# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 429/2002
**REPORTABLE**

In the matter between

**Reginah Gwendoline Kgafela** **Appellant**

**and**

**The State** **Respondent**

Before: Schutz, Mthiyane JJA and Shongwe AJA

Heard: 21 May 2003

Delivered: 28 May 2003

Life sentence – substantial and compelling circumstances – not for a trial court to grant leave in order that SCA may reconsider its earlier decision – in this instance *S v Malgas* – such circumstances absent – life imprisonment confirmed.

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**JUDGMENT**

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**SCHUTZ JA**

**[1]** The appellant was sentenced to life imprisonment for the murder of her husband. Sitting in the Bophuthatswana Provincial Division, Friedman JP held that there were no 'substantial and compelling circumstances' present, that is in the sense of s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. That being so, Friedman JP held, in the light of the decision in *S v Malgas* 2001 (2) SA 1222 (SCA) as later approved in *S v Dodo* 2001 (3) SA 382 (CC) at 404I-405E para [40], that he was obliged to impose a life sentence.

[2] But when he granted leave to appeal to this court, after setting out a full review of the general sentencing rules (see *S v Kgafela* 2001 (2) SACR 207 (B) at 210(g)-213F para [13]), he felt 'impelled to venture' that this court might welcome the opportunity to revisit the decision in *Malgas* in order to give more definition or formulation to the phrase 'substantial and compelling circumstances' and to reverse the order of the enquiry. By this last he intended that the court should commence with the conventional enquiry as to what is the appropriate sentence and only thereafter proceed to the prescribed minimum sentence. Whatever one might think of the desirability of the law being as it is suggested it should be, the suggestion is contrary to the terms of the statute and the interpretative decisions in *Malgas* and *Dodo*. Marais JA expressly said in *Malgas* (at 1234C-D para [20]) that:

> 'It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which would rank as substantial and compelling or those which could not.'

I agree entirely.

[3] Notwithstanding, Friedman JP said in his judgment granting leave:

'In my view, although I think with modesty that my judgment is correct, nevertheless there is a dispute on it. I have stated in the judgment that although I am bound by the decision of the Appellate Division I still believe that the terms substantial and compelling circumstances should be defined and in the circumstances and in the interests of law I will grant leave to appeal.'

This is an approach to granting leave that cannot be accepted. Whilst being of the view that his judgment was correct, Friedman JP considered that this court should be given the opportunity of mending its earlier judgment. In *Cassell and Co Ltd v Broome and Another* [1972] AC 1027 the House of Lords observed that in granting leave to appeal the Court of Appeal (headed by Lord Denning MR) had expressed the opinion that a previous decision of the House had been made *per incuriam*, or was in any event wrong, or was 'unworkable'. The suggestion was that the House might wish to set matters aright. This suggestion earned the following rebuke – per Lord Hailsham at 1054E:

'The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.'

[4] But, leave having been granted, there is an appeal before us. The facts are set out in the reported decision *a quo* referred to above. Was Friedman JP correct in finding that substantial and compelling circumstances were not present? In deciding this question one must have regard to the totality of the circumstances.

[5] First, the threshold requirement set out in s 51(1) and Part 1 of Schedule 2, that the murder was 'planned or premeditated', was clearly satisfied. On her own version the instruction to kill was given some seven weeks before the shooting which took place on the evening of 5 December 1999. According to the appellant she did not know quite when her husband was to be killed, but she knew that the assassin that she had engaged would observe his habits and kill him outside his home. That is what happened. Throughout it was open to the appellant to call off the assassin. She did not do so and there is no real attempt to explain why she did not.

[6] But the matter is even worse than that. The person ultimately engaged to arrange the murder was one Tsholo. He was engaged in mid-October 1999. However, there had been an earlier approach in August 1999 – to one Ronald Sentsho – a relative of hers if not 'that close'. The court *a quo* accepted his evidence, and although she denies it, she could advance no reason why he should have fabricated so damaging a story against her. On his version she emerges as a Lady Macbeth. She asked him whether he could 'remove the deceased from her eyes'. He was frightened and said he could think it over.

After discussing the matter with his girlfriend he refused her request. At this she was angry and said that he had wasted her time.

A serious aggravating factor, often recognised as such by our courts, is that the appellant made use of a hired killer – on her evidence the agreed fee was R10 000.

