

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: CC48/2021

DATE: 26-04-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE 17/05/2024

SIGNATURE [Redacted]

10 In the matter between

STATE

and

ANDREW MOCHIFEFE

ACCUSED

S E N T E N C E

MOSOPA, J: Before I deal with what I deem to be an appropriate sentence in this matter, I want to first deal with
20 the aspect raised by Ms Kolbe, relating to the fact that for the reason that I did not find that the murder was premeditated or planned at verdict stage, it means that the accused was convicted of murder, read with the provisions of section 51(2)(a) of part 2 of schedule 2 of Act 105 of 1997, as I did not make such a pronouncement, or that the provisions of section 51 of Act 105 1997 are not applicable

in this matter.

Ms Kolbe further contends that I failed to deal with the nature of intention the accused had when killing the deceased. With utmost respect of Ms Kolbe, that is not the correct position as in my judgment on merits I plainly said the following:

10 "The form of intention that the accused had when killing the deceased is direct intention. Looking at the fact that the deceased was shot three times on the abdomen and once in his thigh. Further, that Dr Madikawa stated in her findings that the deceased was shot at close range."

The fact that this Court did not make a pronouncement that the accused is convicted of murder, read with the provisions of section 51(1) does not mean that this Court is bound to sentence the accused in terms of section 51(2) of Act 105 of 1997.

20 After considering the circumstances of this matter, I came to the conclusion that it cannot be found that the murder in these circumstances is premeditated or planned. The implication thereof remains that the accused is convicted of murder in terms of section 51(1) of Act 105 of 1997, and the prescribed minimum sentence is applicable.

As a result, the accused can show that even though

there is no onus on his side to do that, there is existence of substantial and compelling circumstances which entitle this Court to deviate from the imposition of the prescribed minimum sentence and impose a lesser sentence (see the matter of *S v Roslee* 2006 (1) SACR 537 (SCA) at paragraph 33).

Section 35(3)(a) of the constitution which provides that:

10 "Every accused person has a right to a fair trial, which includes the right (a) to be informed of the charge with sufficient detail to answer it."

It is also applicable to the accused as at this stage of the proceedings.

In argument in mitigation of sentence, Ms Kolbe dealt with the following personal circumstances of the accused, deterioration of the accused's health, previous convictions and other matters, period spent incarcerated awaiting trial, and whilst being presumed innocent, and
20 substantial and compelling circumstances.

Under the latter Ms Kolbe submitted that:

"On the assumption that section 51(1) of Act 105 of 1997 does apply in this matter, it is respectively submitted that the facts and circumstances of this matter would render a

sentence of 15 years' imprisonment unjust."

Based on the above it will not be correct to say that the accused did not know what charge he was convicted of, which rendered his trial unfair.

Simple question which can be asked is why should Ms Kolbe consider the aspect of substantial and compelling circumstances in her address if the provisions of section 51 of Act 105 of 1997 are not applicable in this matter at this stage of the proceedings.

10 In 2019 (1) SACR 1 (SCA) at paragraph 22 the following was stated:

 "[22] There is another reason why the suggestion that the court's power to consider the prescribed minimum sentence in terms of s 51(1) can be ousted simply by mere reference to s 51(2) in a plea explanation, is untenable. The provisions of the CLAA do not create different or new offences, but are relevant to sentence.
20 Thus, murder remains murder, as a substantive charge, irrespective of whether s 51(1) or s 51(2) applies. Simply put, there is no such charge as 'murder in terms of s 51(1) or s 51(2)'. It follows that there can never be a plea to such a non-existent

charge.”

On 4 March 2024, this Court convicted the accused of the following charges:

1. Murder.
2. Unlawful possession of a firearm; and
3. Unlawful possession of ammunition.

In *S v SMM* 2013 (2) SACR 292 (SCA) at paragraph 13, the Court dealt with what has to be considered when sentencing the accused, and stated that:

10 " I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant

20 factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in 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. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in *S v Rabie*:

10 'A judicial officer should not approach punishment in a spirit of anger D because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests 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 to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate
20 E understanding of human frailties and the pressures of society which contribute to criminality.'

From the above quoted passage, it is plain that when sentencing the offender, the Court must consider the personal circumstances of the offender, crime committed and

the interests of society (see also *S v Zinn* 1969 (2) SA 537 (A)).

The accused in *casu* refused to satisfy in mitigation of sentence but instructed his counsel to place the following personal circumstances on record from the bar.

1. That he was born on 16 November 1972 and he is currently 51 years old. This means that at the time of the commission of the offence in October 2019, the accused was 47 years old.

10 2. The accused as born in Johannesburg, most importantly at Chris Hani Baragwanath Hospital, and he was, at the time of his arrest, residing at Block M, Soshanguve, the house which he referred to as a family house as it is registered in his deceased mother's name.

3. In that property he was residing with his wife and their three children an 18-year-old who is a girl child, 17-year-old boy child and a seven-year-old boy child.

