JEKESONI YAVALA v STATE (AAU00019 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP

18 September, 26 October 2012

Criminal Law — appeals — leave to appeal against sentence — whether arguable ground for establishing that sentence was wrong in principle — manslaughter — infidelity of deceased — mitigating factors — early guilty plea — whether sentence excessive — excessive violence domestic violence — grave provocation — Court of Appeal Act ss 21(1)(c), 23(3), 35(1), (3) — Penal Code s 198.

The appellant was convicted of the manslaughter of his wife and sentenced to five years' imprisonment, with a non-parole period of three years. The appellant had found his wife lying naked beside his cousin brother and physically assaulted her, causing her death. The appellant appealed against sentence on the grounds that the sentence was harsh and excessive.

Held –

(1) The judge did not fail to consider the mitigating factors raised by the appellant, but rather expressly considered them.

(2) The issue of the early guilty plea to manslaughter was expressly considered by the judge in his sentencing decision.

(3) The appellant had used excessive violence that caused the deceased's liver to rupture and her skull to fracture. The learned judge considered that under those circumstances, a non-custodial sentence was not appropriate. There is clearly no error in respect of that conclusion.

(4) The sentence fixed by the judge was not wrong in principle, and the appellant has not established an arguable point of appeal.

Kim Nam Bae v The State (unreported Criminal Appeal AAU 15 of 1998; 26 February 1999), followed.

Application for leave to appeal against sentence dismissed.

Appellant in person.

T Leweni for the Respondent.

[1] Calanchini AP. On 2 February 2011 the Appellant pleaded guilty to one count of manslaughter contrary to s 198 of the Penal Code Cap 17. He had initially been charged with one count of murder which was withdrawn. He was then charged with one count of manslaughter by way of an Amended Information subsequently filed by the Director of Public Prosecutions.

[2] On the same day the Appellant was convicted on his plea and sentenced to five years imprisonment with a non-parole term of 3 years. A conviction for the felony of manslaughter carries a maximum penalty of life imprisonment.

[3] By notice of appeal dated 18 February 2011 the Appellant indicated his intention to appeal against conviction and sentence. The notice of appeal was not received by the Registry until 8 March 2011. It was out of time by a few days. In view of the relatively short period of time by which the notice was late and the fact that the Appellant was representing himself I allow an extension of time for appealing to 8 March 2011 pursuant to s 35 (1) of the Court of Appeal Act Cap 12.

[4] By a further notice of appeal dated 28 February 2011 and filed on 1 April 2011 the Appellant indicated that he was appealing against sentence only. On 24 July 2012 the Appellant informed the Court that he no longer intended to pursue his appeal against conviction.

[5] In his sentencing decision the learned trial judge outlined the relevant background facts and I shall refer to that summary for the purposes of this appeal. The deceased was the wife of the Appellant. The Appellant assaulted her after losing his self-control when he saw her naked lying beside his cousin brother in an unoccupied house after she had disappeared from the family home on the evening of the incident. The Appellant attacked his cousin who managed to escape. The deceased tried to escape but the Appellant struck her with a torch. He kicked and punched her several times as she lay on the ground trying to protect her face and head. He then picked her up to return home. While on his way to the family home, the Appellant kicked the deceased when she fell to the ground and lost consciousness. When she could not get up, the Appellant carried her to a nearby creek and tried to revive her. She did not respond. He then dragged her for about 20 metres to an outside shower and tried to revive her under running water. A fellow villager came and assisted the Appellant to revive her. She did not respond. The Appellant took her body inside a house and went straight to the nearest police post and reported the incident. The deceased died of haemorrhage shock due to rupture of the liver and bleeding in the brain due to fractured skull. The injuries were consistent with physical assault.

[6] In his Notice of Appeal filed on 1 April 2011 the Appellant relied upon the following grounds of appeal:

> *'1. That the learned Judge erred in law and in fact when he did not consider other relevant and salient mitigating facts.*
>
> *2. That the said sentence is harsh and excessive.*
>
> *3. That the learned Judge erred in law and in fact when he failed to consider that other similar cases have much lighter and suspended sentences given.*
>
> *4. That the learned Judge erred in law and in fact when he failed to consider the Appellant's early guilty plea to the charge of manslaughter.'*

[7] These four grounds of appeal were repeated in a notice dated 5 June 2012 which was handed to the Court on the day of the hearing. In that document the Appellant crystallised the issues that formed the basis of his appeal against sentence.

