relationship with the deceased.

[7] Dissatisfied with that outcome, the appellant petitioned this Court for and was granted special leave to appeal against the sentence. The appeal was disposed of in terms of s 19(a) of the Superior Court Act 10 of 2013 without the hearing of oral evidence.

[8] The primary grievance is that the high court misdirected itself by underemphasising the domestic violence and abuse she suffered at the hands of the deceased. The appellant contends that this Court must take account of the persistent threats by the deceased to leave her for another woman, whenever she refused to comply with his demands as a facet of emotional abuse. The high court ignored this.

[9] Her second ground for appeal is that the high court minimised her personal circumstances when it imposed a custodial sentence. She places an emphasis on her position as a primary caregiver of the minor children as well as her role as the sole breadwinner. She contends that imprisonment will have a devastating effect on them.

[10] In essence, the appellant seeks an order setting aside the custodial sentence imposed and for the matter to be remitted to the trial court for consideration of a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977,² alternatively for this Court to impose a suitable sentence of correctional supervision with conditions.

Background

[11] The facts leading to the appellant's conviction are not contested. Despite a difficult upbringing, the appellant established a home at [...] Bonteheuwel Carnarvon, where she lived with her children. Her home is a typical municipal semi-detached house comprising a two-roomed house. From the trial exhibits, it is no more than 40 square meters.

[12] The appellant was 47 years old at the time of the offence. She had stable employment working as a cleaner and a part-time assistant librarian at Carnarvon Kareeberg for several years. She is the sole primary caregiver and breadwinner for her family. Her children with the deceased were 15 and 11 years respectively at that time.

[13] Even though the deceased was employed, he frequently asked the appellant for money to buy alcohol. The appellant often yielded to his demands. The trial court was informed that in addition to alcohol, the deceased often smoked dagga. He had a relationship with another woman, a public fact known by the appellant.

² Section 276(1)(h) provides that '[s]ubject to the provisions of this Act and any other law and of the common law' various sentences may be passed upon a person convicted of an offence, including a sentence for correctional supervision.

[14] The trial evidence was that the deceased would stay with the appellant for a few months, then leave to stay with his other partner for another few months. The night before the incident, the deceased and the appellant drank together. The deceased stayed overnight at the appellant's home.

[15] On 13 February 2016, the deceased left at about 5 am to go to the shebeen, leaving the appellant behind. At around 10 am, the deceased and the appellant met at Nevos Tavern, where they drank more beers. The appellant testified that the deceased swore at her, demanding money to buy more alcohol. The appellant relented once more and gave him R50.

[16] After a while, she left Nevos Tavern with a friend, Belsaar, to fetch food parcels from Belsaar's father. Thereafter, Belsaar provided her a lift to Spar, where she brought groceries. Despite evidence that the deceased had sworn at her, the appellant entrusted her house key to the deceased.

[17] The sole witness for the State, Mr Meckock (also known as Oom Klass), a mutual friend of the deceased and the appellant, testified that he had been drinking with the deceased that morning. He was not present when the deceased swore at the appellant. However, that afternoon, he met with the appellant and the deceased at Annie's house, the semi-detached house next to the appellant's house.

[18] He confirmed that the appellant returned from town with two bags of groceries from Spar and a crate with cold meats but without her house keys. The appellant had sent her neighbour's child, Jasmine, to fetch her house key from the deceased. They waited for the key at Annie's house. The deceased arrived at Annie's house with Jasmine.

[19] The trial evidence is that the appellant had asked Mr Meckock, but not the deceased, to assist in carrying her groceries to her house next door, which he did. At this time, the deceased took a polony roll from the crate of cold meats without asking the appellant. This upset the appellant. An argument ensued and migrated to the appellant's house. Given the proximity of the houses and permeable sound, Mr Meckock overheard the exchange. The appellant used harsh and foul language.

[20] The deceased, who was described as a softly spoken person, demanded his backpack, clothes and work boots from the appellant. He threatened to leave the appellant for the other woman. The appellant first asked the deceased to lie down. When he did not, she told the deceased to take his clothes and leave. Mr Meckock disputed that the deceased swore back or shouted at the appellant.

[21] Mr Meckock testified that he returned to Annie's house to wait for the deceased but later came out to check on the deceased. He found the deceased standing at the doorway of the appellant's house, his back towards Mr Meckock, facing the appellant, who was inside the kitchen. The deceased had his boots and backpack over his shoulder.

[22] Mr Meckock saw the appellant come from the kitchen towards the deceased and stab him once with a knife. The deceased had staggered backward towards Mr Meckock, who caught him from behind. The post-mortem report shows that the appellant inflicted a 24 mm cut in the anterior thorax just left of the midline over T5 with a 10 mm exit wound on the right ventricle posterior and pericardium of the deceased's heart.

[23] As already alluded to above, the appellant testified about previous incidents of violence at the hands of the deceased. She showed the trial court three facial injuries to her cheek, chin, and forehead caused by stab wounds which she claimed were inflicted by the deceased. She testified that she was hospitalised on each of these occasions. Her evidence was that she did not lay charges against the deceased because she was scared of him. It is, however, common cause that in February 2015, the appellant obtained a domestic violence interdict against the deceased premised on emotional abuse.

[24] It bears mentioning that even though they did not testify at the trial, a letter from the family of the deceased was admitted into evidence. His family disputed that the deceased assaulted the appellant. They claim that the appellant and her elder son, who was not born out of the relationship with the deceased, perpetually 'hurt the

deceased in so many different ways, it is impossible to describe.’ As a result, the deceased relocated back to his family home.

