



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTHERN CIRCUIT LOCAL DIVISION, SWELLENDAM)**

[REPORTABLE]

CASE No: CC05/2018

In the matter between:

THE STATE

VS

VIRGIL PRETORIUS

Accused

SENTENCING JUDGMENT: 14 JUNE 2018

HENNEY, J:

INTRODUCTION

[1] When considering an appropriate sentence, the court should have regard to all relevant facts as well as the circumstances of a case, especially the factual matrix which underpins such a case and thereafter consider such facts against the aims of punishment and the Triad.

[2] The following are specific aims of punishment mentioned by our authorities in Criminal Law e.g. deterrence, retribution, rehabilitation as well as prevention. In a modern criminal justice system, the specific aspects of retribution are starting to play a lesser role, more especially so in a constitutional dispensation and democracy such as ours. There is much greater emphasis on prevention and rehabilitation. In the recent past, however, due to the

spiraling rate of crime in this country there has been greater emphasis on deterrence and retribution. The court will refer to this discussion at a later stage. It is for these reasons particularly, that the legislature has thought it appropriate to enact certain prescribed sentences for categories of crime as mentioned in the Criminal Law Amendment Act 105 of 1997. The sentences that the court must impose in this case on count four, falls squarely within the ambit of the legislation. The court will expound upon this matter later in the judgment.

THE TRIAD

[3] The triad of factors that has to be considered when the court considers sentencing is set out in **S v Zinn 1969 (2) SA 537 (A)**. These factors in my view are very important and must be considered in this matter.

[4] That is, the personal circumstances of the accused, the offence(s) that he has committed, and lastly the interest of society.

[5] I will now deal with the personal circumstances of the accused, as highlighted by his legal representative Mr. Du Toit.

PERSONAL CIRCUMSTANCES OF ACCUSED

[6] The accused is a 33 year old male. He is married but separated, and the father of 6 children, 3 with his wife from whom he is separated, 1 with the deceased, and 2 others from another woman staying in Cape Town. The children he has with his wife are respectively 14, 9 and 2 years old respectively. The one child with the deceased is 3 years old, and the other

two with a woman from Cape Town is 6 years, and another who is 2 years old .He has one previous conviction for Assault that he committed on 14 July 2014, for which he received an admission of guilt fine of R500. The complainant in that matter was his wife. The accused has obtained a matric certificate and thereafter, joined the South African Police Service in 2009, and held the rank of Constable. He resigned after his arrest for this matter.

THE OFFENCE

[7] The offence that he committed is without any doubt, a very serious one. Murder is regarded as such a serious offence that it falls within the categories mentioned in the schedule of Act 105 of 1997, especially where such murder was premeditated.

[8] It is for this very reason that the legislature, under the circumstances prescribed that the sentence of life imprisonment should be imposed, unless, the court finds that there are other substantial and compelling circumstances to deviate from the prescribed sentence. The court will deal with this aspect at a later stage. The crime of murder in itself has since time immemorial been considered by our courts as a very serious offence, and rightly so.

[9] For the very reason that our courts, and society considers human life as being precious and more particularly so in a democratic and constitutional dispensation such as ours, where the right to life is guaranteed and regarded as sacrosanct. Any sentence, which a court imposes, should send out a very clear message that the life of another human being is not cheap.

[10] The court considers the circumstances under which the murder of the deceased in this matter was committed, as extremely aggravating. And I say this for the following reasons;

- 1) The accused was in a relationship with the deceased that was characterized by physical and psychological abuse;
- 2) She was under constant threat by him;
- 3) He clearly exercised control and power over her;
- 4) He disregarded her rights as a human being, by undermining her freedom, dignity, freedom of association and self-worth.

All of this is apparent from the evidence that was lead during the trial, his version and most importantly, the audio clips.

[11] I am in agreement with the prosecutor that the accused showed total disregard for the sanctity of her life. Especially, after he had murdered her, he dumped her body in the bushes, where it was nearly impossible for anybody to find. .

[12] If regard is to be had to the manner in which he murdered the deceased, it becomes clear that he wanted to kill her. The degree of violence, he perpetrated against her was excessive, overwhelming and exhibits horrifying aggression. It is not clear what possessed the accused to perpetrate such a ghastly deed to bring the life of the accused to an end.

