THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 271/2011

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS TRANSVAAL **Appellant**

and

LARRY BURT PHILLIPS **Respondent**

Neutral citation: *The Director of Public Prosecutions v Larry Burt Phillips* (271/2011) [2011] ZASCA 192 (14 November 2011)

Coram: PONNAN, BOSIELO JJA and PETSE AJA

Heard 16 September 2011

Delivered: 14 November 2011

Summary: Sentence – imposition of – factors to be taken into account – murder of wife – kidnapping – assault – contravention of s 17(*a*) of the Domestic Violence Act 116 of 1998 – globular sentence – undesirability of such practice – sentence set aside and increased on appeal.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Louw J sitting as court of first instance):

1 The appeal by the Director of Public Prosecutions against the sentence imposed on the respondent by the court below succeeds.

2 The sentence imposed by the court below is set aside and in its place is substituted the following:

'a in respect of count 1, common assault, the accused is sentenced to twelve months' imprisonment.

b in respect of count 3, kidnapping, the accused is sentenced to three years' imprisonment.

c in respect of count 4, murder, the accused is sentenced to eighteen years' imprisonment.

d in respect of count 5, common assault, the accused is sentenced to twelve months' imprisonment.

e in respect of count 6, contravention of s 17(*a*) of the Domestic Violence Act 116 of 1998, the accused is sentenced to two years' imprisonment.'

3 It is ordered, in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, that each of the sentences imposed on counts 1, 3, 5 and 6 shall run concurrently with the sentence imposed on count 4.

4. The respondent will therefore undergo imprisonment for an effective term of eighteen years.

5. The sentence is, in terms of s 282 of the Criminal Procedure Act 51 of 1977, antedated to 14 October 2009.

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JUDGMENT

PETSE AJA (PONNAN and BOSIELO JJA CONCURRING):

[1] This is an appeal by the State under s 316B of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) against the sentence imposed on the respondent, Larry Burt Phillips, subsequent to his conviction in respect of the following charges: kidnapping; murder; contravening s 17(*a*) of the Domestic Violence Act 116 of 1998 (the Domestic Violence Act) and two counts of common assault.

[2] Aggrieved by the leniency of the sentence and the fact that the court below took all counts as one for the purposes of sentence the State sought leave to appeal from the court below which was granted to this court on 4 December 2009.

[3] The prosecution of the respondent in the court below was a sequel to two incidents which occurred on 31 October and 24 November 2008. In respect of counts 1 and 2, which were both alleged to have been committed on the former date, the respondent was charged with the attempted murder and rape, respectively, of his then estranged wife, Henriette Elizabeth Phillips (the deceased). The deceased had, following the incident which occurred in the common home of the parties on 31 October 2008, obtained a protection order against the respondent in the Pretoria Magistrates' Court on 3 November 2008. This order was served on the respondent by an officer in the employ of the South African Police Service on 10 November 2008. Counts 3 to 6 are all alleged to have been committed on 24 November 2008. In respect of count 3, the respondent is alleged to have kidnapped his son Howard James Phillips. Count 4 pertains to the murder of his wife and count 5 to the assault with intent to do grievous bodily harm in respect of his neighbour Joachim Petrus Korb. In count 6 the respondent was charged with a contravention of s 17(a) of the Domestic Violence Act.

[4] The respondent pleaded not guilty to the attempted murder charge and the

assault

with intent to do grievous bodily harm charge on counts 1 and 5, but guilty on those counts to the offence of common assault. He pleaded guilty to count 4, the murder and count 6, the breach of the domestic violence interdict and not guilty to the remaining counts of rape (count 2) and kidnapping (count 3). Dealing first with the charges that arose out of the incident on 31 October 2008. As the complainant on counts 1 and 2 was deceased by the time the matter came to trial, the rape charge (count 2) could not be sustained and the respondent was accordingly found not guilty. As far as count 1 was concerned, the respondent was convicted on his guilty plea of common assault. Turning to the occurrences of 24 November 2008. The respondent was duly convicted on his guilty plea on count 6, the breach of the domestic violence protection order. The State, however, disputed the facts upon which the guilty plea tendered by the respondent in respect of count 4, the murder, was advanced. Those facts were not accepted by the State as the respondent sought to downplay the gravity of the offences to which he had pleaded guilty in his written statement in terms of s 112(2) of the Criminal Procedure Act. Consequently a plea of not guilty was entered by the court below in respect of counts 3 to 5 and evidence was adduced by the State.

