

IN THE HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: KS23/23

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|------------------------------------|--------|
| Reportable:                        | YES/NO |
| Circulate to Judges:               | YES/NO |
| Circulate to Magistrates:          | YES/NO |
| Circulate to Regional Magistrates: | YES/NO |

In the matter between:

THE STATE

And

D[...] F[...]

Accused

Coram: Lever J

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JUDGMENT ON SENTENCE

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LEVER J:

1. The accused in this matter faced the following charges: Count 1 – assault with the intention to do grievous bodily harm; Count 2 – Kidnapping; Count 3 – Murder read with section 51(1) of Act 105 of 1997; Count 4 – Housebreaking with intent to commit a crime unknown to the State.
2. The accused was sent for 30 days observation under the provisions of section 79 of the Criminal Procedure Act<sup>1</sup> (the CPA). The psychiatric report which showed the unanimous finding of the Assessment Board was admitted by consent as exhibit “F”. The said Board found that the accused was able to follow the court

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<sup>1</sup> 51 of 1977.

proceedings to defend himself. However, in relation to responsibility the said Board found that: “At the time of the alleged offences, the accused was voluntarily intoxicated to the extent that his appreciation of the wrongfulness of the alleged crimes was impaired.” This finding of the Board was confirmed by Dr Kirimi, one of the psychiatrists that made up the relevant Board.

3. The said finding under section 79 of the CPA brought sections 1(1) and (2) of the Criminal Law Amendment Act<sup>2</sup> (the 1998 CLAA) into play. The said section reads as follows:

“1. (1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with such appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.”

4. In sentencing an accused the actual offence he commits is obviously relevant under the triad referred to in the classic case of *S v Zinn*<sup>3</sup>. As can be seen from the provisions of section 1 of the 1988 CLAA, the accused can only be convicted of the statutory offence created in subsection 1 thereof if the evidence proved the commission of the contravention concerned as set out in subsection 2 thereof. This is relevant to the accused in this case because the evidence did not establish the charge set out in the indictment in respect of counts 1 and 4, but the

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<sup>2</sup> 1 of 1988.

<sup>3</sup> 1969 (2) SA 357 (A).

evidence established a competent verdict on each of those counts so the accused was found not guilty of the competent verdict but guilty of the crime set out in section 1(1) of the 1988 CLAA. The underlying acts as well as the consequences of such acts are obviously relevant in the sentencing process.

5. In the result, the accused was convicted in the following manner: Count 1 – Not guilty of common assault, but guilty of the offence contemplated in section 1 of the 1988 CLAA; Count 2 – Not guilty of Kidnapping, but guilty of the offence created by section 1 of the 1988 CLAA; Count 3 – Not guilty of murder, but guilty of the offence created by section 1 of the 1988 CLAA; and Count 4 – Not guilty of malicious damage to property, but guilty of the offence created by section 1 of the 1988 CLAA. As already stated, the actions of the accused behind each offence are relevant consideration in finding an appropriate punishment.
6. The exercise of sentencing a person convicted of a crime is an exercise of finding the correct balance between several competing factors and considerations.
7. Accordingly, the proper starting point is what has become known as the triad, being: the considerations and circumstances relevant to the crime, the circumstances of the criminal involved, and the interests of society. This is set out in the classic case of *S v ZINN*<sup>4</sup> as the crime, the criminal and the interests of society.
8. Further, one should also consider the main purposes of punishment, being deterrent, preventative, rehabilitative, and retributive effects of such punishment. There is no pre-set hierarchy in relation to these purposes of punishment. The facts of the relevant case will bring one of these purposes of punishment to the fore. Sometimes, the facts of the case concerned, will bring a combination of these objects of punishment to the fore. In performing the required balancing exercise, the court must ensure that any sentence imposed gives effect to the relevant purpose/s of punishment that are most relevant in the particular circumstances of the case.

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<sup>4</sup> 1969 (2) SA 537 (A).

9. In finding the correct balance, the court must also consider whether in the circumstances of the case before the court, it is appropriate to show the accused a measure of mercy. As set out by Holmes JA in the case of *S v Rabie*, “Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.”<sup>5</sup>

10. What ‘mercy’ means in this context has been set out by Baker J in the matter of *S v van der Westhuizen*, where he stated:

“What we mean when we talk of a criminal court extending mercy is really this, that justice must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation. ... But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crime.”<sup>6</sup>

11. This approach was adopted by Legodi J in the case of *S v Nyambosi*.<sup>7</sup>

12. Accordingly, the triad of the crime, the criminal, and the interests of society, as set out in the classic case of *S v ZINN*<sup>8</sup> is the proper point of departure in this exercise.

