

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA
HELD AT GRASKOP/MBOMBELA**

CASE NO: CC 29/2021

DPP REF: M 18/2021

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 07 December 2022

SIGNATURE:

In the matter between:

THE STATE

v

CHRISTOPHER VELLY MASHABA

ACCUSED

JUDGMENT ON SENTENCE

MOOSA J:

[1] **MR CHRISTOPHER VELLY MASHABA ('accused')** has been found guilty on Tuesday, 02 November 2021, on the following charge:

[a] **COUNT 1:**

MURDER READ WITH THE PROVISIONS OF SECTION 51(1)

**AND PART 1 OF SCHEDULE 2 OF THE CRIMINAL LAW
AMENDMENT ACT 105 OF 1997.**

IN THAT upon or about 26 April 2021 and at or near Dumphries Trust, in the district of Bushbuckridge, the accused did unlawfully and intentionally kill **ELVIS MKANSI**, an adult male person.

[2] The court in imposing sentence, must have due regard to the facts of the case, and in addition thereto, must apply certain well-established legal principles relating to the extent and magnitude of punishment. An awesome responsibility is thereby vested in the Court.

[3] The acknowledged objects and purpose of criminal punishment are deterrent, preventive, reformatory and retributive.

[4] What must also be considered is the triad consisting of the crime, the offender and the interests of society.¹ I am in respectful agreement with what has been stated in these cases. The elements of the triad contain an equilibrium and a tension. A court should when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements.

What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less. Therefore all the elements of the triad, although not identical are inseparable.

[5] The nature of the crime is of considerable importance. It may be of such

¹ S v Zinn 1969 (2) SA 537 (A) at 540G; S v Scheepers 1977 (2) SA 154 (A)

significance or so far reaching that a lengthy period of imprisonment is the only adequate punishment. In passing sentence the trial court must take into account the moral and ethical nature of the crime, and the gravity of the offence. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment. A process of arid intellectualism is insufficient. Mere theorising is insufficient. What matters finally is how the court views the crime on its own merits, and all the relevant proven facts and circumstances must be carefully considered and assessed.

[6] Merely to find that a crime by itself is serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the court, in its judicial discretion, would fail to pay due regard to the facts and circumstances of the particular crime.

The sentence therefore must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment.²

[7] In considering the offender, due regard must be had, inter alia, to the following: his/her age and background; level of education, attainment, and position in society; family circumstances, whether married or not, and the question of dependants; motive in committing the offence, whether for personal gain or for reasons of avarice, or being actuated by some moral or laudable objective; whether the offender stood to gain by the offence; the question of the accused being a first offender; the effect of punishment on the offender, and more particularly if a sentence of imprisonment is imposed; the prospects of reformation and correction, and becoming a useful member of society; the presence or absence of remorse or contrition; whether instead of imprisonment an alternative method of punishment would not be appropriate in

² S v Haasbroek 1969 (1) SA 356 (E)

the circumstances; a perceptive understanding of the accused's human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed³; influence or encouragement of another⁴.

[8] Due weight must be given to the personal circumstances of the accused. As a general principle equal punishment for equal offences is to be imposed unless the personal characteristics of the respective accused make such differentiation necessary.

[9] The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquility in the land needs to be taken into account. Whilst considering the interests of society as a factor in determining sentence, the interests of society should not be over-stressed to the detriment of the personal factors of the accused.

I pause to mention that a balance should be maintained between the different elements of the triad.

[10] It is noteworthy to mention that this triad has been criticised as inadequate, as the role of the victim is not emphasised. This anomaly has caused the courts to now give serious consideration to the victim during sentencing proceedings. This phenomenon has been termed as the squaring of the triad.

[11] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court.⁵ To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed

³ S v Sigwahla 1967 (4) SA 566 (A) at 571 E-F

⁴ S v Lehnberg en 'n Ander 1975 (4) SA 533 (A)

⁵ Samuels v The State [2010] ZASCA 113

through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Crime and Abuse of Power.⁶

The Declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State – it is an injury or wrong done to another person.⁷

The underlying philosophy of the Service Charter for Victims of Crime in South Africa⁸ (also referred to as Victim's Charter) is to give meaningful content to the rights of all citizens, by reaffirming one of our founding democratic values namely human dignity.⁹

[12] By accommodating the victim and/or their representative during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim and/or their families, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim and/or their families be placed before the court. That in turn will contribute to the achievement of the right sense of balance, and in the ultimate analysis will enhance proportionality rather than harshness.¹⁰

[13] The conviction in this case results from a domestic dispute between the deceased, his younger brother Reason Mkansi, and his aged parents, and

⁶ Resolution 40/34 Adopted by the General Assembly on 29 November 1985

⁷ SA Law Commission Discussion Paper 7 Sentencing Restorative Justice (1997)

⁸ Approved by Cabinet on 2 December 2004

⁹ S 7(1) of the Constitution 108 of 1996

¹⁰ S v Matyityi 2011 (1) SACR 40 (SCA) paragraph 17

which subsequently culminated in an incident wherein the accused shot the deceased, after he was requested by his parents to intervene and assist them with the challenges that they were facing with the deceased.