[13] The extent and amount of violence used to murder the deceased, was clearly out of proportion, senseless and induces a sense of shock and horror.

[14] This matter once again highlights the plight of vulnerable women in our society, who are often, unable to defend themselves against their violent partners, becoming one of those horrible statistics. This happens almost on a daily basis in our country In **Mudau v S (547/13) [2014] ZASCA 43 (31 March 2014) Mathopa JA** at para [6] said the following in

this regard:

“[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] ZASCA 45; 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’

[15] Similarly, in the matter of **S v Van Staden (KS21/2016) [2017] ZANHC 21 (20 March 2017)** it was held:

“[14] Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased's partner, who had the duty and the responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes.”

[16] It is important and the duty of the courts to impose appropriate sentences, particularly so when violence is committed by men in a marital relationship, especially in a case like this where the violence, culminates in the brutal murder of a vulnerable woman. The court is therefore enjoined to impose a strict sentence and send out a clear message, because failing to do so, would result in society losing confidence in the court. The court is therefore enjoined

to consider and impose a strict sentence to send out a clear and unambiguous message. Failing to do so would result in society losing confidence in the court.

[17] The accused, during evidence in mitigation of sentence expressed his regret and remorse for his conduct. Counsel for the accused implored the court to consider the mitigating circumstances in imposing an appropriate sentence.

[18] I am not truly convinced that the accused has shown true and sincere remorse for the crime that he has committed against the deceased as well as her family. .

In **S v Matyityi**, 2011 (1) SACR 40 (SCA), at para 13 *Ponnan JA* had the following to say on this aspect:

“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.”

[19] If regard is to be had to what was stated by the learned judge of appeal in the abovementioned dictum, it becomes imperative upon a court to look at the surrounding conduct and live reality of an accused person. This approach is also not only confined to the statements made by the accused to the court. This is especially prudent where the accused verbally admits to his criminal conduct on the day when he murdered the deceased, I deal with these aspects hereunder.

[20] When he was confronted by Mr Alberts immediately after the incident and asked whether he had killed the deceased, he remained silent. He further tried to mislead them by telling them that he dropped her off at work and that he did not do anything to her. He was unsympathetic towards their anguish, trepidation and suspicion that he may have had done something to her. It is clear, that he was the last person in her company and would therefore be the primary suspect. There was a significant suspicion on the part of the police as well as the family that he had done something to her.

[21] This was also because of his conduct, behaviour and attitude he displayed towards the deceased. It was immediately suspected by Mr and Mrs Alberts, her colleague Feldman, as well as the police, that he had something to do with her disappearance. Mr Alberts immediately accused him of having killed his daughter., Feldman immediately went to the police with the audio clips that she had in safekeeping and raised a suspicion based on the audio recordings given to her by the deceased two months earlier, that the accused may have done something to her. This is a very disturbing aspect of this case. In my view, he had no other choice but to confess to the murder of the deceased.

[22] The plea of guilty on the murder charge was watered down, and the accused used this anger and rage as an excuse for not remembering that he stabbed the deceased 24 times. She was also either bludgeoned with an object against her head, or her head was smashed against an object. He further, did not play open cards with the court when he omitted to fully explain the manner and method he used to kill the deceased, when the evidence clearly showed how he systematically almost in stages, went about to kill the deceased.

[23] I must state that he admitted that he also strangled the deceased with an electric cord. He was, however, not forthcoming, open and honest as to why he went to such great lengths to murder the deceased. When it clearly emerged that his actions was premeditated and he formed a direct intention to murder the deceased.

[24] Despite the overwhelming evidence that he regularly, physically abused the deceased, to the extent that she had to lay charges against him, get protection orders and moved out of the house she shared with him, he denied that he regularly abused her. He tried to create the impression that it was not so. He furthermore, shamelessly, failed to appreciate that the deceased was a human being that had the right to associate with whom she wanted to, had the right to leave him, and had the right not be considered as a possession of his. This was the conduct, he displayed in his defence, and also when he testified under oath, in mitigation of sentence.

