


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC34/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
23/08	
.....2019
DATE	SIGNATURE

In the matter between:

THE STATE

and

JOHANNES RABOSHAGA MABETWA

ACCUSED

SENTENCE

PHAHLANE, AJ

[1] The accused has been convicted of Premeditated Murder – that is Murder read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997. It is now the duty of this court to pass sentence on the accused and it is not an easy task. In passing the sentence, the court also have to have due regard to the judicial purposes of punishment, which are deterrence; prevention; retribution and rehabilitation as stated in the case of *S v Rabie*¹

[2] This court should also be mindful of the “triad” factors pertaining to punishment namely: ‘the crime, the offender and the interests of society’ as enunciated in *S v Zinn*²

[3] The offence for which the accused has been convicted of, is a very serious offence. I already indicated in my judgment that Dr Mabotja who performed the post-mortem on the body of the deceased indicated to this court that the cause of death is what is called ASPHYXIAL DEATH, and that manual strangulation could not be excluded – the reason being the fact that there was haemorrhage (bruising/bruises) on the neck area of the deceased. These bruises were on the two big muscles running up towards the back of the neck on both the left and right side of the neck. There was also haemorrhage over the thyroid gland, which sits in the centre of the neck, and lying directly on the spinal column. The injuries on the neck indicated that there was blunt force applied to the neck and it may have been caused because hands were used or a heavy object was placed over the neck for example.

¹ 1975 (4) SA 855 (A)

² 1969 (2) SA 537 (A)

[4] This clearly indicates that the deceased suffered and died a painful death. It is the duty of the courts to protect women and the society in general from the scourge of these violent actions, and to send a clear message that this behaviour is unacceptable.

[5] In **S v Swart**³ NUGENT JA had the following to say:

"In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role".

[6] This court referred to, and with approval, the case of **R v Karg**⁴ where the court held that:

"While the deterrent effect of punishment has remained as important as ever, it is correct to say that the retributive aspect has tended to yield ground to the aspect of prevention and correction. That is no doubt a good thing. But the element of retribution historically important, is by no means absent from the modern approach. Is it not wrong that the natural

³ 2004 (2) SACR 370 (SCA)

⁴ 1961 (1) SA 231 (A) at 236A-B

indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands".

[7] Turning to the issue of the minimum sentences, it is important to note that because of serious and violent crimes, Parliament saw it fit to step in and address the problem, hence the Legislature passed the Criminal Law Amendment Act 105 of 1997. This Act was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. The relevant section is s51(1) which has been explained to you Mr Mabetwa, at the begging of the trial.

[8] Amongst the serious crimes mentioned in section 51(1) is murder where it was planned or premeditated, and this is the offence which falls under Part I schedule 2 of the Act and the mandatory sentence is life imprisonment.

[9] The court is also enjoined with the powers to depart from imposing the prescribed minimum sentence where substantial and compelling circumstances exist. However, the specified sentences are not be departed from lightly, and for flimsy reasons as stated in *S v Malgas*⁵

⁵ 2001 (1) SACR 469 (SCA)

[10] The general principles governing the imposition of a sentence in terms of the Minimum Sentences Act as enunciated by the Supreme Court of Appeal in this case of **Malgas** cannot be ignored. MARAIS JA held that:

"The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored."

And that:

"The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained."

And further that:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence".

[11] The court in **S v Matyityi**⁶ referring to **Malgas supra** reaffirmed that

“The starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation”.

[12] The decision whether the circumstances of this case calls for the imposition of a lesser sentence than the prescribed minimum sentence, means the mitigating factors would have to be weighed with the aggravating factors.

See in this regard **S v Sikhapha**⁷

[13] The accused testified in mitigation of his sentence. He placed his personal circumstances before this court that:

1. He is 62 years old, born on 21 June 1957, in Atteridgeville
2. He is married to Gladys Mabetwa and they have 4 children born in 1976; 1978; 1990 and 1995 respectively.
3. The highest standard he has passed is matric (ie. Grade 12 as it is now known) – which he obtained in 1976
4. His employment history – he worked at Armscor as a storeman from 1980-1989; worked at Nampac as machine operator from 1990-2000; he has company for bricklaying called Batase building construction (which is apparently not operating due to financial difficulties)

⁶ 2011 (1) SACR 40 (SCA)

⁷ 2006 (2) SACR 439 (SCA)

5. He also receives pension grants and has an additional income from odd jobs of doing renovations (at a workshop in Church street)
6. His income is R4000-4500 per month apart from the pension grant he receives, and which he said he support his family and pay school fees for his youngest son who is doing N5 (Engineering) at Springfield
7. He is a first offender
8. He has no firearm nor a licence to possess such.
9. He owns property (ie. house) where he stays with his family & a motor vehicle.

[14] Under cross-examination, the accused still maintained that he is not responsible for the death of the deceased. He explained as he did during trial proceedings that he knew the deceased from back in the days when they were in school together and met up with her when the deceased told him about her leaking roof. Further that they were planning to do a cash loan business. He explained that there were times when the deceased would take money and loan people at her workplace, and the benefit which he would get from that was that if he gives the deceased R5000 for example, he would receive his money back with 40% interest.

[15] The accused has during the trial, testified that, had it not been for the post published on social media, he would not have been arrested and that is worrying, because clearly the accused fails and refuses to appreciate the wrongfulness of his actions. He still refuses to take responsibility. When asked by his counsel if there was anything that he wishes to say to the court now that he has been convicted, his response was that the court is making a big mistake in convicting him.

[16] Having said that, it should be borne in mind that it is always necessary and important that in the evaluation of an appropriate punishment or what a proper punishment should be, the court must have due and proper consideration of all mitigating circumstances of an accused person as well as aggravating circumstances. This is particularly important because of the applicability of the minimum sentence in this case.

[17] Counsel on behalf of the accused submitted that he cannot address the court about remorse because the accused is refusing to take responsibility of his action. He further submitted that the evidence on record shows that the planning or premeditation was of a short period of time because, days before the deceased was killed, there was a good relationship between the accused and the deceased. He however argues that the court should take the age of the accused and his clean record as substantial and compelling circumstance that should persuade this court not to impose the prescribed sentence.

[18] On the other hand, Advocate Fourie for the State argues that the accused's counsel having submitted that the accused refuses to take responsibility for his action, is an indication that he cannot be rehabilitated. Put differently, that the accused is not a candidate for rehabilitation because he still does not want to admit liability. He submitted that it is clear from the circumstances of the case that there was proper planning as the accused took the deceased to a secluded area where he committed this offence and left her there. He further submitted that though the accused is older and has a clean record, that alone cannot be regarded as substantial and compelling circumstances.

[19] I agree with both counsels that the accused does not want to take responsibility for his actions. I am also inclined to agree with the submissions made by the State that the accused has not shown any remorse or circumstances that might persuade this court to deviate from imposing the prescribed minimum sentence.

[20] This court has earlier indicated that, not only will it make a balance between the interest of the accused; the interests of society; and the offence which the accused has been convicted of, but it will also look at the purposes of punishment.

[21] I have taken due consideration to the personal circumstances of the accused and the only positive thing in his circumstance is the fact that he is the first offender. Having considered all the aspects, I am of the view that the personal circumstances of the accused are just ordinary circumstances, taking into consideration the submission made by his own counsel that he refuses to take responsibility.

[22] In ***S v Ro and Another***⁸ the majority of the supreme court of appeal held that:

"To elevate the personal circumstances of the accused above that of society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution".

[23] I agree with, and I am bound by this decision. I am of the view that the aggravating factors far outweigh the mitigating factors and that there are no

⁸ 2010 (2) SACR 248 (SCA)

substantial and compelling circumstances which warrants a deviation from the imposition of the prescribed minimum sentence.

In the circumstance, the following sentence is imposed:

1. The accused is sentenced to Life imprisonment.



P. D PHAHLANE

Acting Judge of the High Court, Gauteng Division, Pretoria

For the State : Adv Fourie

: Adv Roos

Instructed by : Deputy Director of Public Prosecutions

For the Defendant : Adv Ntsibande

Instructed by : Legal Aid South Africa

Date of Sentence : 23 August 2019