

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: SS 54/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO ☐
25 April 2024	
DATE	SIGNATURE

In the matter between:

THE STATE

and

NTSIBANDE, MUSA FRANK

Accused

JUDGMENT

Mdalana-Mayisela J

- [1] This is a judgment on sentence. I delivered my judgment on 15 September 2023 in respect of the trial and conviction which followed upon it.
- [2] The accused had been charged in count 1 with assault with intent to do grievous bodily harm; count 2 with the contravention of the provisions of section 120(6)(a) read with sections 1, 103, 120(1)(a), section 121 read with

schedule 4, and section 151 of the Firearms Control Act,¹ (pointing of a firearm, an antique firearm or airgun); alternative to count 2, with the contravention of the provisions of section 120(6)(b) read with sections 1, 103, 120(1)(a), section 121 read with schedule 4, and section 151 of the Firearms Control Act,² (pointing of something likely to lead a person to believe it is a firearm); and count 3 with murder read with section 51(2)(a) of the Criminal Law Amendment Act ("the CLAA"),³ and further read with section 258 of the Criminal Procedure Act ("the CPA").⁴

- [3] The accused pleaded not guilty to all the charges. On count 2 and the alternative count he was discharged in terms of section 174 of the CPA. On count 1 he was found not guilty. On count 3 he was found guilty of murder with criminal intent in the form of *dolus eventualis*.
- [4] The state proved no previous convictions. The accused did not testify in mitigation of sentence. He presented a pre-sentencing report prepared by the social worker in private practice, Ms Annette Vergeer. The state presented the victim impact report prepared by Mrs Pinky Matsepe and called no other witnesses in aggravation of sentence.
- [5] The sentencing court must strive to achieve a balance in its sentence. In order to do this, it must not sentence in anger or hastily, or take into account irrelevant matters. In *S v Zinn*⁵ the court said that in imposing sentence the court must consider 'the triad consisting of the crime, the offender and the interests of society'.
- [6] First, I deal with the offender and crime. The accused has been convicted of the offence where the CLAA is applicable. The provisions of section 51(2) of the CLAA were explained to the accused before pleading in Court. The state submitted that there are no substantial and compelling circumstances

¹ 60 of 2000.

² 60 of 2000.

³ 105 of 1997.

⁴ 51 of 1977.

⁵ [1969] 3 ALL SA 57 [A] 61; 1969 (2) SA 537 (A) 540G-H⁵

warranting a deviation from imposing the prescribed minimum sentence of 15 years on count 3.

- [7] Section 51(2)(a)(i) of the CLAA provides that notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years. Subsection (3) provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.
- [8] The legislature has not defined substantial and compelling circumstances, it has left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role, none is excluded at the outset from consideration in the sentencing process⁶.
- [9] If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. In doing so, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided⁷.
- [10] I now turn to deal with the accused's personal circumstances. I have considered all the personal circumstances mentioned in the pre-sentencing report and I do

⁶ S v Malgas 2001 (1) SACR 469 SCA at 470-471 paras E and F.

⁷ S v Malgas supra paras I and J

not intend to repeat all herein. Briefly, they are as follows. He was born on 15 July 1986. He has six minor children. The eldest daughter was born on 11 November 2007. She committed suicide on 11 November 2023 after the accused was convicted of murder. She left a suicide note where she stated that she wanted to live with the accused. The second daughter is 12 years old. She was born with a physical disability. She finds it difficult to walk. The mother is unemployed. She receives a child grant. The third daughter is 10 years old. The mother is unemployed. She receives a child grant. The fourth child is 6 years old. He has been in the care of the accused since birth. Currently, he is in the care of the accused's cousin. The fifth child is 5 years old. The mother is unemployed. He receives a child grant. The sixth child is 4 years old. He is the son of the accused and the deceased. Currently, he resides with the aunt and uncle of the deceased. The accused has been denied access to the child since the death of the deceased. The accused maintains all his children. He is the bread winner for his children.

- [11] The father of the accused passed away during 2020. His mother passed away during 2010. He has two siblings. His sister passed away during 2020. His brother committed suicide in February 2024 while the accused is in prison. The accused completed grade 12. He also completed an IT course at Damelin Business School. He was employed by Woolworths for a period of 12 years. He resigned and started his own construction business, Kasi MF Holdings. He has a business partner. At the time of his detention, they were busy with the construction of a road from Kyalami to Leeukop which has since been stopped or placed on hold. He was earning R250 000.00 per month.
- [12] He is unmarried. The accused and the deceased met during November 2017. He paid lobola for her. He murdered her on 3 August 2020. He is a first offender. He spent two months in prison before he was released on bail. He has been in custody for seven months since his conviction. He apologised to the deceased's aunt for the death of the deceased on the day the offence was committed. The accused is generally a healthy person. Currently he experienced stressors and depression.

- [13] It was submitted on behalf of the accused that the following circumstances are substantial and compelling. His business ensures employment and income for many people. He is a breadwinner for his six minor children. He is a first offender. He does not impose a threat to members of the community. He spent few months in prison before his sentencing. He showed remorse. His eldest daughter committed suicide after his conviction, and he did not attend the funeral.
- [14] The following factors are aggravating. Murder is a serious and prevalent offence. The deceased was killed in her bedroom which is supposed to be her place of safety. She was killed by the person who was supposed to love and protect her. The fact that the accused thought it was an intruder does not make the offence less serious. He knew that the firearm is a deadly weapon. He did not fire a warning shot. The deceased's minor children have been left without a mother. She was a young and energetic woman, and her life has been prematurely terminated. The children of the deceased had to move in with her aunt and uncle which forced them to adapt to a new environment and new living arrangements. The minor children have lost both parents because of the offence as the accused is now in custody. Their eldest child saw the deceased lying down in the pool of blood, which was very traumatic. The family of the deceased has been financially and emotionally impacted by the offence.
- [15] The society has been enraged by the death of the deceased. The court must impose a balanced sentence that will also deter other members of the society from committing this kind of offence. However, the court must distinguish between punishment and vengeance when exercising its sentencing function.
- [16] Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's particular circumstances at the time of the offence⁸.

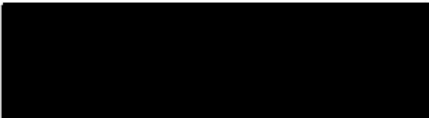
[1] ⁸ *S v Mashego (CC142/2017) [2019] ZAGPPHC 95 (22 March 2019)*.

- [17] I have considered all the relevant factors in sentencing, without overemphasizing one factor above others. In my view a lengthy sentence of imprisonment will not serve justice in the circumstances of this case. The children who are the main victims in this case are not coping as evidenced in the victim impact and pre-sentencing reports. The accused is the bread winner for his minor children. He has prospects of rehabilitation. The court as an upper guardian of the minor children has a duty to consider the minor children's interests in sentencing. I find that the personal circumstances of the accused cumulatively taken amount to substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.
- [18] In my view the appropriate sentence that fit the accused as well as crime, fair to him, victims and society is the one that follows.

Order

- [19] The following order is made.

1. The accused is sentenced to 12 years direct imprisonment for murder.
2. In terms of section 103 of the Firearms Control Act the accused is declared unfit to possess a firearm.


MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered:

25 April 2024

APPEARANCES:

For the State:

Adv. N P Serepo

Instructed by:

The National Prosecuting Authority of
South Africa

For the Accused:

Mr P T Leisher

Instructed by:

Paul T Leisher & Associates