THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 547/13

In the matter between:

NYADZANI SAMUEL MUDAU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mudau v State* (547/13) [2014] ZASCA 43 (31 March 2014)

Coram: Ponnan JA, Swain and Mathopo AJJA

Heard: 5 March 2014

Delivered: 31 March 2014

Summary: Sentence **–** minimum sentence – General Law Amendment Act 105 of 1997 – sentence imposed startlingly inappropriate – balancing of aggravating features against mitigating factors.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Lukoto J sitting as court of first instance):

1. The appeal against sentence is upheld.
2. The sentence of 40 years' imprisonment imposed by the trial court is set aside and replaced with a sentence of 20 years' imprisonment.
3. The sentence is in terms of s 282 of the Criminal Procedure Act 51 of 1977 ante dated to the 22 May 2000 being the date upon which the sentence was imposed.

JUDGMENT

Mathopo AJA (Ponnan JA and Swain AJA concurring):

[1] Mr Samuel Mudau appeared before Lukoto J, charged with the murder of his wife. He pleaded guilty and was convicted as charged. In his plea explanation he admitted to assaulting his wife with a stick several times all over her body with the result that she died in consequence of the injuries inflicted upon her by him. The trial court applied the provisions of the General Law Amendment Act 105 of 1997 (the Act) and sentenced him to 40 years' imprisonment. The appellant is appealing against sentence with the leave of the court below (per Mann AJ).

[2] This appeal is based on two grounds. First, that the court below applied the sentence prescribed by the Act without prior warning to the appellant. Second, that the sentence imposed by the trial court is disturbingly or startlingly inappropriate so as to induce a sense of shock.

[3] It was submitted that the trial judge misdirected himself when he sentenced the appellant in terms of the Act without any prior warning to him or his counsel. It is apparent from the record that the provisions of the Act were pertinently brought to the attention of the appellant and his counsel. The record reveals that the trial judge had even remarked during sentencing that the prosecutor had read the provisions of the applicable legislation to the appellant before he pleaded. Furthermore, the record is replete with remarks by the trial judge that the Act was applicable. In his judgment the trial judge alluded to the fact that the appellant was pertinently warned that upon conviction he faced the prospect that the minimum sentence prescribed by the Act would apply to him. I am thus satisfied that the appellant was properly warned of the applicability of the Act to him in the event of conviction. It follows that this submission has no merit.

[4] Turning to the second submission: The appellant testified in mitigation that he was 48 years old, married to the deceased, had one child with her who was six months old at the time of the offence and the child was currently living with his maternal grandparents. He has three children of tender age with his previous wife. All three children are school going and the appellant is responsible for their maintenance. Prior to his arrest he was employed as a cleaner. He has two relevant previous convictions – one for culpable homicide committed during 1992 and, another for assault committed during 1995. Both offences indicate a propensity for violence. It was submitted that the fact that he pleaded guilty at the outset of the trial is a strongly mitigating factor. The trial judge disagreed. He was not satisfied that there was genuine remorse on his part because when questioned by the court as to why he killed the deceased, he equivocated. Initially he said the deceased hit him with a stick and when confronted with the version that he started hitting her because he suspected that she was with her lover, he changed his version and admitted that it was after he hit her with a stick, that the thought of her lover crossed his mind.

[5] The trial court considered his nonchalant attitude in not checking on the condition of the deceased after the brutal attack and the fact that he slept until the middle of the night until he was woken by his crying child, as indicative of a lack of remorse. What is worse is that after he was roused the appellant failed to secure medical assistance for his wife. I agree with the trial judge that this conduct does not manifest genuine remorse. Genuine remorse was aptly described by Ponnan JA in *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13 when 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 motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[6] Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. 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* 1997 (3) SA 341 (SCA) at 345A-B when this Court said the following:

'Women in this country have a legitimate claim 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 diminishes the quality and enjoyment of their lives.'

See also *S v Baloyi* 2000 (1) SACR 81(CC) at para 11.

[7] The evidence on record suggests that the appellant killed the deceased on the mere suspicion that she had an illicit love affair. His conduct is morally reprehensible. The deceased was killed in the one place that she ought to have been safe, the sanctity of her own home. The appellant exploited her vulnerability and abused the trust that she ought to have had in him as a husband.

[8] There is one further aggravating factor. The post mortem report indicates that the deceased was beaten all over her body. The trial judge remarked that no part of her body or person escaped the brutality of the appellant. There is no doubt that this was a vicious assault on a defenceless and vulnerable woman.

[9] However, the record does not show that the mitigating factors were properly considered by the trial judge as they ought to have been. Nor was any attempt made to balance the aggravating features that I have referred to as against such mitigating factors as must weigh in the appellant's favour. In failing to afford any recognition to those factors in the determination of an appropriate sentence, the trial court disregarded the traditional triad. See *S v Zinn* 1969 (2) SA 537 (A) at 540. Instead what the learned judge did was to over-emphasise the public interest and general deterrence. This is a misdirection. This Court in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 35 said the following:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.'

The judgment further states—

'(i)t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

[10] In the course of his judgement the judge remarked that if the appellant had not

pleaded guilty, he would have imposed a sentence of 50 years' imprisonment. Why and how he thought 50 years' imprisonment would be appropriate, is not explained. The sentence imposed is startlingly inappropriate. This Court is thus at large to interfere.

[11] Taking all these factors into account, I am satisfied that although the appellant deserves a lengthy period of imprisonment, a sentence of 40 years' imprisonment is totally out of proportion to the offence, the interests of society and fails to accord appropriate weight to the personal circumstances of the appellant. In my view, a sentence of 20 years' imprisonment would give recognition to the justifiable abhorrence invoked by the callousness of the deed whilst not destroying the appellant on the altar of general deterrence. Furthermore, it will also afford the appellant the opportunity to rehabilitate himself should that prove possible. The appeal therefore succeeds.

[12] The following order is made:

1. The appeal against sentence is upheld.
2. The sentence of 40 years' imprisonment imposed by the trial court is set aside and replaced with a sentence of 20 years' imprisonment.
3. The sentence is in terms of s 282 of the Criminal Procedure Act 51 of 1977 ante dated to the 22 May 2000 being the date upon which the sentence was imposed.

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R S Mathopo
Acting Judge of Appeal

Appearances

For the Appellant:	M Madima
	Instructed by:
	Thohoyandou Justice Centre
	c/o Bloemfontein Justice Centre
For the Respondent:	N R Nekhambele
	Instructed by:
	The Director of Public Prosecutions, Thohoyandou
	c/o Director of Public Prosecutions, Bloemfontein