

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA**

CASE NO: A260/20 15

20/6/2016

Reportable: no

Of interest to other judges: no

Revised.

In the matter between:

TUTA MUZI MASANGO

Appellant

and

THE STATE

Respondent

JUDGMENT

PHATUDI AJ,

[1] INTRODUCTION

1.1. The Appellant in this matter has been convicted of murder read with the provisions of **Section 51(1) of Act 105 of 1997¹**, and was sentenced to life imprisonment by the learned Magistrate E. Schutte,

¹ The Criminal Law Amendment Act., 1997

sitting as a Court of First instance at Actonville Regional Division.

- 1.2. As a result of the capital sentence imposed the Appellant enjoys automatic right of appeal in terms of the provisions of **Section 10 of Act 42 of 2013**.² The Appellant now appeals against both conviction and sentence imposed against him. The Appellant was assisted by an Attorney throughout the trial.
- 1.3. The facts giving rise to the conviction may be briefly summarized as follows:

[2] A BRIEF SURVEY OF THE STATE'S CASE:

The first witness for the State, **Ms. Zinhle Dlamini** testified that:

- 2.1. On **01 March 2014, Mabel Nondlyebo Oinglswayo** ("the deceased") who was her friend, went to town accompanied by her child one **A.** to do some shopping. That evening the deceased came to pay her a visit at about **18h30**. She was delirious and crying with her vest torn. The deceased later received a phone call from the Appellant who asked her to come back home at [...] Street, Wadville where they cohabited.
- 2.2. Upon arrival at that residence, the witness asked the Appellant as to why he had assaulted the deceased. Appellant hit her with an open hand on her cheek and she fell down. Then in the dining room was the deceased, Appellant, **A**, the deceased's grandfather, the witness, and two children who were all in the house.
- 2.3. All of a sudden after the deceased asked why he slapped the witness, she suddenly saw that the deceased was down on the floor face down, with her arms around her head, covering her face. The witness saw the Appellant coming from the kitchen with a knife in his hand which when measured was **32** centimetres in length with a **15** centimetre blade. She saw Appellant sitting on the deceased's back and stabbing her twice in the back. Thereafter, the Appellant wrapped the knife in his shirt and fled on foot. Later Appellant returned to the house and locked himself therein. The police arrived at the scene of the crime and arrested the Appellant.

² Judicial Matter Amendment Ad., 2013

2.4. The second witness to give evidence was one **Herald Mavimbela**. The gist of his evidence was that he was related to the deceased and that both the Appellant and deceased lived together at [...] Street where the grandfather **Isaac Nkabinde** also lived. He stated that he was phoned to come to the house in question (**[...] Street**) on **02 March 2014** where an incident occurred. On arrival he found the house in a state of disarray and there was blood on the floor which spilled between the dining room and the kitchen. It was from the dining room door where he saw a knife under the bed in the bedroom. He described it as a homemade knife. Although found clean, the knife had black marks on the handle. This knife was later collected by the police as an exhibit.

2.5. The third witness for the prosecution was **Constable Lucas Ambani Sadiki** attached to Actonville police Station. He stated that he and one Constable Manilla (surname not recorded) visited the crime scene at house no: **[...] Street on 01 March 2014** at about **20h00-21h00**.

An old man appointed out to them a body of a person with a stab wound at the back, who it appeared was still alive when they arrived at the house.

The victim informed them that it was Appellant who stabbed her at the back.

According to him the victim died while on the way to the hospital. The fourth witness to testify was **Warrant Officer Rashimiti Simeon Chokwe**, also a police officer attached to Actonville Police Station. He testified that on **02 March 2014** while on duty paid a visit at house no [...] Street to collect an exhibit, a knife, which was shown to him by the second witness, **Herald Mavimbela**. He said that he found the knife under the bed and booked it into **SAP 13,214/2014**.

2.6. A further witness was the minor child (**8 years old**) **A.**, the deceased's daughter, who testified in camera with the assistance of an Intermediary a **Ms. Khaya Khasi Poepe**, duly appointed in terms of **Section 170A of Act 51 of 1977³**, as amended.

The crux of her evidence was that on the day in question her mother (the deceased), and **Zinhle**, the first witness, on arrival from town were busy consuming liquor at home until late that evening when they returned home.

On arrival, her grandfather and Appellant were home. Appellant asked her mother for a **R100.00** note which she gave to him. They returned to **Zinhle's**

³ The Criminal Procedure Act, 1977

house and later returned home, where her mother's purse was torn up and damaged. She alleged it was damaged by the Appellant, although that was a mere suspicion.

An altercation ensued between her mother and Appellant over the money.

Appellant then grabbed deceased by her neck. He sat on top of the deceased but she managed to push him away. Appellant went into the kitchen from where he emerged armed with a knife. He again sat on top of the deceased, stabbing her twice with the knife in her back. Demonstrating with dolls, the position of her mother, she illustrated that her mother was lying face down, while Appellant straddled on her back as he stabbed her. That was the summary of her evidence.

- 2.7. The last witness for the State was one **Dr Mohammed Sharam**. He confined his evidence to exhibit "**B**" being a post-mortem report. The gravamen of his evidence was that a good or sufficient force was required to inflict the wound which collapsed the deceased's lung. The injury was sufficient to fell the victim. Of crucial importance was that it was physically impossible for the deceased to have stabbed herself in the back while her arm was twisted behind her back. It was also said that it was medically possible for the knife to have penetrated the body twice in the same position and at the same tractor. The State's case was concluded at this point.