[5] The State's principal witness was the respondent's son, Howard. His account of the events of 28 November 2008 was as follows: at approximately 16h00 he was telephoned by the respondent who desired to see him. As arranged the respondent came to fetch him from his friend's home. The respondent drove around with him in his motor vehicle aimlessly and attempted to force him to drink brandy. But Howard refused to succumb to the respondent's threats. However, the respondent was unrelenting and refused to allow Howard to alight from his motor vehicle. As they were driving around the respondent told Howard that he would do so until his vehicle ran out of petrol. The respondent appears to have suggested to Howard that he (the respondent) had been sodomised when much younger and insinuated that a similar fate could befall Howard. The respondent refused to allow Howard to answer his cellphone when it rang. When the deceased persisted in calling Howard on his cellphone he, on orders from the respondent, answered the phone but only to lie to the

deceased, on the suggestion of the respondent, saying that he was

with the respondent and that all was well.

[6] All of this time the respondent was telling Howard that he wanted the latter and his sister Leigh to speak to the deceased and persuade her to withdraw the charges that had been preferred against him arising out of the occurrences of 31 October 2008, for which he had been arrested and released on bail, so that he could leave the country and work in Angola where he had been promised a well paying job. He told Howard that he would miss this golden opportunity for as long as there were charges still hanging over his head.

[7] Ultimately the respondent drove to the Silverton Police Station where he wanted Howard to make a statement to the police. However, on their arrival the respondent was told by a police officer that he could not force Howard to make a statement against his will. At the request of Howard, the police telephoned Leigh to come to the police station to fetch him.

[8] On Leigh's arrival at the police station the respondent was still present with Howard. When Leigh asked them what was going on, the respondent would not answer her. Rather, he asked Howard to explain to Leigh what was happening but Howard refused to do so. Ultimately the respondent left in his motor vehicle driving in the opposite direction to that taken by Leigh and Howard as they also left the police station. Whilst they were en-route home Howard recounted to Leigh what the respondent had done to him earlier.

[9] When Leigh and Howard arrived at their home Leigh parked the motor vehicle in which they were travelling in the garage. Thereafter they both walked over to their neighbour's house where the deceased was. After spending time together at their neighbour's house and telling the deceased what had happened to Howard, whilst he was with the respondent, the deceased feared that it would not be safe for her to sleep at her house believing that the respondent might harm her despite the fact that she had changed the locks to her house.

[10] Later the deceased went over to her house, accompanied by Leigh and her neighbour Petrus, to fetch bedding so that she could sleep over at her neighbour's house. On reaching the house she unlocked and opened the front door, switched on the lights and walked down the passage to the main bedroom whilst Leigh and Petrus waited for her in the passage.

[11] Suddenly Leigh and Petrus heard the deceased screaming and then saw her running out of the main bedroom towards the front door with the respondent in hot pursuit. Petrus' attempts to intervene were unsuccessful as he was overpowered by the respondent who also stabbed him. Petrus, on regaining his balance, also ran towards his house following the respondent who was still pursuing the deceased. As the deceased reached the front door at Petrus' house the respondent stabbed her in the back.

[12] Howard and Petrus intervened and subdued the respondent whom they later dispossessed of the knife with which he had stabbed the deceased. After the respondent had calmed down they released him. Just before they let go of the respondent he remarked that he was satisfied that the deceased was dead. At that stage Leigh asked the respondent why he was doing all of this. The respondent retorted that he had warned the deceased.

[13] The respondent left the neighbours' premises and a short while thereafter called Howard to come to him. Howard refused to do so as he realised that the respondent was carrying a knife in his trouser pocket. Howard asked the respondent to surrender the knife first. This prompted the respondent to take the knife out of his pocket and throw it to the ground next to Howard. Howard took the knife, with which the deceased was stabbed, and put it on the kitchen table of his home. The ambulance and police subsequently arrived at the crime scene having been summoned thereto by Petrus' wife. The deceased was certified dead by the paramedics and her body was removed. The respondent was then arrested.

[14] The respondent told the court that it was his intention at all material times to discuss his marital problems with the deceased and their children and to prevail upon the

deceased to withdraw the charges pending against him so that he could take up employment in Angola. He denied that he ever threatened to sodomise Howard and said that all that he did was to recount to him his past unfortunate experience of having been sodomised. He also denied that he had expressed satisfaction at the death of the deceased or told Leigh that he had previously warned the deceased of what might befall her. He also expressed the view that Leigh and Howard sided with the deceased against him. Although he saw that the deceased was at their neighbour's premises when he arrived at the home of the deceased he did not approach her there or call her to him but rather decided to break into the deceased's house – for the locks had been changed to keep him away from the house – gained entry into the premises through the window and lay in wait for the deceased in her bedroom. All along the respondent deliberately chose to leave the whole house in darkness presumably so as not to arouse suspicion.