[7] Dr. Labuschagne, a criminologist, gave evidence on her behalf. She painted a picture of a woman rejected throughout her life. Her mother had died three days after her birth and her biological father thereafter paid her scant attention. She was brought up in the home of her uncle, Victor Setshele. It was a strict, religious home. She fared well at school and later at university, where she gained a MA degree and was well on her way to a doctorate. It is evident, overall, that she is an intelligent woman, but, as she said '… unfortunately feelings do not go with intelligence'. She felt privileged to have married a man who rose to become a senior magistrate. But gradually she felt that he was withdrawing from her life. Increasingly he drank to excess over the weekends. When under the influence of liquor he would on occasion abuse her and even assault her, to the extent of at least once using a sjambok, and on another, of pointing a firearm at her. On this latter occasion she went to the police station. Two policemen attended at her home, where they spoke to her husband. He denied her allegations. She was asked if she wished to lay a charge but she declined to do so. At times he would boast to her that because of his position he was immune from arrest and prosecution. Increasingly he would absent

himself over weekends and she suspected him of infidelity (of which he once accused her also).

[8] Another thing that troubled her was the barrenness of the marriage. As is so common, the finger was pointed at her, as the woman. In her Tswana custom this was a serious thing. She consulted three gynaecologists who could find nothing wrong with her, but when she took the matter up with her husband he did not respond. So the perceived stigma remained attached to her.

[9] The State sought to counter this picture, painting the deceased as a gentle creature who would not harm a fly. But I am ready to accept the broad picture of alienation and rejection described by the appellant, as the court *a quo* did. However, hers is not a case of a wife driven to desperation and seeing no other solution such as divorce. She was intelligent and well educated and capable of fending for herself. Nor was the murder a reaction to a recent assault. It was planned over a long period when there was ample time to repent. But the brutal plan went remorselessly forward.

[10] When one tries to ascertain why she chose murder one gropes through her evidence largely in vain. The nearest one comes to a reason is in the following passage:

> 'You said you were terrified of losing him. Is that right? --- That is right.
>
> But if he's killed you lose him for good. Isn't that so? --- In fact that was what came to me – I didn't want to lose him for anybody. I loved him.

I see. So in other words, if you couldn't have him, nobody could have him. --- That was what was in my mind.

That was in your mind. --- Yes Your Worship.

So the best way out of it was to kill him. --- That is the decision I took.'

Let this evidence speak for itself.

[11] One asks whether there is not some other, unrevealed, explanation. One possibility is that she decided to take revenge on the deceased for his divorcing her. The divorce and her alleged ignorance of it is an extraordinary episode. A divorce summons was served on her (although she denies it) during August 1999, which is the month in which she approached Ronald Sentsho with the request that he kill her husband. The latter was in hospital from 5 December 1999, when he was shot, to 3 January 2000, when he died. Yet, according to the appellant she learned of the fact of her divorce for the first time only a few days before his death. The court *a quo* rejected her evidence on this score and in my opinion correctly so.

[12] There is one clear mitigating factor – that she was a first offender at the age of 37. That is about all. She professes remorse and Dr Labuschagne claims that she shows it. But it took a criminal trial to extract it. She claimed to be innocent up to and including the stage when she applied for bail. Eventually she did plead guilty, but there is no evidence that she did so in order to make a clean breast of it, rather than because she knew that the State had an unanswerable case against her. There is another factor relevant to remorse. By

now knowing that she had been divorced (even on her own version), she became engaged in a burial dispute with the deceased's 79 year old, grieving mother. The appellant insisted that she was entitled to take an active part in the funeral arrangements causing the mother to go to court. The appellant's answering affidavit in that matter reveals her thinking. Her plan was to have the decree of divorce set aside so that she might become the deceased's intestate heir as his reinstated wife.

[13] Two other matters are raised as reflecting remorse. She attended the deceased closely in hospital during the last month of his life. She also borrowed a large sum of money in order to ensure that he remained in a good hospital. In order to avoid suspicion she had to behave in this way, so that the submission that these actions demonstrate remorse becomes of dubious worth.

[14] Taking together the many aggravating feature that there are and such little mitigation as there is, I am not able to conclude that there are substantial and compelling circumstances which justify life imprisonment not being imposed.

[15] The appeal is dismissed.

**W P SCHUTZ**
**JUDGE OF APPEAL**

**CONCUR**

**MTHIYANE JA**

**SHONGWE AJA**