[25] In the matter of **S v Khwela 2001(1) SACR 546 (N)** referred to by the prosecutor, the accused was convicted of murdering his ex-lover's new lover by shooting him four times at close range. The accused was a 44 year old first offender. Although the court found that it was pre-planned, there is no discussion in the judgment concerning the prescribed minimum

sentence of life for a pre-planned murder. This distinguishes **Khwela** from the present case.

Nevertheless the court remarked as follows at P548H-549C

“Whilst the facts of a particular case may be such as to result in a diminution of his blameworthiness, I am of the view that the Court should be careful to guard against the perpetuation of the oft-held misperception that in every case where there is a killing, consequent upon a break-up of a love relationship, of an ex-lover or the ex-lover's new lover, the very existence of such a relationship alone is sufficient for the perpetrator to be regarded in so sympathetic a light as to justify the imposition of a sentence upon him markedly more lenient than that which would be imposed had the love relationship not existed and had there been some other motive for the killing than one connected with such love relationship. The facts of each case should be considered carefully, in order to determine whether such mitigating circumstances are indeed present, and if so, the extent to which such mitigating circumstances should influence the severity of the sentence to be imposed. It is to my mind quite inappropriate, as has been the unfortunate tendency in certain instances in the past, to regard certain killings as 'domestic murders', and automatically less morally reprehensible.”

[26] The court in **Khwela** remarked further at P549F-H as follows:

“There is, in my opinion, no room for the suggestion that the accused was at the time of the killing in any heightened emotional state of mind, bearing in mind the time that had elapsed since the break-up. The unfortunate fact of the matter is that all too frequently in the present day South Africa the use of firearms to maim and kill is resorted to where people are frustrated in the attainment of their own selfish wants and desires. In the present case, the object of such desire was the ex-lover, who would not reconcile.

The population at large is justifiably sick and tired of the burgeoning crime rate and the country's unenviable reputation as the murder capital of the world. It is for this reason that the Courts have a duty to society to impose sentences for these crimes which reflect the repugnance felt towards them by the general population and which accordingly both satisfy the need for retribution and operate as a deterrent to others of like-minded criminal intent.”

[27] I am in respectful agreement with the sentiments expressed by the court in the **Khwela** judgment. All too often male persons who would make themselves guilty of spousal, or partner abuse would more often take place in the form of physical violence directed towards women. And where such physical violence and assault would, result in the murder of the female partner and would be viewed as less serious. In my view the opposite is true, because it is expected of the abuser who is in a position of trust, to respect, and protect his female counterpart, rather to inflict harm upon her. It is also sometimes described as a crime of passion because of jealousy, rage and hatred brought about by heightened emotions during a lover's quarrel between people who are involved in an intimate relationship or a marriage. It would then be considered as either a mitigating circumstance, which would lessen the moral blameworthiness of the offender. In my view, this is a patriarchal viewpoint, which found its way into our judicial system, because of the subservient manner in which women are treated. This clearly undermines a woman's right to dignity and equality before the law.

[28] In this regard the Constitutional Court in **S v Baloyi 2000(1) SA 425 CC** at para 11 said:

"All crime has harsh effects on society., what distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and in particular on family life, it cuts across class, race culture and geography and is all the more pernicious because it is so often concealed and so often frequently goes unpunished".

[29] The Constitutional court continued at para 12:

'To the extent that it is systemic, pervasive and overwhelming gender-specific, domestic violence both reflects and re-enforces patriarchal domination, and does so in a particularly brutal form.'"

[30] Before dealing with the interests of society, it would be appropriate first consider whether, there are substantial and compelling circumstances to deviate from the prescribed sentence. In this regard, the guidance of the Supreme Court of Appeal in the oft quoted **S v Malgas 2001(1) SACR 469 (SCA)** where it was held that:

“Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

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.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.”

[31] Mr Du Toit in argument, submitted that there are substantial and compelling circumstances present in this case to deviate from the prescribed sentence. These are:

- 1) that the accused after the commission of the offence, went to hand himself over to the police, he confessed to the crime and went to point out where the body of the deceased was laying;
- 2) he showed remorse and admitted guilt to the charges;
- 3) that he was worried about the fact that the body of the deceased was laying outside in the elements;
- 4) he further submitted that the crime was committed under circumstances where the accused was jealous and involved in a very stormy relationship with the deceased; and
- 5) that the court should take into consideration his personal circumstances; I have already dealt with the aspect of remorse and the accused perceived confession of the crime and do not consider it of any real significance.