[3] The Appellant also presented his version of events briefly as follows:

- 3.1. That on his arrival at home, **Zinhle**, the deceased **Mabel**, and his Uncle **Isaac Nkabinde** were present. He stated that **Mabel** (the deceased), demanded her money from him, and slapped him twice. She started throwing objects and broke some items and then went into the kitchen and returned armed with a knife. She came straight to him with the aim to stab him with the knife.
- 3.2. Appellant allegedly jumped and stood behind her and grabbed her from behind with his arm around her neck. He twisted her arm around her neck, bent forward, and they both fell. He fell on top of her and both were down. He stated that he believed that she stabbed herself accidentally as she fell down. He went outside the house to summon an ambulance to convey the victim to the hospital. He left the knife on the floor.

[4] The vexed question is whether the State had succeeded in proving its case beyond reasonable doubt.

[5] It is common cause that the following facts had been established by the evidence:

5.1. The deceased died on the night of **01 March 2014**. The cause of death was on account of a stab wound caused by a knife near her shoulder blade.

5.2. The evidence of the first witness, **Zinhle**, and the minor child **A**. corroborated each other as to who inflicted the fatal wound. The Court *a quo* found their evidence "very coherent and clear" and that it was the Appellant who went to fetch the knife. He sat on top of the deceased, straddling her as he stabbed her twice⁴.

5.3. The Appellant's evidence that she accidentally stabbed herself has been refuted by the medical evidence of **Dr Sharam**. The deceased could not have managed to stab herself twice while her hand was twisted behind her back, while lying on the floor with her face down. The sharp end of the knife would have pointed downwards and could not have inflicted the wound on the upper shoulder blade as Appellant alleged it did. I am of the view, therefore, that the Appellant's version is not only improbable, but also not reasonably possibly true.

5.4. The testimony of the said two state witnesses' indicated that the Appellant was the aggressor.

5.5. The knife blade would not have been plunged in the area where it would have been able to inflict the nature of the wound sustained. The penetration of both lobes of the lungs suggests that considerable force was used from the position described by the eye witnesses referred to. The knife, because of the depth of the penetration had to be extricated from her back.⁵ It follows, that on the semblance of the State's evidence as opposed to that of the Appellant, his version is not only fraught with improbabilities, but is beyond reasonable doubt, false.

5.6. In view of not only the formal admissions that Appellant made in terms of the provisions of **Section 220 of Act 51 of 1977 (exhibit "A")**, but also the totality of the evidence presented, during the trial, I entertain no doubt that the

⁴ Pp 95-96, line 20, record

Appellant had been properly convicted of murder. The evidence and the facts presented do not however support a conviction of murder within the purview in **Section 51 (1) of Act 105 of 1997**. There was no evidence adduced that the killing was premeditated either.

[6] This then brings another dimension to the appropriateness of the life sentence imposed. Due to the obvious error on conviction of premeditated murder it is open to this Court to interfere with the sentence.

[7] The Appellant was considered a first offender as the previous convictions were not related to the current offence which is one of murder⁶.

[8] It is trite principle that sentencing an offender is a matter pre-eminently residing in the discretion of the sentencing court, and clearly, the courts of Appellate jurisdiction should be slow if not loathe to erode such discretion. Accordingly, the sentence imposed should only be altered and disturbed where the discretion has not been judicially and properly exercised. The yardstick is often whether the sentence is vitiated by irregularity and misdirection or that it is disturbingly inappropriate. See: **S v Rabie**⁷ regarding the above principles. See also **S v SM**⁸.

[9] The Court, in interfering with the sentence of the court *a quo*, has to determine the appropriate sentence. This is done regard being had to the triad that was enunciated in **S v Zinn**⁹ where Rumpff JA said:

"It then becomes the task of this Court to impose the sentence which it thinks is suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society."

[10] Holmes JA, in **S v Rabie**¹⁰ said:

⁵ P. 96, record

⁶ P 111, line 10-20, recorded

⁷

⁸ 2010 (1) SACR 504 at 510 c-d (WC)

⁹ 1969 (2) SA 537 (A) at 540G

¹⁰

"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."

[11] Interfering with the sentence of the court *a quo* does not reduce the seriousness of the crime that the Appellant has been convicted of. The crime remains serious and the Courts, in serious cases are not to avoid imposing appropriate sentences for flimsy reasons. (See: *S v Malgas*¹¹ 2001 (1) SACR 469 (SCA) at 4811-482A).

[12] The absence of premeditation, as I have found, makes the sentence imposed by the court *a quo* harsh and inappropriate. This Court, therefore, is at large to disturb the sentence and substitute it with a lesser sentence.

[13] Having regard to the triad and what I said above, I, in the circumstances, propose to make the following order:

- (1) The appeal against the murder conviction is dismissed.**
- (2) The appeal against the sentence of life imprisonment is upheld.**
- (3) The sentence is set aside and substituted with the following sentence:**
 - "3.1 The accused is sentenced to twenty (20) years imprisonment".***
 - 3.2 "The sentence in 3.1 above is, in terms of Section 282 of Act 51 of 1977, antedated to 18 November 2014".***

M.G.PHATUDI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

I concur and it is so ordered

¹⁰ 1975 (4) SA 855 (A) at 862G

M W MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT
PRETORIA

I agree

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The Director of Public
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Date heard: 3 December 2015

Date delivered:

¹¹ 2001 (1) SACR 469 (SCA) at 481i-48a).