

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A131/09

In the appeal between:-

LEHLOHONOLO ERNST MOKONE

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* JORDAAN, J *et* MOLOI, J

HEARD ON: 16 NOVEMBER 2009

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 19 NOVEMBER 2009

[1] The appellant, a 36 year old male, has been convicted of murder in that he killed his wife with whom he has been married for approximately three weeks at the time by shooting her twice from behind. The first shot was into her back and the second shot in her head.

[2] The appellant, though not denying that he shot and killed his wife, did not have any recollection of what happened and could not give any explanation for his deeds. In regard to

sentence the provisions of Act 105 of 1997 are applicable, more in particular, the provisions of section 51(2)(a)(i) of the said Act which provides for a minimum sentence of 15 (fifteen) years imprisonment for a first offender such as the appellant was.

[3] The trial court dealt with the factual circumstances of the offence, the personal circumstances of the appellant and the mitigating factors pertaining to the appellant, but was of the opinion that the gravity of the offence, being an execution style murder, the appellant's perceived lack of remorse and the lack of any explanation for appellant's deeds, justified a sentence of 25 (twenty five) years imprisonment and sentenced the appellant accordingly.

[4] The appeal is against that sentence and brought with the leave of the court *a quo*.

[5] On behalf of the appellant, Mr. Van der Merwe submitted that the trial court did not sufficiently take into account the personal circumstances of the appellant and submitted that the court overemphasised the gravity of the offence in comparison to the mitigating factors pertaining to the appellant, which

consisted, according to Mr. Van der Merwe, more particularly of the following:

1. The appellant was a first offender at the age of 36 years.
2. He was a well-respected member of the community and well-educated in that he did a course in electronics.
3. He was economically active in that he did repairs to electronic equipment for his own account.
4. He was also socially active in being a member of a community policing forum in which capacity he regularly acted as mediator to solve disputes between members of the community and gave advice to members of the community if and when they would have problems.
5. He was known as a good-hearted, kind and peaceful person.
6. Even the family of the deceased did not bear a grudge against him at least to the extent that they allowed him to attend the funeral service.
7. There were signs of remorse in that he did not deny that he shot her and according to the evidence held her in his arms shortly after the incident.

[6] In view of the aforesaid, so Mr. Van der Merwe contended, the sentence imposed is shockingly inappropriate and harsh. He

submitted that a proper sentence in the circumstances would be imprisonment of between 10 (ten) and 12 (twelve) years.

[7] Ms Claasen, on behalf of the respondent, conceded that the sentence imposed was shockingly harsh and inappropriate in the circumstances.

[8] The aforesaid mitigating circumstances are borne out by the evidence, in particular the evidence of the eyewitness to the events, the neighbour one S.E. Tsomo, who obviously knew the appellant well.

[9] The trial court did not explicitly deal with the question whether there were substantive and compelling circumstances justifying a discretionary lesser sentence as envisaged in section 51(3)(a) of the aforesaid Act and did not enter any such circumstances in the record of proceedings. In this regard the trial court only remarked as follows:

“A minimum sentence of 15 (fifteen) years imprisonment has been prescribed by the Legislature for a crime such as this, however, although I am not obliged to impose the minimum sentence only, I

can impose a heavier sentence if it is called for in the circumstances.”

[10] One gains the impression that the trial court by implication found that no such circumstances existed in this matter.

[11] In view of the fact that the trial court did not make any explicit finding in this regard, this court has to deal with the question whether such circumstances exist and if so, what an appropriate sentence would be.

[12] The fact that the appellant is a first offender is in itself not such a circumstance. The Legislature already made provision for that fact by prescribing a lesser minimum sentence for first offenders. That, however, does not mean that it should be totally disregarded. The fact that the appellant already attained the age of 36 years with a clean slate can, in my view, be taken into consideration together with other mitigating circumstances.

[13] In my view, the circumstances referred to above, taken cumulatively, do constitute substantive and compelling circumstances as envisaged in section 51(3)(a) of the

aforesaid Act, which justifies this court to impose a discretionary sentence. That, however, does not mean that a lesser sentence than the prescribed minimum should inevitably be imposed.

[14] It must be taken into account that the appellant shot and killed his young wife even after she pleaded with him not to shoot her. Why he has done that, remains a mystery. Something must have triggered the usually peaceful and kind hearted appellant to do what he did.

[15] According to the appellant, he was very hungry at that stage, he asked his wife for food but was told that there was nothing, not even milk, but maize porridge available. That might have been the reason why he became so angry as to commit the hideous crime. To kill someone only because of a lack of food would, to my mind, rather be an aggravating than a mitigating factor but I express no firm view on that, nor on the possibility that that might have been the trigger for his subsequent behaviour.

[16] I am, however, convinced that the sentence imposed by the trial court is shockingly severe and inappropriate. I am of the

view that an appropriate sentence, taking into account all the relevant circumstances pertaining to this matter, would be imprisonment for a period of 12 (twelve) years.

[17] In the result I am of the opinion that the appeal against sentence should succeed and that the sentence should be set aside and a sentence of 12 (twelve) years imprisonment be substituted therefore.

A.F. JORDAAN, J

I concur and it is so ordered.

M.H. RAMPAL, J

I concur.

K.J. MOLOI, J

On behalf of appellant:

Mr. P.L. van der Merwe
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent: Adv. B. Claassens
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp