

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. CC75/2023

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED:

DATE:

SIGNATURE:

In the matter of

The State

vs

Mpho Mangweni

Accused

JUDGEMENT ON SENTENCE

MLOTSHWA AJ

- 1 The accused has been found guilty of murder read with the provisions of section 51(1) and further read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 in that on 29 July 2023 he murdered his then girlfriend, Z[...] H[...].
- 2 The accused is 26 years old. He is unmarried. He has a 2-year-old daughter with the deceased. He was unemployed at the time of his arrest for this offence. He has no previous convictions.

- 3 At the time of his arrest, he was a recipient of the State's monthly grant of R350,00.
- 4 The accused has been in custody since his arrest on 29 July 2023, that was on the day of the commission of the offence.
- 5 The accused has been found guilty of a very serious offence. He killed his girlfriend with whom he had a minor daughter. The accused, although, a father to his minor daughter, played no part in taking care of her daily needs. According to his evidence his family were the ones taking care of the child's daily needs including her financial needs.
- 6 When determining the appropriate sentence, the classic triad enunciated in **S v Zinn**¹ is to be taken into account. This court has to consider the gravity of the offence, the circumstances of the offender and the public interest.
- 7 In **State v Banda and Others**² Friedman J explained that:

“The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns.”

¹ 1969 (2) SA 537(A)

² 1991(2) SA 352 (B) at 355A-C

- 8 As aforesaid, the accused is the father of one minor child aged 2 years. It is therefore imperative to this court in the light of section 28 of the Constitution and other relevant statutory provisions to take into account when sentencing the accused that he is a father of the minor child whose mother has unfortunately died at the hands of her father, the accused.
- 9 Section 28 (2) of the Constitution provides that “(a) child’s best interests are of paramount importance in every matter concerning the child”.
- 10 In **S v M**³ it was held that:

“Indeed, it is the very sweeping character of the provision that has led to be asked about its normative efficacy. For example, in Jooste, Van Dijkhorst J stated:

‘The wide formulation of section 28(2) is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings, and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child’s interest. That clearly could not have been intended. In my view, this provision is intended as a general guideline and not a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.’”

- 11 Section 28 of the Constitution like all other rights conferred by the Constitution is subject to the limitation clause contained in section 36 of the Constitution as the Constitutional Court found in **Sonderup v Tondelli and Another**⁴ that the international obligation to return a child to the country of his or her residence for determination of custody would constitute a justifiable limitation under section 36 of section 28 rights. It was found that this limitation on section 28(2) was counterbalanced by the

³ 2008 (3) SA 232(CC)

⁴ 2001 (2) BCLR 152(CC)

duty of courts to weigh the consequences of the court's decision on children". See **S v Mphahlele**⁵ and **S v Howells**⁶

- 12 Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship with other rights, which might require that their ambit be limited.
- 13 The question to be asked in this case is whether the accused is a primary caregiver to the minor child. In **S v M**⁷, a primary caregiver was described as *"the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.....as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise"*.
- 14 According to Busisiwe Hlatshwayo, a cousin of the deceased, the child is presently taken care of by her maternal grandmother, that is, the deceased mother. Strictly speaking the accused is therefore presently not the primary caregiver of the child. This is further confirmed by Ms Masego Nkoane, the probation officer who compiled the Victim Impact report.
- 15 It is therefore clear that if the accused is sentenced to a custodial sentence, although it would be ideal for the child to be brought up by a parent, the impact on the child will be minimal as her status will not change and she is presently being taken care of, adequately. The child's best interests are therefore sufficiently taken care of.
- 16 As the Constitutional Court further found in **M**⁸ that the purpose of emphasizing the duty of the sentencing court to acknowledge the interests of the child is not to permit errant parents unreasonably to avoid

⁵ [2023] ZAGP JHC 792 (14 July 2023)

⁶ 1999 (1) SACR 675 (C)

⁷ *supra*

⁸ *supra*

appropriate punishment. Rather it is to protect the innocent child as much as is possible in the circumstances from avoidable harm.

- 17 Further an appropriate order may be made, that the Department of Welfare and Population Department be requested to see to it that the child is properly cared for during her father's imprisonment and is kept in touch with him. Ms Nkoane further undertook to make a follow up and request her colleagues who are involved in the welfare of children to look at the circumstances of this child.
- 18 The State contended that the accused displayed no remorse. The post-murder behavior of the accused should also be taken into account when one assesses whether or not the accused is remorseful. In **S v Matyityi**⁹ Ponnann JA stated the following regarding remorse:

“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. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from the appreciation and acknowledgement 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, rather than what he says in court, that one should rather look. 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. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. Afterall, 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.”

⁹ 2011 (1) SACR 40 SCA

- 19 In **S v Mudua**¹⁰ an unreported judgement by Mathopo AJA, 15 years ago, as he then was, stated the following:

“Domestic violence has been a scourge in our society and should not be treated lightly, but deplored and severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity.” Sadly, we still sing the same song even today.

- 20 The applicable sentence for the murder is subject to the provisions of section 51(1) of Act 105 of 1997 (the Minimum Sentences Act). In this instance the minimum sentence is life imprisonment.
- 21 It is trite that where the minimum sentence is applicable, a court can only deviate therefrom if substantial and compelling circumstances are found to justify the imposition of a lesser sentence. In **S v Malgas**¹¹ it was stated that when dealing with crimes falling under the regime of the Minimum Sentences Act, it is no longer “business as usual” and that minimum sentences should not be departed from lightly and for flimsy reasons which could not withstand scrutiny.
- 22 The deceased died a painful, brutal, violent and sadistic death. The accused stabbed her 111 times and most likely trampled on her as well resulting in her having broken ribs and head injuries. One shudders to think of the pain felt by the deceased as the knife penetrated her body so many times. The accused’s actions were callous, heartless and really cold. Such brutality would have been heartless even to an animal. The deceased was a defenseless tiny woman who posed no threat to the accused.

¹⁰ 2010 JDR 0641 (SCA): (547/13) [2014] ZASCA 43

¹¹ 2001 (1) SACR 469 (SCA)

- 23 The accused has deprived the deceased's minor children of a mother. The grandparent and other family members are now left with the invidious task of bringing up these children with the meager government child grant.
- 24 As aforesaid, the crime of murder is very prevalent. What makes this crime more despicable is that it was committed against an intimate life partner. Crime in South Africa is out of control. Society expects courts to pass sentences that should deter would-be criminals. The minimum sentences Act was passed more than 20 years ago, mainly to curb the spiraling of the offences mentioned in the Act, one of which is murder. The minimum sentences contained in the Act seem to hardly deter criminals, for if this was the case, then there would have been a steady decline in the rate of murders and more especially murders committed against life partners. As stated in **S v Makatu**¹² “.....*despite all these valiant efforts by the government, we are not winning the war against these crimes*”.
- 25 It is trite that the minimum sentences are ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances which would justify a departure therefrom.
- 26 The court has to evaluate all the circumstances cumulatively including the mitigating and aggravating circumstances to decide whether substantial and compelling circumstances exist in the matter to justify a departure from the ordained sentence. The court must be alive to the fact the legislature has ordained a particular sentence for the offence committed by the accused.
- 27 The court has to balance the aggravating and mitigating factors in this matter. The court has further to take into account that the accused is a father of a minor child.

¹² 2014 (2) SACR 539 (SCA)

- 28 A pre-sentence report was compiled on behalf of the accused by Mr Daniel Moleko a probation officer employed by the Department of Welfare and Social Development, to whom the court is indebted. According to Moleko, the accused responded to questions rationally during the interview. He could differentiate between what is right and wrong. He stated that he is able to make his own decisions without external influence. It is therefore surprising that in his evidence in court and later in the report he alleges that the deceased introduced him to drugs. He further stated that he takes full responsibility for his actions but at the same time he blames his addiction to drugs for his actions.
- 29 In the supplementary pre-sentence report compiled by Ms Matloko Mphahlele, also a social worker with the Department of Welfare and Population Development and attached to the Substance Disorder Unit, the accused informed Ms Mphahlele that he had been using dagga (cannabis) since the age of 16 years. He further stated that in 2020 he developed tolerance for the substance as the substance was no longer giving him the kick he desired. That is when he started using more potent substances such as crystal meth and “double star”.
- 30 In court, it has been argued that the deceased introduced the accused to the drugs. Much has also been made of the fact that the deceased was a drug addict. It is in fact common cause that the deceased used drugs. This was confirmed by her cousin in her testimony in this court and by her family to Ms Nkoane who compiled the victim impact report. But did that mean that she had to be killed let alone the brutal way in which she killed.
- 31 The deceased was not only a mother to the 2-year-old daughter she had with the accused. She also had two older children, a ten-year-old daughter and a seventeen-year-old son from a previous relationship. According to Ms Nkoane, it was reported to her that the seventeen-year-old boy is now also taking drugs. A sorry state of affairs indeed.

32 Due to the seriousness of the offence, which you committed, although the court has to exercise a measure of mercy, see **S v Rabie**¹³, it is required that the elements of retribution and deterrence should come to the fore, and that your rehabilitation should be accorded a smaller role. The Supreme Court of Appeal in **S v Mhlakaza and Another**¹⁴ also pointed out that, given the high level of violent and serious crimes in the country, when sentencing an accused person for such offences, emphasis should be on retribution and deterrence. It is therefore not wrong to conclude that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and victims of crime may be inclined to take the law into their own hands.

33 In affirming that retribution should carry more weight because of the seriousness of the crime which an accused person has been convicted of, when the court considers the aspects relating to the purpose of punishment, it was put in **S v Swart**¹⁵ as follows:

“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.

34 As aforesaid, the deceased was killed in a ruthless manner and showed that the accused has no regard for human life. It is very scary that a partner could be so heartless and coldblooded towards a woman with whom he had an intimate relationship for some time and is the mother of

¹³ 1975 (4) SA 855 AD at 862D-F

¹⁴ 1997(1) SACR 515(SCA)

¹⁵ 2004(2) SACR 370(SCA)

his minor child. The sentence must surely show the indignation of society about this type of crime.

- 35 The Constitution of our country provides that “everyone has a right to life”. It is therefore the duty of the courts to protect the citizens of the country and society in general from the scourge of these violent crimes, and to send a clear message that this behavior is unacceptable and will not be tolerated.
- 36 Society has a legitimate expectation that apprehensible criminal activities as displayed by the accused should not be left unpunished. Society demands and commands that serious crimes warrant serious sentences and expects that the courts send a clear and strong message that such acts of gruesome criminality will not be tolerated and will be dealt with effectively. See **S v Holder**¹⁶
- 37 It is hoped that you will use the time in custody to attend to the necessary programs offered by the Correctional Services fruitfully to attend to your anger management problems, to learn that life is not about you only, other people have rights too. Hopefully you will learn that bullying and controlling other people, especially a life partner is not ideal. Hopefully you will learn that having an intimate relationship with a woman does not mean that you “own” her and that you are at liberty to do whatever you want to do on her, let alone killing her.
- 38 In your case, the court has to consider that, as aforesaid, you are a father of a young child. The court has therefore not to look at your personal circumstances only but also take into account the interests of your child, her mental and physical health, her safety, education, primary needs, care and protection. Unfortunately, you provided none of the above to your child.

¹⁶ 1979 (2) SA 70 (A)

39 As aforesaid, the minor child is being taken care of by the deceased's mother. Her financial needs may also be met in the form of the government's monthly child grant.

40 This court is mindful that a sentence must also be fair to the accused as well as to the community and be blended with a measure of mercy. This court has considered the best interest of the child. The court has considered the test to be applied by sentencing courts when sentencing a primary caregiver, which you are not, to a custodial sentence as set out in the **M**¹⁷ matter. I have applied my mind as to whether the minor child will be adequately cared for while the accused is incarcerated, and this court is satisfied that whilst she is cared for as alluded to above, the measures incorporated in the order of this court have catered for the child's wellbeing and her best interests are considered.

41 I have also taken into account that you have been in custody for just over a year awaiting the finalization of this matter. This period in which you have been in custody is overwhelmingly overshadowed by the heinous crime you committed.

42 In **S v Vilakazi**¹⁸, it was stated that:

"In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two or three children, whether or not he is in employment are in themselves largely immaterial to what the period should be, and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided"

43 This court has also taken into account the other sentencing options like a fine, a suspended sentence, a correctional supervision sentence and is of

¹⁷ *supra*

¹⁸ 2009 (1) SACR 552 SCA

the opinion that due to the heinous crime committed by the accused, all of the above sentencing options are unsuitable. As was stated in **S v Shaik**¹⁹ that:

“The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right to an accused to demand the most favourable possible treatment. A fair trial also requires-fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime”.

In **S v Maila**²⁰ Mocumie JA at Paragraph 59 stated as follows:

“Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgements which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances.....courts should, through consistent sentencing of offenders who commit gender based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as.....the accused was drunk....are an affront to what the victims of gender violence endure short and long term and perpetuate the abuse of women and children by the courts. When the legislature has dealt with some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not.

The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of

¹⁹ 2008 (1) SACR 1 (CC) para 43

²⁰ (429/2022) [2023] ZACSA 3 (23 January 2023)

respect for the dignity and life of others, especially the most vulnerable in society.”

- 44 Taking into account the Zinn triad, the only factors in your favour are that you are still relatively young and have no previous convictions. But the crime that you committed is horrendous and the manner with which you murdered the deceased is cold-blooded. The community is looking upon courts to protect it from these callous crimes. The community is looking upon the courts to impose appropriate sentences for these crimes. If the courts fail in this function, the community will lose faith in the criminal justice system and take matters into their own hands. Your personal circumstances are far outweighed by the crime you committed and the interest of society. The gravity of the offence and the scourge of such offences on helpless and vulnerable women cannot be downplayed. The effect of this crime on the community at large cannot be understated. Cases dealing with murder of women are a plague in this country and continue unabated.
- 45 Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist, which call for the imposition of a lesser sentence than the prescribed minimum sentence in terms of the Act, even though this court looked at your personal circumstances cumulatively, this court could not find same to amount to substantial and compelling circumstances to enable the court to deviate from the minimum sentence of life imprisonment.
- 46 In the circumstances the court makes the following order:
1. You are sentenced to life imprisonment.
 2. You are declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

3. The Registrar of this Court is requested to immediately approach the Department of Welfare and Population Development with a request:

3.1. That the Department of Welfare and Population Development investigate the circumstances of the accused's minor child without delay and take all appropriate steps to ensure that;

3.1.1. The child is properly cared for in all respects during the accused's incarceration.

3.1.2. The child, when she is old enough, remains in contact with the accused during his period of incarceration and sees him on a frequent basis, insofar as prison regulations may permit.

JABULANI JACOB MLOTSHWA

Acting Judge of the High Court

Gauteng Division, Pretoria