



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1007/18

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

and

KHOLOFELO CHARMAINE MOLOTO

RESPONDENT

Neutral citation: *The Director of Public Prosecutions v Moloto* (1007/18) [2019] ZASCA 83 (31 May 2019)

Coram Tshiqi, Majiedt and Van der Merwe JJA

Heard: 15 May 2019

Delivered: 31 May 2019

Summary: Criminal Procedure – sentence for murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 – unclear from judgment whether the trial court found substantial and compelling circumstances justifying deviation from prescribed minimum sentence – sentence in terms of s 276(1)(i) of Act 51 of 1977 set aside and substituted with a sentence of 10 years' imprisonment.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba J sitting as court of first instance):

1 The appeal is upheld

2 The sentence imposed by the trial court is set aside and substituted as follows:

‘(a) The accused is sentenced to 10 years imprisonment

(b) The sentence is antedated to 7 March 2017’

JUDGMENT

Tshiqi (Majiedt and Van der Merwe JJA concurring):

[1] The respondent, Ms Kholofelo Moloto, was charged in the Limpopo Division of the High Court, Polokwane, with two counts of murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). In count 1 it was alleged that on 3 June 2014 and at Ga-Semenya village in Seshego, the respondent unlawfully and intentionally killed Florence Gwenya Moloto, an adult female person. In count 2 it was alleged that on the same date and place the respondent unlawfully and intentionally killed Elna Tintswalo Pele, a young girl aged 5 years. The deceased in count 1 was the respondent’s grandmother and the deceased child (count 2) resided with the respondent’s grandmother. The respondent pleaded guilty to count 1 and tendered a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act), in terms of which she admitted all the elements of the offence. Regarding count 2, she pleaded not guilty and the state led the evidence of her co-conspirator, Mr Frans Baloyi, who was her boyfriend at the date of the commission of the offences. She was convicted on count 1 but acquitted on count 2, and was sentenced to 5 years’ imprisonment in

terms of s 276(1)(i) of the Criminal Procedure Act. The appellant, the Director of Public Prosecutions, appeals against the sentence, with the leave of this court.

[2] The respondent recounted the circumstances of the murder in her s 112(2) statement as follows: Before the date of the murder she had been ill for quite some time and her health was not improving. She consulted two traditional healers on the advice of Mr Baloyi and both traditional healers told her that she was being bewitched by her grandmother, the deceased in count 1. The second traditional healer further told her that she would die soon. As she believed in witchcraft, she got frustrated and scared. She discussed this diagnosis with Mr Baloyi, and requested him to assist her in killing the deceased.

[3] On 2nd June 2014 Mr Baloyi went to the deceased's home with the intention to kill her, but did not do so as he found the deceased in the company of two other women. This did not deter the respondent. The following day she accompanied Mr Baloyi to the deceased's home and found her in the presence of the child, the deceased in count 2. They sat in the dining room waiting for the grandmother and the child to go to their respective bedrooms to sleep. At some stage during the course of the evening, after the grandmother had gone to her bedroom, Mr Baloyi followed her into the bedroom and strangled her. At this time the respondent took the child to a different room, apparently to protect the child from witnessing the murder. The respondent then went to the grandmother's bedroom and found Mr Baloyi strangling the deceased. Mr Baloyi invited her to join him, but when she came close to them she realised that the grandmother was already dead. She touched her and shook her and was satisfied that she was dead. Mr Baloyi suggested that they should also kill the child as she might have witnessed the killing of the grandmother. She refused and said that she did not want to kill a child. Mr Baloyi went to the room where the child was sleeping and killed her, also by strangulation. He moved the child's body to the grandmother's bedroom, covered both bodies with blankets and they left the scene.

[4] The respondent testified in mitigation of sentence and presented the following personal circumstances, which were considered by the court during sentencing proceedings. She was 26 years old at the time of the commission of the offence and

29 on the date of the sentencing. The respondent's highest qualification was grade 11. She was unmarried and had a child of her own, who was eleven years old and who stayed at the respondent's parental home (with the respondent's mother). She was gainfully employed, earning a salary of R3 500 per month. She was assisted towards the maintenance of the child by the child's father, although not on a regular basis. Regarding her relationship with the deceased, she testified that she was her paternal grandmother. The respondent grew up at the deceased's home and the deceased assisted the respondent's mother in raising her from a young age as her father passed away when the respondent was still young. She left the deceased's home after she heard about the witchcraft allegations. Whilst they were staying together they got along well, but had minor differences as the deceased did not approve of the respondent's friendship with one Lenny. On one occasion the deceased threatened to kill her if she did not disassociate herself from 'those people'. She was asked how the deceased threatened to kill her and she said that the deceased had said that 'she does not buy herbs'. This apparently suggested that she had the capacity to bewitch her. When she was asked by the court if she still believed in witchcraft she said: 'I do slightly believe in it M'Lord'.

[5] In imposing sentence, the court was satisfied that the accused indeed laboured under the belief that her illness was as a result of being bewitched by the deceased. The court considered this to be a mitigating factor. It also found that she was misled by the traditional healers, but that she had since realised she was wrong and was remorseful. The court then stated that it would have imposed a postponed sentence in terms of s 297(1) of the Criminal Procedure Act, had this been a competent sentence for the offence, in order to ensure that Ms Moloto did not serve a custodial sentence. The court reluctantly considered itself 'with no option but to resort to the provisions of section 276(1)(i) of the Criminal Procedure Act because the court did 'not agree with the state advocate's submission that the accused deserved to go to imprisonment [prison] for a long time.'