13. The underlying actions in respect of Count 2, kidnapping and Count 3, murder are indeed serious. This has been properly conceded by Mr Steynberg who appeared for the accused.

14. During the course of my judgment in respect of the convictions I determined that the prescribed minimum sentences contemplated in section 51 of the Criminal

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<sup>5</sup> *S v Rabie* 1975 (4) SA 855 (A) at 862G.

<sup>6</sup> *S v van der Westhuizen* 1974 (4) SA 61 (CPD) at 66E-G.

<sup>7</sup> *S v Nyambosi* 2009 (1) SACR 447 (T) at 451e-f.

<sup>8</sup> 1969 (2) SA 537 (A).

Law Amendment Act<sup>9</sup> (the 1997 CLAA) do not apply in the present circumstances.

15. The personal circumstances of the accused are as follows: He was born on the 26 March 1989 and is currently 36 years old; He was 34 years old when he committed the relevant offences; His highest level of education is grade 11; He failed grade 12; He is not married but has two children who are 15 and 12 years old respectively; The said children live with their biological mother in Hopetown; The accused is not the primary caregiver of the minor children; The accused and the biological mother of the said children have been separated and live apart; Prior to his arrest the accused did casual work on a farm and was paid R1200 every two weeks; The accused has one previous conviction for operating a motor vehicle without the consent of the owner; This conviction occurred on the 8 December 2021 and he was sentenced to 6 months imprisonment, wholly suspended for 5 years on certain conditions not presently relevant; The accused was in custody for a period of approximately two years and four months whilst this matter was finalised and is still in custody; and the accused committed the acts in question in a drug induced psychotic state, which Dr Kirimi described as the accused acting as if he was an automaton.

16. The interests of society in circumstances such as those presently before this court, were dealt with in the case of *S v Ingram*, where the court stated:

“...I accept that the section was introduced to satisfy public indignation against a legal system which allows a person to escape the criminal consequences of his act because of the effects of a drug voluntarily ingested, ... . But it does not follow that public sentiment requires that the same sentence be imposed as would have been imposed had the appellant been convicted of the offence charged. The section itself suggests the contrary, as it only makes competent, not compulsory, for an accused to be sentenced to the same penalty as could be imposed had he not lacked criminal capacity. It must be borne in mind when sentence is imposed for the contravention of the section, no less than in other cases, that the object of sentencing is not to

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<sup>9</sup> 105 of 1997.

satisfy public opinion, but to serve the public interest:..."<sup>10</sup> (references omitted)

17. A Correctional Service Officers report was prepared by Ms Klaaste and handed in by consent as exhibit "H". Ms Klaaste also testified. Her evidence was to the effect that a sentence under the provisions of section 276(1)(h) of the CPA would be inappropriate for two reasons. Firstly, the serious consequences of the accused's actions and secondly, the state-run facilities outside of the prison environment were overstretched and it would take too long to secure a place for the accused's drug problem to be dealt with appropriately. Private facilities were too expensive and were not an option for the accused.
18. Ms Klaaste testified that while nobody could guarantee that drugs were not available in the prison system, she maintained that the environment was more controlled. Ms Klaaste fairly conceded that drugs were known to be available in the prison system but maintained that the environment was more controlled in the prison environment than outside the prison environment.
19. Ms Klaaste testified that programs were available within the prison system to assist the accused with his addiction. There were also other programs such as anger management that would also be applicable to the accused and assist him in coming to terms with his behaviour and consequences of his conduct.
20. Ms Klaaste acknowledged that the prison facilities had limited resources to deal with addiction within the system. There were financial constraints in executing random urine or blood tests to check on drug usage in prison. However, she did testify that if circumstances warranted, they did engage outside stakeholders to help treat drug addiction. Her evidence was to the effect that despite the difficulties, it was still better for the drug addict to try and rehabilitate in prison as being exposed to the environment that got him into trouble in the first place.

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<sup>10</sup> S v Ingram 1999 (2) SACR 127 (W) at 135f-i.