[25] The appellant’s version was that she acted in self-defence on the day because the deceased had assaulted her first. Dr van Zyl had examined her. The high court confirmed the trial court’s view that the absence of physical injuries sustained on her body that day militated against self-defence.

The appeal on sentence

[26] The issue in this appeal is whether the high court misdirected itself in the exercise of its discretion to warrant an interference with the sentence as contended. The complaint centres on the court’s approach to the evidence of domestic violence and abuse at the hands of the deceased. A second issue pertains to the imposition of a custodial sentence and in particular whether appropriate considerations were taken into account given that the appellant is a primary caregiver.

[27] The appellant relies on the pre-sentencing report prepared at the trial court. The report points to an intergenerational cycle of abuse and violence in her family of origin. It reveals that the appellant grew up in an abusive environment. Her father abused her mother, which fractured her family of origin. Her brother, left home at a young age to live with their grandparents because of the abuse. Her parents finally divorced.

[28] The main contention by the State is that the appellant failed to meet the threshold in *S v Engelbrecht*.³ The State contends that the finding by the trial court was not that the appellant was ‘a victim’ in the relationship but that the relationship was marred by violence. The argument is that the domestic violence interdict obtained by the appellant in February 2015 did not mention ‘physical assaults’ inflicted by the deceased. In addition, the appellant had not reported these incidents to the probation officer. The State argues further that the trial court took judicial notice that both men and women could be perpetrators of violence. This may be so.

³ *S v Engelbrecht* 2005 (2) SACR 163 (W) para 47 where the court held that where a party relies on domestic violence to ameliorate a sentence, it must discharge an extra ordinary evidentiary burden of proving the existence, the extent, the nature, the duration and the impact of the domestic violence.

[29] Something must be said about the submission by the State. Implicit in it is that there must have been evidence that the appellant suffered physical harm. That approach is contrary to the Domestic Violence Act 116 of 1998, which provides a wide definition of domestic abuse.⁴ However, for present purposes nothing turns on this.

[30] The pre-sentencing report depicts a history of the intergenerational cycle of domestic violence in the appellant's family of origin, a significant contributor to the pervasive scourge. The impact of this history, and factors that propelled the appellant to stay with the deceased, who she claims humiliated her, were never tested by the trial court or on appeal. Moreover, her legal representative did little to counter the impression that her conduct was synonymous with that of 'a woman scorned' (a pejorative term). As a result, the evidence on sentence was in the main narrowed to the fateful single incident of February 2016.

[31] It is trite, based on a long line of decided cases,⁵ that an appellate court may only interfere with the sentencing discretion of the trial court on limited grounds; if it is satisfied that the discretion was not properly exercised or the sentence was shockingly inappropriate or disproportionate.

[32] In addition to the shortcomings above, the appellant did not testify in mitigation of her sentence. She does not explain the failure to do so. The threshold in *Engelbrecht* can only be met if evidence is adduced before the court. Despite the submissions by the State, and the paucity of evidence as to the extent and impact of the history of domestic violence, the high court took cognisance of the protection

⁴ Section 1 of the Domestic Violence Act provides that the term 'domestic violence' means—
'(a) physical abuse;

...

(c) emotional, verbal and psychological abuse;

(d) economic abuse;

...

or

(j) any other controlling or abusive behaviour towards a complainant'.

⁵ See *S v Rabie* 1975 (4) SA 855(A) at 865B. See also *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469; [2001] 3 All SA 220 paras 12-13 and *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 113.

order as an indication of the existence thereof, correctly, in my view. It ameliorated the severity of the sentence within the evidence available before it.

[33] The last complaint pertains to the appropriateness of a non-custodial sentence, considering the appellant's role as a primary caregiver. In this instance, the trial court weighed up and took account of the imperatives required when sentencing a primary caregiver propounded in *MS v S (Centre for Child Law as amicus curiae)*.⁶

[34] The issue on appeal essentially pivots on the adequacy of the care found for the children. At the time, placement of the children was found in the care of Ms Agnes Sebenya, a relative of the deceased. The appellant was unhappy with this, contending it was not in the best interest for the children without substantiating the basis for her dissatisfaction.

[35] Significantly, the above issues have been overtaken by various events. The appellant has been on bail pending the appeal since 2018. At the time of the probation report in September 2018, her children were 15 and 11 years, respectively. One child has reached the age of majority and the younger child is 16 years.

[36] I am satisfied that the high court exercised its discretion appropriately. The sentence is not disproportionate given the seriousness of the offence. Thus, there is no basis to interfere with the sentence imposed.

[37] In the result, the following order is made:
The appeal against the sentence is dismissed.

⁶ *MS v S (Centre for Child Law as amicus curiae)* 2011 (2) SACR 88; [2011] ZACC 7; 2011 (7) BCLR 740 (CC) para 45; the court held that the fact that the children will be adversely affected by the incarceration of their mother who is a primary care giver does not on its own impose an obligation on the sentencing court to protect the children at all costs from the consequences of an incarceration. All that is required is that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children, on the one hand, and the need to punish the appellant for her misconduct, on the other.

NTY SIWENDU
ACTING JUDGE OF APPEAL

Appearances:

For appellant: IJ Nel

Instructed by: Mario Williams Attorneys, Kimberley
Symington & De Kok Inc, Bloemfontein

For respondent: AH van Heerden

Instructed by: The Director of Public Prosecutions, Kimberley
The Director of Public Prosecutions, Bloemfontein