

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No : AR 404/10

In the matter between :

Sibongile Khumalo

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] On the 14th May, 2009 the appellant pleaded guilty to, and was convicted of the charge of murdering her husband Bheki Prince Khumalo. On the 19th May, 2009 she was sentenced to life imprisonment. This matter comes before us by way of the grant, by Mogwera AJ, of an application for leave to appeal against sentence.

[2] When the appellant pleaded guilty, a s112 statement was submitted to the Court by her legal representative. In the statement she recorded that she and the deceased were married in 1996 and further stated :-

‘3. The deceased subjected me to abuse and financial neglect. As a result I became depressed and desperate.

4. I approached my co-accused and planned to have the deceased killed. We found a man who agreed to be paid to kill the deceased.

5. As planned on 25 March 2009 the man came to our home and shot my husband, who died as a result thereof.

6. I knew it was wrongful and unlawful to kill the deceased at all material times thereto.

...’

[3] Counsel for the State made no objection to the plea, and the appellant was convicted of murder. The statement was sufficient information upon which the Court was entitled to convict the appellant. The appellant’s representative then addressed the Court in mitigation of sentence and to indicate that substantial and compelling circumstances existed entitling the learned Acting Judge not to impose the minimum sentence in terms of the Criminal Law Amendment Act, 1997. The learned Acting Judge, however, was of the view that the appellant should testify as to the circumstances in which she came to want to bring about the death of the deceased. She stressed to the appellant that evidence under oath would carry more weight than submissions from the bar by her legal representative. The learned Acting Judge was, however, careful to explain to the appellant that she was under no compulsion to give evidence. She also notified the appellant that she could call witnesses to testify to the abuse which she experienced at the hands of the deceased.

[4] The learned Acting Judge was clearly signalling to the appellant and her legal representative that the evidence adduced in her s112 statement and the submissions from the bar were insufficient for her to find that substantial and compelling circumstances existed which would entitle her not to impose the minimum sentence of life imprisonment. This is clear from the record where the learned Acting Judge stated :-

‘The thing is it is very important that you bring everything to light, things that you are of the view will assist you to get sentence other than life imprisonment. If you do not do so, then it is going to be difficult for me to find substantial and compelling circumstances exist ... In fact I am supposed to just take what you are giving me and proceed with what has been placed before me, but I just think it is important that I make you aware of everything what you are facing and how you can avoid – convince us to depart from what you are facing now. Just making you aware that we are not playing here now. Your life is hanging in the balance ...’

[5] It is clear from the foregoing that the learned Acting Judge :-

- a) did not consider that in the s 112 statement and submissions from the bar, a case for substantial and compelling circumstances had been made out;
- b) was concerned that the appellant should receive proper advice as to the placing of acceptable evidence before the Court; and
- c) that justice would best be served if the appellant was appraised

of the need for her to lead further and better evidence.

[6] The matter was then adjourned to the next day to give the appellant and her legal representative time to consider the above. After having heard her testify, the learned Acting Judge found that her evidence did not disclose on a balance of probabilities the existence of substantial and compelling circumstances. In her judgment on sentence the learned Acting Judge stated :-

‘The only thing that I can say is that claim of abuse is not very convincing, because it is not really substantial ...’

[7] In coming to this conclusion the learned Acting Judge stated, perhaps somewhat loosely – ‘What you have given us is not different from what most women in this country have to endure.’ In the context I understand her to call for information which would demonstrate why the circumstances of the appellant were different from those of other abused women. The learned Acting Judge then highlighted the numerous alternatives available to the appellant, such as divorcing the deceased, reporting to relatives, etc, none of which the appellant had pursued.

[8] Two aspects fall to be considered :-

- (a) Was the State bound by the s112(2) statement made by the appellant when she pleaded guilty?
- (b) Was the learned Acting Judge entitled to reject the submissions from the bar of the appellant’s legal representative?

[9] In *S v Jansen* 1999 (2) SACR 368 (C), Davis J considered the situation where an accused pleads guilty and hands in a written statement in terms of s112(2) of the Criminal Procedure Act, 1977, setting out the facts upon which guilt is admitted, and the State accepts that plea. Davis J stated that in those circumstances the plea so accepted constituted the essential factual matrix on the basis of which a sentence must be imposed. He stated that the State may adduce evidence to fill in the framework which was set by the plea, but that the essential factual matrix could not be extended or altered by evidence given in mitigation of sentence.

[10] In the *Jansen* matter the accused had pleaded guilty to a charge of raping a nine year old. In his guilty plea he admitted having had sexual relations with a person under the age of 16 years, but provided the rider that he had done so with her consent. Evidence was led subsequent to the acceptance of the plea, and in aggravation of sentence the State wished to refer to evidence to the effect that the accused had employed force in order to have sex with the minor child. Davis J was of the view that to have allowed that to have taken place, would undoubtedly have changed the factual matrix upon which the plea of guilty was accepted by the State.

[11] Although the judgment of Davis J provides that the essential factual matrix is set out in the plea accepted by the State and cannot be altered by evidence subsequently adduced, this does not prevent the leading of

evidence which does not contradict the plea, but which may be relevant to the question of sentence. Even if contradictory evidence does emerge the conviction on the plea as accepted stands.

[12] Indeed, a Court would misdirect itself if it failed to factor into its sentencing deliberations a factual allegation contained in a guilty plea accepted by the State.

See : *S v Cele* 1990 (1) SACR 251 (A) at 254h – 255a

[13] With regard to submissions from the bar in relation to sentence, it is undoubtedly the practice in our Courts for statements of fact to be made by the representative of an accused in mitigation of sentence. Mostly such statements relate to uncontentious issues such as the age, family background and employment details of the accused. Most often the State offers no challenge to these statements and they are accepted by the Court.

[14] However, neither the State nor the Court are obliged to accept such statements and even more so statements relating to the facts of the commission of the crime. The State may contest them and lead evidence to do so. The Court may require them to be given under oath, as occurred in this matter

[15] Whatever course the State or the Court adopts, our procedure requires that it be fair to the accused. The accused and/or the legal representative must be informed, prior to any judgment being given, that the Court requires the statements to be made under oath.

See : *R v Hartley* 1966 (4) SA 219 (RA)

The principle that fairness must be the guiding factor in dealing with such statements was reiterated in *S v Jabuvu* 1969 (2) SA 466 (A) and again in this division in *S v Shangase and Others* 1972 (2) SA 410 (N) at 431H – 432C.

[16] It is important in this regard that the State makes its attitude clearly known. If the State objects to the allegations then the accused will have been made aware that a failure to testify will be accompanied by the risk of having any allegations rejected.

See *S v Caleni* 1990 (1) SACR 178 (C) at 181 e – f

S v Olivier 2010 (2) SACR 178 (SCA)

[17] In the present case the plea of the appellant stated that she had become “depressed and desperate”. Having accepted her plea the State was then bound by the fact that, as a result of the conduct of her deceased husband, she had become depressed and desperate.

[18] Although the learned Acting Judge was entitled to indicate that she did not accept the further submissions from the bar, a substantial and compelling circumstance had already been disclosed in the appellant’s s112 statement. Consequently, her final analysis of all the evidence was flawed. The evidence led by the appellant did not contradict her s112 statement. Albeit that the cross-examination of the appellant by the prosecutor may have revealed other aggravating circumstances relating to the commission of the crime, the fact that the conduct of the deceased had made her depressed and desperate

constituted a compelling and substantial circumstance, entitling a Court not to impose the prescribed sentence.

[19] This Court is accordingly at large to determine an appropriate sentence. Taking into account all the personal circumstances of the appellant, and the circumstances of the commission of her husband's murder, I would view an appropriate sentence to be one of 20 years.

[20] In the circumstances I make the following order :-

- a) the appeal against sentence succeeds;
- b) the sentence of life imprisonment is set aside and substituted with an order that the appellant undergo 20 years imprisonment.

Patel DJP : I agree.

D Pillay J : I agree.

Date of hearing : 26th January 2011

Date of judgment : 4th March 2011

Counsel for the Appellant : I Mthembu (instructed by Durban Justice Centre)

Counsel for the Respondent : D Paver (instructed by the Director of Public Prosecutions)