[15] The court below rejected the respondent's evidence and accepted the State's version. It also found that the murder committed by the respondent was premeditated. This finding accordingly brought the murder count within the purview of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) which decrees that a sentence of life imprisonment must be imposed for a premeditated murder unless substantial and compelling circumstances were found to be present.

[16] In its reasons for sentence the court below made reference to the fact that the respondent had, inter alia, been convicted of premeditated murder in that he lay in wait in the deceased's bedroom armed with a knife. It thus took cognisance of the fact that the murder count fell within the purview of Part I of Schedule 2 of the Act which ordained life imprisonment unless substantial and compelling circumstances were found to exist. It went on to mention that in respect of murder that is not premeditated the Act prescribes a minimum sentence of fifteen years in the absence of a finding that substantial and compelling circumstances exist. On the premeditation it found that the

intention to kill was formed a short while earlier when the respondent lay in wait for the deceased in the latter's bedroom.

[17] The court below also laid much emphasis on the personal circumstances of the respondent. It listed, inter alia, the following factors: that the events of the fateful night were precipitated by a long and stormy marriage relationship between the respondent and the deceased; that the deceased often humiliated and ridiculed the respondent; that the incident of 31 October 2008 that led to the charges of assault and rape precipitated the granting of the protection order on 3 November 2008; that as a consequence of the protection order the respondent was compelled to leave the common home where his children Leigh and Howard lived and went to stay with a friend; that he was a first offender; that over a period of a year he had been without a source of income as a result of which he was unable to provide for his wife, children and household; that his first marriage had ended in divorce; that he was abandoned by his parents at the age of six months and consequently grew up with his paternal grandmother; that as a child he lacked emotional security; and, that because of his emotional upheavals he had low self esteem. The court below also took into account the evidence led in mitigation of sentence from a psychologist and pre-sentence reports which it found were testimony to the fact that the respondent's life at the critical moment was disintegrating.

[18] As to the evidence of the psychologist the court below emphasised that the respondent was not in a position to deal with and handle the intense emotional state thrust upon him by the vicissitudes of life not least the lack of parental love and nurturing during his early childhood. That he had also suffered sustained emotional torture and betrayal at the hands of the deceased and that he was so traumatised during the eight hour session with the psychologist that he, at times, burst into tears thus manifesting remorse for what he did to the deceased and his family.

[19] Taking into account all the foregoing factors the court below came to the conclusion that there were substantial and compelling circumstances that justified the imposition of a lesser sentence than that prescribed in terms of s 51(1) of the Act.

[20] Having further considered the cumulative effect of all mitigating factors it went on to impose a sentence of twelve years' imprisonment taking all counts as one for the

purposes of sentence.

[21] It is trite that the imposition of sentence is a matter pre-eminently within the discretion of the trial court. This court can interfere where the reasoning of the trial court is vitiated by a misdirection or where the sentence imposed can be said to be startlingly inappropriate or induces a sense of shock.

[22] In this court the State accepted that the court below was correct in its conclusion that substantial and compelling circumstances within the contemplation of that expression were present. The main thrust of the State's argument was that the court below failed to pay due regard to the benchmark set by the Legislature in arriving at what it considered to be an appropriate sentence (*S v Malgas* 2001 (1) SACR 469 (SCA) para 25). Thus it was argued that such a failure constitutes a material misdirection which leaves this court at large to interfere. This argument is, to my mind, sound.

[23] In *S v Abrahams* 2002 (1) SACR 116 (SCA) paras 24–26 this court made the following pertinent point in regard to the legislative benchmark set in terms of s 51(1) of the Act:

'It is therefore clear that the Judge considered that, having found substantial and compelling circumstances, he was at liberty to impose a sentence consonant with those applied before the Act came into force – hence the sentence one year lighter than that in *S v B*. This approach was incorrect. The prescribed sentences the Act contains play a dual role in the sentencing process. Where factors of substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before. This was made clear in *Malgas.*

Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as "ordinarily appropriate" is a consideration that the courts are "to respect, and not merely pay lip service to". When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as the "bench mark".'(Footnotes omitted)

Plainly had the court below employed the statutorily ordained minimum as its benchmark,

it could hardly have arrived at a sentence of 12 years' imprisonment for all of the counts, which it took as one for the purposes of sentence. It obviously approached the matter as if it was starting with a clean sentencing slate. In doing so, it misdirected itself.

