IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR 279/2014

In the matter between:

COSMOS SIZWE MBUTHO Appellant

and

THE STATE Respondent

Order:

The sentence of life imprisonment is set aside and substituted with a sentence of imprisonment of 25 years. The sentence is antedated to 3 March 2014.

APPEAL JUDGMENT

K PILLAY J (Chili J concurring)

[1] On 28 February 2014 pursuant to a plea of guilty the appellant was convicted of Murder read with the provisions of Section 51(1) of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] The background facts giving rise to the charge were largely contained in a statement in terms of Section 112(2) of Act 51 of 1977, which was

handed in after its contents were confirmed by the appellant and may be summarised as follows.

[3] The appellant and the deceased were lovers who lived together. On the day of the incident, he saw her with another man at the latter's house. Armed with a bush knife he proceeded there with intent to kill her and confronted her with why she was in another man's house. A quarrel ensued. Enraged he chopped her with the bush knife repeatedly. He immediately reported the incident to the Induna and apologised for his actions. He then vowed to kill himself.

[4] According to the post-mortem report (which was admitted) the deceased sustained 11 chop wounds to various parts of her body. The skull was fragmented. The cause of death was determined to be '*Sharp Force Head Trauma.'*

[5] That the deceased suffered an agonisingly painful death is clear from the post-mortem findings as well as from the photographs handed in. They paint a gruesome picture of the last moments of the deceased and suggest that the appellant acted in utter rage.

[6] The appellant was duly convicted of murder as aforesaid and sentenced to life imprisonment. With leave of the court *a quo*, the appellant appeals against the sentence imposed.

[7] The propriety of the sentenced imposed is assailed on the following basis:

(i) That the trial court erred in finding that the appellant's mitigating factors collectively were not sufficiently substantial and compelling to justify a deviation.

(ii) As a result of a dearth of facts in the Section 112(2) statement it was not proved conclusively that the appellant *'premeditated'* or

planned to kill the deceased, as is required by Part 1 of Schedule 2 to justify the imposition of life imprisonment.

[8] In support thereof, this court was referred to the following dicta in *S v Raath 2009(2) SACR 46 (C) para 16:*

> *'There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may be have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some point, provide a ready-made answer to the question of whether the murder was "planned or premeditated'.'*

[9] This submission would probably have held sway if the Section 112(2) statement was silent on this issue. The need for elaboration would then have been greater. However in his plea explanation, the appellant clearly and unambiguously articulated as follows:

> 'On the day of the incident I saw her with another man at his house and I then armed myself with a bush knife with the intention to kill her, a (sic) I went there and asked her what she was doing there'.

[10] It is clear from the above that incensed by seeing her with another male, he armed himself with a bush knife with, in his own words, the intention to kill her. He then proceeded to the house where he saw her with the other man and chopped her with the bush knife. This can hardly be considered as a crime committed on the spur of the moment. In my view there is no merit in this submission.

[11] Turning to the contention that the trial court failed to find the existence of substantial and compelling circumstances in the appellant's background, a perusal of the judgment on sentence indicates that the trial court, clearly and thoroughly considered all factors relevant to the imposition of sentence.

[12] The question which arises is, did he fail to accord any weight to the fact that the appellant, until the commission of this crime was a model citizen who had no brushes with the law. In addition the accepted facts were that he immediately admitted his wrongdoing to the Induna in the area and pleaded guilty to the charge.

[13] The powers of an appeal court are limited. This has been emphasised in a number of cases. The State aptly referred to the decision in *State v Barnard 2004(1) SACR 191 (SCA) para 9* where the following was stated:

> 'A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[14] In the absence of misdirection the question turns to whether the sentence imposed is so strikingly or disturbingly inappropriate or unduly harsh as to justify interference.

[15] This was, as stated before, a particularly heinous crime where the appellant proceeded to confront the deceased about her presumed infidelity, armed with a bush knife with intent to kill her. That he did so, callously and brazenly in front of a witness, is common cause.

[16] It is clear from the judgment that the Magistrate properly considered the appellant's personal circumstances, namely that the appellant was a first offender who pleaded guilty; that the appellant had spent less than a year in custody awaiting finalisation of the case; had displayed remorse; that he has five minor children; that he was in gainful employment as a gardener and painter, a position he held for 11 years. His employer confirmed in writing that the appellant was a conscientious and diligent worker.

[17] As against these factors, the Magistrate considered the fact that the appellant's actions were spurred by jealousy, that the crime committed was

serious, that the interests of society have to be protected and that it was wrong to focus only on the well-being of the appellant at the expense of the other objectives of punishment.

[18] Clearly alive to the prescripts of Section 51(1) Act 105 of 1997 he found that cumulatively considered, the appellant's personal circumstances were not sufficiently substantial to compel the imposition of less than the minimum sentence, namely, life imprisonment.

[19] Even with such finding it is still important to consider whether, the imposition of the benchmark ordained by the legislature, given the mitigating factors, weighed against all the circumstances extant in a given case, is unjust.

[20] In *State v Malgas 2001(1) SACR 469 (SCA) para 25 I* the view expressed for when prescribed sentences may be departed from is the following:

> 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[23] The appellant was a model citizen. The deceased was his girlfriend with whom he lived and had a child. It is natural that on seeing her with another man he would become upset at perceiving a threat to his relationship. The appellant's behaviour on the fateful day is clearly not in keeping with the image portrayed of him by the chairperson of the body corporate. Until this incident he appears to have had led an exemplary life. His remorse appears to be genuine.

[21] In this case, without detracting from the seriousness and viciousness of appellant's conduct and that the killing was committed intentionally, I consider that the personal circumstances of the appellant, 'his clean record', his proven exemplary employment record, his genuine manifestation of remorse, and the

fact that he pleaded guilty immediately are sufficiently strong mitigating factors to satisfy me that the imposition of a sentence of life imprisonment would be unjust.

[24] Whilst I could not fault the trial court's assessment of the seriousness of the accused's actions, in order to achieve a balanced sentence, the above factors should also have been given some consideration. Unfortunately this was not the case and therefore this court is entitled to interfere.

[22] Given the heinous nature of the crime in question, my view is that a sentence of 25 years imprisonment is appropriate. Domestic violence is endemic. Persons like the appellant should seek alternative solutions to relationship problems, like counselling, rather than resorting to violence. Those who did choose violence instead, deserved severe censure.

[26] The appeal succeeds. The sentence of life imprisonment is set aside and substituted with a sentence of imprisonment of 25 years. The sentence is antedated to 3 March 2014.

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K PILLAY J

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CHILI J

Appearances

For the Appellant:	Mr T P Pillay c/o Durban Justice Centre DURBAN 4000
For the Respondent:	A Bissessur The Director of Public Prosecutions DURBAN 4000
Date of Hearing:	19 February 2015
Date of Judgment:	27 February 2015