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

CASE NO: CC56/2024

DATE: 10-07-2025

(1) REPORTABLE: YES / **NO**.

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

(3) REVISED.

DATE: 10/07/2025

SIGNATURE

In the matter between

STATE

and

JOHAN MARAIS

ACCUSED 1

SENTENCE

MOSOPA, J:

1. The accused, Mr Johan Marais was convicted on the 12 November 2024, following his guilty plea on a count of murder. The accused was at the time of the commission of this offence a member of the then apartheid South African Police, attached to the Reaction Unit and was a section leader. The deceased was a student activist and was a leader in various student formations opposed to the regime the accused served under. The deceased was shot and killed on the 24 August 1987 at his parental place at 9[...] L[...] Street Daveyton.

2. In 1966, the General Assembly labelled apartheid as a crime against humanity (Resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (Resolution 556 (1984) of 23 October 1984). The International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention") was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of United Nations, in addition declared apartheid to be criminal.

3. Article 1 (1) of the Apartheid Convention makes the following pronouncement;

"1. The State Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid."

4. Article 2 provides;

"For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or

dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

5. The Constitution of South Africa in its preamble, recognises the injustice of our past and honour those who support for justice and freedom in our land. The Constitution was adopted to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. The adoption of the constitution led to promulgation of legislation aimed at dismantling and repealing racially based laws.

6. In his book, SS Terblanche, third Edition, A Guide to Sentencing in South Africa, Page 151 to 152 formulates basic principles according to which sentence is imposed and provide that;

- 1) The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case, the sentence should not be too light or too severe;
- 2) An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender, in other words, the sentence should reflect blameworthiness of the offender, or be in proportion to what is deserved by the offender;
- 3) An appropriate sentence should have regard to or serve in the interest of society, the third element of the third element of the *Zinn* triad. The interest of society can refer to the protection of society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that public opinion be satisfied;
- 4) In the interest of society, the purpose of sentencing are deterrence, prevention and rehabilitation and also retribution;
- 5) Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve; and
- 6) Mercy is contained within a balanced a human approach to consideration of the appropriate punishment.

7. The accused refused to testify in mitigation of sentence but led evidence of a clinical psychologist and Mr Matthee who compiled a consideration of correctional supervision as a sentence report. Ms Clark, a clinical psychologist in her report, detailed the personal circumstances of the accused, that he is currently 66 years old, His mother gave birth while she was a University student, but his grandfather had forbidden his mother from getting married to the accused's father as he was a very strict person. His mother was also chased out of their house.

8. The accused was then adopted by his maternal aunt and her husband. His adoptive mother died twenty years ago from smoke inhalation and his father, three

years ago from natural causes. He has adopted siblings, a sister and three brothers. The accused found out that he was adopted when he was 16 years old. Three of his adopted siblings had since died and the only surviving sibling is his sister who is currently 73 years old. The accused described his parents as alcoholics, and the family home was characterised by domestic violence.

9. The accused grew up in a smallholding and the family moved around a number of times that led the accused attending various primary schools. He grew up in a Christian family and only had one friend as he was growing up. He never experienced any abuse in his childhood life, and described his childhood as being happy. He talks of his love for his .22 rifle that he used to shoot at birds and would cook such on fire after the shooting.

10. Accused attended his high school at Huguenot Hoërskool in Springs. He left school at 16 years old when he was in Grade 11, after he obtained permission from the school board to go to the police college. In the police service he completed matric (National Examination) when he was 17 years in 1976. He did several police courses with his time in the police. Accused took a discharge from the police in 1981 and gained employment at Carlton Paper as a re-pulper. He left the employment after six months and joined the Rhodesian Light Infantry and worked there for a year. He then rejoined the South African Police and that is when he was stationed at the Riot Reaction Unit in Benoni. Accused was in and out of the police, and worked at Sun City Entertainment Centre in the Senior Security Office, Koevoet (also known as Operation K or SWAPOL-COIN) based in Rondo. He was also in the then South West border four times in 3-month slots.