[8] Under s 21(1)(c) of the Court of Appeal Act the Appellant is given the right, with the leave of the Court, to appeal against the sentence passed on conviction unless the sentence is one fixed by law. In respect of a conviction for manslaughter there is no sentence fixed by law, only a maximum sentence up to which any term may be imposed. Leave is required and under s 35(1) of the Act, a judge of the Court may exercise the power of the Court to give leave to appeal.

[9] In order to obtain leave the Appellant is required to identify an arguable ground for establishing that the sentence was wrong in principle. In accordance with s 23 (3) of the Act, the issue is whether there is an arguable case for thinking that a different sentence should have been passed. In *Kim Nam Bae v The State* (unreported criminal appeal AAU 15 of 1998; 26 February 1999) this Court observed that:

> *'It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows*

extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the appellant court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v R* (1936) 55 CLR 499).'

[10] The question for me at the leave stage is whether any of the Appellant's grounds of appeal are arguable when considered in the context of the matters to which the Court referred in the passage quoted above. The Appellant's principal ground of appeal is ground 2 that the sentence is harsh and excessive. The remaining grounds of appeal do no more than explain why the Appellant claims that the sentence was harsh and excessive. The Appellant claims that (a) the learned judge did not consider salient mitigating factors, (b) the learned judge failed to take into account similar cases of manslaughter where lighter or suspended sentences were imposed and (c) the learned judge failed to consider the Appellant's early guilty plea.

[11] In paragraph 11 of his written submissions the Appellant claims that the learned Judge failed to consider six mitigating factors. However in paragraph 7 of the sentencing decision the learned trial Judge stated:

'You are 33 years old and a farmer by profession. You have 5 children aged between 12 and 3 years. Your children are depended on you. You have an elderly father to look after. You are their only source of financial support. You did not re-marry after losing your wife in 2009.'

[12] It is clear that all the matters raised in the submissions were expressly considered by the learned judge in his sentencing decision. In my judgment the Appellant has not established an arguable point.

[13] In respect of the ground of appeal relating to the early guilty plea, the learned judge noted in paragraphs 9 and 10 that:

'You pleaded guilty at the first opportunity after the charge was reduced from murder to manslaughter. I treat your guilty plea as evidence of contrition deserving substantial credit. After assaulting the deceased you made attempts to revive her when she lost consciousness. You immediately went to the police when you realised that you had seriously injured the deceased. You co-operated with the Police during the investigation and confessed to the killing. After you were charged, you spent nearly three weeks in custody on remand.

The offence is nearly 2 years old. You had early offered to plead guilty to manslaughter but the State did not accept your offer until the eve of the trial on 1 February 2011. I consider the delay in your favour.'

[14] The issue of the early plea of guilty to manslaughter has been expressly considered by the learned Judge. As a result I find no arguable point raised by this ground.

[15] The issue raised by the two remaining grounds of appeal is whether the sentence is excessive? The sentence imposed in this case was five years imprisonment with a non-parole period of three years.

[16] In *Kim Nam Bae v The State* (supra) the Court of Appeal stated at page 4:

'The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly so with manslaughter where the circumstances and the offender's culpability can vary greatly from case to case. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences

imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence.

The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts.'

[17] The learned judge noted the serious nature of the deceased's injuries that were set out in the post mortem report. The learned judge noted that the Appellant had used excessive violence that caused the deceased's liver to rupture and her fractured skull. The learned judge considered that under those circumstances a non-custodial sentence was not appropriate. There is clearly no error in respect of that conclusion.

[18] Although no weapon was used, kicking and punching the victim were described by the learned judge as equally dangerous methods of killing. He stated that the actions of the Appellant and the use of excessive violence which resulted in the death of the deceased must be denounced and deterred. I also note that the offence occurred in the context of domestic violence.

[19] The learned judge considered the circumstances of the provocation. The deceased's infidelity and the circumstances in which the Appellant discovered the deceased were expressly noted. In the present case there is a combination of a high degree of violence and arguably grave provocation.

[20] In *Kim Nam Bae v The State* (supra) the Appellant received an effective sentence of seven years and four months. The circumstances of the offence in that case and the present appeal were similar and the mitigating factors raised by the Appellants in both appeals were similar. In my judgment the sentence fixed by the learned Judge was not wrong in principle. I am not satisfied that the Appellant has established an arguable point on either of these two grounds of appeal.

[21] Having regard to the circumstances of the present appeal I do not consider that the Appellant has raised an arguable point in respect of any of his proposed grounds of appeal. I dismiss the Appellant's application for leave to appeal against sentence pursuant to s 35(3) of the Court of Appeal Act.

Application dismissed.