

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A277/2015

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

HLONGWANE, NTSIKELELO ALFRED

APPELLANT

Versus

THE STATE

RESPONDENT

J U D G M E N T

TWALA AJ

- [1] On 11 July 2014 the appellant was convicted of murder by the Magistrate Court sitting in Roodepoort and was on the 21 August 2014 sentenced to fifteen (15) years imprisonment in terms of Section 51 of the Criminal Law Amendment Act, Act 105 of 1997 (the CLAA). He was further declared unfit to possess a firearm in terms of Section 108 of the Firearms Control Act, Act 60 of 2000. He was legally represented and now appeals against the sentence only pursuant to the leave to appeal granted by the court a quo.
- [2] It is common cause that the deceased and the appellant had a love relationship as a result whereof two (2) children were born. The love relationship between the appellant and the deceased is described by the mother of the deceased as a rocky one. Although the appellant had free access to the house where the deceased lived with her mother and her children, he did not live there permanently with the deceased. At some point the deceased was arrested in Randburg and the appellant did not go to the police station to assist her. It is Mr Msizi Mtumba (**MTUMBA**), the first witness, who went to the police station to assist the deceased.
- [3] It appears from the record that Mtumba and the deceased had a love relationship. The deceased had already parted ways with the appellant and had moved on with her life. On the day in question the deceased had requested Mtumba to take her to the school of her children as she was called in by the school. When Mtumba arrived at the home of the deceased, she was alone and they decided to have sex. Whilst they were busy with foreplay, Mtumba heard a noise coming from the window. The window pane was broken and they used a plastic to close it. Mtumba heard someone removing the plastic and pulling the curtain through the broken window pane. He

jumped off the bed and saw the appellant pointing a gun at them through the broken window pane. He ran away and hid in the ceiling in another room. He heard gun shots and he was hit in the foot. He called for help from his children and reported to the mother of the deceased that the appellant had shot at them. At the time he did not know if the deceased was shot or whether she was alive or not. He only realised that the deceased had died when he came back to the house after he went to the police station to report the incident. He knows the appellant by sight as he saw him when he, Mtumba, visited the deceased in Florida.

- [4] The appellant's version was that the deceased was his wife since he paid lobola for her. They have two children born of the relationship. He was living with the deceased at a backroom in the same yard where this incident occurred. On the day in question he left the house to fetch seats of his vehicle. When he came back he could not find the keys to the house where they normally leave them. He knocked on the door but there was no answer. When he was about to leave the yard, he heard the deceased screaming from the main house. He approached the room where the screams came from, removed the plastic on the window and moved the curtain. He saw a naked man on top of the deceased and he thought he was raping her. He pulled out his licensed firearm and fired a shot at them. He then left and reported the incident to the Roodepoort police. He did not render any assistance to deceased after he fired the shot in the room nor did he bother to check if anyone was hit by his shot.

- [5] The personal circumstances of the appellant were placed before the court by a Social Worker who compiled a pre-sentencing report. She testified that the appellant is 44 years old, has two (2) children. The eldest child is 15 years

old and is presently living with the appellant and the young one is living with the mother of the deceased. He has another child with his current girlfriend. He is the eldest child in a family of 8 and has passed standard 6 at school. He is a taxi operator and earns between R7000 and R10 000 per month. His girlfriend works for a construction company and earns a sum of R5000 per month. He looks after his younger sister who is mentally retarded. He suffers from a kidney condition for which he requires prescription medicine.

[6] It is trite that sentencing is a matter pre-eminently in the discretion of the trial court. The appeal court may only interfere with the sentence imposed by the trial court only if the court a quo did not exercise its discretion reasonably or if the sentence is shockingly inappropriate. In this regard see the case of **S vs Matlala 2003 (1) SACR 80 (SCA)**.

[7] The question that needs to be answered in the present case is whether the court a quo has taken into account all the relevant personal circumstances of the accused. In the case of **Zinn vs State 1969 (2) SA 537 (A)** the court stated that:

“What has to be considered is the triad consisting of the crime, the offender and the interests of society.

[8] In **S vs Malgas 2001 (1) SACR 469 (SCA)** the court stated the following:

“Section 51 of the CLAA has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2. Courts are required to approach the imposition of sentence conscious that the legislature has

ordained life imprisonment or the particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances”.

The court continued to state that:

“Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process”.

[9] The unchallenged evidence of the pathologist is that the deceased suffered a seven millimetre penetrating laceration surrounded by colour abrasion one centimetre below the left eye. The wound was surrounded by tattooing which extended for seven centimetres medial to wound, three centimetres superior to the wound, 4.5 centimetres lateral to the wound and for 4.5 centimetres inferior to the wound. This gives one an idea of the distance from which the shot was fired. It is what is called a near shot within one arm’s length and with an average gun using average ammunition. One would estimate the distance as between 30 to 60 centimetres.

[10] It is on record that the appellant did not enter the house after firing a shot at the people in the house to find out if any of them was injured. He knew that he shot the deceased in the face for he was only 30 to 60 centimetres away from her.

The court stated the following in the Obisi's case *supra*:

"...the nature of the crime, the brazenness, the callousness and the brutality of the appellant's conduct show that he attaches no value to other people's lives, or physical integrity, or to their dignity".

[11] Counsel for the appellant argues that the appellant is a breadwinner and has two children with the deceased and one with his girlfriend. The court a quo has failed to take into account the interest of the children when sentencing the appellant. The interests of the minor children are of paramount importance in any matter that affects them.

[12] In the case of **S vs M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC)** the court stated the following:

"The question to be asked is, what are the duties of the sentencing court in the light of Section 28 of the Constitution of the Republic of South Africa and any relevant statutory provisions when the person being sentenced is the primary care giver of the minor children".

[13] In the present case the question that needs to be answered first is whether the appellant is the primary care giver of the minor children of the deceased or that of his girlfriend.

[14] It is on record that the deceased lived with her children in her mother's house and the appellant would only visit them there. On the day the deceased was killed, she had an arrangement with Mtumba to accompany her to the school of her children. If the appellant had any interests of the children at heart, it would have been him attending to the school of his children with the

deceased. It cannot be said now that after he killed the mother of his children, that qualifies him as a primary care giver of the minor children since he is the surviving parent.

[15] The death of the mother of the minor children in this case was caused by the deceased callously. As a result the minor children of the deceased have suffered loss of maternal and emotional support. It is on record that the siblings are now separated, the 15 year old girl lives with the father and the younger one with its maternal grandmother. The appellant has disrupted the lives of these children and unfortunately he cannot therefore use their plight for his benefit.

[16] It is my view therefore, that this case is distinguishable from the case of **S vs M** *supra* in that the appellant is not a primary care giver of the minor children and therefore the interests of the minor children cannot be taken as a factor that is substantial and compelling the court to deviate from imposing the minimum sentence as prescribed by section 51 of the CLAA.

[17] I agree with the court a quo that the appellant did not show any remorse in this case. He maintained throughout the trial that he thought the deceased was being raped by Mtumba and wanted to protect her. Only when he was interviewed by the social worker did he admit that he shot the deceased because he was angry and felt rejected by the deceased.

[18] In the case of **S vs Banda 1991 (2) SACR 325 (B)** the court stated the following:

“The court fulfils an important function in applying the law in the community. It has the duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no space in life it does not include. The court must also by its decisions, and imposition of sentence promote respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender. The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered as well as the maintenance of peace and tranquility in the land needs to be taken into account”.

[19] The society calls for protection of women and children because of their vulnerability. There are campaigns by different groups in the society for the protection of women especially from the people they know and trust. A lot of money is spent in such campaigns. The courts are enjoined to deal decisively with people like the appellant who brazenly kill the women they claim to love.

[20] I agree with the court a quo that there are no compelling and substantial circumstances in this case that compelled the court to deviate from sentencing the appellant to a period of fifteen (15) years as prescribed by the section 51 of the Criminal Law Amendment Act.

[21] It is therefore my view, that the court a quo did not misdirect itself and that the sentence imposed is appropriate in the circumstances.

[22] In the circumstances, I propose the following order:

The appeal is dismissed.

TWALA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered,

HEATON - NICHOLLS J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Appellant	:	ADV. M.D. BALOYI
Instructed by	:	MOKGOBI ATTORNEYS INC
Tel	:	011 760 6169
Counsel for the Respondent	:	ADV. J STEYN
Instructed by	:	DIRECTOR OF PUBLIC PROSECUTIONS
Tel	:	011 220 4069
Date of Hearing	:	8 MARCH 2016
Date of Judgment	:	10 MARCH 2016