IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA82/2018
Date heard: 3 September 2018
Date delivered: 11 September 2018

In the matter between

M. BABE **Appellant**

Vs

THE STATE **Respondent**

JUDGMENT

PICKERING J

[1] Appellant was charged in the High Court, Grahamstown, with the murder of his common law wife, Nosiphiwo Siletile. Despite his plea of not guilty he was convicted by Msizi AJ as charged and sentenced to undergo life imprisonment. He applied for leave to appeal against his sentence only which application was refused. The requisite leave to appeal against sentence was granted on petition to the Supreme Court of Appeal (per Lewis and Mocumie JJA).

[2] During the course of New Year's Eve appellant, by his own account consumed two bottles of brandy as well as a number of beers. Remarkably, despite this, he was in his words, "*not very much intoxicated*".

[3] It was accepted by the learned Judge in the court a quo that appellant had, during the course of the night, become angry with the deceased, suspecting that she had been unfaithful to him. At some stage he arrived at his mother's house holding the deceased by her clothing. He told his mother that he had seen the deceased with another man and that she had bitten him on the fingers on being confronted. He took hold of a panga in order to assault deceased but his mother dispossessed him thereof and told him to leave. He did leave but shortly thereafter returned and took deceased

away with him. At approximately 7am that morning appellant confessed to an elder in the community that he had killed deceased. He informed him where the body of deceased could be found. Her body was then found in a forested area under a mound of rubbish from a nearby rubbish tip with a cross made of two stakes at the head thereof.

[4] The chief findings as recorded on form J88 in respect of the postmortem examination of deceased's body by Dr. Jwaqa were as follows:

> "*History of getting stabbed. Has a single incised wound to the forehead which is probably not fatal. Has clear obvious signs of manual strangulation.*"

[5] Dr. Jwaqa concluded that the cause of death was "*manual strangulation.*" He found a fractured hyoid bone on the right side of deceased's neck together with linear abrasions on the neck and concluded that "*some strong object like a wire may have been used trying to strangle her.*"

[6] Although the State alleged that the killing of deceased was planned or premeditated the learned Judge found that in all the circumstances this was not the only reasonable inference to be drawn and that the matter therefore did not fall within the purview of the provisions of section 51(1) of Act 105 of 1997. In effect she found that fuelled by jealousy, the appellant had murdered the deceased whilst he was to some extent under the influence of alcohol. Because of the fact that this was appellant's second conviction for murder a compulsory minimum sentence of 20 years imprisonment was applicable in terms of Act 105 of 1997, absent the presence of any substantial and compelling circumstances justifying a lesser sentence. The sentence of life imprisonment was, however, imposed by her in terms of the Court's inherent jurisdiction in consequence of her finding that appellant was a very violent man who directed his violence at women.

[7] The appellant, a 29 year old man, working as a logger, has an unenviable list of previous convictions, involving violence against women. On 24 June 2008 he was convicted of murder and sentenced to undergo ten years imprisonment. On 30 August 2013, after serving just over five years of this sentence, he was released on parole until 23 December 2017. Accordingly, at the time that he committed the present offence he was still on parole in respect of his previous conviction.

[8] On 3 March 2016, also during his unexpired period of parole, he was convicted of assault with intent to do grievous bodily harm and fined R1500,00 or 90 days imprisonment the whole of which was suspended for five years. On the same date he was convicted of malicious damage to property and sentenced to a wholly suspended sentence of 6 months.

[9] On 6 July 2016 he was convicted of arson and sentenced to 6 months imprisonment.

[10] Ms. Turner, who appeared at the trial on behalf of the State, adduced the evidence of Ms. Hana who had been the complainant in respect of the appellant's latter three previous convictions. She testified that she had been involved in a relationship with the appellant during 2016 when he assaulted her with a sjambok accusing her of having been unfaithful. In consequence of this assault she was hospitalized for approximately five days and as a result thereof is unable to bear children. He also burned Ms. Hana's clothes as well as her identity document. In respect of the arson conviction she testified that appellant had set her house alight whilst she was inside.

[11] The learned Judge considered appellant to be incapable of rehabilitation and stated that the evidence showed that he was a menace to society.

[12] In respect of the finding by Dr. Jwaqa that the body of the deceased revealed "*a history of getting stabbed*" the learned Judge stated as follows:

> "*Although there is no evidence before this Court that those would have been inflicted by the accused, given the profile that this Court now has of the person of the accused it is highly likely that the deceased had also regularly been assaulted by the accused so this Court accepts him as being an unusually violent man.*" (My emphasis).