[14] The Accused has been found guilty on one count of Murder read with Section 51(1) of the Criminal Law Amendment Act 105 of 1997, which prescribes the imposition of life imprisonment, unless there are substantial and compelling circumstances present, and which would cause this court to deviate in the imposition of the prescribed minimum sentence.

[15] I have duly taken note of the fact that the accused does not have any previous convictions, and accordingly stands as a first offender before this court.

[16] Mr Mashile ('Mashile') informed this court that he will be leading evidence in respect of a pre-sentence report on behalf of the accused. Further advising that the accused would be testifying during the pre-sentence proceedings.

[17] **Gladness Letabo Dibakoane** ('Dibakoane') a social worker in the employ of the Department of Social Development testified, *inter alia*, as follows:

[a] She interviewed various family members in order to compile her report regarding the social circumstances of the accused, so that an appropriate sentence may be imposed.

[b] The accused's family originated from Mozambique, and settled in South Africa during 1985. The accused is the second son of the eight children born to David and Violet Ubisi.

[c] The accused is 48 (forty eight) years old and currently married to Mavis Mashaba, and they have three children born from this union. He was previously married to Nozipho Sibuyi and had two children from his

first marriage. His eldest child is attending the Tshwane University of Technology at Pretoria. The second child is studying grade 7, and the last one is in grade 4.

[d] The accused resides with his extended family in a 9 (nine) bedroomed homestead. He has been responsible for the payment of school fees for the deceased's three children, as well as their maintenance.

[e] The accused was employed as a game tracker at the Thulini Lodge situated within the Sabi Sabi Game Reserve and earned an amount of R 5600.00 (five thousand six hundred rand) per month. However, shortly after his arrest he was released from his duties thereat pending the outcome of his trial.

[f] She interviewed family members, who stated that they were still shocked and traumatised by the ordeal, as they never anticipated that something like this would happen. The accused's parents stated that they feel extremely frustrated with the ordeal, as they continually blame themselves, due to the fact that they requested the accused to come to their assistance. Further, they are of the view that had they not approached the accused for assistance, this incident would not have taken place.

[g] The members of the community who were interviewed indicated that the accused was a respected member of the community. They further indicated that the Mkansi family are regularly involved in arguments with each other. Further that they were upset and angry due to the death of the deceased at the hands of the accused.

[h] She was of the view that the accused was not remorseful for his actions, as he pleaded not guilty to the charge, and according to her did not show any remorse for his unlawful action.

That in essence concluded the evidence of this witness, and her report was handed in as Exhibit “E”.

[18] The **Accused** testified in mitigation of sentence, *inter alia*, as follows:

[a] He was born on 07 July 1974 and is 48 years old, and currently residing with his wife and 5 (five) children at Dumphries B.

[b] He confirmed that he was employed at the Thulini Lodge as a game tracker and earned an amount of R 5600.00 (five thousand six hundred rand) per month. He was suspended from his employment due to the pending case against him, and worked part time thereat and earned an amount of R 3600.00 (three thousand six hundred rand) per month.

[c] He is responsible for the maintenance of his family, which includes his aged parents who are both receiving pensions, his siblings, which included the deceased who was unemployed. In addition thereto he assisted with the maintenance of the deceased’s children whilst he was alive, and has continued to do so after his death.

[d] The deceased and his younger brother would create tremendous amount of strife within the family once they consumed alcohol and became intoxicated. He would continually have to reprimand his troublesome siblings, and he was responsible in ensuring that everyone lived in peace and harmony within the homestead.

[e] He admitted that the court has made a just decision in finding him guilty of the murder of his brother. He admitted that he was angry at the time, due to the fact that the deceased had been troubling their parents. His intention was accordingly to scare the deceased and not to kill him. He aimed for the deceased’s hand and unfortunately the bullet struck the deceased’s chest. He further admitted that the version of the deceased having a panga in his possession was untrue, and the injuries

that he had suffered on his hand was as a result of him being hit with the beer crate, by the deceased.

He acknowledged that he was guilty of his brother's death, and pleaded to this court that he should not be crushed by the imposition of a severe sentence.

[f] Dibakoane misunderstood him when she concluded that he did not exhibit any remorse for his actions. He accordingly feels extreme remorse at the death of his brother.

[g] From the date of his arrest he was warned by the court not to return to his home and/ or to meet with his family members. He resided at his workplace during this time, and until this condition was subsequently relaxed. Accordingly, he suffered being separated from his wife and children, as well as his parents and siblings.

[h] He pleaded to the court to treat him with an element of mercy when imposing a suitable sentence upon him, as there is no one left at his homestead that could take care of his family and shoulder his responsibilities.

[i] The court should carefully consider the fact that his mother had insisted on leaving her marital home, as a result of the deceased's conduct, and strife caused by the deceased and his younger brother.

[j] That he made a huge mistake on the day in question when he fired at the deceased. His intention was to threaten and not kill the deceased. Further, that he is not a violent person and that he has never ever become involved in any form of violence prior to this incident.

[k] During cross-examination he stated that he wanted to tell the court the entire truth, as he has self introspected, and the death of his

brother has been haunting him.

[I] He pleaded to the court to impose a non-custodial sentence upon him.

That in essence concluded the evidence of the accused.

[19] It is noteworthy to mention that Mr Mashile subsequently fell ill and requested Mr Silubane ('Silubane') to assist him with the finalisation of the pre-sentence proceedings. Silubane duly appeared on behalf of the accused and informed this court that he intended leading the evidence of a correctional supervision report on behalf of the accused.

[20] **Nozibusiso Agnes Chamane** ('Chamane') a social worker in the employ of the Department of Correctional Services, Bushbuckridge Community Corrections testified, *inter alia*, as follows:

[a] She compiled a report in terms of section 276 A (i) of the CPA in respect of the accused, wherein she set out, *inter alia*, his personal circumstances. I have duly taken these into account and do not intend to regurgitate all of them herein, as the accused was called to testify regarding his personal circumstances. I do so simply for the sake of brevity and to avoid unnecessary prolix.

[b] Her mandate was to conduct an assessment of the accused in order to determine whether he is a suitable candidate to be sentenced to correctional supervision. Her suitability report was handed in as Exhibit "F".

[c] The accused's parents, his sister Nikiwe Mkansi and his brother Reason Mkansi, as well as the accused's wife all highlighted that the accused is a loving, selfless and caring person, and that he has always been taking good care of his parents, his siblings and their children, despite him having his own family.

[d] The deceased's mother was interviewed and was tearful throughout the entire interview and stated that she found the death of the deceased rather painful, and this pain was further compounded by the fact that the accused has been charged with murder, and that it would be extremely painful to lose another son to prison. She pleaded to this court to exercise an element of mercy upon her, and not to allow her to lose another son.

[e] The deceased's father stated that he understood the principle that there is no one above the law and that the courts are there to serve justice. However, having due regard to the particular facts of this case, if the accused were to be sentenced to imprisonment it would result in a double tragedy for his family. He pleaded with the court to be merciful towards him and his family, and to exempt him from further pain, and not to sentence his son to imprisonment.

[f] The accused's sister, Nikiwe and brother Reason have also pleaded for this court to exercise an element of mercy when imposing a suitable sentence upon the accused. The family members have stated that if the accused were to be sentenced to a long term of imprisonment, it would result in severe hardship to the entire family. Accordingly, pleading that he be given a non-custodial sentence having due regard to all their personal family circumstances.

[g] She dealt with the evaluation/assessment of the accused regarding his suitability for correctional supervision, and noted that the accused has taken full responsibility for his actions and criminal behaviour. Further, that the accused is aware of the seriousness of the conviction and the impact it may have on his life.

[h] She was of the view that the accused meets the necessary requirements, but made no further recommendations in the report and left it to the court to make a final decision regarding this sentencing

option.

That in essence concluded the evidence of this witness.

[20] Mr Silubane further informed this court that he will be leading the evidence of the accused's father in mitigation of sentence.

[21] **David Mkansi** ('Mkansi') the accused's father testified on behalf of the accused in mitigation of sentence, inter alia, as follows:

[a] He confirmed that the accused was responsible for the care and maintenance of the deceased's three children, as a result of the unfortunate accident that happened at his homestead on 26 April 2021. Further, that the mother's of the deceased's children are unemployed and hence rely solely upon the accused to support their children.

[b] The accused is responsible for the maintenance of both himself and his aged wife, as their pensions are insufficient to sustain themselves.

[c] He stated that if the accused were to be imprisoned it would be the same as if he were dead. He would then have to take over the accused's family responsibility, and would have to take care of the accused's wife and children, as well as the deceased's children. Adding further that he would simply not be able to shoulder such responsibility, and would not be able to cope financially, due to his advanced age. Essentially, making the point that his family would be ruined and face devastation.

[d] He pleaded repeatedly that the court take into account both his and his wife's advanced age, and carefully consider this fact when imposing a sentence upon their son. Further, crying and pleading to this court that it impose a non-custodial sentence upon the accused, as they would both rather die, if the accused were sentenced to imprisonment.

[e] The unfortunate incident took place as a result of the conduct of the deceased, who he described as troublesome. He described the deceased as a person who was negatively influenced when he consumed alcohol. He would return home late and then begin arguing and demanding food from his aged mother. Due to the deceased's behaviour just prior to his death, his wife had to sleep at the neighbours homestead.

[f] The accused was called to assist in reprimanding the deceased and his younger brother. Instead of behaving and listening to the accused, the deceased became uncontrollable during the family meeting.

[g] That he held both himself and his wife responsible for what transpired on that fateful day, and begged this court to incarcerate the both of them, and not the accused.

[h] The court requested his input regarding the feelings and reaction of the community, in the event that the accused were given a non-custodial sentence. He was of the view that the community would accept such a sentence, as they are full well aware of what had transpired and have been privy of the deceased's wayward conduct. In addition thereto, the community is aware that the accused is a responsible person, and that he found himself in this situation not out of his own making.

That in essence concluded the evidence of this witness, and the case for the defence in mitigation of sentence was duly closed.

[22] Mr Silubane made the following submissions, *inter alia*, on behalf of the accused, in mitigation of sentence:

[a] The court take into account that the person who lost his life is the

accused's brother, and that they have the same parents.

[b] The accused has been taking care of the deceased's family, as well as the other members of his immediate family.

[c] It is clear from all the evidence that the accused is a responsible person and has never defaulted in his responsibilities.

[d] The aged parents have pleaded to this court to impose a non-custodial sentence upon the accused, and that this has been the request from all the accused's family. Further, that the parents have stated that they would not be able to bear the loss of two of their sons.

[e] The accused is gainfully employed for many years with the same employer, and this shows stability and great responsibility on the part of the accused.

[f] That the personal circumstances of the accused together with the mitigating factors can be cumulatively regarded as substantial and compelling circumstances, and which would cause this court to deviate from the imposition of the prescribed minimum sentence.

That in essence concluded the submissions on behalf of the accused.

[23] Mr Mkhulise, in support of aggravation of sentence submitted, *inter alia*, as follows:

[a] Submitting that the personal circumstances of the accused are not in dispute. Further, that it is clear that the accused is a first offender, and that he lived an honest and responsible life, thus far.

[b] The court take into account the circumstances under which this crime was committed. However, the court should be mindful of the fact that this is a serious crime and that a firearm was used.

[c] That the accused pleaded not guilty in the face of an open and shut case, and only took this court into his confidence during the pre-sentencing proceedings.

[d] Conceding that there are clearly substantial and compelling circumstances that would cause this court to deviate in the imposition of the prescribed minimum sentence.

That in essence concluded the submissions of the State in aggravation of sentence.

[24] In the seminal judgment of **S v Malgas**¹¹ at paragraphs 7 and 8, the following was said per Marais JA regarding the provisions of the Minimum Sentence legislation: “The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes”.

“In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the

¹¹ 2001 (1) SACR 469 SCA

commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may”.

“Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence....Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.

Nor were marginal differences in the personal circumstances or degrees of participation of co- offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets “substantial” and “compelling” cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure.

It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically

different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration”.

[25] In **S v Malgas** supra, **S v Dodo**¹² and **S v Vilakazi**¹³ regarding the imposition of an appropriate and proportional sentence in the context of the prescribed minimum sentence of life imprisonment and the “determination” for when the prescribed sentence may be departed from. The following extract from **Vilakazi**, paragraph 3 is apposite: “... the Constitutional Court reminded us in **S v Dodo** that punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings ought to be treated as ends in themselves, never merely as means to an end”.

[26] Mercy is regarded as a concomitant of justice. In **S v Rabie** ¹⁴ at 861 D et seq, Holmes JA stated: “Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one’s approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime, and being fair to society”.

[27] It is trite that sentencing is generally a matter of discretion left in the hands of the court-passing sentence. The discretion, however, may not be exercised arbitrarily, but reasonably and judicially within the parameters of legislative prescription. Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence.¹⁵ Retribution may even be decisive.¹⁶

¹² 2001 (1) SACR 594 (CC)

¹³ 2009 (1) SACR 552 (SCA)

¹⁴ 1975 (4) SA (A)

¹⁵ **S v Mhlakaza and Another** 1997 (1) SACR 515 (SCA) at 519 d - e

¹⁶ **S v Nkwanyana and Others** 1990 (4) SA 735 (A) at 749 C - D

[28] What appears from the aforementioned cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role¹⁷.

[29] In *S v Dodo* 2001 (1) SACR 594 (CC) the Court reiterated at paragraph 8 that:

“A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence, which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.’

[30] It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence, which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.

¹⁷ *S v Swart* 2004 (2) SACR 370 (SCA)

[31] Sentencing involves a very high degree of responsibility, which should be carried out with equanimity. I am reminded of the comments of Corbett JA in **S v Rabie**¹⁸ “ a judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality”.

[32] “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 acknowledgment 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”.¹⁹

It is clear that the accused did not take this court into his confidence during the trial. However, this changed drastically when he testified during the pre-sentence proceedings, and laid his chest bare to the court whereby he agreed with his conviction, and exhibited remorse for his unlawful action.

Accordingly, in my view he has taken this court fully into his confidence, and as such the genuineness of any contrition alleged to exist can be determined, *albeit*, at a late stage in the trial. It was clear from the general demeanour of the

¹⁸ 1975 (4) SA 855 (A) at 866 A-C

¹⁹ S v Matyityi supra at 53 A-D

accused during the entire trial that he had a gnawing pain of conscience for the plight of the deceased's family. To this end, I am reminded of the fact that he has been supporting the deceased's three children and their respective mothers. Therefore, I am inclined to conclude that the accused is clearly remorseful and regrets his actions.

[32] It is noteworthy to mention that this court is duly enjoined to look at the aggravating and mitigating circumstances and once these are carefully considered, to determine as to whether there are substantial and compelling circumstances that will cause it to deviate from the imposition of the prescribed minimum sentence of life imprisonment.

[33] The court will bear in mind that there is no onus placed on the accused to prove the presence of substantial and compelling circumstances, or on the State to prove the absence of such substantial and compelling circumstances. However, there rests a clear duty on an accused to produce evidence to convince the court that circumstances exist, which justify the imposition of a lesser sentence. It stands to reason that such substantial and compelling circumstances may also be inferred to be present in the State's case or in evidence presented by State witnesses or by the prosecution itself. If no factual basis is laid for a finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it follows that a court will be obliged under the statutory provisions to impose the prescribed sentence.

[36] I have duly given due cognisance to the principles that need to be applied when imposing a suitable punishment upon the accused I have carefully looked at the aggravating as opposed to the mitigating factors, and have taken all other circumstances and factors relevant to sentencing and measured it against the composite yardstick ("substantial and compelling"), in order to properly determine whether the aforementioned cumulatively justify a departure from the standardised response that the legislature has ordained.

[37] After careful consideration of all the evidence before me, and taking into

account all the aggravating and mitigating and other factors that I am required to take into account, I am of the view that as far as the accused is concerned, there are substantially compelling circumstances which exist, and which would justify a refusal to impose the specified sentence.

[38] To this end, I have duly taken into consideration the following substantial and compelling facts, which I am required to place on record, and which have impelled me to conclude that there should be a deviation from the imposition of the prescribed minimum sentence upon the accused:

[a] The extraordinary nature and the circumstances of the crime.

[b] The dynamics of the accused's extended family, and the events which preceded and culminated in the shooting of the deceased.

[c] The accused has lost a brother and has exhibited remorse and contrition, and accordingly has taken it upon himself to support the deceased's children and their respective mother's.

[d] The evidence in respect of the personal circumstances of the accused, and more especially his good character and general disposition.

[e] The fact that the accused is a first offender, and has been a responsible member of society. Further, that he has been regarded as a responsible member of his family.

[f] The heart wrenching evidence by the accused's aged father wherein he pleaded to this court that both himself and his wife not be punished twice, and that the accused be given a non-custodial sentence. To this end, I pause to mention that this court was steeped in the atmosphere of the trial and pre-sentence proceedings, and more so when the accused's father testified. I deem it important that I place on record that the father was highly emotional, and the mother lost control

of herself during the proceedings. To this end, I am reminded of the many occasions that the proceedings were disrupted by the mother crawling from the gallery on her stomach, in order to join the accused in the dock and to plead to this court to exercise mercy upon the accused.

[g] It was clear to this court that both the parents relied very heavily upon the accused for their emotional wellbeing, as he was the only one who was able to calm them down during the proceedings.

[h] The submissions made by the accused's siblings regarding the fact that they do not deem it appropriate that he be imprisoned, as the family would suffer severe hardship, as well as emotional and financial distress.

[i] There is no evidence before me during the pre-sentence proceedings to support the call that the accused needs to be removed from society, and that he is a candidate for direct imprisonment.

[j] The personal circumstances of the accused, as well as the totality of the evidence before me, including the unique circumstances of this case clearly call for a deviation from the imposition of the minimum sentence.

[k] The killing of the deceased has directly affected the accused and his family, and does not directly impact and affect the greater community at large, as it is not a crime that has been perpetrated against a member of the community.

[l] The impact that a term of direct imprisonment is likely to have on the interests of his and that of the deceased's minor children, and the due consideration of the best interests of the children.

[m] The accused is a suitable candidate for rehabilitation.

Accordingly, it is for the aforementioned reasons that I believe it appropriate to depart from the imposition of the prescribed minimum sentence of life imprisonment.

[39] Accordingly, having found substantial and compelling circumstances present it is trite that this calls for a different response, as I am no longer required to proceed in terms of the provisions of the minimum sentence legislation, and may therefore exercise my discretion, as I am required to do in imposing a suitable sentence upon the accused.

[40] The principles of sentencing in Hiemstra's Criminal Procedure, issue 11 at 28-8 (1) are explained as follows:

"At the sentencing phase, other considerations apply. Now it is the judicial officer's difficult task to determine fairly the accused's fate. While it is still part of the trial and consequently subject to the general provisions thereanent, the process of sentencing is of a different nature:

- (a) it is not a clinical exercise as is that of determining the merits;*
- (b) there are no demarcated points in dispute and formal satisfaction of burdens of proof;*
- (c) impressions are central, not facts;*
- (d) it is possible to have regard to considerations which were irrelevant to the merits (such as, for instance, motive);*
- (e) the person of the accused is specifically considered, including his or her character and general conduct in life, not only the act in question;*

- (f) *it is mainly a probe into the future, while in respect of the merits the court considered past conduct; and*
- (g) *a complex value-judgment must be made in which the four aims of punishment must be considered in conjunction with each other and with regard to the Zinn triad."*

[41] In **S v Banda 1991 (2) SACR 325 (B)** Friedman J stated the following:

"The court fulfills an important function in applying the law in the community. It has the duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no space in life it does not include. The court must also by its decisions, and imposition of sentence, promote the respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender. The feelings and the requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquility in the land needs to be taken into account".

[42] It has been submitted on behalf of the accused that he is a suitable candidate to be sentenced to correctional supervision in terms of section 276 (1) (h) of the CPA. Section 276 (1) (h) and (i) of Act 51 of 1977 reads as follows:

"Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of any offence, namely:

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner"

[43] In **Samuels v S 2011 (1) SACR 9 (SCA)** at paragraphs 9 -10 Ponnar JA held as follows:

“It is trite that the determination of an appropriate sentence requires that proper regard be had to the well known triad of the crime, the offender and the interests of the society. After all any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.....Sentencing courts must differentiate between those offenders who ought to be removed from society and those who although deserving of punishment should not be removed. With appropriate conditions correctional supervision can be made a suitably severe punishment even for persons convicted of serious offences”.

[44] In **S v Aspeling 1998 (1) SACR 561 CPD at page 576 b – f** the Appeal court stated as follows, when it overturned the sentence of the trial court:

“In considering whether a sentence of correctional supervision is an appropriate punishment for a first offender the question to be answered is: ‘Whether the particular offender should, having regard to his personal circumstances, the nature of the crime and the interests of the society, be removed from the community’.....‘Having regard to appellant’s personal circumstances and the nature and mitigating factors relating to the offences he committed, the interests of society, in my opinion, do not require that appellant be removed from the community for any substantial time. Consequently the appeal against both sentences should succeed and in respect of both offences a sentence in terms of s 276 (1) (i) of Act 51 of 1977 should be imposed. This will give the accused the opportunity to persuade the prison authorities that he should be subjected to correctional supervision”.

[45] The imposition of correctional supervision is provided for in section

276(1)(h) of the Criminal Procedure Act, 51 of 1977 and falls under the general rubric of community corrections addressed in chapter VI of the Correctional Services Act, 111 of 1998 ('CSA'). The laudable objectives of community corrections are recorded in section 50(1)(a) of the CSA as being:

- “(i) to afford sentenced offenders an opportunity to serve their sentences in a non- custodial manner;
- (ii) to enable persons subject to community corrections to lead a socially responsible and crime free life during the period of their sentence and in future;
- (iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
- (iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.”

[45] In **S v Ingram 1995 (1) SACR 1 (A) at 9 d – e**, the court held that the introduction of correctional supervision has sought to distinguish between two types of offenders: those who should be removed from society and imprisoned and those who, although deserving of punishment, should not be removed.

[46] In **S v Samuels** supra, the Supreme Court of Appeal held that “ *with appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences*”.

The SCA again referred to this case recently in **Botha v The State 2017 ZASCA 148** at para 46, when it held in circumstances that are notably similar to those applicable in the current matter that the applicant, who was also found guilty of murder to which a mandatory minimum sentence would otherwise have applied..... “.....*certainly does not fall within the category of persons who need to be removed from the society. Imprisonment could, and probably would, have a devastating effect on her, particularly taking into consideration*

that over a period of 30 years she was subjected to assaults and abuse by the deceased. I am of the view, in all the circumstances, considerations should be given to the imposition of a sentence under s 276(1)(h)".

[47] In **Botha v The State 1995 (1) SACR 9 (SCA)**, it was held that “ *the courts should be cautious not to debase the currency of correctional supervision as a form of punishment, especially in the case of serious offences, if however, it is used in appropriate cases and applied to those likely to respond positively to its regimen, it can serve to protect society without the destructive impact incarceration can have on a convicted person’s innocent family members*”.

[48] I pause to mention that a court will consider imposing correctional supervision particularly if the crime is too serious for only a suspended sentence, and if the court is of the view that the more personal attention, inherent in correctional supervision, may be beneficial to the offender and eventually the community as well.

I have duly noted various literature on the subject, and have noted that in contrast to imprisonment, correctional supervision has, among others, the following advantages:²⁰

- [a] The probationer can benefit to the greater extent from the normalising influences of the community.
- [b] The probationer is not exposed to the negative influences of hardened criminals and the prison sub-culture.
- [c] The rehabilitation process takes place within the community where the best results are obtained.
- [d] It is a more cost effective sentence.

²⁰ Criminal Law & Procedure by Lt-Col Elsa Jones, De Rebus 1993

- [e] There is less pressure on available prison space.
- [f] The isolating effect and the stigma attached to imprisonment are avoided.
- [g] To a large extent some negative results of imprisonment are eliminated, for example:
- Loss of self respect;
 - Loss of income resulting in the inability to provide for the family;
 - Breaking up of family life, etc.

[49] I now turn to examine Section 276A of the CPA which makes it peremptory that a term of punishment in terms of section 276 (1) (i) must not exceed a period of five years. I am of the firm view that the imposition of a sentence of correctional supervision in terms of this section will not be in the interests of justice, in this case. I am of the further view that such a sentence will surely bring the administration of justice into disrepute.

[50] I am reminded of what Sachs J stated in **S v M 2007 (2) SACR 539 (CC)** at page 568 para 59 as follows: “[59] *Correctional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice, The South African Law Commission (SALC) has underlined the importance of correctional supervision, observing: ‘ There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African Tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment’.*”

[51] I am further reminded of the comments of Scott JA in **S v Ningi 2000 (2) SACR 511 (A)** at para 8: *“The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that in so far as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because, whatever its advantages, correctional supervision remains a lighter sentence than direct imprisonment. Any contention to the contrary I think would be unrealistic.”*

[52] Having due regard to the cases which I have dealt with hereinabove it is clear that the existence of a mandatory minimum sentence does not, in itself, exclude a conclusion that correctional supervision is potentially an appropriate sentence when substantial and compelling circumstances are indeed found to exist.

[53] It is clear in my mind, having due regard to and considering the totality of the facts before me, that the accused is not an individual that needs to be removed from society. Therefore, in my view a sentence needs to be imposed that would clearly take into account the seriousness of the crime, as well as taking into account the personal circumstances of the accused and the interests of society, and to that it must be added the interest of the deceased and/or his family.

Accordingly, I am mindful of the difficult and fine balancing act that one has to perform in order to give credence to the aforementioned principles, in order to properly exercise one's discretion in imposing a suitable sentence upon the accused.

[54] Consequently, I have duly taken into account and given credence to the

evidence that has been presented, having due regard to the triad as espoused in **S v Zinn** supra, together with the overall impact on the deceased's family, when considering a suitable sentence to be imposed. I have carefully considered the mitigating and aggravating factors present in this case, whilst carefully weighing and balancing them against each other. I have taken all the factors that are necessary, and as I am required to do, in the determination of a suitable sentence to be imposed upon the accused.

[54] In the result the accused is sentenced as follows:

[54.1] **COUNT 1:**

**MURDER READ WITH THE PROVISIONS OF SECTION 51(1)
AND PART 1 OF SCHEDULE 2 OF THE CRIMINAL LAW
AMENDMENT ACT 105 OF 1997**

**15 (FIFTEEN) YEARS IMPRISONMENT WHICH IS
SUSPENDED FOR A PERIOD OF 10 (TEN) YEARS ON
CONDITION THAT THE ACCUSED IS NOT CONVICTED OF
AN OFFENCE INVOLVING VIOLENCE DURING THE PERIOD
OF SUSPENSION.**

[54.2] In addition thereto, the accused is sentenced to undergo correctional supervision in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977, read together with the provisions of section 52 of the Correctional Services Act 111 of 1998, on the following conditions:

[a] The accused be placed under house arrest for the duration of his sentence with due consideration to his employment, co-operation in general and other relevant circumstances.

[b] The accused may not leave the magisterial district in which he resides without the prior approval of Mr J H Ngobese, the Head Community Corrections, except for

the purposes of essential work or other reasons, in the discretion of the National Commissioner.

- [c] The accused shall continue to care for and maintain the deceased's three children up until they attain the age of majority.
- [d] The accused shall perform 576 (five hundred and seventy six) hours of free community service at a community institution, to be determined by the Head Community Corrections, for the duration of 16 (sixteen) hours per month.
- [e] The accused shall attend the following programmes or lectures offered by the Department of Correctional Services and/or other welfare departments, as follows:
 - (i) financial management;
 - (ii) dealing with conflict;
 - (iii) communication and self-conduct;
 - (iv) social functioning programmes;
 - (v) career ability and methods of obtaining a job;
 - (vi) recreation/education programmes;
 - (vii) life skills programmes.
- [f] The accused is not allowed to visit places where alcohol is sold and consumed. Further, the use of alcohol and drugs is strictly prohibited.

[g] The accused shall be monitored by correctional official, C M Mabasa and/or appointed volunteers of the Bushbuckridge Community Corrections by means of:

- (i) telephonic supervision at the workplace and at home;
- (ii) visits to the workplace;
- (iii) visits to the probationer's residence (including after-hours visits);
- (iv) compulsory visits by the probationer to the community corrections office for consultation.

[h] The accused is to reside at a suitable fixed address for the duration of his term of supervision, and should notify the Head of Community Corrections, Mr J H Ngobese before change of his residential address.

[i] The accused is required to remain employed and that he should comply with the conditions of his employment. He may not leave his employment without notifying the Reintegration Case Management Supervisor, Mr K M Ngomane.

[54.3] In addition to the aforementioned conditions, the accused is ordered to participate in long term psychotherapy, with a focus on behaviour, anger management, and insight-orientated interventions offered by the Department of Correctional Services; and that he further participate in other appropriate programmes/courses offered by the Department of Correctional

Services.

[54.4] In terms of Section 103(1)(g) of the Firearms Control Act 60 of 2000, the court makes no order. The accused is hereby deemed unfit to possess a firearm.

[a] In terms of Section 103(4) of Act 60 of 2000, the court issues a search and seizure order for competency certificates, licences, authorisations and permits, firearms and ammunition.

[b] The Assistant Registrar is ordered to inform the Registrar: Central Firearms Control Register in writing of this order.

[54.5] A copy of the judgment and sentence be forwarded to the Department of Correctional Services, and be reviewed when considering relevant programmes and psychological treatment for the accused.

C I MOOSA
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA WEDNESDAY,
07 DECEMBER 2022

Counsel for State:

Instructed by:

Adv C Mkhulise

Director of Public Prosecutions

Mbombela

Mpumalanga

Counsel for Accused

Instructed by:

Mr B Silubane

AB Mdluli Attorneys

Bushbuckridge

Mpumalanga

Date of hearing:

02 November 2022

04 November 2022

29 November 2022

10 January 2022

28 March 2022

29 March 2022

06 April 2022

16 May 2022

20 June 2022

22 June 2022

23 June 2022

12 August 2022

07 December 2022

Date of judgment:

07 December 2022