

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS93/2022

DATE: 29-06-2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between

THE STATE

and

LUCKY MULALO MUDAU

Accused

S E N T E N C E

KARAM, AJ: The Court will then proceed to hand down its sentence in this matter. The accused, Mulalo Lucky Mudau, was indicted in this Court on a count of murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, hereinafter referred to as the minimum sentence provisions.

The accused was legally represented by Mr. Leisher and Mr. Maphiri represented the State. The record

will reflect that prior to the accused pleading, the Court satisfied itself that the accused understood the minimum sentence provisions.

On 3 March 2023 this court convicted the accused as charged, pursuant to his guilty plea. The court had been advised by Counsel that the accused was a quadriplegic, pursuant to his unsuccessful attempt to take his own life after having committed the murder *in casu*. Further, that Correctional Services were unable to accommodate the accused as an inmate, having regard to his quadriplegia, hence his release on bail.

On 3 March 2023, having convicted the accused as charged, this Court extended the accused's bail, and imposed additional restrictive bail conditions. The Court advised Counsel that it required firstly, medical proof of his quadriplegia, secondly, that this condition was permanent, and thirdly, proof as to the submissions aforesaid regarding correctional services.

The accused did not testify in mitigation of sentence and no witnesses were called by the defence. The state led the evidence of Raymond Mathebula in respect of the first and second issues aforesaid. He is a medical doctor and holds a BA and MBCHB degrees, as well as a Diploma and a Master's degree in public health.

He is the clinical manager of the Tshwane

Rehabilitation Hospital. He testified that the accused was admitted to this facility from the Baragwanath Hospital with C5 quadriplegia on 21 April 2022, in order that the accused receive therapy in order to function optimally in respect of his condition. The accused spent three months there and was discharged on 11 July 2022. He explained that C5 quadriplegia is a cervical spinal cord injury that results in paralysis of both wrists and hands, of both legs and of the back. The accused has no motor functioning in these areas, cannot propel his wheelchair himself, and further has involuntary bowel and bladder movements.

The witness confirmed the hospital's diagnosis of C5 quadriplegia and testified that the accused's condition is that of a complete C5 case and that his condition is permanent. The accused can only move his head left to right. In short, the accused requires care 24 hours of the day, and needs assistance with every function, including eating, bathing, dressing, grooming, taking of his medication, changing of his diapers and that he needs to be turned every two hours in order to prevent pressure sores.

He requires two people, fulltime, to assist him with his daily needs. He confirmed the clinical notes compiled by a Dr Fourie, who worked under the witness's supervision and who left the employ of the rehabilitation hospital at the end of 2022. These notes were handed in by consent as

Exhibit F.

He stated that the bullet wound to the accused's left side of his neck at Zone 2, as referred to in the notes, is where C5 is located, and the witness was of the view that this is the gunshot wound that would have resulted in the accused' quadriplegia. Regarding the third issue aforesaid, the State led the evidence of the Head of Health Care Services at Johannesburg prison and the Deputy Nursing Manager at the Kgosi Mampuru Correctional facility. Their evidence is on record and the court does not intend to burden this judgment by dealing with same.

Safe for ascertaining from these witnesses that neither of the aforesaid prisons were able to accommodate a quadriplegic inmate, these witnesses did not assist the Court.

There are multiple correctional facilities in this country and there is no law that states that an accused who is convicted and sentenced in one province, cannot serve such sentence at a correctional facility in another province. Ultimately, the State called Mmamekhize Miriam Mabe to testify.

She is the director of Health Care Services in the Department of Correctional Services and is currently the Acting Deputy Commissioner of Health Care Services and is based at Correctional Services National Office in Pretoria.

In short and on the Court's questioning she confirmed that nationally, throughout the whole of South Africa, there is not a correctional facility that can accommodate a quadriplegic inmate or prisoner as in terms of the Correctional Services Act, only primary health care is provided to inmates.

The State further presented a pre-sentence report and a report of a Correctional Officer, both handed in by consent, as a sentencing option of Correctional Supervision in terms of Section 276(1)(h) of the Criminal Procedure Act. I will revert thereto hereinbelow.

