

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Appeal No. : A113/07

In the appeal between:

PHILLIP XHALISILE MEHLOANE

Appellant

and

THE STATE

Respondent

CORAM: CILLIÉ, J *et* VAN ZYL, J

HEARD ON: 23 FEBRUARY 2009

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 26 MARCH 2009

[1] The appellant was charged with culpable homicide in the Regional Court, Welkom. It is alleged that he unlawfully assaulted his wife, Maria Malefu Diphooko (hereinafter referred to as “the deceased”) on 3 June 2000, as a result of which assault she died on 8 June 2000. He pleaded not guilty, but was subsequently convicted and sentenced to five years imprisonment.

[2] The appeal is directed against both the conviction and the sentence.

[3] At the outset of the trial, the appellant made the following formal admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as “the Act”):

3.1 He admitted the identity of the deceased.

3.2 He admitted the correctness of the contents of the post-mortem report, including the cause of death as being a head injury.

3.3 He admitted that the deceased did not suffer any further injuries from the scene of the incident up until the post mortem was performed.

3.4 He admitted that the deceased died on 8 June 2000.

[4] The State presented the evidence of two witnesses. Sagaria Phukuntsi, the appellant’s brother-in-law, testified that on the date of the incident he was staying at the appellant’s house. The appellant left for work at 3h00 in the morning, but later returned home at 04h00 the same morning. The deceased

opened the door for him. She enquired from him why he did not go to work, whereupon he responded by saying that the car with which he was supposed to have travelled to work, left him behind. An argument ensued between the appellant and the deceased, but eventually everybody went to sleep again. At 06h00 the same morning, the witness woke up and went to the outside toilet, when he again heard an argument between the appellant and the deceased. The deceased was again enquiring from the appellant why he did not go to work. Whilst the witness was still outside, the deceased called him by calling "Opodi", which means "brother". When he entered the room in which the appellant and the deceased were, the deceased was lying on her back on the bed and she was bleeding from her head. He enquired from the accused whether their argument resulted in the deceased being injured, but the appellant did not respond. At the time when the witness entered the room, he saw the accused putting a spade under the bed. The witness formed the impression that the appellant or the deceased had fallen on the spade. According to the witness, the appellant was sober. The appellant then called an ambulance. The ambulance arrived and took the deceased to hospital, where

she died five days later.

At the time of the incident, the only other person in the house was a 10-year old child. Three other ladies arrived after the incident.

- [5] Evodia Khumalo, one of the neighbours of the appellant and the deceased, was the second State witness. The morning of the incident another neighbour came to her and said that they should go to the deceased's house. On their arrival, they found the deceased on the bed and there was blood on her head and her chest. The appellant was also present. She asked him what had happened, when he responded that it was dark in front of his eyes and that he injured her. The appellant appeared to be shaken and scared. The appellant told her that when he arrived at his work that morning, he found that somebody had replaced him and he was told to go home. According to what the appellant told her, the deceased did not believe him that he was in fact at his place of work that morning.

During cross-examination it was put to the witness that the appellant denies her allegation that he told her that he injured the deceased. She, however, confirmed that he had said it and she also confirmed that he said it freely and voluntarily in response to her question of what had happened.

[6] After the closing of the case for the State, the legal representative of the appellant applied for his discharge in terms of section 174 of the Act. This application was refused. The defence case was then closed, without the accused testifying.

[7] The Court *a quo* found that it is the only reasonable inference that the appellant was responsible for the death of the deceased and therefore concluded that the State proved its case beyond reasonable doubt.

[8] With regard to the appeal against the conviction, Mr. Fourie, appearing on behalf of the appellant, conceded that he cannot advance any proper submissions in favour of the merits thereof. This concession was, in my view, correctly

made. The Court *a quo* found the state witnesses to be truthful and reliable witnesses, a finding which cannot be faulted. The appellant was the only person in the presence of the deceased when she was injured, there was a quarrel between them, the appellant was at the time in possession of a spade, he made an admission to the state witness that he injured her and the nature of the deceased's injury reflected on the post mortem report, corresponds with the type of injury one would expect when inflicted by a spade. This clearly constituted a *prima facie* case against the appellant, despite which the appellant elected not to testify. This was a very unfortunate choice. In the circumstances and in the absence of any explanation by the appellant as to what had happened, the conviction was correctly made and has to be confirmed.

- [9] The appellant elected to testify under oath in mitigation of sentence. He testified that he is 50 years of age and was married to the deceased for approximately 10 years. They had what he described as a "normal marriage". They had one child, born out of wedlock, who was at the time 17 years of age, attending grade 12 at school and staying with his

mother, although financially he was caring for the child. He also testified that should he be imprisoned, nobody else will care financially for the child, as his mother is only a pensioner. The appellant is employed at a security firm, which employment he has been holding for the past three years. His gross income is R2 700,00 and his net income is R2 500,00.

The family of the deceased does not bear a grudge against him as a result of the deceased's death. However, he himself feels depressed as a result of the death of the deceased. The appellant also testified that he is remorseful about the death of the deceased.

He has since remarried by means of a customary marriage and he testified that he received the blessing of the deceased's family before he remarried. He does not have any children with his new wife.

With the regard to the possible imposition of a fine, he testified that his employer will assist him with the payment of

a fine and that he foresees that he will be able to collect R2 000,00.

This concluded his evidence.

[10] The Court *a quo* in her judgment on sentence referred to the aforesaid personal circumstances of the accused, the seriousness of the offence and the interest of the community. In her reference to the seriousness of the offence, she described the offence as one of domestic violence and stated that domestic violence is increasing and that many women are seriously abused or lose their lives as a result of domestic violence. She then also emphasized the rights of women and the seriousness of an assault when it is committed on women. The Court *a quo* then concluded that a wholly suspended sentence will be too lenient, that a fine cannot be equivalent to the loss of a life and that therefore a term of direct imprisonment is the only appropriate sentence.

[11] Mrs. Mosetlha, on behalf of the State, submitted that the trial Court considered all relevant factors in respect of sentence in a balanced way and that considering this Court's limited

entitlement to interfere with an imposed sentence on appeal ,
the sentence should be confirmed.

[12] Mr. Fourie, on the other hand, submitted that the Court *a quo* overemphasised the fact that the deceased's death was a result of violence between a husband and his wife and that this resulted in the imposition of a sentence that is shockingly harsh and inappropriate. He suggested that a wholly suspended sentence or a fine coupled with a suspended sentence, would be appropriate in the circumstances of this case.

[13] The circumstances of this matter are peculiar and quite unique. Although It is evident that there in fact was an argument between the appellant and the deceased before she was injured, there is no apparent history of violence between the two of them. After the infliction of the injury, the appellant was in fact the one who phoned the ambulance and who was, according to the evidence, shocked by the incident. It therefore remains a mystery as to what really happened between them that led to the appellant inflicting the injury on the deceased.

[14] On the facts of this matter, I have to agree with Mr. Fourie that the Court *a quo* overemphasized the fact that the violence was inflicted by a husband upon his wife. This appears to have been an isolated incidence of violence between them and we do not know what really happened that led to the appellant turning to violence. Furthermore, it appears that the Court *a quo* did not attach any real or effective weight to the appellants remorse - not only did he verbalise his remorse under oath, but his conduct after the incident is in my view also a reflection of his remorse.

[15] The aforesaid and the fact that the appellant is a first offender, is in my view indicative thereof that the appellant can not be labelled as an inherently violent person. This was clearly an isolated incident and the appellant will probably never revert to violence again. He cannot be considered to be an evil and vicious person against whom society should be protected. Even the deceased's family has forgiven him. His personal circumstances also speak of a steadfast way of living.

[16] Without at all detracting from the seriousness of the offence and after a balanced consideration of the elements of sentencing, I am of the view that the imposed sentence is in fact shockingly harsh and inappropriate and justify interference.

[17] This matter appears to be an appropriate instance where the appellant should be punished without being taken out of society. He is a useful and contributing member of society. I am therefore of the view that a stiff fine as an alternative to direct imprisonment, is an appropriate sentence in this instance. I am furthermore of the view that in order to ensure that the appellant refrain from similar conduct in future, a suspended term of imprisonment should be imposed in order to serve as a proverbial sword over the appellant's head.

[18] Accordingly the following order is made:

1. The appeal against the conviction is dismissed and the conviction is confirmed.
2. The appeal against the sentence is upheld and the imposed sentence is set aside and substituted by the following:

“R5000,00 (five thousand rand) or 3 (three) years imprisonment. A further 5 (five) years imprisonment, wholly suspended for 5 (five) years on condition that the accused is not convicted of any crime which involves violence against the body of another person committed during the period of suspension.”

The aforesaid sentence should be considered to have been imposed on 22 January 2007.

C. VAN ZYL, J

I concur.

C.B. CILLIÉ, J

On behalf of the appellant:

Adv. J.A. Fourie
Instructed by:
Vermaak en Dennis
BLOEMFONTEIN

On behalf of the respondent:

Adv. G.D. Mosetlha
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp

