THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 629/13

In the matter between:

DAVID KEKANA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kekana v The State* (629/2013) [2014] ZASCA 158 (1 October 2014)

Coram: **Lewis JA and Mathopo and Gorven AJJA**

Heard: 11 September 2014
Delivered: 1 October 2014

Summary: Murder ─ premeditation. Accused pleading guilty ─ admitting to locking wife in the bedroom, and setting bed on fire ─ wife died few days later in hospital ─ whether acted on the spur of the moment or premeditated.
Sentence ─ life imprisonment ─ no substantial and compelling circumstances found to exist.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Boruchowitz J, Nicholls J and Tshabalala J sitting as a court of appeal):

The appeal against sentence is dismissed.

JUDGMENT

Mathopo AJA (Lewis JA and Gorven AJA concurring)

[1] Mr Kekana, the appellant, was charged with arson and murder in the South Gauteng High Court, Johannesburg. He was duly convicted on his plea of guilty to both charges. Having found that there were no substantial and compelling circumstances justifying a departure from the minimum sentence prescribed under section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) in respect of the murder count, the trial court sentenced him to life imprisonment and five years' imprisonment for the arson count. The sentences were ordered to run concurrently.

[2] The appellant appealed to the full bench of the South Gauteng High Court, Johannesburg (Boruchowitz J, Nicholls J and Tshabalala J) which dismissed the appeal. This appeal is with the special leave of this court against the sentence of life imprisonment.

[3] The appeal is based on two grounds. First, that the appellant was incorrectly sentenced as if he had been convicted of murder that was planned or

premeditated. Second, that the trial court erred in finding that no substantial and compelling circumstances existed to justify a departure from a sentence of life imprisonment.

[4] The trial court dealt with the case on the basis that the murder was planned or premeditated and applied the provisions of s 51(1) read with Part 1 of Schedule 2 of the Act. At the commencement of the trial the appellant, who was legally represented, was warned by the court that he faced the prospect of life imprisonment in the absence of substantial and compelling circumstances. The record reveals that before he pleaded the trial judge pertinently drew his attention to the provisions in question.

[5] The only argument advanced on behalf of the appellant is that the trial court and high court erred in their findings that the murder of the deceased was premeditated. The case advanced for the appellant is that he killed the deceased in the heat of the moment and that he had not conceived any plan to burn the house with the deceased inside. To fully appreciate the appellant's contention it is necessary to canvas the circumstances leading to the murder as described in the statement setting out his plea of guilty.

[6] The statement contained a detailed explanation of how and why the offences were committed. The appellant had a tempestuous relationship with the deceased. He accused her of conducting extramarital affairs, the parties quarrelled incessantly and threatened to kill each other and the deceased told him several times to pack his belongings and leave the common home. On 13 April 2006, he set alight the house having locked the deceased inside the bedroom.

[7] The appellant stated that, after an argument, the deceased had initially locked herself in the bedroom. As a result he slept on the carpet in the dining room. After midnight he tried to get into the bedroom but it was still locked. The deceased told him that their relationship was over and that he must leave the house. He then decided to leave but because there was no petrol in his car (as he had used all of his petrol to test the deceased's motor vehicle, which he was repairing) he went to the filling station in her car to buy petrol to put in his car so that he could collect his clothes and leave.

[8] On his return, he found some of his clothes in the dining room packed in a bag. This incensed him and he confronted the deceased who was in the bedroom lying on the bed. At that stage he decided to kill her by setting fire to the house and lock her in the bedroom. To achieve his purpose he walked outside, fetched the petrol which he had just bought, went to the deceased's bedroom and poured it onto the bed on which she was lying. When she asked him what he was doing, he told her that was the night she would die. He then set the petrol alight and ran out of the bedroom and locked the door. He continued to spill the petrol in the passage, kitchen and dining room and set that alight. When he saw the flames he drove to Booysens Police Station and reported his conduct. The State accepted the facts in his statement and the trial court duly convicted the appellant.

[9] In *S* v *Jansen*[1] it was held that where an accused pleads guilty and hands in a written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) detailing the facts on which his plea is premised and the prosecution accepts the plea, the plea constitutes the essential factual matrix and cannot be extended or varied in any manner which adversely impacts on the measure of punishment as regards the offence. The plea defines the lis between

[1] *S v Jansen* 1999 (2) SACR 368 (C).

the prosecution and the defence. See also *S* v *Ngubane*.[2] The State contended that the facts set out in the s 112(2) statement showed that the murder was premeditated.

[10] In argument before us, counsel for the appellant submitted that the trial court and the full bench wrongly relied on certain parts of the s 112(2) statement and incorrectly inferred that the appellant's conduct amounted to premeditation. The submission was that the appellant acted on the spur of the moment and was incandescent with rage when he killed the deceased by setting fire to the house. It was only when he saw his clothes packed in a bag in the dining room that he decided to kill her. The act was thus not premeditated, it was argued.

[11] However, the relationship with the deceased was a turbulent one characterised by accusations of infidelity on the part of the appellant. It was not the first time that the deceased had packed his clothes into a bag and left them at the door. The appellant dealt with such incidents before without any fatal consequences. It is difficult to understand how the fact that he found his clothes packed in a bag and placed near the dining room could have triggered anger such as to lead to the death of the deceased.

[12] Another argument advanced on behalf of the appellant was based on *S v Raath*,[3] where it was held that to prove premeditation, the State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. In the present matter there is no evidence as to how much time passed between the appellant's admitted decision to kill the deceased and when he doused the bed with petrol and set it alight. But

[2] *S v Ngubane* 1985 (3) 677 (A) at 683 E-F.
[3] *S v Raath* 2009 (2) SACR 46 (CPD).

a consideration of the appellant's evidence suggests that it was a matter of a few minutes, at the least.

[13] In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.

[14] The appellant pertinently admitted that after he saw his clothes, he formed an intention and in his own words he decided to end it all and kill the deceased. He then gave effect to this decision. He went outside to fetch petrol. He re-entered the house and poured it on the bed of the deceased while at the same time telling her of his intention. He set it alight with the petrol. He locked the deceased in the room. He spilled the petrol in the passage, kitchen and dining room. The locking of the door and further pouring of petrol show that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. To my mind, this is proof of premeditation on his part. It follows that the appellant was correctly convicted of premeditated murder.

[15] I now turn to consider the second leg of the appellant's ground of appeal. The appellant's attack against the imposition of life imprisonment is that the trial court erred in finding that no substantial and compelling circumstances existed which allowed for a departure from the prescribed sentence. In argument before us counsel for the appellant referred to the following considerations which he submitted qualified as such substantial and compelling circumstances. Firstly, that the appellant pleaded guilty and showed remorse for his actions and verbalised such remorse to Dr Labuschagne, who interviewed him for the pre-sentencing report. Secondly, that he was a first offender and therefore that there were prospects that he could be rehabilitated. Also that he was in a turbulent

relationship with the deceased where lack of trust played a major role as he suspected his wife of infidelity. That he felt abused and belittled by the deceased. That when he found his clothes packed in a bag in the dining room he felt provoked and snapped. Counsel for the appellant argued that life imprisonment was inappropriate and that it would effectively deny the appellant the opportunity for rehabilitation.

[16] On the other hand, counsel for the State submitted that the facts placed before the court by the appellant did not qualify as substantial and compelling circumstances which justified a lesser sentence than life imprisonment. He argued that the mere fact that the appellant pleaded guilty did not necessarily support the conclusion that he was remorseful as the plea of guilty could have been motivated by various factors, for example the appellant realising that his son had seen him pouring petrol in the passage and setting it alight and/or that the evidence against him was overwhelming and that it would have been futile to plead not guilty. Concerning the prospects of rehabilitation, counsel for the State contended that the appellant placed no facts before the court to demonstrate any probability of rehabilitation. In support of his submission, he referred us to the report of Dr Labuschagne in which the latter confirmed that she had not been informed of the appellant's violent behaviour towards the deceased.

[17] In responding to the argument that life imprisonment was inappropriate, counsel for the respondent submitted that on the undisputed facts, the appellant killed the deceased in a callous and brutal manner by pouring petrol on the deceased, a defenceless woman who was in bed at the time. The fact that he locked her inside the bedroom shows brutality. In addition, it was submitted, the appellant poured petrol in the passage leading to the dining room and the kitchen to ensure that the deceased could not escape the inferno.

[18] Counsel further contended that what is even more aggravating about the conduct of the appellant, is that when the son cried for help, the appellant ignored his pleas until a neighbour came to assist the son and they managed to break the window and free the deceased. It was submitted that after the incident the deceased spent a week in hospital and must have been in excruciating pain before she died. According to counsel, all these factors negate any basis for finding the existence of substantial and compelling circumstances.

[19] This case has more aggravating than mitigating factors. It can hardly be disputed that the deceased died a cruel and painful death at the hands of her husband. She was killed in the one place that she ought to have been safe, the sanctity of her own home. The appellant clearly exploited her vulnerability and abused the trust she had in him as a husband. What is worse is that after burning the house the appellant failed to rescue her and secure medical assistance for her. This callous and heartless attitude in not checking the condition of the deceased is clear proof of his lack of remorse. I agree with the trial judge that this conduct does not manifest genuine remorse. Genuine remorse was correctly described by Ponnan JA in *S v Matyityi*[4] where he said the following:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what

[4] *S v Matyity* 2011 (1) SACR 40 (SCA) para 13.

motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions.'

[20] Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in *S v Chapman*[5] when this court said the following:

'Women in this country have a legitimate right to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.'

[21] The uncontested evidence suggests that the appellant killed the deceased on a mere suspicion that she was unfaithful towards him. He torched the house in the presence of their son. Prior to that, he had told his friend and neighbour that he was going to kill the deceased. This makes his conduct all the more morally reprehensible.

[22] The correct legal approach to an appeal on sentence imposed in terms of the Act is set out as follows in *S v Malgas*[6]:

'A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate Court is of court entitled to consider the

[5] *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-B.
[6] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exits in the former situation.'

[23] I have already indicated that the aggravating features in this matter far outweigh the mitigating factors. I am unable to find that the court below erred in finding that there were no substantial and compelling circumstances to justify any sentence other than the one statutorily prescribed by the legislature namely life imprisonment. It follows that this court is not at large to interfere with the sentence and the appeal must fail.

[24] In the result the appeal against sentence is dismissed.

R S Mathopo

Acting Judge of Appeal

Appearances:

For Appellant:	E Guarneri with him W Karam
	Instructed by:
	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	M L Gcaba
	Instructed by:
	Director of Public Prosecutions, Johannesburg
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