21. It was also the evidence of Ms Klaaste that at least in the Kimberley prison facility they had a full time Doctor as well as nurses that had training in helping patients with mental health conditions. Ms Klaaste testified that this would help the accused manage and properly use the medications prescribed to manage his chronic drug induced psychotic mood disorder and epilepsy. That a full time Doctor and appropriately trained nurses were not available in the Hopetown correctional facility closest to the home and family of the accused.
22. The evidence of Ms L[...] P[...] F[...] was also placed before the court. Ms F[...] is the accused's sister. She is also the victim of the common assault relevant to Count 1 as well as the mother of the one-year-old J[...] T[...] P[...] F[...] who was killed by the accused relevant to the murder charge in count 3.
23. Ms F[...] testified that the death of her one-year-old son left a void in her life and affected her deeply. She has slowly come to terms with her son's death. She testified that she now has employment in Cape Town. That before she moved to Cape Town she would visit the accused before the accused was moved to a detention facility in Kimberley. It was her testimony that she had already forgiven the accused.
24. Ms F[...] also testified that she was aware of the accused's drug addiction. She testified that she started using drugs before the accused started to do so. That the accused tried to assist her to give up the use of drugs which she ultimately did. She testified that she tried to help the accused in the same way, by trying to provide alternatives to him going out and spending time with his friends, which she believed was one of the reasons why the accused was using drugs.
25. Ms F[...] seemed to understand her brother's addiction. She also seemed to have a genuine desire to help him.
26. It is clear from the evidence placed before this court prior to the conviction of the accused and during the sentencing process that abuse of the drug TIK was central to this tragedy. That were it not for his addiction this tragedy would not have happened.

27. In all these circumstances the rehabilitative and preventative objects of punishment come to the fore. The accused certainly needs to be punished for the consequences of his actions; in the present circumstances it would certainly be appropriate to show the accused a measure of mercy on sentencing him. The accused must also receive treatment to optimise his chances of rehabilitation and optimise the chances of preventing a similar tragedy in the future.

28. In these circumstances I believe a period of imprisonment under the provisions of section 276(1)(i) would be the most appropriate form of punishment.

29. The accused must be sentenced in respect of each conviction, but it is also appropriate that I consider the cumulative effects of such sentences.

30. In respect of Count 1, the conviction where the underlying action was the common assault of his sister. In all the circumstances set out above, including the time already served as an awaiting trial prisoner, I believe the appropriate punishment is a period of six (6) months imprisonment under the provisions of section 276(1)(i) of the CPA.

31. In respect of Count 2, the conviction where the underlying action was the Kidnapping of his sister's one year old child. In all the circumstances set out above, including the time already served as an awaiting trial prisoner, I believe the appropriate punishment is a period of three (3) years imprisonment under the provisions of section 276(1)(i) of the CPA.

32. In respect of Count 3, the conviction where the underlying action was the murder of his sister's one year old child. In all the circumstances set out above, including the time already served as an awaiting trial prisoner, I believe the appropriate punishment is a period of five (5) years imprisonment under the provisions of section 276(1)(i) of the CPA.

33. In respect of Count 4, the conviction where the underlying action was malicious damage to property. In all the circumstances set out above, including the time

already served as an awaiting trial prisoner, I believe the appropriate punishment is a period of three (3) months imprisonment under the provisions of section 276(1)(i) of the CPA.

34. Considering the cumulative effect of the sentences set out above it would be appropriate for the sentences in respect of Count 1, Count 2 and Count 4 to run concurrently with the sentence imposed in respect of Count 3. Effectively then the accused is sentenced to a term of imprisonment of five (5) years imprisonment under the provisions of section 276(1)(i) of the CPA.

35. Both the State and the Defence have submitted that it would be appropriate for me to order that the sentence be carried out in the Kimberley Correctional facility where the accused will be under the supervision of a Doctor and appropriately qualified nursing staff to ensure that he takes his medication appropriately and understands the importance of managing his chronic psychotic mood disorder and epilepsy.

In the circumstances, the accused is sentenced as follows:

1. Count 1 – six (6) months imprisonment under the provisions of section 276(1)(i) of the Criminal Procedure Act.
2. Count 2 – three (3) years imprisonment under the provisions of section 276(1)(i) of the Criminal Procedure Act.
3. Count 3 – five (5) years imprisonment under the provisions of section 276(1)(i) of the Criminal Procedure Act.
4. Count 4 – three (3) months imprisonment under the provisions of section 276(1)(i) of the Criminal Procedure Act.
5. The sentences in respect of Count 1, Count 2 and Count 4 are to run concurrently with the sentence imposed in respect of Count 3.
6. The accused is to serve the above sentences at the Kimberley Correctional facility.

L. G. Lever  
Judge  
Northern Cape Division, Kimberley

Representation:

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|-------------------|-----------------------------------|
| For the State:    | ADV L PILLAY                      |
| Instructed by:    | DIRECTORS OF PUBLIC PROSECUTIONS  |
| For the Accused:  | MR H STEYNBERG                    |
| Instructed by:    | LEGAL AID SOUTH AFRICA, KIMBERLEY |
| Date of Judgment: | 25 July 2025                      |