[13] With respect, the learned Judge erred in this finding. There was no evidence to the effect that the appellant had previously assaulted the deceased and that he was responsible for her previously inflicted injuries. As was conceded by Ms. Turner this finding amounted to impermissible speculation by the Court. Nevertheless, as further submitted by her, that finding did not inform the conclusion by the learned Judge that appellant was a violent person. It is clear from her statement concerning the profile which the Court already had of the appellant that such conclusion was informed by appellant's previous convictions and by his actions on the night in question without regard having been had to deceased's history of injuries. These aggravating factors remain and were accorded due weight by the learned Judge.

[14] Ms. McCallum, who appeared for appellant, stressed that the murder of the deceased was not planned or premeditated by appellant and submitted that he had murdered her in a fit of jealous rage whilst under the influence of alcohol. She submitted that despite appellant's plea of not guilty he had in fact clearly demonstrated remorse by immediately confessing to an elder in the community. She submitted that in the circumstances a sentence of life imprisonment was inappropriate.

[15] It must always be borne in mind that a court of appeal has no general power to set aside the sentence of the trial court. The imposition of sentence is within the discretion of the trial court and the appeal court may only interfere if that discretion has not been exercised in a proper judicial manner. This might arise, for example, where the sentence is so grossly disproportionate or unreasonably excessive that it gives rise to the inference that the trial court could not have applied its mind to the matter properly. (S v Giannoulis 1975 (4) SA 867 (A); S v Kgosimore 1999 (2) SACR 238 (SCA) at

paragraph [10].) The obligation to impose a sentence prescribed by an Act of Parliament does not divest the imposition of sentence of its discretionary nature. The discretion is circumscribed but not taken away by the legislation. The cases of, for instance, S v Malgas 2001 (1) SACR 469 (SCA); Rammoko v Director of Public Prosecutions 2003 (1) SACR 200 (SCA) and S v Vilakazi 2009 (1) SACR 552 (SCA) explain this at some length.

[16] I am unpersuaded that the learned Judge misdirected herself in reaching her conclusion that the only appropriate sentence was that of life imprisonment. As was stressed by Ms. Turner, appellant killed deceased on no more than a suspicion that she was being unfaithful towards him. Furthermore, a period of some hours elapsed between the time that he first formed the belief that she was unfaithful and the time that he eventually took the deceased away to the forest. This was therefore not the sort of situation in which an accused "*reacts spontaneously to perceived provocation, driven by anger, without sufficient time to consider this actions.*" See: Dikana v S [2008] 2 All SA 182 (E) at [7]. It was, in other words, not a "*true crime of passion.*"

[17] I agree further with Ms. Turner that appellant also displayed no genuine remorse for his actions. As pointed out by her appellant, far from accepting his guilt, sought falsely during his trial to implicate the elder to whom he had confessed as being the actual perpetrator of the crime. This necessitated the calling of appellant's mother as a witness. Appellant in turn stated that she was lying.

[18] Having regard to the seriousness of the present offence committed whilst on parole as well as to the nature of appellant's previous convictions, and his lack of remorse the likelihood of his rehabilitation is minimal. I agree with the finding by the learned Judge in the court a quo that by his brutal and callous actions he has shown himself to be a menace to society and to women in particular.

[19] Ms. Turner referred to a number of decisions emanating from the Supreme Court of Appeal dealing with the scourge of domestic violence and femicide in South Africa. In Kekana v S [2014] ZASCA 158 the following was stated at [20]:

> "*Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in S v Chapman when this court said the following:*
>
> > Women in this country have a legitimate right to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.'"

[20] In my view the learned Judge was correct in her view that the aggravating factors in this matter far outweigh any mitigating factors.

[21] In the circumstances I am of the view that the only appropriate sentence was indeed that of life imprisonment.

[22] Accordingly the appeal against the sentence of life imprisonment is dismissed.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

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M.S. JOLWANA
JUDGE OF THE HIGH COURT

I agree,

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H.S. TONI
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. H. McCallum
Instructed by: Legal Aid South Africa, Grahamstown

Appearing on behalf of Respondent: Adv. N. Turner
Instructed by: Director of Public Prosecutions, Grahamstown