11. In 2004 after taking the exams, worked as an Estate Agent mainly selling plots and farms. He also started his own company reclaiming tungsten and other precious metals from the mines. He also had a “spaza shop”, cash for scrap business, second hand/antique shop and in 2010 he published a book titled “*Tydbom – ‘n Polisieman se ware verhaal.*”

12. The accused's first marriage was in November 1987 and divorced on the 22 September 2003. He attributed such partly to his drinking habit. Two sons were

born out of that relation and one stillborn child. He had relationships with two women after such divorce and he is currently not married. Accused as a child, to be precise when he was six years old, he was involved in a motor vehicle collision and suffered head injuries. He also collided with a wall and a metal pole when he was eight years old. He has a sharpnel on his right leg during his time with Koevoet. He also suffered a head injury on his righthand side when the police Casper he was travelling in ran over a landmine. He also sustained a head injury when he was he was hit with a rock during his training as a police officer. He had Bell's palsy when he was eight years old.

13. He has fainting spells but does not know the source of such. He was diagnosed with gout when he was 31 years old. The medical records seen by the Clinical Psychologist indicates that the accused was seen in an outpatient department on the 11 January 2024 for a swollen and septic toe, which he had for three months after defaulting from treatment because of a lack of funds. This resulted in him being admitted into the hospital and the abscess was drained and eventually discharged on the 19 January 2024. His gout ailment is described as severe on his right foot, right knee and right elbow, which also affected his left knee. He has a suppurating sore on his right toe, which is not healing and that makes walking difficult for him. He is currently on chronic medication for gout.

14. Accused experienced bouts of depression and attempted suicide on three different occasions. The death of the deceased in this matter was one of the causes. This led him in having a change in his eating and sleeping patterns. Accused was admitted in a psychiatric ward, where he was seen by a Psychologist, Psychiatrist and a Social Worker but was discharged without a diagnosis after his second suicide attempt. His two adopted brothers died of suicide. Accused used to have a drinking problem but he now occasionally drinks alcohol.

15. It is stated that the accused has remorse and regret. He feels differently now and if he could go back in time, he would never do it. He believed that the deceased at the time was a terrorist. It is acknowledged that the accused did not disclose his role in the killing of the deceased for many years, but in recent years he attempted to disclose that to the police and then contacted a journalist from "Die Rapport". The

accused is a first offender. It is also stated that the accused does not pose a risk to the society at this point. It was then recommended that the accused be placed under correctional supervision with additional hours of community service.

16. The second witness for the defence was Mr Leon Matthee from the Correctional Services who compiled a suitability report in relation to Correctional Service. He stated that the accused is currently unemployed and a Sassa pension beneficiary and also receives a small pension, (no amount stated) from Sanlam Policy. He stays in a property which is a rental property belonging to Ms Slabbert who also confirmed such. Accused has good ties with his two sons. One of his sons is staying in China and the other in Nigel, South Africa. Accused does not have a previous conviction, has no history of violation of parole conditions, escapes and absconding. Accused uses alcohol on occasions and is not smoking or using drugs. Accused is getting emotional support from his family, and they are also financially supporting him. If accused can be placed under correctional supervision he will be strictly monitored for the entire duration of his sentence.

17. In addition to that, accused will be obliged to perform community service. As a result based on his analysis and evaluation accused is considered a suitable candidate to be sentenced under correctional supervision in terms of Section 276(1)(h). He tabled a proposed conditions in terms of Section 52 of the Correctional Services Act 111 of 1998 which includes house detention, community service. Further that, the accused can seek employment, takes up and remain in employment, participate in mediation/restorative justice system between victim and offender or in family group conferencing, restricted to one or more Magisterial Districts, live in a fixed address, refrain from using alcohol or illegal drugs, refrain from committing a criminal offence, refrain from a visiting a particular place or places, refrain from making contact with a particular person or persons, refrain from threatening a particular person by words or action, be subjected to monitoring or any other condition as may be appropriate, can be made.

18. After the evidence of the two witnesses, accused then handed in a letter he wrote to the family of the deceased asking for forgiveness for his actions dated 13

January 2025, which was admitted into evidence as EXHIBIT D. The accused then closed his case in mitigation of sentence.

19. The State also led evidence of two witnesses, the sister of the deceased, Ms Alegria Kusaka Nyoka and Mr Gugulakhe Exodus Nyakane who was sleeping in the same room with the deceased before he was murdered. Ms Nyoka testified that she is a firstborn in a family of seven children and the deceased was the fourth born. In 1987 when the deceased died, he was 23 years old. The deceased was a student at Mabuya High School doing Standard 10 now referred to as Grade 12. She confirmed that the deceased was a student activist, member of COSAS, South African Youth Congress, organiser of the East Rand Transvaal Student Congress. He was also the president of the Student Representative Council at Mabuya High School.

20. The family was conscious of the political activities of the time and was sensitive to the happening under the apartheid regime. Their family was targeted because of their political activism and they saw many police raids conducted at their family. In 1987 she was 32 years but still residing at her parental place. The deceased was arrested in 1985 for public violence and arson but together with his co-accused were not found guilty. He was also arrested in 1986 under the state of emergency without a trial.

21. The day the deceased was murdered, there was funeral at their diagonal front neighbour's house and when she went home to sleep she did not see the deceased. It was only after the deceased was murdered that they realised that he was with three other young men in the room. They heard footsteps in the yard at around 02h30am and could tell that many people were inside that yard. After the death of the deceased, his body was taken without them being informed where the body was taken to by the police. They only saw a pool of blood on the bed he was sleeping on, and they only saw that in the morning at approximately five or six o' clock.

22. They went to the Daveyton Police Station to make enquiries there, but they were told to go to the Benoni Police Station and look for Major Van der Berg as he was in charge of the operation. They could not get assistance at the Benoni Police

Station, and it crossed their minds that they should go to the government mortuary. That is where they found the body of the deceased and saw a bullet hole on the forehead and the nose was covered with blood. The incident had a negative impact on the family as the deceased was still young, and they were expecting bigger things from him. They had hopes that he would go to the University and study.

23. At the time of the funeral of the deceased, they were given restriction orders by the then government and told that there is a possibility that they cannot get the body of deceased as he died in police custody. They received support from the family and the South African Council of churches. They had to delay the burial of the deceased as a post-mortem was conducted by both the state and private pathologist. The private pathologist report indicated that the deceased died from 12 bullet wounds which were centred around the head, chest and hands. The funeral procession of the deceased was surrounded by a large contingent of police officers driving police Caspers and specific travelling routes were demarcated by the police for such purpose.

24. There was an inquest conducted relating to the death of the deceased from 1988 to 1989 and it was the court's finding that police were acting in private defence because of the information they received that the deceased was the terrorist. The deceased father died with a broken heart in 1992, five years after the death of the deceased without answers as to what happened to the deceased. His health deteriorated and was diagnosed with high blood, sugar diabetes, growth on the kidney and three months after removing it, he passed on. Her mother was also affected by such and was diagnosed with high blood that led to the amputation of her leg and was wheelchair bound when she passed away four years later.

25. She took the matter to the Truth and Reconciliation Commission ("TRC") in 1996 and made a submission. Their case was referred for public hearing in 1997, February and she testified in the TRC. The accused and the people who were with him at the time of the death of the deceased did not participate in the TRC process. In 2019, she saw an article in the City Press and Die Rapport and in that article, it was reported that the accused had made a confession relating to the death of the deceased and that is how the investigations in this matter unfolded.

26. The deceased did not have any dependants. The accused never came to their family and apologise but they did receive a letter dated the 13 January 2025 following his guilty plea. The plea is for the accused to assist in the other matter which relates to his co-accused before trials were separated. She is of the view that the accused is worried about himself and not them.

27. The second witness for the state was Mr Gugulakhe Exodus Nyakane who testified that before the day of the death of the deceased he did not know him. He attended the funeral at the deceased's neighbour and together with his friends were housed to sleep at the deceased's room. There were four in the room being himself, the deceased, Excellent Mthembu and Elston. Elston was sharing the same bed with the deceased, and he was sharing a bed with Excellent. Not long after they went to sleep, they heard a bang at the door and people saying "open we are the police". They forcefully opened the door and upon entering the room they asked who Caiphus was, and the deceased responded by saying that he is Caiphus.

28. He saw four police officers entering the room and Elston, Excellent and himself were taken out of the room, forcefully dragged. The police officers were covering their faces with balaclavas. They were ordered to lie on the ground next to the deceased room and he was stomped on his face. He then heard a lot of gunshots, and then they went off, he could hear movements inside the yard. He could hear the police asking Mothas Nyoka, the sister of the deceased who he knew before the shooting incident, who are their names and after that they were told to stand up and go and wear their clothes. They were then handcuffed after getting dressed and taken to Daveyton Police Station. There was a lot of police officers which included Municipality police and police who were wearing plain clothes at the scene.

29. They were taken to a room and were made to sit on a floor guarded by a police dog. Later on, a police officer wearing a balaclava entered that room and wrote on the board "9[...] L[...] Street, Caiphus Nyoka executed hands of death" and also wrote a number of shots, but he cannot exactly remember the number of shots written. He was made to read what was written with a firearm pointed to his head.

