IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT)

Case No: A106/13

In the matter between:

PATRICK MPOKELI **Appellant**

and

THE STATE **Respondent**

JUDGMENT delivered on 15 May 2013

BOQWANA AJ

[1] The appellant was charged with the murder of his teenage daughter, N.M., aged [...]. He pleaded not guilty to murder and made formal admissions in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977. He was convicted of culpable homicide on 4 July 2011 in the Bellville Regional Court and sentenced to 12 years imprisonment of which 5 years were suspended for a period of five years on condition that the appellant was not convicted of murder, culpable homicide where assault was present, attempted murder or assault with the intention to do serious bodily harm committed during the period of suspension.

[2] The appellant sought leave to appeal against his sentence which was refused by the magistrate. On 13 December 2012, the appellant was granted leave to appeal against his sentence on petition to this Court.

[3] The facts of this case are very tragic and they are as follows: On 27 August

2009 the appellant assaulted his daughter with a double-folded electric cord for an intermittent period of four hours. The appellant had been punishing the deceased after he received a complaint from the school principal that the deceased was not attending school. Apparently she would leave home under the pretence that she was going to school. The appellant waited for the deceased to come home after the meeting he had with the principal. In an attempt to elicit the truth from the deceased he continuously assaulted her causing her death. The post- mortem examination conducted by Dr Marianne Tiemensma concluded that the deceased was badly injured externally but her death was caused by extensive soft tissue injuries secondary to blunt force trauma. The extent of the assault caused internal bleeding beneath the tissue. The appellant's wife Nonkoliso Mpokeli ('N Mpokeli') gave evidence for the state, whilst the appellant did not testify. N Mpokeli's evidence largely corresponded with the appellant's admissions. The appellant was found guilty of culpable homicide.

[4] N Mpokeli gave detailed evidence in mitigation setting out the appellant's personal circumstances. In short, N Mpokeli testified that she had been [….] to the appellant for 23 years and they had four children excluding the deceased. The first child was 25 years old whilst the other children were 9, 7 and 5 years of age. The three older children lived in the Eastern Cape with their grandmother who is ill whilst the 5 year old lives with her. She had been battling to obtain a social grant for the minor children due to the requirements of social services. N Mpokeli testified that she did not work and could not afford to support her children. The appellant supported her and the children from the money he received from a shop they operated inside their house. She could not continue to run the shop because she had no money to do so and all the money there was, was used for her daughter's funeral. She further alleged that their house was registered in the appellant's name. N Mpokeli however testified that she no longer lives at such property after the community told her to leave, and that she now lives with her sister in a squatter camp.

[5] Their house was being kept by her brother in law. The community has

however allowed her to return but she has no money to do so. Her husband was the eldest in his family and his other brothers had no fixed employment and could not give her regular financial support. N Mpokeli testified further that her children were suffering because of her husband being in prison.

[6] In handing down the sentence the magistrate considered the appellant's personal circumstances, that he was 42 years old at the time of sentencing, the seriousness of the offence, the interests of the community and the deceased. Taking the appellant's and his family's circumstances into account the magistrate found that three minor children are eligible for receiving state grants. He also found that there was no reason why the wife could not continue with the shop that she ran with her husband. In regard to the seriousness of the offence committed, the magistrate held that the appellant had planned to discipline the deceased child with a particular weapon which was inappropriate for parental disciplining purposes. The photos and the evidence given by the pathologist indicate that the injuries were inflicted with extreme force. The magistrate found that an aggravating factor was that the appellant did not hit the deceased once, he repeated the assault. As regards the interests of the community the trial court considered the fact that this incident had attracted an outrage from the community that forced the appellant's wife to leave their communal home. The court took into account that the appellant had shown remorse. It also found that the appellant had a previous conviction which occurred 16 years earlier, which it could not ignore, although it happened a long time ago. Having looked at all of these factors, the court imposed the sentence mentioned above.

[7] Counsel for the appellant submitted that the magistrate erred in not considering a non-custodial sentence as a suitable sentence in these circumstances. It was further submitted on behalf of the appellant that the magistrate should have taken into account that the appellant showed remorse from the onset and took responsibility for his crime. Counsel for the appellant submitted further that whilst the magistrate took into account the time spent in custody by the appellant awaiting trial, he seemed to be of the view that the minimum sentence legislation (i.e. Act 105 of 1997) was

applicable, which was not the case in this instance. According to counsel the magistrate overemphasized the deterrent aspect of sentencing. He argued that the seriousness of the offence does not mean that correctional supervision cannot be considered. The relief sought on behalf of the appellant was that the sentence be set aside and the matter remitted to the trial court for the procurement of a Probation Officer's Report. In the alternative counsel asked for the reduction of the sentence in the event that the appeal Court finds that direct imprisonment is necessary.

[8] It is trite that the appeal Court will not lightly interfere with the sentence imposed by the trial court. It is only when there is a serious misdirection on the part of the trial court or a failure to exercise the discretion properly or when the sentence imposed is startlingly inappropriate that the Court of appeal would interfere. In that regard see **S v Michele and Another 2010 (1) SACR 131 (SCA) at paragraph [11].**

[9] The key issue to be determined by this Court is whether the sentence imposed by the magistrate is appropriate or shoufd be set aside and replaced by a non-custodial sentence or a reduced custodial sentence having regard to the interests of the children.

[10] In **S** v **M** 2007 (2) **SACR** 539 **(CC)** at paragraph 36 Sachs J set out guidelines that the sentencing court should take into account when there is an indication that the convicted person might be a primary caregiver. The Court said the following:

1. A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
3. A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if

the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

4. If on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

5. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

6. Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

[11] In the present case the magistrate did not necessarily follow these guidelines methodically although he referred to the judgment of S *v M* and the judgment of this Court, **Lorimer v S (A 57/2009) [2010] ZAWCHC 47 (18 March 2010),** where Bozalek J analysed at length the guidelines suggested by Sachs J in the context of the *Lorimer* judgment That however does not mean he misdirected himself in any way. The magistrate paid due regard to the evidence provided by the appellant's wife which in my view fully set out all the circumstances regarding the impact that the incarceration had on the minor children. In my view, the magistrate had sufficient information before him regarding the status of the children. It is clear from his wife's evidence that the appellant was providing financial support for his family through the shop he ran with his wife. **N** Mpokeli was sketchy on why she could not continue with the shop. I understand from her evidence that she did not have money to

continue with the shop because all the money they had was used for the funeral of their deceased daughter. It is not clear where the husband will get the money from if a non-custodial sentence was to be imposed. N Mpokeli simply alleged that the appellant would make a plan. Although the appellant's incarceration depleted the family structure, it seems to me all is not lost as the children are with their grandmother and could still live with their mother and are eligible for social grants. The community has given messages to N Mpokeli to come back to her house which is being kept by the appellant's brother. She is currently supported by her sister and occasionally the appellant's brothers would give her money when they could.

[12] The interests of the children and the family must be weighed against the state's responsibility to prosecute and punish for crime. These are to be looked at on a case by case scenario.

[13] The duty on the State to deal firmly with criminal misconduct is an important consideration that cannot be ignored. Sachs J remarked in *S v M* at paragraph 40 as follows:

'As the *Zinn* triad recognises, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and anti-social criminality is appropriately and publicly repudiated. In practical terms, then, the difficulty is how appropriately and on a case-by-case basis to balance the three interests as required by *Zinn,* without disregarding the peremptory provisions of section 28. This requires a nuanced weighing of all the interlinked factors in each sentencing process. The normative setting for the balancing will be the intricate inter-relationship between sections 28(1) (b) and 28(2) of the Constitution, on the one hand, and section 276(1) of the CPA on the other.'

[14] The appellant repeatedly inflicted the pain and injuries on the body of the child. He did not stop after giving her the first hiding, but he went on and on, albeit intermittently, not using a hand or a stick but an electric cord that might have been intertwined for the purposes of the assault. Although the Court is

aware of the fact that the appellant admitted his actions and was somewhat remorseful and emotional, I find no basis to interfere with the sentence imposed by the magistrate.

[15] In the result I propose an order in the following terms:

1. The appeal is dismissed and the sentence imposed by the magistrate is confirmed.

N P BOQWANA

Acting Judge of the High Court

I agree, and it is so ordered

A BLIGNAULT Judge of the

High Court