

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A312/2015

In the case between:-

THE DIRECTOR OF PUBLIC PROSECUTIONS FS

Applicant

and

FATIMAH ABUBAKER

Respondent

JUDGMENT BY: KRUGER, J

DELIVERED ON: 25 JUNE 2015

[1] This is an application under section 310A of the Criminal Procedure Act 51 of 1977 by the state for leave to appeal against the sentence imposed by a regional magistrate. The respondent was convicted of attempted murder and sentenced to five years' imprisonment wholly suspended and three years correctional supervision under section 276(1)(h) of Act 51 of 1977. The complainant was the husband of the respondent. She told him at 4am one morning that there was an intruder behind her. He rushed from the shower to the bed where he kept his revolver under his pillow, but it was not there. The respondent had the revolver. He rushed to her and she shot him. He ran away down the passage and she fired more shots at him, eight in all. The

complainant was seriously injured and had to be transferred to a hospital in Bloemfontein. He took a year to recover. The respondent did not testify.

- [2] Counsel for the state, Ms Giorgi, and for the respondent, Mr Van der Merwe provided written submissions, for which they are thanked. Mr Van der Merwe lists the mitigating and aggravating factors:

(a) Mitigating:

- “3.1.1 Respondent was a first offender and the breadwinner for her family which included six (6) children.
- 3.1.2 Three of the children were taken away and are living with their father (complainant in matter) now.
- 3.1.3 Respondent was taking care of her mother financially and if she was sent to prison her remaining three children would be destitute.
- 3.1.4 Respondent was not a threat to society and there was very slim chance that she would commit any further crime.
- 3.1.5 Community work that Respondent does in the community.”

(b) Aggravating:

- “6.2.1 Seriousness of the offence;
- 6.2.2 Impact of offence on Complainant;
- 6.2.3 Community interest;
- 6.2.4 Nature of the offence;
- 6.2.5 Fact that offence was planned;
- 6.2.6 Impact of offence on Family of Complainant;
- 6.2.7 Absence of remorse;
- 6.2.8 Injuries sustained by Complainant.”

Ms Giorgi says the sentence is shockingly inappropriate, inter alia for the following reasons:

- “1.3 The court *a quo*, with the sentence it imposed, gives the impression that, as long as an accused has minor children, it is acceptable to commit a serious crime and that you will not be incarcerated.
- 1.4 The court *a quo* did not attach enough weight to the injuries sustained by the complainant which were of a very serious nature.
- 1.5 The court *a quo* did not attach enough weight to the fact that this was a serious case of domestic violence which takes on epidemic proportions in South Africa.”

- [2] In sentencing the respondent, the regional magistrate heard the evidence of social workers. The magistrate attached importance to the fact that the respondent was the primary caregiver of her children. See **S v M (Centre for Child Law as Amicus Curiae)** 2008 (3) SA 232 (CC) par [36]; **S v Pillay** 2011 (2) SACR 409 (SCA) par [24]; **MS v S (Centre for Child Law as Amicus Curiae)** 2011 (2) SACR 88 (CC) pars [62]-[64] and **S v Chetty** 2013 (2) SACR 142 (SCA).
- [3] This was a serious case. The complainant was shot eight times, also while he was lying on the ground. The regional magistrate found that the crime was pre-meditated because the respondent had removed the baby from the bedroom before the shooting started.

- [4] In my view there are reasonable prospects that another court can come to the conclusion that the regional magistrate erred by overlooking the fact that the cases dealing with the importance of the wife as primary caregiver referred to above deal with economical crimes, not a violent crime against the father of the children as the present, where the mother may not be a suitable person to look after the children. Another court may find that the magistrate treated sentencing too much in the nature of a custody enquiry and under-emphasised the seriousness of the offence.

ORDER

1. Leave is granted to the state to appeal to the full court of this division against the sentence imposed.

A. KRUGER, J

On behalf of applicant:

Adv S Giorgi
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

On behalf of respondent:

Mr P van der Merwe
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN