



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 8/2017

In the matter between:

THE STATE

and

MOLETSANE McDONALD MOTAUNG

CORAM: MATHEBULA J

JUDGMENT BY: MATHEBULA, J

HEARD ON: 20, 21, 22, 23, 24, 27 & 28 MAY 2019

DELIVERED ON: 29 & 31 MAY 2019

[1] The indictment states that the accused is guilty of the crimes of

Murder read with the provisions of section 51(2) and Schedule 2 of Act 105 of 1997, Unlawful Possession of a firearm and defeating or obstructing the administration of justice. The accused pleaded not guilty to all charges and did not give any plea explanation.

- [2] A bundle of documents was handed in and admitted as Exhibit A to D. Exhibit A and B are two photo albums compiled by Warrant Officer Mokgobo Gloria Mofutsanyane. The photos on Exhibit "A" largely depict the scene of crime on the fateful day of 21 September 2015. Exhibit "B" is the construction of the crime scene she undertook on 23 March 2016 as per the request of the Investigating Officer Warrant Officer Mollo. Exhibit "C" is the Report on Medico-Legal Post-Mortem Examination conducted by Dr Samuel Moopela following an examination on the body of the deceased on 22 September 2015. The cause of death is recorded as gunshot to the head. The photos on Exhibit "D" were taken and compiled by the bosom friend of the deceased Matieho Dlamini on 26 October 2014 allegedly following an assault on her by the accused.
- [3] In an effort to shorten the proceedings, the admissions made in terms of section 220 of Act 51 of 1977 were reduced to writing and handed in as Exhibit "E". They are as follows:-
- "1. The identity of their deceased mentioned in count 1 of the indictment.**
 - 2. That the above-mentioned deceased did not sustain any further injuries from the time of the discovery of corpse do the execution of the post-mortem examination (Exhibit C).**
 - 3. The findings and contents of the post-mortem report (Exhibit C) are correct and sound.**

4. **That the expended cartridge of a firearm found in the deceased's bedroom and depicted on photo number 11 in Exhibit "A" is a 9 mm Parabellum pistol calibre.**
5. **That the accused is not licensed to possess a firearm."**

- [4] The accused and the deceased were involved in a love affair from around 2011. Apparently it started on a happy note and with time progressed into a tumultuous one punctuated by assaults and fear perpetrated by the accused. This became clear in the evidence of K[....] M[....], P[....] P[....], M[....] D[....] and M[....]N[....]. It is arguable whether the love affair was still in existence or not at the time of her demise. Equally whether it co-existed with the one she had with M[....] N[....] or the latter existed on its own. I shall return to this aspect at a later stage.
- [5] The first witness, K[....] M[....] a seventeen (17) year old son of the deceased testified that on that fateful day, together with his aunt were woken up by the deceased to prepare to go to school. It was at around 5H30am. A while later the accused arrived and he saw the deceased boarding his City Golf motor vehicle. What attracted him to look through the window was that he heard the deceased screaming for help. He observed that the front left passenger door was open and her leg was dangling outside. He formed the opinion that she appeared like a person who wanted to alight it but being held back. He reached this conclusion because she was also sitting with her back on the driver instead of both of them facing in the same direction. The motor vehicle sped off with her inside.
- [6] They summoned for help from her maternal grandmother P[....] P[....] who stays at Lusaka Village. The time was between 6H30am to 7H00am. About ten (10) minutes after she had left

the deceased called her cell phone informing them that they should take the money which was in the boot of her motor vehicle. He was unable to do so because it was raining.

- [7] A while later she returned and she looked like a person who had been crying because she was wiping the tears from her eyes. He did not ask her the source of her tears because he knew that the accused was a violent person. The accused used to fight with the deceased. He once pulled her with her pants while they were watching television. On another occasion he broke a window in a rage. The deceased gave him and his aunt twenty (20) rands each and was preventing the accused from entering the house. She told them that the accused will take them to school.
- [8] They drove off with the accused for a short distance until the neighbour's gate where he stopped the motor vehicle and reversed it to their gate after enquiring as to who was in the house and they had informed him that K[...] slept at Lusaka last night. The accused alighted and proceeded to enter the house and it was at this time that his maternal grandfather arrived there and stood next to his mother's motor vehicle.
- [9] His grandfather told the accused that he want to talk to him and the latter responded that he will come back. They left with him to school dropping off K[...] first at her school.
- [10] While they were left alone the accused probed him whether the deceased was engaged in any other love affair. He answered in the affirmative because he was aware that she was seeing another person. The relationship between himself and the accused was a cordial one. He once bought him soccer boots to pursue his passion of playing football. They also spent one Christmas with him.

- [11] He continued that as they were driving to school, only one hand of the accused was on the steering wheel. The other hand was not in the sleeve of a sweater he was wearing and he will only take it out on occasions. However, he never saw the accused holding a firearm on that day. He continued that the deceased had given them firm orders not to allow the accused into the house. At one stage the accused brought her garment and did not enter the erf.
- [12] He testified that when she called at the time she was away with the accused, he does not know whose phone she used. It was put to him that according to the accused, when he went back to the house he found the deceased already shot. His response was that he does not know and can neither confirm nor deny it.
- [13] M[....] D[....] P[....], the second witness and father of the deceased, responded to a request from his wife that there was an altercation between the accused and the deceased. It took him approximately thirty (30) minutes to run to her house. On arrival he found the accused about to take the children to school. He requested to talk to him and he responded that he will come back after dropping the children at school. Before leaving he requested the deceased to make him tea. He left to look for his wife (who was following him) at the bus stop.
- [14] On his return, he called out the deceased who was taking time to bring his tea and there was no reply. He tried to open the door but it was locked. This gave him a fright. One of the neighbours gave him a garden spade and he used it to open the door. Inside he encountered the body of the deceased on the floor in her bedroom. She was lying on her stomach and already injured.

- [15] The accused was well known to him as her boyfriend for quite some time. During their interaction he found him to be a respectful person and they have never had difficulties in their relationship. The last time he spoke to the accused was when he left with the children. He had never seen him since that fateful day neither has he (accused) made any contact with him.
- [16] Under cross-examination, he denied that a week prior to her demise they had an altercation with her over missing money. His terse response was that in his family he does not handle the finances but his wife does so. He denied ever calling the accused on his cell phone because he does not have his number.
- [17] Elaborating on his encounter with the accused that morning, he stated that he met him on his way out to taking the children to school. It is unclear whether he saw the deceased or not. Also whether the deceased responded verbally to his request or not. However, when he left to meet his wife at the bus stop, the accused and the children were still waiting in his motor vehicle. It took him a bit of time and on his return he met the accused in his motor vehicle taking the children to school. The accused told him that the time for school is up and he will talk to him at a later stage.
- [18] The version of the accused put to him was that the accused proceeded to her residence to confront her about the missing money, which resulted in a quarrel. The couple drove away in the motor vehicle to the Golden Gate National Park where they made up for the misunderstanding and engaged in a sexual intercourse. On their return he took the children to school. However, he returned and entered the house in order to relieve himself. He (P[....]) testified that he does not have any knowledge of his version and cannot admit nor deny the same.

- [19] On being probed further, he testified that, at any stage while he was there, he did not hear any gunshot and never saw the accused holding a firearm. The issue that the position he stated to have found the body of the deceased differed with that on photo 7 and 8 of Exhibit "A", he stated that the body must have been put on the bed by people who arrived at the scene shortly after he had discovered it.
- [20] The mother of the deceased, P[....] P[....], the third witness, testified that she received a cell phone call about the warring couple and summoned her husband to attend to it at once. She was fearing that her daughter might be killed because K[....] (her other daughter) told her that the deceased appeared frightened. In addition she was aware that the love affair had hit rock bottom and on that day she had cut off the ties.
- [21] It happened that the deceased once called from Bloemfontein in tears. She narrated to her that the accused had assaulted her even using a firearm. She implored her to come home.
- [22] On that fateful day after her husband had left, she received a cell phone call that a motor vehicle had been dispatched to fetch her. She walked up to the shopping centre and then travelled with the occupants of that motor vehicle to the deceased's residence. On arrival she found few people milling around and on enquiring about her daughter. She was informed that she was no more.
- [23] On the issue of the assault that occurred in Bloemfontein, she testified that it occurred about a month prior to her demise. On a Sunday when the couple returned, they held a meeting at her house attended inter alia by the accused, his mother, herself, deceased and her friend M[....] D[....]. The accused's mother proposed that the warring couple must separate with the accused

remaining with her and deceased at her residence in Mandela Park. The accused objected to it and indicated that it will not happen and he will do something about it.

- [24] The intense cross-examination that followed elicited from her confirmation of the cell phone call and that she was informed that the accused has taken the deceased away with him. Further, that she was privy to the state health of the love affair because they had an unbreakable bond with the deceased. She vehemently denied the accused's version put to her that the deceased was assaulted by the wife of the man she was seeing at that time.
- [25] The fourth and fifth witnesses are police officers who arrested the accused on the same day of the incident about fifty (50) kilometres from the scene of crime. They corroborated each other significantly although there are contradictions that must be pointed out in the respective testimonies.
- [26] They were on patrol at Petsana, Reitz when they received a call to be on the lookout of the black Volkswagen Golf coming from the direction Qwa Qwa. They were informed that the driver of that motor vehicle is a wanted person armed with a firearm and had just murdered a woman. They set off in the direction of Kestell/Qwa Qwa with the hope of finding the suspect.
- [27] They drove for approximately forty (40) kilometres until the intersection of Warden/Bethlehem/Kestell and Reitz. The first person they encountered walking on foot towards the intersection was none other than the accused. They enquired from him whether he had seen the aforementioned motor vehicle. He answered in the affirmative that it had had gone in the direction of Bethlehem. He also informed them that he was one of the construction workers who were repairing the road at that time.

- [28] They approached another construction worker who was driving a truck. They were doubtful about the accused because he was not even wearing the appropriate safety clothes for construction workers. The driver told them that he had only started the new job that morning and the accused was unknown to him. It was at this stage that they saw the accused boarding a motor vehicle driven by a passer-by driver. They set off after it.
- [29] They caught up with it few kilometres from the intersection, stopped and searched it. The accused was not in the motor vehicle and were informed by the driver that soon after boarding, he requested the motor vehicle to stop and he alighted. They returned towards the intersection to look for him. It appears that they were driven by police instincts. They were approaching the construction site office when they spotted him again and he immediately hid behind the water pipes. Only when they stopped next to where he was did he emerge from the water pipes.
- [30] Constable Makhoba read him his constitutional rights and informed him that he was being arrested as a suspect. The accused informed them that he was the person they were looking for and that his motor vehicle had overturned on the way. He drove with them to where the motor vehicle was parked on the farm road and they noticed some damages particularly on the left rear passenger door. On their arrival there were a sizeable contingent of police officers from different units.
- [31] The three (3) of them left the scene where the motor vehicle was parked to Phuthaditjhaba Police Station. On the way they asked him about the firearm. His response was that he disposed it somewhere between the Engine Garage and University Campus. According to Warrant Officer Mosia they looked for it on the way

to the Police Station and were unsuccessful in their endeavours. The evidence of Constable Makhoba is that they went to the Police Station and only thereafter went to look for the firearm.

- [32] Under cross-examination, it was put to Mosia that the accused deliberately gave false information because he was scared. He denied ever hiding himself from them. His version is that he was assaulted by the many police officers who were there and in an effort to save his skin he lied about the firearm. Perhaps the more telling of his version is that he became scared and afraid when he saw the body of the deceased in the house. That is the only reason why he evaded the police when he saw them at the intersection.
- [33] The evidence of the sixth and seventh witnesses namely Warrant Officer Teboho Mofokeng and M[...] M[...] is largely unchallenged and only deal with the securing of the scene of crime and taking photographs depicting how and where the deceased was found. Nothing turn on their evidence pertaining to who killed the deceased. I pause to add that their evidence is largely undisputed.
- [34] The eighth witness M[...] D[...] had not only known the deceased for approximately ten (10) years but their relationship has grown from being bosom friends and sisterhood. She testified that on 26 October 2014 they were supposed to have dinner with the deceased but she failed to honour the appointment. Only at around 20H00pm did she call her sobbing and told her that she was at het parental home. Together with her sister they went there.
- [35] The accused, his mother, deceased's parents and son were all in the house. However the meeting was apparently concluded and

the accused left with his mother. They later took her child to Bolata Village and thereafter proceeded to Mandela Park.

- [36] She noticed that the deceased had bruises above her eye, ears, arms and knees. On enquiring about them, the deceased informed her that they were caused by the accused. She continued that she tried to run away from him on their way back but he caught up with her.
- [37] She also related an incident that occurred in Bloemfontein when the deceased was attending a training course at her new company. The accused arrived there unannounced and accused the instructor of having a love affair with the deceased. This was apparently the later straw that broke the camel's back. The deceased called off the love affair. The accused continued threatening and assaulting her.
- [38] At the time of her demise she was seeing one N[...] and had also bought a new motor vehicle. The day before her untimely death they went to church and returned to have lunch at the deceased's house. They later parted amicably at around 14H00pm. She learned about her death the next day.
- [39] The crux of the evidence of the ninth witness M[...] N[...] is that they have been involved in a love affair with the deceased for approximately a month before her demise. They spent the evening of 20 September 2015 together until she left at around 22H00pm. They spoke over the phone later that day when he wanted to satisfy himself that she was safe.
- [40] The next morning at around 7H00am she put a call through to her and a child answered it that she is out but she will give her the message. Later in the morning the deceased called her informing him that the accused had been there and he looked around the

residence. The accused according to her, had driven her to the nearby Golden Gate National Park and he had a firearm which he put on the dashboard. He advised her to report the matter to the police. Their conversation was abruptly ended when the deceased sounded distracted by something she hang up and promised to call a bit later.

[41] A quarter of an hour later her received a cell phone call from her cell phone but it was a male voice on the other end. The male person who identified himself as Moletsane (accused) wanted to know how do they know each other. During that conversation, the said person informed him that he will never see the deceased she is dead. He wanted to know where he was and concerned about his own safety, the matter was reported to the police.

[42] At this stage the State closed its case.

[43] The accused testified in his defence and stated that he received a call from D[....] P[....] complaining about the deceased that she had misappropriated his money and displayed disrespectful conduct. They had arranged to meet at the residence of the deceased on the day of her demise. That is what led him to proceed to her residence that morning at about 5H00am.

[44] On arrival the deceased approached him and they spoke briefly before she returned to the house. Later she emerged, boarded his motor vehicle. The issue of the missing money cropped up and they fought over it. This was later resolved and he drove off. A few metres away he stopped because his faulty passenger door could not close properly.

[45] They drove to Golden Gate National Park and even had sexual intercourse there. They returned and the deceased entered her residence while he remained outside seated in his motor vehicle.

At that stage they were still involved in a love affair although her father has intimated to him that she was involved in a love affair with someone else.

- [46] All the same he left with the children but quickly reversed, alighted and entered the house because he was pressed and wanted to relieve himself. Emerging from the residence he encountered her father. They briefly spoke to each other and they agreed to continue their meeting on his return. On his way back his uncle called enquiring about the earlier altercation with the deceased. He assured him that all was well in the nest.
- [47] He arrived at the deceased residence, and proceeded to her bedroom. There she was lying on her back with her head covered with blood. He tried to resuscitate her but to no avail. This gave him such a fright that he boarded his motor vehicle and fled the scene. Later he contacted his attorneys and they advised him to come to Bethlehem.
- [48] His woes were compounded when on the way there, he was chased by unknown person(s) in a Volkswagen Jetta. After a brief car chase around the dusty streets of Kestell he was on the way towards Reitz. It is unclear as to how he overturned his motor vehicle and ended up on foot.
- [49] He corroborated the evidence of Mosia and Makhoba regarding the circumstances around his arrest bar the allegation that he tried to hide himself away from the police. On the way to the police station they assaulted him. This continued unabated at the police station and he lied in order to bring it to a halt. He deliberately showed them a place just a place in order to save his skin.

- [50] Returning to the assault on 26 October 2014 against the deceased, it was his narration that the injuries were inflicted by one Nthabeleng miffed by a love affair that the deceased had with her husband one Fani. At no stage did he beat up the deceased as alleged by M[....] D[....]and P[....] P[....].
- [51] It was his view that someone must have killed the deceased and surreptitiously left the crime scene. This is exactly what gave him a fright because he suspected that the circumstances of her death will be pinned to him. In essence, he did not commit any crime he is accused of having committed.
- [52] His mother Emily Motaung testified that she was in the motor vehicle with the accused and the deceased sometime in April 2014 from Bloemfontein to Qwa Qwa. At no stage did she witness an altercation between the couple. On arrival at home they dropped her off and left. A while later they returned and the deceased was bruised and her eyes were swelling. She was informed that she had been assaulted by a woman whose husband she was engaged in an illicit affair. The deceased was reluctant to report the matter to the police. They then went to her homestead to report the matter.
- [53] The deceased was coy to report fully to her parents because she was afraid / embarrassed that she was dating two men.
- [54] On the day of her demise, she was sleeping when her brother woke her up that there was a fight between the couple. Together they proceeded to the residence of the deceased. There he met her father. They entered the house and the father of the deceased opened the bedroom door using a spade. The deceased was slumped on the bed covered with blood.

- [55] On making this ghastly discovery, the father remarked that the accused had killed his child. They sat outside for some time and noting that the police were to not arriving at the scene of crime, she took the initiative to go and report it personally at the police station.
- [56] With no further witnesses to call, the accused closed his case.
- [57] Confronted with this evidence, I must consider whether the State has succeeded in proving its case against the accused beyond reasonable doubt. It is common cause that the State case against the accused is based on circumstantial evidence. In this regard I am guided by well-established legal principles followed in our courts for decades.
- [58] The locus classicus case dealing with this subject is **R v Blom**¹ where the court stated that there are two (2) cardinal rules of logic which cannot be ignored. The first is that the inference drawn must be consistent with all the proved facts and the second part is that the proved facts should be such that “they exclude every other reasonable inference from them save the one to be drawn”.
- [59] The position as stated in **R v De Villiers**² the court said the following about the cumulative effects of circumstantial evidence:-

“It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably to drawn.”

- [60] In **S v Reddy**³ the court held that circumstantial evidence is not necessarily weaker than direct evidence. In the contrary, there

¹ 1939 AD 188 at 202 - 203

² 1944 AD 492 at 508

might be instances where it may even be considered stronger or of more value than direct evidence. This evidence must be based on objective facts.

- [61] Circumstantial evidence on its own is problematic. The court cautioned about it in **S v Cooper and others**⁴ in the following manner:-

“When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which inference can be made, the method of inference fails and what is left is mere speculation or conjecture”.

- [62] The accused person is under no obligation to prove his innocence and this was lucidly explained in the following manner in **S v V**⁵

“It is trite that there is no obligation upon an accused person, where the State bears the *onus*, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is

³1996 ZASCA 55 (28 May 1996)

⁴ 1976 (2) SA 875 (T) at 888H to 889A

⁵ 2000 (1) SACR 453 (SCA) at 455A-C

whether there is a reasonable possibility that the accused's evidence may be true”

[63] The emphasis is that there is no onus on the accused to prove the truthfulness of any explanation which he gives to convince the court that he is innocent. The court is enjoined to consider the strengths and weaknesses including the merits or demerits as well as the probabilities and improbabilities. Whether this court subjectively believes him or not, is not the test. Should there be any reasonable doubt concerning his guilt, then he must be afforded such doubt and be acquitted.

[64] The following are the proven facts in this case:-

1. On 21 September 2015 the accused proceeded to the deceased's residence early in the morning at around 5H00am.
2. They had an altercation and he drove off with her while the passenger door was open and her foot was dangling outside the motor vehicle. The aspect that the door was not properly closed was confirmed by the accused.
3. That as a result of this frightening experience she cried for help as testified by K[...]. They drove away and she made a cell phone call to the children from the accused's cell phone.
4. On her return she entered her residence and the accused left with the children. After making inquiry about who else was in the house he returned and entered the house.
5. During this time the father of the deceased arrived and they had a conversation. The father of the deceased left and

they had arranged with the accused that they will meet at a later stage.

6. D[....]P[....] is the one who opened the door with a spade and found the deceased slumped on the bed with a gunshot wound.
7. The accused did not return to him and was few hours later arrested by Warrant Officer Mosia and Constable Makhoba about fifty (50) kilometres away from the crime scene. He gave them a false version not only about his presence there but also about the firearm that was used to murder the deceased.
8. It is common cause that no assault charges were laid by the accused against both Mosia and Makhoba or any other police officer alleged to have assaulted him.
9. The deceased was no longer in a love affair with the accused and had moved on with M[....] N[....].

[65] I was impressed by the evidence of K[....] the young son of the deceased. In an eloquent but quite manner he responded to the questions that led me to conclude that he is a reliable and credible witness. He did not attempt even to add anything in order to aggravate the plight of the accused.

[66] He testified that the accused on emerging from the house drove with his left hand out of the sleeve and hidden in a sweater. Only occasionally will he take it out and take it back again. The accused while they were both in the motor vehicle wanted to know who was in the house and only then entered it. He did not even add that the accused was in possession of a firearm or some weapon. On the way once he was isolated from his aunt,

the accused interrogated him about the new love affair that his mother was engaged in.

- [67] I accept his evidence that his mother was no longer in a love affair with the accused. They were given instructions not to allow him to enter the house. This is indicative of the irretrievable breakdown of the love affair between the couple. He stated that the accused was a violent person who had been engaged in violent episodes with the deceased. These are not those that other witnesses testified about. He added that the accused was a good person to him. This shows that he does not harbour any bitterness to falsely implicate the accused.
- [68] The evidence of both D[....] and P[....] P[....] has some contradictions. I hasten to add that I found them to be reliable, honest and credible witnesses. Though there are contradictions, I deemed them not to be material in the circumstances.
- [69] D[....] P[....] spoke to his daughter on the day in question requesting her to make him tea. He spoke to the accused and asked for a meeting. He left to pick up his wife from the bus stop. He was gone for approximately fifteen (15) minutes. The only reason he was there was because he was told that the accused had taken the deceased away and she looked frightened by that conduct. Here he acted like any other right thinking parent. It was not put to him that he was there because of a pre-arranged meeting with the accused.
- [70] On his return he met the accused on the way. On arrival he found the doors locked and the deceased not responding to him. He used the spade to enter the house. He was alone. It was not put to him that the deceased's mother was also there. The glaring contradiction lies on the aspect that he said he found the deceased

on the floor whereas the photos on **Exhibit A** shows that she was lying on her back on the bed. His assertion is not supported by the proven facts. However, the material aspect is that he discovered the deceased in her bedroom already late. During the time that he made a ghastly discovering and arrival of the police, the accused did not return.

[71] The evidence of P[....] P[....] contradicts that of A[....] D[....] pertaining to the date of the meeting after the accused had assaulted the deceased. Her assertion of the date is one year after the fact. Her confusion of the dates leave me not to place any reliance on her evidence on this aspect. However, she responded to questions put to her in a candid manner that was not misleading. Be that as it may, she testified that the accused was an abusive partner to her daughter.

[72] I accept as reliable and truthful the evidence of A[....] D[....]. As the bosom friend of the deceased she was privy even to her private life. She too, was aware that the accused was in the habit of assaulting her. It was not disputed that she took the photos accepted as **Exhibit D** which patently showed that she was assaulted. Her evidence corroborates that of P[....] P[....] that the person who caused the injuries was none other than the accused. She too, was an impressive and a credible witness.

[73] I do not intend to deal with the evidence of other witnesses as it is largely common cause between the parties. I accept the evidence of all the members of the South African Police Service who testified in this case.

[74] I must point that there is a contradiction between the evidence of Mosia and Makhoba regarding the chronology of events limited to the time they went to search for the firearm. According to Mosia

they did so before proceeding to the police station with the accused. The version of Makhoba is that they went to the police station and thereafter went to search for the firearm. The latter version is corroborated by the accused.

- [75] The common denominator is that the two policemen were led by the accused on a wild goose chase to an area between the University Campus and the Engine garage to search for the firearm. He told them that he discarded it there. They did not go there on their own but at his behest. Equally, they both testified that they did not assault him or was he ever assaulted by any person in their presence. It was also not put to them that they intimidated and/or assaulted the accused in order to reveal the firearm and the place where he discarded.
- [76] The chain evidence narrated by T[....] M[....] and M[....] M[....] is not in dispute. I accept their evidence as reliable and truthful.
- [77] The testimony of K[....] and M[....] is corroborated by the evidence of her boyfriend at the time of her demise. They had been having the affair for approximately a month prior to her demise. Of relevance is his testimony that he called her on the morning of 21 September 2015. He left the message with the child because she was not at home. Later she called her that the accused was there and intimidated her with a firearm which was placed on the dashboard. He was not confronted and contradicted that the accused was there that morning and intimidated her.
- [78] Equally he was not confronted and contradicted that he spoke to the person identifying himself as the accused that morning. The accused informed him that he will not see the deceased anymore because she has passed on.

- [79] I was impressed by his demeanour in the witness box and the forthright manner that he dealt with the questions posed to him. The accused was and is still an unknown person to him prior to seeing him in the dock and there is no reason pointed out that he could be telling lies to aggravate the situation of the accused. He did not contradict himself and his version of events withstood relentless and intensive cross-examination.
- [80] The accused testified in his defence. The crux of his evidence is that he left the disease alive when he took the children to school. As promised he returned and made a grisly discovery of the deceased shot in the head. This gave him such a fright because he was concerned that he will be falsely accused of having committed the deed of murdering her. He did not call the neighbours, his family, her family and/or the police. He drove past two police stations, lied his way to two policemen before admitting that he was the person they were looking for.
- [81] I find the accused to be an accomplished liar whose version of events is so far-fetched that it cannot be reasonably possibly true. It is a convoluted web of lies of which most of it is an afterthought.
- [82] Under cross-examination most of his version came unstuck and he contradicted his earlier version or that that was put to the witnesses on his behalf and probably on his instructions.
- [83] It cannot be true that after dropping the children he came back to the residence of the deceased. He parted ways with D[....] P[....]and promised him that he will return. It is the latter who found the deceased dead with a gunshot wound. What unfolded thereafter was that the neighbours descended to her house, onlookers and the police. He was nowhere near the house of the deceased.

- [84] The version that he got a fright on discovering the deceased is a far-fetched narration without logic and common sense. The impression created is that he was in love with the deceased. When he finds her in crisis, his first concern is to try and save his skin. He called his lawyers and actively went to them. He does not try to assist his lover in distress, a point I have repeatedly alluded to in the preceding paragraphs.
- [85] He concluded without any cogent basis, that he will be falsely accused for her death. The overwhelming evidence is that indeed he was the sole cause of death. I conclude as such because his conduct points to the person who murdered the deceased. He left the house and after ensuring that she was alone, he returned to the house under the pretext of relieving himself. One gunshot was all that was required to eliminate her from the face of the earth.
- [86] K[...] described his conduct of hiding one hand as he was driving them to school. He must have been hiding something. I conclude that the facts point to the Parabellum 9 mm which was used to murder the deceased. The spent cartridge was found in the bedroom.
- [87] It was not put to the witnesses Mosia and Makhoba that they assaulted him. I accept that he voluntarily engaged them in a wild goose chase patently aware that the firearm is safely deposited off. The fact that he was found far away from the scene of crime is reminiscent of a person who was fleeing the scene and covering his tracks. The version about being chased by unknown motor vehicle only surfaced in his evidence in chief. I have no hesitation but to reject his version as false.
- [88] His mother did not do herself as a witness any favours nor the fortunes of her son. She was woeful and an accomplished liar as

well. She was testifying on an incident that happened on a different date. The less said about her the better. Pity she tried to save him but failed dismally to make sense in her evidence.

[89] She testified that she was there when D[....] P[....] entered the residence of the deceased. He opened the door and used a spade to open the bedroom. Until she came on the picture, it was accepted that when he entered he was alone and one of the first person to arrive was his wife P[....]. The spade was used to open the main door. D[....] P[....] was not confronted with her version and his evidence is contradicted. It is clear that she veered off the script and introduced a version that did not assist the accused. I reject her evidence as unreliable, contradictory and untruthful.

[90] I simply restate the legal position that proof beyond reasonable doubt does not mean proof to an absolute certainty nor is proof beyond any doubt or frivolous doubt. The only logical conclusion and reasonable explanation is that the accused murdered the deceased by inflicting one gunshot wound with a Parabellum 9 mm and disposed of the murder weapon thus defeating the ends of justice. This was meticulously and carefully planned. It was executed in a callous manner against her. This he did because of his obsession and jealousy he harboured against the deceased.

[91] I am satisfied that the State has succeeded in proving the guilt of the accused beyond reasonable doubt and find the accused guilty as charged.

SENTENCE

[92] The right to life is the most sacred human right enshrined in our Constitution. It is the only right from which all rights flow. Should life be obliterated in any manner, all other rights are worth

nothing. It is for this reason that the right to life is jealously guarded and preserved. Any person who infringed this right, it is incumbent upon the courts to deal with the transgressors in a firm and decisive manner. However, whatever sentence I impose on you, it should be within the confines of the law and established principles accepted and applied in the courts throughout the Republic.

- [93] Section 51(2) of Act 105 of 1997 read with Part II of Schedule 2 makes provision for a sentence of no less than fifteen (15) years for a first offender. In this case, the accused is liable for fifteen (15) years imprisonment for a charge of murder and possession of firearms respectively. The court can deviate from imposing lengthy terms of imprisonment only if there are substantial and compelling circumstances justifying such deviation.
- [94] I am mindful of the elements of the well-known triad taking into consideration the interests of society, the offense and personal circumstances of the accused. Equally that these elements must be balanced to ensure that one element is not unduly accentuated at the expense of and the exclusion of the other.⁶
- [95] The accused was born on 30 July 1977. That makes him 41 years and 10 months old. He is unmarried with two (2) adult children who are still studying in Johannesburg. His scholastic achievements are Grade 12 and a Diploma in Information Technology. He appears before this court as a first offender. He was employed but lost his job. The substantial and compelling circumstances were submitted by his defence counsel as the period he spent incarcerated before his release on warning. Also that he was a family man who was maintaining his children. He is

⁶ S v Banda and others 1991 (1) 2 SA 353 (B9) at 355 A-C

inflicted with incurable diseases and is on chronic medication. Lastly that he is a first offender and therefore an appropriate candidate for rehabilitation.

- [96] Defence counsel argued that the sentence of thirteen (13) years for count 1, five (5) years for count 2 and two (2) years for count 3 will be appropriate. He submitted that should I decide to impose the minimum sentence of fifteen (15) years on count one then all other sentences should run concurrently with it.
- [97] In aggravation the State Counsel submitted that the taking of life of defenceless women and children is prevalent in the area of jurisdiction of this Court. The deceased was attacked in the sanctuary of her home. The crime perpetrated against her was fuelled by jealousy and obsession. The accused showed no remorse for his deeds despite taking away the life of a young mother from her son.
- [98] State Counsel urged me that I should impose a sentence of twenty five (25) years on count one, five (5) years on count 2 and three years (3) on count 3. Effectively a total sentence of twenty five (25) years. Sentences on both counts 2 and 3 should run concurrently with the sentence on count 1.
- [99] The taking away of life of another person is a matter which is serious in nature. The deceased was murdered for the sake of it and mercilessly so. Murder is abhorrent in the democratic society like ours. The sentences imposed must reflect society's indignation with those who have appropriated to themselves the right to decide who must live and who must not.
- [100] I take into consideration that the accused armed himself with a lethal weapon like a Parabellum 9 mm. He went to the house of the deceased and in cold blood shot her. Thereafter in a coward

manner fled the scene only concerned with how he can extricate himself from the mess he had just created. She must have bled profusely and suffered immensely in the process of losing her life. The accused also took positive steps to conceal his callous act and did not show any remorse.

[101] Sentence must achieve its primary objective which is retribution, rehabilitation, deterrence and the prevention of crime. Weighing the aggravating factors against the mitigating factors, I am convinced that the accused deserves a much harsh sentence on count 1. This in tandem with the dictum of the Court in **S v Chapman**⁷ that women must be free to enjoy their rights like everybody else without any hindrance or fear. The right to associate extend to men and women alike.

[102] On the second count, I note that the accused is a first offender who can be rehabilitated. I am alive to the fact that prison life is hard and long. It can easily break the offender. In **S v Sparks**⁸ the court said the following:-

“Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.

The learned Judge thought anxiously about a prison sentence. He said -

“is this a case for prison or is it not? I must confess that this question has caused me much anxious thought - I do not think that in the 17 years I have been on this Bench I have had to make a more difficult decision relating to sentence.”

In the end he regarded it as his duty to the man in the street to impose a sentence which would deter executive officers from stealing and which would protect members of the public who invest their funds in trust institutions.”

[103] Therefore, I conclude that every avenue should be explored to circumvent imposing and unnecessary long sentence which is

⁷ **S v Chapman** 1997 (3) SA 341 (SCA)

⁸ **S v Sparks & Another** 1972(3) SA 396 (A) at 410G-H

burdensome to the accused. However the sentence I intend to impose will not be light by any stretch of imagination. Unfortunately it will not bring back the deceased to her family but will bring closure to their long wait for justice.

[104] I intend to order that the sentence on count 2 and 3 should run concurrently with the sentence on count 1. The reason is that all the crimes committed by the accused arise out of the same set of facts. Also with a view that the accused should not be sentenced to the point of being broken. Should I not make such an order, it will be a clear indication of accentuating other elements of the triad over and above the others.

[105] In the exercise of my discretion in a judicial manner guided by the principles of fairness and justice, I deem it appropriate to impose the following sentence:-

1. Count 1 – Twenty (20) years imprisonment.
2. Count 2 – Eight (8) years imprisonment.
3. Count 3 – Three (3) years imprisonment.

It is further ordered that the sentences on both counts 2 and 3 should run concurrently with the sentence on count 1. The accused is ordered to serve an effective term of Twenty (20) years imprisonment.

M. A. MATHEBULA, J

On behalf of the State:

Adv. C Steyn

Instructed by:

Department of Public Prosecution
BLOEMFONTEIN

On behalf of Accused:
Instructed by:

Mr P van der Merwe
Legal Aid
BLOEMFONTEIN

/roosthuizen