

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A698/2014

Date: 19 February 2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

19/2/2015 *[Signature]*
DATE SIGNATURE

In the matter between:

SAMUEL MOTHATA

Appellant

And

THE STATE

Respondent

JUDGMENT

PRETORIUS J.

[1] The appellant was charged in the Local Circuit Division of the High

Court sitting at Polokwane with one count of murder and one count of rape.

- [2] The appellant pleaded guilty on the charge of murder and on the lesser count of indecent assault. The state accepted his plea and he was convicted on both counts. The appellant was sentenced to thirty (30) years imprisonment on 28 November 2007. Leave to appeal was refused, but granted by the Supreme Court of Appeal on 20 May 2013 to the full court of this division. The appellant was legally represented throughout the proceedings.

The current appeal is only against sentence and not against conviction.

- [3] The facts are that on 5 December 2005, at Mmotong Village, the Appellant had accompanied the deceased to a certain homestead. He waited outside for her. Whilst talking to her he found that the house she had visited was that of her other lover. He confronted her and she admitted that the man was her lover and that the person was a witchdoctor who would bewitch the appellant.

- [4] He grabbed her clothes and she slapped him, whereafter he started throttling her until she fell to the ground.

He then kicked her between her thighs and inserted his finger into her vagina. He then discovered that she had passed away. He undressed her body and disposed of the clothes.

- [5] The doctor, who conducted the post mortem, found that the cause of death was

“Hypoxia due to manual strangulation.”

- [6] In the present matter the dictum by Marais JA in **S v Malgas 2001(1) SACR 469 (SCA)** p 481 para 22 is apposite :

“The greater the sense of unease a court feels about the imprisonment of a described sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

- [7] In this instance the court has to agree with counsel for the defence that the prescribed sentence for murder is 15 years imprisonment, as it was not premeditated murder. The court *a quo* had erred by imposing a sentence of thirty (30) years imprisonment without indicating and informing the appellant why the court thought it prudent to double the prescribed sentence. There was no attempt by the court to adhere to the

guidelines as set out in **S v Mathebula and Another 2012(1) 374 (SCR)** at paragraph 11.

- [8] This court cannot speculate as to the reasons which motivated the court *a quo* to impose double the prescribed sentence, as the court did not give any reasons in the judgment on sentencing. It does not appear from the judgment on sentencing that the court had considered substantial and compelling circumstances when considering the sentence, therefor the sentence of the court *a quo* should be set aside. The court had erred and misdirected itself by not considering whether there are substantial and compelling circumstances as provided for in section 51(3) of Act 105 of 1997.

- [9] In **S v Rabie 1975(4) SA 855(A) at 862(G)** Holmes JA held:

“It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal,”

In **S v Dodo 2001(1) SACR 594 (CC)** Ackerman J dealt with imprisonment in paragraph 38:

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves,

never as merely means to an end”

[10] This court takes into account the argument by counsel for the appellant that the court should find compelling and substantial circumstances. The court finds the following as substantial and compelling circumstances: the fact that the appellant pleaded guilty to the charges; he was 23 years of age, thus relatively young when he committed these crimes, the current offence was committed whilst the appellant was under the influence of liquor and he was provoked by the deceased when she told him that she had another boyfriend who was a witchdoctor and who would bewitch the appellant. The appellant is married and has one child. He was a welder earning R1300 per month.

[11] The aggravating facts are that the appellant has a previous record for similar offences. In 2001 he was convicted of attempted rape and indecent assault. He was convicted of assault on 22 July 2005.

[12] It is so that women and children are the most vulnerable members of our society. The murder and indecent assault of a woman is a scourge in our country, which deserves harsh sentences. Having said so the appellant should not be sacrificed on the altar of deterrence but the court has to balance the interest of society, the interest of the deceased and her family, the appellant, as well as the crime.

[13] The purpose of sentence is not to destroy a person, but to punish him in a balanced and considered manner.

The court has considered all the mitigating and aggravating facts. The court has also considered whether the two charges should be taken as one when sentencing the appellant. Both charges emanated from the murder of the deceased and therefore they should be taken as one. The appeal is upheld.

I therefore propose the following order:

1. The sentence imposed on 28 November 2007 is set aside;
2. Counts 1 and 2 are taken as one for sentencing;
3. The appellant is sentenced to fifteen (15) years imprisonment;
4. This sentence is ante-dated to 28 November 2007

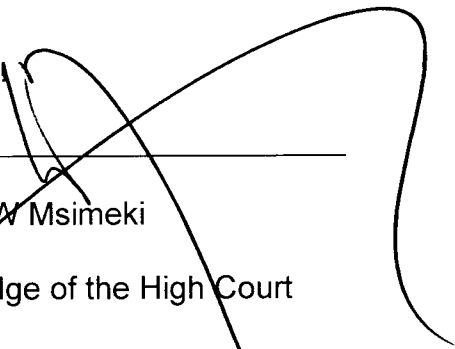
It is so ordered



C Pretorius

Judge of the High Court

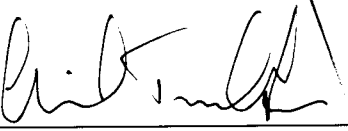
I agree,



M W Msimeki

Judge of the High Court

I agree,



N B Tuchten

Judge of the High Court

Case number : A698/2014
Heard on : 13 February 2015
For the Appellant : Adv. Monyane
Instructed by :
For the Respondent : Adv Mnisi
Instructed by : Director of Public Prosecutions
Date of Judgment : 19 February 2015