

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

16/8/2013
Case number: A236/2013

In the matter between : -		NOT APPLICABLE
INTEREST TO OTHER JUDGES: YES/NO		YES/NO
REVISED.		
ELIZABETH NINA MAZIBUKO	16.8.2013	Appellant
DATE		SIGNATURE

and

THE STATE

Respondent

JUDGEMENT

JANSE VAN NIEUWENHUIZEN AJ

- [1] On 11 October 2011, the appellant pleaded guilty to a charge of murder in the Nigel Regional Court. The appellant was convicted accordingly and sentenced to 25 years imprisonment.
- [2] The appeal only lies against the sentence imposed by the court *a quo*.

FACTS:

- [3] The circumstances that gave rise to the appellant's conviction, are extremely tragic.
- [4] The appellant, a 27 year old female, administered poison to her four year old son, which resulted in his untimely death.
- [5] The appellant also took poison in an attempt to commit suicide, but was revived at hospital.
- [6] As stated *supra*, the appellant pleaded guilty to the charge of murder. From her plea explanation, the following facts emerge:
- i) at the time of the incident the appellant was staying at her boyfriend's residence, because she was chased away from her family residence due an argument she had with her brother and eldest sister;
 - ii) the appellant is HIV positive and her status as such, contributed to the fact that she was chased away from her family residence. The hostile attitude of the appellant's family towards her, is demonstrated by the fact that her brother told her he wanted nothing to do with her children, should something happen to her;

- ii) on the morning of the incident, the appellant did not feel well enough to go to work and suspected that her condition is attributable to her HIV positive status;
- iii) she felt that it was the end of her life and that she was going to die;
- iv) she realised that no one will look after her son if she dies and decided to commit suicide and kill her son;
- v) she gave her son yoghurt with rat poison and he died on the scene.

EVIDENCE IN MITIGATION OF SENTENCE

[7] The appellant testified in mitigation of sentence.

[8] She, *inter alia*, testified that:

- i) she is unmarried and was at the time of her arrest on 1 June 2011, working at Jet Store;
- ii) when she realised on the morning of the incident that she might die, she became scared and decided to end her life and that of her son;
- iii) she first gave her son the yoghurt mixed with rat poison and then ate some herself;
- iv) when she realized she and her son is dying, she phoned her boyfriend for help;
- v) she only woke up in hospital;

- vi) she has two other children, who were taken away by social services.

STATUTORY FRAMEWORK:

- [9] In terms of section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997, the court must impose a sentence of life imprisonment, if it is found that a murder was planned or premeditated.
- [10] The court *a quo* found that the murder of the appellant's son was premeditated and sentenced the appellant in terms of section 51(1) read with section 51(3) to 25 years imprisonment.
- [11] The court *a quo*, therefore found, correctly so, that substantial and compelling circumstances existed to justify the imposition of a lesser sentence than imprisonment for life.
- [12] In terms of section 51(2) read with Part II of Schedule 2 of the Act, the court must impose a sentence of 15 years imprisonment if the person convicted on a murder charge is a first offender.

GROUND FOR APPEAL

- [13] Mr Kgagara, who appeared on behalf of the appellant, submitted that the murder was not premeditated and that the court *a quo* erred in sentencing the appellant in terms of section 51(1) of the Act.
- [14] According to the *South African Concise Oxford Dictionary*, "*premeditated*" means "*think out or plan (an action, especially in crime) beforehand*".
- [15] The "*plan beforehand*" portion of the definition is, in my view, already referred to in section 51(1) in addition to premeditation.
- [16] In the premises, the question arises whether the appellant thought out the murder beforehand.
- [17] If one has regard to the uncontested evidence of the appellant, she took the decision to take her own life and that of her son, shortly after she awoke on the day of the incident.
- [18] She was manifestly desperate and immediately executed her decision.
- [19] Having regard to the appellant's emotional condition and the manner in which the murder was committed, there are clearly no facts to substantiate

the finding that the murder was premeditated. It would appear that the murder was committed at the spur of the moment without properly considering the result.

[20] The court *a quo* erred in this regard and the sentence falls to be set aside.

APPROPRIATE SENTENCE

[21] Mr Kgagara referred to the recent decision in *S v Mtshali* 2012 (2) SACR 255 KZD.

[22] The unfortunate facts in the *Mtshali* matter is almost at par with the facts of this matter.

[23] The accused, a 26 year unmarried mother of two children, respectively, 8 and 3 years old, murdered the children.

[24] The accused worked on a farm and her two children was under her care. Her grandmother assisted in caring for the children and the accused was dependent on her grandmother for maintenance. The father of the children did not contribute to their maintenance, save for clothing he send from time to time.

- [25] On an arranged visit with the children to their father, the father severely assaulted the accused in front of the children.
- [26] She was chased away by the father of the children, but after intervention of an uncle of the father, succeeded in staying one night at the residence.
- [27] The following morning she left with the children and spend that night in a bush.
- [28] The accused was extremely desperate and decided to take her life as well as that of her children. She took a cocktail of various tablets, thinking the tablets would kill her. She, thereafter, strangled both children in their sleep with a cellphone-handset cord.
- [29] The accused did not die and reported the next morning to the nearest police station.
- [30] The accused pleaded guilty and was convicted of the murders. After conviction, Penzhorn AJ, requested a probation officer's report. A certain Prof Lourens Schlebusch, an expert in 'extended suicide', became involved and after evaluating the accused filed a comprehensive report, *intra alia*, dealing with the psychological profile of the accused.

[31] The state also appointed an expert, Prof BJ Pillay, who in essence confirmed the views expressed by Prof Schlebusch in his report.

[32] It appeared from the reports that the accused was severely depressed at the time she committed the murders. She had feelings helplessness and felt rejected by society. She did not want her children to suffer the same fate.

[33] In the *Mtshali* matter a 10 year sentence wholly suspended coupled with correctional service was imposed on the accused.

[34] The appellant had legal representation at trial. It is disconcerting that neither the appellant's attorney nor the presiding magistrate requested a social worker and/or probation officer's report prior to sentencing.

[35] Be that as it may and having regard to the following remark by Smalberger JA in *S v Ingram* 1995 (1) SACR A at 8j - 9a:

"Murder, in any form remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime."

:ORDER;

[36] In the premises, I propose the following order:

1. The appeal is upheld.
2. The sentence of 25 years imposed by the court *a quo* is set aside.
3. The sentence is substituted with the following order:

"The accused is sentenced to 5 years imprisonment in terms of section 276(1)(i) of Act 51 of 1977.

4. The sentence is to run from the date of the appellant's arrest on 1 June 2011.


Janse van Nieuwenhuizen AJ

Acting Judge of the North Gauteng High Court, South Africa

I agree


D Lambrecht AJ

Acting Judge of the North Gauteng High Court, South Africa