4. The 18-year-old child is a student at TVET College and the other two minor children are enrolled as learners.

20 5. The children are currently maintained by the accused's wife as the accused is in detention and she is a self-employed, selling food at the traffic department.

6. At the time of his arrest, accused was involved in various businesses, which as a result of his detention have all failed. He was a taxi owner and a member of SATAWU,

Taxi Association and his taxis has since been repossessed by the banks. He conducted a catering business under the name Mochifefe Hospitality, which has since ceased to exist, and had a business Milestone Construction and Maintenance, which is no longer conducting business.

7. The accused's health has deteriorated since his detention in custody on 18 June 2020, as proper treatment is constantly delayed due to the fact that the correctional services gives excuses about the non-availability of escort
10 when accused has to attend to the outside prison medical centre. The accused was referred to Kalafong Hospital by the prison hospital for medical treatment; and

8. Accused has been in custody since the arrest following a warrant of arrest which was issued on 6 June 2022 as bail was denied.

Considering what is stated above, it is clear that the accused had a stable and successful business, since even though the revenue derived from the accused's business was not disclosed.

20 He had a stable family with a wife and three children. From the evidence we also heard that there was a point in time when he together with his family were residing in Centurion, and only came to live in Soshanguve after the death of his mother.

It is not disputed by the state that the accused is not

enjoying good health. He experiences serious challenges; he is accessing outside prison medical help and despite the fact that it is the hospital prison which referred him for treatment at Kalafong Hospital.

The accused maintains that he was only conducting business together with the deceased, they were not friends. The deceased's mother could see the accused visiting the deceased at her home.

She knew the accused's full names and also referred
10 to him by his nickname Chivas, the name which was not disputed by the accused as his.

Ms Coetzee referred to dealings that accused and the deceased had as illegal dealings. The state did not present any evidence in aggravation of sentence nor did the state present evidence of victim impact reports. What was placed on record is that the deceased's sister, Mamusa, who we heard in evidence that she was employed at Dr George Mukhari Hospital, is still hurt by the incident and crying during consultation and no victim impact statement
20 could be obtained from her.

It was, however, placed on record from the bar that:

1. The deceased was 35 years old when he was killed by the accused.
2. He had four minor children with different mothers and did not have a child with his girlfriend Koketso, who also

testified in this matter.

3. The deceased was extremely involved in the lives of his children. The older child of the deceased is in Grade 12 but is facing financial challenges and he is relying on a grandmother for assistance.

4. The deceased's mother was 69 years when the deceased was killed, and her health has since deteriorated since that time. She is suffering from heart condition and kidney failure.

10 5. Her continued attendance of court proceedings also had a toll on her health and brought trauma to her.

6. The family of the deceased is surprised by this incident as the accused and the deceased were good friends and no one bothered to come to there and give them an explanation; and

7. The deceased did not want to lay criminal charges against the accused.

From the above it is clear that the conduct of the accused impacted negatively in the lives of the family of the deceased. Despite the incident happening in 2019, the deceased's sister is still crying over the death of the deceased, and this can be attributed to continuous attendance of the court's proceedings in which the events of 2019 are relived as if the matter happened yesterday.

The deceased's children are currently financially

suffering as a result of the conduct of the accused.

It is not known what means of maintaining his children did the deceased employ, which gives credence to Ms Coetzee's narrative that the accused and the deceased were engaged in illegal dealings. This narrative is supported by evidence, as the accused, after realising that the robbed Audi motor vehicle was heading to Soshanguve, he thought of the deceased as a person who knows people who can dislodge vehicle tracker devices.

10 In evidence, this Court heard how violent crimes are perpetrated around the vicinity where this incident happened. People on daily basis are violently robbed their possessions and many students at the Tshwane University of Technology, (TUT) use that thoroughfare (referred to double-up in evidence) to access their institution. Some properties in the neighbourhood of the accused, which are now turned into student accommodation for the TUT students are also experiencing the robbing of the student's possessions. Criminals have literally declared such area a no-go area and
20 it is shattering to not hear of any police action and visibility around that area.

The people of South Africa are tired of wanton disregard of human life and the continuous perpetration of violent crimes against its citizens. The unlawful use of firearms like one used in this matter to kill the deceased, is a

serious disturbing aspect. Illegal firearms are used mainly in this country to perpetrate serious violent crimes and in most instances, like in this matter, they are not seized by the police while culprits are arrested. Illegal firearms are in wrong hands.

In light of the current high level of violence and serious crimes as shown by recent police crime statistics in our country, the courts are expected, when sentencing such crime, to place much emphasis on retribution and
10 deterrence.

It is acceptable for the Court to take account of public feelings as was expressed in the matter of *R v Karg* 1961 (1) SA 231 (A). however, it must be noted that the object of sentencing is not to satisfy public opinion but to serve the public interests as a sentence that caters predominantly public opinion is inherently flawed (see the matter of *S v Mhlakhaza* 1997 (1) SACR 515 (SCA)).

The other disturbing aspect that emerged in this matter was the fact that the deceased, after being shot and
20 injured refused to lay criminal charges against the accused, with the police.

It is not clear whether it was because of the fact that the deceased perceived the accused connected to the police and did not trust in the police or he wanted to take revenge on the accused.

The deceased's brother, at the time of this incident, was employed in the South African Police, and I fail to understand why the deceased felt that he will not get help if he lays criminal charges with the police. The only inference which can be drawn is that the deceased wanted to revenge his shooting after he is discharged from the hospital.

We also heard in evidence that the deceased, prior to this incident, was shot and injured. This aspect became relevant relating to the bullet which was retrieved from the
10 body of the deceased following the shooting in this matter. It became plain that such bullet was from an earlier shooting of the deceased, which led to the state seeking an amendment relating to the type of calibre which was used to shoot and kill the deceased.

The details of that prior shootings are irrelevant for the determination of this matter but paints a picture for this Court of what type of a person the deceased was. However, that cannot serve as a justification for the accused to kill the deceased as the circumstances of this matter shows that it
20 was unnecessary for the accused to kill the deceased.

As already indicated elsewhere in this judgment, that the provisions of section 51(1) of Act 105 of 1977 are applicable in this matter. This Court is willing to deviate from imposition of a prescribed minimum sentence in terms of the provisions of section 51(3) of Act 105 of 1997 for the

following.

1. The murder is not premeditated or planned.
2. The deceased, despite knowing the identity, which was later divulged to his mother, girlfriend and her entire family, of the person who shot him, failed to report the accused to the police.
3. Accused health deteriorated, an aspect that is not disputed by the state after his arrest. His illness caused him to be frustrated due to not getting an outside prison medical
10 attention despite the fact that it is the prison hospital which referred him for medical treatment at Kalafong Hospital.
4. Accused has been in custody in this matter since December 2020, even though the warrant for his arrest in this matter was issued in June 2020. Accused was arrested in June 2020 for an unrelated matter but was only charged for the commission of this matter after charges were withdrawn in the other matter which is said to be a 2001 matter; and
5. Accused has a previous conviction which is over 10
20 years and not relevant to the current convictions. As a result, the accused is treated as a first offender for purposes of sentence.

The mere pronouncement by this Court that it is willing to deviate from imposition of the prescribed sentence must not be wrongly construed that this Court will be lenient

with the accused.

The deceased was shot in cold blooded manner by the accused. The deceased did not immediately succumb to his injuries but was in hospital for a period of three weeks. Three operations (surgeries) were performed on the deceased during his stay at the hospital before his demise. From evidence it is clear that the deceased was in constant pain. Medical interventions which were in my view necessary as the deceased was shot in his abdomen, also
10 caused him more pain as a laparotomy was done.

Since he was shot, the deceased's mobility was affected and he was bedridden, all this because of the conduct of the accused. The children of the deceased are now without a father figure in their lives as the deceased is no more. They and the family of the deceased can only console themselves by visiting the grave of the deceased whereas the children of the accused will have a benefit from having a father figure in their lives and also exercise their rights by visiting the accused in prison.

20 The accused wantonly disregarded and undermined the deceased's right to life as enshrined in the constitution in terms of the provisions of section 11. The accused is currently enjoying this right despite ending the life of the deceased.

Accused also undermined the deceased's right to

human dignity by failing to protect and respondent deceased's right to human dignity as enshrined in section 10 of the constitution, by compromising his personal security and subjecting him to forms of violence.

The deceased, after being shot, had to take refuge in a stranger's property and had to be transported by a stranger in his vehicle, and the deceased leaving his vehicle behind.

The accused is a power unto himself. This Court
10 was informed that several witnesses refused to come and testify in this matter because they are afraid of the accused. The owner of the house where the deceased ran to after being shot, who is also a neighbour of the accused, initially agreed to can come and testify and later on refused as she was concerned of her safety.

I am going to impose a very lengthy sentence against you, which I consider to be proportionate to the crime committed, the sentence which will serve the object of sentencing, which is retribution and deterrence. The fact
20 that I am willing to deviate from the imposition of a prescribed sentence clearly shows that I considered another object of sentencing which is mercy.

No amount of sentence can bring the life of the deceased back. Having regard to the above I am going to sentence the accused as follows.

Count 1, murder, you are sentenced to 20 years' imprisonment.

Count 2, unlawful possession of firearm, you are sentenced to six years' imprisonment.

Count 3, unlawful possession of ammunition, you are sentenced to two years' imprisonment.

It is ordered that the sentences in counts 2 and 3 are to run concurrently with the sentence in count 1. The effective sentence to be served by the accused is 20 years' imprisonment.



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MOSOPA, J

JUDGE OF THE HIGH COURT

DATE:

17/05/2024