[32] In my view, the mere fact that the abuse took place in the context of an intimate relationship which usually and statistically speaking, result in the death of a woman, should be regarded as an aggravating factor. This, cannot ever be regarded as a circumstance to deviate from the prescribed sentence. In the matter before this court where the life of the deceased was brought about in a premeditated fashion, the court would have to ask itself whether, the circumstances such as rage and jealousy in an intimate relationship as this case is concerned, weighed up against the unspeakable brutality and callous nature of the murder that the accused had committed, can be considered weighty enough to deviate from the prescribed sentence.

[33] Even in cases where the death of a spouse, and the children were not planned and premeditated, and the prescribed sentences were not applicable, the High Court in the exercise of its inherent jurisdiction imposed a sentence of life imprisonment. I am not of the view that the circumstances referred by Mr Du Toit, cumulatively, are weighty enough to conclude that there are substantial and compelling circumstances to deviate from the prescribed sentence. In fact, most of it can either be regarded as a neutral factor, or an aggravating factor, especially in the goal directed and calculated manner in which the accused conducted himself when he murdered the deceased. It was particularly cruel, callous and the type of act only an evil minded person would perpetrate.

THE INTERESTS OF SOCIETY

[34] There is no doubt in my mind that the pre-meditated conduct of the accused justifies a sentence of long term imprisonment. The community as well as the family of the deceased, expects nothing less.

[35] This is clearly a case where the personal circumstances of the accused must give way to the deterrent and retributive effects of punishment. This is clearly a case as Mthiyane JA said in **S v Senatsi 2006(2) SACR 291**.... *“This is one of those cases where any law abiding and self-respecting citizen would be repelled by the conduct of the appellants”*. I agree with the prosecutor that violence against women in South Africa, and especially by persons like the accused, who sought to exercise control and power over the deceased, and threatened her verbally and physically over time, that his conduct on the day in question showed a total disregard for her rights.

[36] The interests of society, in cases like this was highlighted in the matter of **DPP v Mngona 2010 (1) SACR 427 (SCA)** where the appellant was convicted of murdering his lover. It was unplanned and not a scheduled offence. The court increased the sentence of 5 years imprisonment to 10 years and remarked at paragraphs [14] – [15] as follows:

*“A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic. Courts should take due cognisance of the salutary warning expressed by Marais JA in **S v Roberts 2000 (2) SACR 522 (SCA)** para 20 where he stated:*

'It [the sentence] fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.'

The sentence imposed on the accused in the present appeal fails to reflect an appreciation of this warning.”

[37] In **S v Shaw 2011 (1) SACR 368 (ECG)**, the accused, a first offender, was convicted of murdering his two children, in order to punish his wife. Pickering J, despite not being obliged to do so, imposed a sentence of life imprisonment.

[38] Nugent JA in **S v Swart 2004(2) SACR 370 (SCA)** said that serious crimes will normally require that retribution and deterrence come to the fore and that rehabilitation will play a relatively smaller role. Given the circumstances, and the manner in which this horrific offence was committed by the accused, this is one of those cases where retribution and deterrence comes to the fore and the rehabilitation of the accused takes a backseat. It must give expression to the relative gravity of the offence, the prevalence of domestic violence,

which culminates in the murder of women and act as a deterrent for would-be offenders in domestic partnerships that such conduct will not be countenanced.

[39] It calls for a harsh approach to which the court gives effect in the following form:

[40] In respect of **Count 1** the accused is sentenced to **Eight (8) months imprisonment** and in respect of **Count 4**, the accused is sentenced to **Life Imprisonment**.

The court orders that the sentence imposed on **count 1**, be served concurrently with the sentence imposed on **count 2**.

In terms of the provisions of section 102 of the Firearms Control Act, 60 of 2000, the accused is declared unfit to possess a firearm.

RCA HENNEY

Judge of the High Court of South Africa