[24] Moreover the court below also failed to take proper account of the interests of the victims of the respondent's crime. As to aggravating factors which did not receive proper consideration from the court below counsel for the State highlighted the following: the respondent had no regard for the emotional and physical well-being of his son, whom he held captive for several hours; he deliberately breached the protection order granted against him at the instance of the deceased thus treating the court which issued it with utter contempt; he, without justification, blamed his woes not only on the deceased but also on his children when he knew that they did not want to take sides with either of their parents; he was utterly insensitive to the emotional trauma suffered by his children as a result of the violent death of their mother, which occurred in their presence and of which he was the cause; in advancing a version that the State could not accept, which was ultimately rejected by the trial judge, he put his children to the pain of testifying against him in the criminal trial.

[25] On a reading of the record this case in my view reveals, like others, the disturbing prevalence of serious offences rooted in domestic violence. To my mind the court below over-emphasised the mitigating factors at the expense of aggravating factors. With respect to domestic violence it is necessary to say more. In *S v Baloyi* (*Minister of Justice & another Intervening*) 2000 (2) SA 425 (CC) para 11 the Constitutional Court said the following:

‘All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished.’

The Constitutional Court continued, para 12:

‘To the extent that it is systemic, pervasive and overwhelming gender-specific, domestic violence both reflects and re-inforces patriarchal domination, and does so in a particularly brutal form.’

[26] It goes without saying that a more balanced approach to sentencing was required (See *S v Swart* 2004 (2) SACR 370 (SCA) para 13). A clear message needs to be sent to both the respondent and those who might be minded to disregard protection orders granted in terms of the Domestic Violence Act that such conduct will not be countenanced by our courts. This court’s abhorrence of the respondent’s conduct in this regard must therefore be reflected in the imposition of an appropriate sentence.

[27] The practice of imposing globular sentences for multiple counts is generally an undesirable one. In *S v Immelman* 1978 (3) SA 726 (A) at 728E–729A the following was said:

‘The practice of taking more than one count together for the purpose of sentence (ie the imposition of what I shall, for convenience, term a “globular sentence”) was recently commented upon by this Court in the case of *S v Young* 1977 (1) SA 602 (A) where TROLLIP JA stated at (610E–H):

“That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg, *S v Nkosi* 1965 (2) SA 414 (C) where the authorities are collected) the practice is undesirable and should only be adopted

by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review especially if the convictions on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable. However, in the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; and in the ultimate result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant."
(See also *S v Mofokeng* 1977 (2) SA 447 (O) at 448–9 where some of the more recent cases are collected.) The present case was tried under the new Criminal Procedure Act 51 of 1977 but that does not affect the appositeness of the above-quoted remarks. In my view, difficulty can also be

caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this. This difficulty is further compounded in the present case by the extreme brevity of the Court's judgment on sentence which gives no indication as to why or upon what basis of fact the learned Judge arrived at the sentence imposed by him.'

[28] In the result the following order is made:

1 The appeal by the Director of Public Prosecutions against the sentence imposed on the respondent by the court below succeeds.

2 The sentence imposed by the court below is set aside and in its place is substituted the following:

'a in respect of count 1, common assault, the accused is sentenced to twelve months' imprisonment.

b in respect of count 3, kidnapping, the accused is sentenced to three years' imprisonment.

c in respect of count 4, murder, the accused is sentenced to eighteen years' imprisonment.

d in respect of count 5, common assault, the accused is sentenced to

twelve months' imprisonment.

e in respect of count 6, contravention of s 17(*a*) of the Domestic Violence Act 116 of 1998, the accused is sentenced to two years' imprisonment.'

3 It is ordered, in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, that each of the sentences imposed on counts 1, 3, 5 and 6 shall run concurrently with the sentence imposed on count 4.

4 The respondent will therefore undergo imprisonment for an effective term of eighteen years.

5 The sentence is, in terms of s 282 of the Criminal Procedure Act 51 of 1977, antedated to 14 October 2009.

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X M Petse

Acting Judge of Appeal

APPEARANCES

APPELLANT: C Bouwer (Ms)

Instructed by Director of Public Prosecutions, Pretoria
Director of Public Prosecutions, Bloemfontein

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