[6] It is well established that sentencing is pre-eminently within the discretion of the trial court, but it is also trite that a court of appeal may interfere if the discretion has not been exercised properly. A mere misdirection is not sufficient to entitle the appeal court to interfere with sentence; it must be of such a nature, degree or

seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all, or exercised it improperly or unreasonably (See *S v Pillay* 1977 (4) SA 531 (A) at 535 E-F).

[7] The respondent was charged with murder, read with the provisions of s 51(1) of the Minimum Sentences Act. A minimum sentence of life imprisonment was applicable, by virtue of the fact that the respondent was convicted of a premeditated murder as envisaged in Part 1 of Schedule 2 of the Minimum Sentences Act. The court was obliged to impose the minimum sentence of life imprisonment, unless it found substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. In its judgment the trial court did not state whether there were any factors it considered to be substantial and compelling circumstances to justify such deviation. The failure to embark on this exercise was a clear misdirection as this court is now in the dark as to why the prescribed minimum sentence was not imposed. (See *S v Malgas* 2001 (1) SACR 469 (SCA) at 477 para 9). The misdirection is of such a nature that this court is justified in setting aside the sentence imposed by the trial court, assess the evidence afresh to determine whether there are any substantial and compelling circumstances and impose a sentence afresh.

[8] I consider the following to be aggravating circumstances. The s 112(2) statement shows that the murder was premeditated. The first respondent requested her boyfriend to murder the deceased. After discovering that her boyfriend did not kill her grandmother on the first occasion, the respondent was undeterred. Instead, she arranged to accompany him the very next day, possibly to ensure that this time her plan would materialise. On arrival at the grandmother's home, they watched TV waiting for an opportune time to attack. Even on this occasion, their consciences still did not deter them. They proceeded to kill the deceased in her own bedroom, whilst her grandchild was in another room in the same house. The deceased died a painful death through strangulation by people she knew and trusted. It is clear that the respondent and her boyfriend were able to gain entry in the house because her grandmother trusted her. In killing her she breached this trust. She also abused the child's trust by pretending to take her to her bedroom to sleep whilst she knew that

she had arranged for their grandmother to be killed. It is also concerning that although the respondent assured the court that she regretted what she did, when she was asked by the court whether she still believed in witchcraft, she said that she did still did, 'lightly'.

[9] An additional factor requiring strong condemnation is the fact that the deceased had done nothing to the respondent, but lost her life on the basis of unsubstantiated allegations of witchcraft. Whilst it may be accepted that the respondent was so ill and desperate that she believed what she was told by the traditional healers, it is the task of the courts to deter people from taking the law into their own hands and killing innocent people on the basis of such allegations. A strong message has to be sent to the communities who still continue with these practices that such conduct will receive the strictest punishments prescribed in terms of the law.

[10] In *S v Phama* 1997 (1) SACR 485 (E) the accused had shot and killed his neighbours after being told by a traditional healer that they were responsible for his sister's death, who had died as a result of complications resulting from injuries sustained in a motor vehicle accident. The personal circumstances of the accused, the reason for the killing, and the fact that he came from a stable family with a strong support system led a social worker from the Department of Correctional Services to recommend correctional supervision. The court accepted that he was a candidate for correctional supervision but was not willing to overlook the other important considerations that should be taken into account in deciding upon a balanced and proper sentence, namely: the seriousness of the offence, and the interests of society. The court held as follows at 487C-F:

'I cannot overlook the question of retribution and the need to do justice to the victims as well as the offender; and the question of deterrence, the prevention of crime, and the protection of society. If I should do so, my sentence would not be proportionate and balanced. I would fail in my duty to society. I cannot overlook the fact that two innocent people were deliberately and needlessly done to death. . . . The victims gave no provocation. They committed no wrong to the accused or his family. They were not witches. . . . Nothing can undo the dreadful wrong that has been done to them. Society demands that they, too, be given justice. Society demands that other people like them should not suffer the same fate.

The deterrent and preventative elements of criminal justice, and also, but not to the same extent, the retributive element, require that my sentence should reflect the revulsion of society at the readiness to resort to criminal violence; the horror of society that human life should be made so cheap; and the need to show the accused and other potential offenders that the price they must pay for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it.'

In *Mogaramedi* 2015(1) SACR 427 (GP) the court said at para 25:

'... Cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights...'

It continued in para 35:

'Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killing of innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community [has] in the justice system. To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high. The continuation of such killings will create more instability in the communities where such practices are rife. A strong message must be sent out that such conduct will not be condoned in a civilised society. Where such killings arise they must be punished with the full strength of the law.' (Footnotes omitted.)

[11] In this matter I am prepared to accept, as the trial court did, that the respondent believed in witchcraft and that after she consulted the second traditional healer, she thought that her life was in danger. She testified that in the past, during a disagreement with the deceased, the latter had threatened to kill her. She seems to have believed this. After she was diagnosed by the traditional leaders she left the deceased's home, apparently in fear or because of a lack of trust in the deceased. I am prepared to accept these factors as mitigating factors. I am also willing to find that these factors, when considered cumulatively with the respondent's personal circumstances, constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. In the heads, Counsel for the appellant recommended the imposition of a sentence of 10 years' imprisonment. When the fact that the respondent has already served a period of 10 months in prison is also taken into consideration, that appears to me to be a fair, balanced sentence.

[12] I make the following order:

1 The appeal is upheld

2 The sentence imposed by the trial court is set aside and substituted as follows:

'(a) The accused is sentenced to 10 years imprisonment

(b) The sentence is antedated to 7 March 2017'

Z L L Tshiqi
Judge of Appeal

APPEARANCES:

For Appellant: N C Molepo (with him M P Mudau)

Instructed by: Director of Public Prosecution, Polokwane
Director of Public Prosecution, Bloemfontein

For Respondent: L M Manzini

Instructed by: Legal Aid, Polokwane
Legal Aid, Bloemfontein