

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG.
(PALM RIDGE)**

Case No.: SS 31/2023

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES. |

19 September 2024

DATE

SIGNATURE

In the matter between:

THE STATE

and

D[...] M[...]

Accused

JUDGMENT ON SENTENCE

NOKO J

Introduction.

[1] This is the judgment on sentence against the accused who was convicted on 11 June 2024 of the charges detailed below. The court has, subsequent to the conviction, revoked the bail. The case was then remanded and the accused was to be kept in custody. The matter was postponed to 19 September 2024 for sentencing.

Background.

[2] The accused was convicted of, first, murder read with the provisions of section 51(1) of the Criminal Law Amendment Act¹ (CLAA) in that he intentionally and unlawfully killed N[...] B[...] M[...]. Secondly, the accused was convicted of child abuse as contemplated in terms of the Children's Act² in that he intentionally and unlawfully abused K[...] M[...] by leaving her in a shack next to a dead body without food and with dirty clothes.

Evidence in mitigation.

[3] The accused took a stand to provide his testimony in mitigation. He provided the court his personal details as follows: that he was born in 1995, he is unmarried, he has two children, a boy, named L[...] aged 7 and a girl named K[...] aged 3. Further, that L[...] is currently staying with his mother and the grandmother. He is being taken care of by both the said grandmother and the accused. K[...] is apparently residing with her grandmother in Limpopo.

[4] He has N6 certificate obtained from Western TVET college. He was previously employed at the college to screen student to determine if they contracted Covid 19. He also assisted with marking of scripts for students and invigilation during examinations. His income was not fixed and was depended on duties assigned to him at a specific time and for a specific assignment. He grew up being taken care of by his mother who has now passed on. His father was never present in his upbringing. He has 5 siblings, two females and 3 males. The said siblings are unemployed.

¹ Criminal Law Amendment Act 105 of 1997.

² Children's Act 38 of 2005.

[5] The accused stated under cross-examination that his earnings ranged between R4 200.00 and 5 500.00. In addition, he was getting earnings from his internet café business. He also worked at Old Mutual as a consultant from where he received commission and not a fixed income. The accused further detailed under cross-examination as to when he started with studies at the college and when he started working there.

[6] The State requested details of his contacts or visitations with L[...] who was staying in Mpumalanga and the extent of his financial commitments for the child. He retorted that L[...] will be brought to his homestead for visitation. He further stated that with regard to the financial assistance there was no agreed or fixed amount instead he would pay the amount as requested from time to time by L[...]’s mother.

[7] The defence decided not to call any other witness and closed its case. The State opted not call any witness to testify in aggravation.

Submissions by the parties.

[8] The State submitted that the accused has failed to present substantial and compelling circumstances which can justify departure from the prescribed minimum sentence. He has failed to discharge his responsibilities as a father and left the grandmother to take of his child.

[9] The accused has not showed remorse. He was not being honest with the court as he conveniently decided to forget other details of his finances and to this end did not take the court into his confidence. By way of an example, he stated that he cannot remember earnings he was making at Old Mutual.

[10] The way through which the deceased was killed demonstrate how insensitive the accused was. Such conduct is symptomatic of what obtains from abusive and chauvinistic males. The court should relay its displeasure at the accused for the

gruesome crime he committed. In addition, counsel submitted that the SCA in *Matyityi*³ held that it should not be business as usual when the court mete out a sentence in respect of offences falling under the prescribed minimum sentence regime.

[11] The State continued and submitted that in the premises and more particularly in view of the failure to present substantial and compelling reasons the State recommended life sentence in respect of the conviction of murder as decreed by section 51(1) of the CLAA and 5 years in respect of the child abuse conviction. Further, that he must also be declared unfit to own a firearm.

[12] The defence on the other hand submitted that it is acknowledged that section 51(1) of the CLAA enjoins the court to sentence the accused to life imprisonment. However, the court should make a fair assessment of all factors to establish whether the accused has shown the existence of substantial and compelling circumstance to depart from imposing the prescribed minimum sentence. The accused was a first offender and as such he was not friends with criminality. He helped the community by opening business and employed members of the public. He proceeded by himself to report the crime and that is indicative of remorse.

Legal principles.

[13] It was held in *Malgas*⁴ that the legislature was ordained with the powers to prescribe the minimum sentence and the attendant obligation was discharged through the promulgation of section 51 of the CLAA. In doing so, the legislature was alive to the fact that the presiding officers cannot be robotic in their endeavour to dispense justice hence included section 51(3) of the CLAA which permits of deviation from imposing a minimum sentence where there are substantial and compelling reasons to do so.

³ *S v Matyityi* 2011(1) SACR 40 (SCA).

⁴ *S v Malgas* 2001(1) SACR 469 (SCA).

[14] The courts have not been prescriptive to define what substantial and compelling reasons are. The courts would in this regard consider cumulatively factors which are generally employed to determine a just sentence. Such factors includes what was set out in *Zinn*⁵ which recommended that the court should look at the nature of the offence, the offender and interest of the community.⁶ There must be a balancing exercise of those factors for the court to determine a just sentence. Those factors are to be considered *in tandem* with the main purposes of punishment namely, deterrence, prevention, reformation and retribution.⁷

[15] The community needs the protection from the court against being savaged by those who unleash serious offences unto it. Public outcry should not be ignored. That notwithstanding it was held in *SMM*⁸ that the said public outcry “... *cannot be permitted to displace the careful judgment and final balancing that are involved in arriving at an appropriate sentence.*”⁹

[16] Where an accused alleged that he was remorseful the court should not lose sight of the fact that the lines between the remorse and regret are sometimes blurred. The SCA held in *Matyityi* that

“There is, moreover, 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. This, 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,

⁵ *S v Zinn* 1969 (2) SA 537 (A).

⁶ It was stated in *S v Matyityi* that the importance of proportionality and balance between the crime, the criminal and the interest of society must be stressed. Further that “... *it remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored.*”

⁷ See *S v Rabie* 1975 (4) SA 855(A). Further stated in *Malgas* that “... *the ultimate impact of all the circumstances relevant to the sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardized response that the Legislature has ordained.*”

⁸ *S v SMM* 2013 (2) SACR 292.

⁹ *Id* at para 13.

rather than what he says in court, that one should rather look. In order for the remorse to be 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. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions".¹⁰

Analysis.

[17] I had regard to the personal circumstances of the accused that he is an unmarried 29-year-old man and has two young children aged, 3 and 7. Further, that L[...] is currently staying with his mother and the grandmother. That child is being taken care of by the said grandmother and the accused. That his other child, K[...] is residing with her grandmother in Limpopo. Whilst the court appreciate the value of personal circumstances in sentencing process it was held in *S v Vilakazi*¹¹ that in serious cases the personal circumstances recedes in the background once it becomes clear that longer prison sentence is warranted.

[18] In his testimony the accused presented no evidence to show that he is remorseful, if anything he evinces a posture of regret. This profile is at odds with the requirements needed for one to qualify as a perfect candidate for rehabilitation.

[19] The murder of deceased who is female who are of a weaker gender was heartless particularly that a hammer was used. It was indeed horrific and was executed with shocking brutality and cruelty against someone who was defenceless. Even worse the accused has left the child with a dead body. The fact that the accused attempted to be creative and claimed that the deceased lied to him about the deceased's infidelity and he is not the father of the child cannot be an excuse. If

¹⁰ *Supra* note 3, at 47 A - D.

¹¹ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58.

anything, these factors weigh heavily against the accused and also outweigh what accused submitted as substantial and compelling reasons. The conduct of the accused has deprived the deceased's parents of their adult child. In addition, he has deprived his children the benefit of a father through his selfish indiscretions.

[20] It is acknowledged and was mentioned by the State that the community has its hope on the judiciary to protect their rights. The courts cannot outsource this responsibility as this would defeat the object of the very existence of the judiciary which is, *inter alia*, to ensure that there is justice and respect of the law. Such dereliction of duties by the court may also engender self-help and kangaroo courts. The accused has shown himself as an outcast who deserve of no mercy from any quarter by unleashing a deadly punishment to the late N[...] B[...] M[...]. Such conduct has no space in a constitutional democracy and must be nipped from whence it lurks.

[21] The attempt by the defence to contend that there were factors which has the effect of tilting the scale in favour of the accused relative to substantial and compelling circumstances is unsustainable.

[22] I had regard to the factors alluded to in mitigation and am persuaded that they are outweighed by the aggravating factors alluded to by the state.

[23] In the premises the following sentences are imposed:

- 1) Life imprisonment for the murder of N[...] B[...] M[...].
- 2) 5 years for child abuse.
- 3) The accused is declared unfit to possess a firearm.

MV NOKO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Dates:

Hearing: 26 July 2024.

Judgment: 19 September 2024.

Appearances:

For the State:

Adv M. Mokwatedi.

Office of the Public Prosecutions, JHB.

For the Accused:

Adv. M. Mzamane. Legal Aid of SA.