The State called the deceased's father as a witness in aggravation of sentence. He is further the author of the victim impact statement, handed in by consent and marked Exhibit J. He gave a heartrending account of how he came to hear of the demise of his daughter and his having to identify her body, damaged by the multiple gunshot wounds. He further testified that neither he nor his wife are employed and that his wife has become ill as a result of what happened to their daughter. The deceased's children resided with the witness and his wife and the deceased maintained her children and her parents. The children would spend weekends and holidays with the deceased. Her demise has resulted in them being financially prejudiced.

Both his grief at his daughter's cruel demise and

his anger towards the accused was evident in his testimony. He could not dispute that an attempt was made by the accused to apologise to the family for his actions. He explained, however, that in his culture, as the head of the family, it is required that he be approached, and this has not occurred.

He expressed his desire that the Court impose life imprisonment and that a correctional facility be constructed to incarcerate a person in the position of the accused.

Upon the Court's inquiry to Counsel as to the discrepancy in Exhibits F and G, in respect of the number of shots fired by the accused upon himself, Mr. Leisher advised the court that the accused fired a single shot, directed towards himself, and that a spent bullet was found at the scene that was not ballistically linked to the accused's firearm. Mr. Leisher, wisely in this Court's view, did not take this issue further.

Be that as it may, and even assuming, hypothetically speaking, that the shot to the neck causing the accused's quadriplegia was fired by a third person, this is not material for present purposes, for the following reasons:

There is no evidence before the court in this regard; we are dealing with the sentencing proceedings in respect of the accused; the fact is that the Court is required

to sentence the accused on what is before this Court and as the accused appears before this Court, namely as a complete C5 quadriplegic.

In determining an appropriate sentence it is trite that the Court is required to consider the crime and the circumstances surrounding the commission thereof, the personal circumstances of the accused, as well as the interests of the community and society at large. It is further essential that the purposes and objectives of punishment be considered, namely deterrence, retribution, rehabilitation and prevention. The imposition of sentence is the most difficult task in trial proceedings for any presiding officer, and particularly in the current matter.

This Court has spent much time in considering the sentence to be imposed. In so doing, the Court has borne in mind the various principles contained in our law, *inter alia* that the punishment must fit the criminal and the crime, and be blended with a measure of mercy; that a message must be sent to the community that offences will not be dealt with too leniently, so as to bring the judicial system into disrepute; that the offender must not be punished to the point of being broken, and that the sentence not operate as sledgehammer; that all the mitigating and aggravating factors be considered in arriving at an appropriate sentence.

The accused was convicted in terms of the minimum sentence legislation. Having been convicted in terms of Section 51(1) of such legislation the accused faces a minimum sentence of life imprisonment. In terms of such legislation it is mandatory for the Court to impose the prescribed minimum sentence, unless the Court finds that substantial and compelling circumstances exist.

Whilst this Court has a discretion in this regard, that discretion must be exercised properly and judicially. In determining whether substantial and compelling circumstances exist, this Court is guided by the decisions of other courts, and is bound by the decisions of the Superior Courts.

The *locus classicus* on this issue is the decision of *S v Malgas* 2001 (1) SACR 469 (SCA). This decision was, however, decided some 20 years ago, and has over the years been elaborated upon, amplified and supplemented by the Superior Courts. This Court is required to determine whether the mitigating factors, either individually or cumulatively considered, constitute substantial and compelling circumstances, looking at the facts and circumstances of the case as a whole.

Further, if this Court is of the view that the imposition of the minimum sentence would be disproportionate in considering the facts and circumstances

as a whole, and result in an injustice, then the Court is entitled to impose a lesser sentence.

There are numerous aggravating factors in this matter. That the accused intended to kill the deceased is evident from, not only the fact that he shot the deceased at least six times, but further that most of these shots were fired into her head. This is evident *ex facie* the post-mortem report, Exhibit A.

What is further aggravating is the fact that as a police officer, his duty is crime prevention. Instead, and using his lawfully issued firearm, he proceeded to commit murder, the most serious of all crimes. The deceased is yet another statistic of gender-based violence, which has reached epidemic proportions in our country, and has spread like a cancer across all segments of our society.

It would appear *ex facie* the probation officer's report, Exhibit G, that the deceased terminated her relationship with the accused as a result of her not being prepared to accept his continued relationship with the mother of his elder children, and to share the accused with her. This in itself is aggravating.

However, and whatever the reason or reasons, there is no justification for the accused to have murdered the deceased. The accused took away the life of the deceased, and whilst she was in the prime of her life. This

was done in the most cruel manner. She was a nurse and a productive member of society, a daughter who also contributed to the maintenance of her parents, as well as a mother to two young children, the youngest being the accused's own son, aged 3 years, leaving the onerous responsibility of raising these children to the deceased's elderly parents

Turning to the mitigating factors. The accused is a first offender, see Exhibit E. The accused was forthright and pleaded guilty, not wasting the Court's time with some fanciful defence. The most significant of these factors is the condition in which he finds himself. It is common cause that the accused, after having shot the deceased, turned the firearm on himself.

Counsel for the State, wisely in the Court's view, conceded that the accused's condition constitutes substantial and compelling circumstances. The Court finds that, cumulatively considered, the aforesaid factors constitute substantial and compelling factors warranting a departure from the prescribed minimum sentence.

The State and the Defence submitted that in the circumstances, the Court consider the imposition of a sentence of Correctional Supervision in terms of Section 276(1)(h) of the Criminal Procedure Act, as recommended by the probation officer in Exhibit G. The Correctional

Officer's report, Exhibit H, refers to such sentence as a possible sentencing option.

The Court is, however, of the view that this is not an appropriate sentencing option, for the following reasons: One of the important aspects of such sentence is the rendering by the offender of community service. It is conceded by the Correctional Officer in paragraph 2.1(e) of his report that the accused will not be able to perform the recommended 16 hours per month, due to his condition; In a sentence of this nature, the sword of Damocles that hangs over the offender's neck in ensuring compliance with the conditions prescribed, is that the non-complying offender will then be imprisoned. That, however, cannot happen, given the circumstances of the accused and the evidence of the Director of Health Services, Ms. Mabe;

Furthermore, it is this Court's view that to impose house-arrest on the accused would, in the peculiar circumstances of this accused, be cruel and inhumane. Whilst the retributive element of punishment is important, this Court is not here to exact revenge upon an accused, but to do justice.

This has nothing to do with maudlin sympathy, but rather with judicial mercy. The Court has experienced delays in the time it takes to get the accused to court, or whilst his diapers are being changed. Indeed, the accused

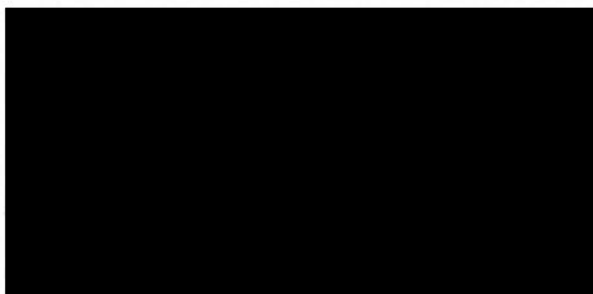
is a pathetic sight to behold.

Mr. Mudau, having regard to all of the foregoing, this Court is of the view that the following is an appropriate sentence:

You are sentenced to 25 years direct imprisonment. However, there is not a correctional facility in the country that will accept you. Further, you have, through your actions, in effect sentenced yourself to lifelong imprisonment in the confines of a wheelchair and not as a paraplegic, but as a quadriplegic, being incapable of performing the most basic acts of human functioning.

This is a punishment worse than the ultimate sentence of life imprisonment that this Court could impose. In the circumstances, the sentence imposed is suspended for the maximum permissible period of five years, on condition that you are not convicted of a similar offence.

Finally, the Court wishes to thank both Counsel for their assistance in the matter.



KARAM, AJ

JUDGE OF THE HIGH COURT

DATE: