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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: SS48/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
03/10/2024	_____
DATE	SIGNATURE

In the matter between:

THE STATE

and

M[...], S[...] R[...]

ACCUSED 1

R[...], J[...]

ACCUSED 2

JUDGMENT ON SENTENCE

BRITZ, AJ

[1] The two accused in this matter, S[...] R[...] M[...] and J[...] R[...], were convicted of three counts:

1. Murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 and further read with the provisions of sections 92(2), 256 and 258 of the Criminal Procedure Act 51 of 1977.
2. Robbery, read with section 51(2) of the Criminal Law Amendment Act 105 of 1977 and further read with the provisions of section 92(2), 256 and 258 of the Criminal Procedure Act 51 of 1977.
3. Attempted theft.

[2] The conviction of murder attracts a mandatory minimum sentence of life imprisonment and that of robbery a mandatory minimum sentence of 15 years imprisonment, unless this Court finds substantial and compelling reasons to deviate from these prescribed minimum sentences.

[3] At the commencement of the sentencing phase, accused 1 admitted two previous convictions, one for a contravention of the Identification Act and one for fraud. The State proved no previous convictions against accused 2.

[4] It is now this Court's unenviable task to sentence each of the accused appropriately.

[5] In order to determine an appropriate sentence, the court has to carefully weigh and balance the nature and seriousness of the crime, the interests of society and the personal circumstances of the accused, without over or under emphasizing any of these factors. The court must also blend the sentence with a measure of mercy as is called for by the circumstances of this case.¹ In addition to this the court must also be alive to the purposes of sentence, which, in general terms, are retribution, prevention, deterrence and rehabilitation.²

[6] In *S v Malgas*³ the Supreme Court of Appeal laid down the law as to how sentencing courts should treat and implement the provisions of the Criminal Law Amendment Act, 105 of 1997. The SCA made it clear that when it comes to

¹ *S v Zinn* 1996 (2) SA 537 (A)

² *S v Rabie* 1975 (4) SA 855 (A)

³ *S v Malgas* 2001 (1) SACR 469 (SCA)

sentencing it can no longer be business as usual and that the prescribed minimum sentences should be viewed as generally appropriate for the offences they have been prescribed. The court further declared that those prescribed minimum sentences should not be departed from lightly and for flimsy reasons.

[7] Before counsel addressed the Court on the aspect of sentence, both accused as well as the parents of the deceased testified.

[8] Accused 1 testified that she was born on 1 October 1991. She is single and the mother of three boys who were respectively 14, 11 and 6 years old at the time of her arrest. The father of the eldest two boys passed away and she and the father of her youngest child separated when the child was 6 months old. She got no support from the father and had to make do with social grants she received in respect of each child. From the time of her arrest until now the children have been living with her grandmother who stays in Winterveld and who is deep in her 70s by now. She receives no visits from the children because of the distance between them, the inability of her grandmother to travel and the attitude of the rest of her family who have shun her as a result of this case against her. It was reported to her by a social worker that the children find it difficult to adapt to their new lives.

[9] Accused 1 testified that her highest level of education was Grade 10 which she passed in 2009. She was formally employed at Spar Supermarket from 2016 to 2018, when she was retrenched. Since then she was unable to find other employment. The situation got worse with the outbreak of the Covid pandemic shortly thereafter. She found it very difficult to provide for the children with only the grant money to assist her.

[10] Accused 1 became teary on the witness stand and started to cry to such an extent that the Court had to adjourn for a few minutes in order for her to compose herself. She then testified that she was sorry for what she did and asked the Court and Cowley family for forgiveness and leniency. She testified that she felt ashamed for what she had done and that it was poverty that drove her to do what she did. She was sorry for what she did because her children must now grow up without her and

she was not even able to bury her mother when she passed away. She has learned that crime does not pay.

[11] She testified that she had been in custody for over 3 and a half years and that life in prison was difficult. She continues to pray and has asked God for forgiveness for what she had done. She further testified that she was from the day of her testimony a different person and that she would never again engage in criminality.

[12] In cross examination by counsel for the State, accused 1 admitted that by killing the deceased she had done irreparable harm to his family, as they would, unlike her, never have a chance to be reunited with their son again.

[13] In questions by the Court she testified that she was sorry for what she had done. When given an opportunity to tell exactly what happened inside the flat of the deceased, she only said that it broke her heart how things turned out. Asked about her sudden outbreak of emotions, she said that she was waiting for the right time to apologise to the family of the deceased. She further testified that she did not wake up the day of the incident with the intention to kill anybody.

[14] That concluded the testimony of accused 1.

[15] Accused 2 testified that she was born on 26 August 1987. She was single with two children – a girl who is currently 16 years old and a boy who is 6 years old. Both children are staying with her sister in Soshanguwe since her arrest. Her sister receives a social grant in respect of each of the children.

[16] Accused 2 testified that her highest qualification was Grade 11. Prior to her arrest she was not formally employed and made a living from prostitution. She was unable to give an estimate of her monthly income. She testified that she used the money she got to buy food and clothes for her children.

[17] Accused 2 testified that she suffers from piles from time to time and that she is also on ARVs. Her medical conditions are being treated in prison.

[18] She remained adamant that she is not guilty of having committed any offence.

[19] Cross examination by counsel for the State did not result in anything material.

[20] Maynia Cowley testified for the State. She testified that she was the mother of the deceased. The deceased was murdered two days before his 29th birthday. He was single and had no children.

[21] She testified that the deceased was a Chartered Accountant who obtained his qualifications from the University of the Free State in Bloemfontein. Although the family reside in the Eastern Cape, the deceased moved to Johannesburg for work, where he was employed in a private firm working in Johannesburg and Turkey.

[22] Mrs Cowley testified that on 14 April 2019 they received a phone call from a friend of the deceased in Johannesburg, informing them that the deceased went missing, after having gone out with his friends on 12 April. The friend further informed them that the deceased was found laying in his flat and that he was deceased. On hearing that news Mrs Cowley's entire life changed forever and a part of her heart died. It is only her strong relationship with God, her love for her daughter and grandchild and the respect she has for Kyle's soul that keep her going on with her life. She finds comfort in God's promise to her that justice will be done for Kyle. She is heartbroken, but at the same time sees what happened to Kyle as God's way of preventing the same evil to befall other families. She described the murder of Kyle as pure evil.

[23] In cross examination by counsel for accused 1, Mrs Cowley testified that she witnessed the breakdown of accused 1 on the witness stand and that she heard the words coming from accused 1's mouth, but that she never saw any remorse in the accused's eyes. She testified that the accused scarred her for life and that it was against the natural order of things for a parent to bury a child. Asked about the sentence she would like to see imposed, she testified that she is just an ordinary human being and that it was not her place to judge the accused. She would leave sentence in the discretion of the Court.

[24] This concluded the testimony of Mrs Cowley. The next witness was Len Cowley.

[25] Mr Cowley was, from the onset of his testimony, and despite his best attempts, emotionally distraught on the witness stand. Despite this he insisted to push through with his testimony in honour of Kyle.

[26] Mr Cowley testified that he was Kyle's father and the one who answered the phone call on 14 April 2019. He was also the one who identified Kyle's body in the morgue on what would have been Kyle's 29th birthday.

[27] Mr Cowley testified that when he received the phone call on 19 April he started to negotiate with God in his mind to let the words he heard not be true. He was overcome with a feeling of guilt that he was unable to protect his son. He described Kyle as the kindest person and the love of his, Mrs Cowley's and their daughter's lives. Kyle was a young man at the start of his life and career. He described it as terrible to have sat in court and listen to the lies being told about Kyle. He hated how Kyle was referred to as 'the deceased'. He feels helpless and terrible to know the feeling to have lost a child. He wishes that on nobody. Seeing the impact of Kyle's death on his wife and daughter made him willing to strike a deal with the devil to take his life and return Kyle to Mrs Cowley.

[28] Asked about the sentence he would like to see imposed, he testified that the accused did not deserve to be called mothers or women. He labelled them a threat to their own children. He testified that he will never be able to forgive them and requested the harshest sentence possible to be imposed. He was upset that the accused never even took time to get to know Kyle. He was not impressed by accused 1's performance on the witness stand and called it a show he did not fall for.

[29] Before leaving the witness stand, and with leave of the Court, Mr Cowley read out a message sent to him by his daughter. In this message she expressed her anguish at having lost her sibling. She referred to Kyle's kind-heartedness and the love she and the rest of the family had for him. She called him the cornerstone of the family and said she will always miss him.

[30] This concluded the evidence in this part of the case. Hereafter all three counsel addressed the Court on the issue of an appropriate sentence.

[31] Counsel were all in agreement that sentencing is the most difficult stage of a criminal trial and that the issue of imposing a sentence resort within the discretion of the Court. They also agreed that each case is unique and must be treated as such.

[32] Counsel for accused 1 pointed out that sentence must be blended with a measure of mercy and must not be aimed at destroying the offender. She referred to the generally acknowledged purpose of sentence which must be considered. She argued that what needs to be considered is the offence, the offender, society and the impact of the crime on the victim.

[33] Counsel for accused 1 referred to s 51(3) of the CLAA⁴ which provides for a way to deviate from the prescribed minimum sentences. She argued that life imprisonment is the ultimate sentence and that before the court imposes that sentence it must first consider other sentencing options.

[34] Counsel submitted that accused 1 does not deserve life imprisonment as she has no history of violence. She also requested the Court to be mindful of the past socio-economic circumstances and the persistent poverty caused by it and the effect that poverty has on today's society.

[35] Counsel referred the Court to the Constitutional Court case of S v M⁵ which instructs all sentencing courts to give prevalence to the best interests of any children that might be affected by the sentence to be imposed. She further referred to a recent case in this division, S v Mphalele⁶, in which reference was made to the S v M case. On the basis of those two cases counsel argued that because accused 1 is the mother of three minor children and a care-giver this Court should deviate from the prescribed minimum sentence.

⁴ Criminal Law Amendment Act, 105 of 1997

⁵ S v M (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC)

⁶ S v Mphalele (SS 111/2021) [2023] ZAGPJHC 792

[36] Counsel for accused 1 further referred to the fact that the accused have spend over three and a half year in custody awaiting trial. She pointed out that the living conditions of awaiting trial detainees in prison are much worse than that of sentenced prisoners. She further pointed out that he accused had the further disadvantage of having been in prison during much of the Covid pandemic. All of this, so she argued, were also reasons for this Court to deviate from the prescribed sentence.

[37] Counsel for accused 1 drew the Court's attention to the accused's co-operation with the police from the time of her arrest, the effect this case had on her relationship with her family and her own expression of remorse during her testimony on sentence. Counsel submitted that this were all indicators that the accused had turned a corner and that there was therefore a good prognosis for rehabilitation. She further argued that the circumstances in which the offences the accused were convicted of were simply that of a sexual deal that went array. She requested the Court to be mindful that alcohol played a roll in the commission of those offences and that the accused also sustained an injury during the cause of what happened. She therefore cautioned that the Court should not over-emphasise the seriousness of the offences.

[38] Counsel requested the Court to order the sentences on all three counts to run concurrently and submitted that a sentence of 15 to 18 years imprisonment would be sufficient. Today, with leave of the Court, counsel changed her recommendation to 12 to 15 years imprisonment.

[39] Counsel for accused 2 started her address on sentence by referring the Court to several decided case on how a sentencing court should determine what an appropriate sentence would be. These cases are not new and the principals stated in them are by now trite. I have considered these cases and have reminded myself of the principals laid down in them. For the sake of brevity and for the reasons stated above I do not deem it necessary to summarise those cases in this judgment.

[40] Counsel for accused 2 submitted that accused 2 is a first-time offender, that she has no history of crime and that she shows no propensity to violence. She too referred to the long time the accused spend awaiting trial and added that the delay in bringing them to trial was not their fault. She reminded the Court of accused 2's testimony regarding her personal circumstances and requested the Court to keep that in mind when determining an appropriate sentence.

[41] Counsel for accused 2 conceded that South Africa has a very high murder rate. She submitted that in the circumstances a lengthy period of imprisonment would be an appropriate sentence.

[42] Counsel for accused 2 reminded the Court that there was no definition of the phrase 'substantial and compelling circumstance' in our law. She referred the court to the case of *S v Jansen*⁷, where it was said that a sentencing court is compelled to consider all the mitigating factors to see whether they are of substantial weight to enable the Court to exercise a discretion and impose a reduced sentence.

[43] Counsel further referred to the decision of *S v Mhlakaza and Another*⁸ and reminded the Court that the object of sentencing was not to satisfy public opinion, but to serve the public interest.

[44] Counsel argued that the fact that the accused did not plead guilty cannot be held against her as it was an exercise of a constitutional right. The exercise of that right, she submitted, cannot prevent the Court from finding that the accused shows remorse. She submitted that by reasoning to the opposite would place the accused in an unfair no-win situation.

[45] Counsel for accused 2 submitted that when viewed in their totality, all the circumstances pertaining to accused 2 points to substantial and compelling circumstances calling for a deviation from the prescribed sentences. She submitted that an effective term of 25 years imprisonment would be an appropriate sentence.

⁷ *S v Jansen* 1999 (2) SACR 368 (C)

⁸ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA)

[46] Counsel for the State referred the Court to the demeanour of the family of the deceased and the effect of his death on them. She reminded the Court of the inroads the CLAA has made in the sentencing discretion of the Court. She addressed the paramountcy of the right to life and the reason why South Africa does not have the death penalty. She referred to the untimely taking of the deceased's life, the rare skills he possessed as a chartered accountant and the life he had waiting for him and the good influence he could have had on society as a whole. She referred to the deceased's kind-heartedness and the fact that he lived it out by allowing the accused in his flat which was his sanctuary and the fact that he paid for the Uber and bought all of them food.

[47] Counsel for the State described the manner in which the deceased was killed as cruel and inhumane. She argued that in comparison with accused 1, accused 2 showed no remorse.

[48] Counsel further referred to the facts of the *S v M* case and argued that the present case is distinguishable from that case. She submitted that the accused's children are well taken care of and that social workers can take the children to visit the accused if needed.

[49] Counsel submitted that the only appropriate sentence in this case would be direct imprisonment.

[50] It stands to reason that murder and robbery are serious offences which both contain an element of violence. Robbery and attempted theft further contain an element of dishonesty. These are all traits that erode the moral values we strive for in a society that we attempt to build on the values of our Constitution and Ubuntu. When our values are threatened the courts must step in to protect society against those who do it harm and to balance the natural order of things.

[51] The taking of the life of another person brings a finality which cannot ever be repaired. It creates an effect like that of a small pebble thrown into a tranquil pond. In many instances these effects circle out so far and wide that their full impact remains forever unnoticed.

[52] Kyle Cowley was by all accounts a much beloved, kind-hearted young man who was robbed of his dreams and potential in the prime of his life. Through hard work he managed to obtain sought after qualifications and good employment. He contributed to society and enjoyed the fruits of his labour. It is unimaginable to think that the thought crossed his mind when he went to Billy the Bum with his friends, that it would ultimately cause him his life.

[53] The fact that such a person was murdered is in itself an aggravating circumstance. It is, however, not the only aggravating circumstance in this case. In my view, the manner in which he was killed is also an aggravating factor, as I agree with counsel for the State that it was cruel and inhumane. The fact that he was murdered in his home by people he invited in and to whom he showed hospitality is also aggravating. On the accepted evidence he was murdered for financial gain, yet the accused only took his cellphone and house keys. Perhaps the most severe of the aggravating circumstances in this case is the fact that after a trial that lasted many days, only the accused know what really happened in the flat that lead to his death and they, despite many opportunities afforded to them, remain tight lipped and continue to protect each other.

[54] The personal circumstance of each of the accused were placed before me through their own testimony and the address by their counsel. I take due regard of those circumstances without repeating it here again.

[55] I am mindful of the fact that the accused are both single mothers of minor children and that they have very little support in raising their children. Their life stories are, however, not exceptional. As stated by counsel for accused 1, it is a sad reality that we live in a country with a high poverty rate. Many other people find themselves in similar positions as the accused, and many others in even worse circumstances. The majority of these people live their lives with what ever they have, without committing crime. It is but a small portion of people in the position of the accused who turn to crime. And even then, it is petty crime like shoplifting and not murder and robbery.

[56] Although the accused are both single parents of minor children, it does not mean that the law should turn a blind eye to their wrong-doings. *S v M* speaks indeed of the duty on sentencing courts to consider the interests of children when imposing sentences. However, one needs to remember that the Constitutional Court in that matter dealt with the position where a primary care-giver had to be sentenced. Both accused in this matter have been out of their children's lives for over three and a half years by now. Others have stepped into the shoes of primary care-givers to the children of the accused. The circumstances in this case therefore dictate that these accused no longer fit the definition the Constitutional Court ascribed to a primary care-giver. In the circumstances I agree with counsel for the State that this case is distinguishable from that in *S v M*. Having said this, it does not mean that the Court can just forget about these children. The sentence imposed will still have an effect on them. From the evidence before me I am satisfied that all the children are being taken well care of. They are with family members who care for them, and it is clear that there are also social workers who are keeping an eye on them.

[57] I agree with counsel that the accused have spend a long time in prison awaiting trial. This lapse of time is unfortunately the result of unforeseen circumstances such as the Covid pandemic and systemic challenges where the capacity of judges and prosecutors cannot keep up with the growing number of cases on our rolls, especially in busy metropolitan areas like Johannesburg and Pretoria. Notwithstanding this, I have given due consideration to the time the accused have spend awaiting trial and the conditions in prison.

[58] Counsel for accused 1 in particular referred to her good prognosis of rehabilitation due to her showing remorse. The establishing of remorse in any case is a tricky horse. Accused 1 broke down in tears when she testified, proclaimed that she had remorse, offered her condolences to the Cowley family and begged them and the court for forgiveness. Despite this neither Mr not Mrs Cowley was convinced by the accused. The dicta in *S v Matyityi* 2011(1) SACR 40 (SCA) at paragraph [13] is applicable: "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.... Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error... It is the surrounding

actions of the accused, rather than what he says in court, that one should rather look at. 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.” In this case it is clear that the accused has not taken the court into her confidence. The court still does not know what really happened in the flat of the deceased. The accused further failed to give any cogent explanation for her sudden emotional breakdown and proclamation of remorse. In the result I am not convinced that accused 1 has shown any genuine remorse. To me, she looked and sounded like a person who only now realizes the consequences of her actions and who is making a final ditch attempt at minimizing the impact thereof on her future. I further need to be remembered that she is not a first-time offender, but has a propensity towards dishonesty. I find it highly improbable that she will rehabilitate.

[59] As to accused 2 I have throughout this trial found her demeanor to be cold, hard and almost aggressive at times. There is in my mind no shadow of a doubt that she never has shown any remorse for her actions and with her persistence in her innocence, despite the evidence against her, I find it highly improbable that she ever will show any remorse. There is therefore in my mind no prospect of accused 2 ever rehabilitating.

[60] I have considered the case law counsel referred me to. The majority of the cases dealing with substantial and compelling circumstances stem from a period shortly after the enactment of the CLAA, when there was no clear path set out as to how the provisions of that act should be interpreted. Since then, the SCA has spoken the final word on the issue when it stated ‘it cannot be business as usual’. It has since then become trite that where a minimum sentence is prescribed the starting point should be that such prescribed sentence be imposed and not as suggested by counsel for accused 1 that the Court should consider other sentencing options before it imposes the prescribed minimum sentence. To do as suggested by counsel for accused 1 would be to revert to business as usual. The only escape for an accused under the present regime is for the Court to find substantial and compelling circumstances.

[61] I have carefully considered all the facts and circumstances placed before me in this case by all three counsel. I have, in respect of each accused, weighed each of these facts and circumstances individually and cumulatively. After careful consideration I am convinced that the aggravating circumstances in this matter far outweigh the mitigating factors. The personal circumstances of the accused placed before this Court are nothing but ordinary circumstances which courts hear in almost every criminal trial. Such ordinary mitigating factors, it was held by this Court in *S v Speelman*⁹, cannot be elevated to the status of substantial and compelling circumstances. I therefor find that there are no substantial and compelling circumstances present in this case. I am thus duty-bound to impose the prescribed sentences in respect of counts 1 and 2.

[62] With regards to count 3 I consider that it was an attempt to steal money from the deceased's bank account and that the accused were unsuccessful.

[63] For these reasons the following sentences are imposed on each of the accused:

Count 1: LIFE IMPRISONMENT in terms of s 51(1) of Act 105 of 1997

Count 2: FIFTEEN YEARS IMPRISONMENT in terms of s 51(2) of Act 105 of 1997

Count 3: SIX (6) MONTHS IMPRISONMENT.

[64] I have not heard any submissions why I should make an order deviating from the ex lege position of s 103(1) of the Fire Arms Control Act 60 of 2000 and therefore I make no order. The accused is automatically, by operation of the law, unfit to possess a firearm.

W J BRITZ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances:

⁹ *S v Speelman* 2014 JDR 0916 (GSJ)

For the State: Adv E Moseki – DPP Johannesburg

For Accused 1: Adv S Shongwe – Legal Aid Johannesburg (Judicare)

For Accused 2: Ms Y Britz – Legal Aid Johannesburg