He was poured with boiling water over his head when he requested drinking water. The incident disturbed him and hurt him a lot as it was his first time to hear shots fired at such close range. He had just met the deceased and within a short time he was murdered. The thought of being taken half naked outside embarrassed him. He did receive counselling following what he witnessed. The State closed its case after the testimony of Mr Nyakane.

30. The accused found himself standing a trial for murder that was committed almost 37 years back in time. The accused at that stage was only four years after rejoining the police, after he left in 1981 and that is after going for training at the age of 16. He completed his matric while serving in the police. He was still young at that stage but already had a rank of a sergeant. He got married the same year he committed this murder in November which is a period of approximately 3 months. It is not disputed by the State that the accused in his line of duty as a police officer and in the military was exposed to serious violent encounters. He fought in the border, as a member of Koevoet and in Angola.

31. He has experienced as a victim of violent encounters and survived limpet mine attacks and other violent incidents. As a leader and a member of the Riot Reaction Unit he was deployed to what was classified by the apartheid regime as "Black townships" in the East Rand. He was exposed to "necklace killings" where a tyre is placed around the neck of the victim and dosed with petrol while the victim is still alive. He was exposed to what was referred to as "Black on Black violence" wherein victims were hacked and assaulted with knobkieries and made to dispose of such bodies. He had to collect the mutilated bodies which were placed on rail tracks to be run over by moving trains.

32. He had a serious drinking problem and a violent behaviour that resulted into the dissolution of his marriage. The accused kept quiet for a long period of time without telling any person about his involvement in the murder of the deceased. He lied under oath together with his colleagues at the inquest proceedings that the deceased was armed when he was murdered which resulted in the court finding that they acted in private defence when murdering the deceased. He was aware of the TRC hearing, as he stated in his clinical psychological report that he saw that on

television, but failed to participate in that process. He failed to reach out to the family of the deceased to ask for forgiveness despite the fact that the death of the deceased troubled him for a very long time. He only wrote a letter to the family of the deceased after he was convicted in November 2024, and the letter is dated 13 January 2025. He only started speaking of his involvement in the murder of the deceased for the first time in 2019. However, the family of the deceased acknowledged that it is because of him coming out indicating his involvement that the investigation in this matter unfolded.

33. This is despite that already in March 2024, there were negotiations between the state and the defence relating to the plea of the accused and the accused was legally represented at that stage. That was an opportune time, through his legal representative to write a letter and formally apologise for his actions to the family of the deceased.

34. The accused gave a narrative of the events of 24 August 1987, which is a direct opposite of what he stated in his Section 112(2) statement (guilty plea statement). He mentions the presence of people who were arrested at Daveyton Police Station which concealed limpet mines and hand grenades. That the deceased had plans to attack the Daveyton Police Station the next day and that he was highly trained and has also been training other military activists. Whereas in his guilty plea statement he mentioned that they were briefed to arrest the accused. He does not mention the order to kill the deceased, which was given by Sergeant Stander, but he said that immediately after Engelbrecht left the room he fired shots and Stander also fired shots.

35. The accused attempted to take his life on three different occasions and attributes that amongst others to the death of the deceased and his involvement. The first suicide attempt related to his divorce matter, and it was in 2003. His second suicide attempt was in 2019, and he does not state the reasons for his attempt to take his life. His last attempt to take his life was when the police officer who was supposed to have come and fetch him for a court appearance failed to fetch him for his appearance at court, no date stated. He thought that he will be

arrested for failing to appear at court. I do not know why the accused had to be transported to court for appearance because he was not in custody at that time.

36. However, on a proper look of the reason for his attempt to take his life, one will realise that they have nothing to do with the death of the deceased and are actually for his own personal problems.

37. The deceased died a brutal, callous and painful death. The post-mortem report which was admitted into evidence as EXHIBIT B, indicates that the deceased died as a result of being shot multiple times. The deceased was lying on the bed when he was shot. According to the guilty plea, he was shot at a very close range by the accused and his colleagues at a range of one meter. The deceased despite the contention by the accused that he perceived him as a terrorist, did not pose any danger to them. Neither of the people in the room were armed and no weapons were found by the police after the deceased was murdered in that yard.

38. The right to life of the deceased was taken away in a flagrant manner in disregard of such right, in defence of the policy that was declared a crime against humanity by the International Community. Ms Clark argues that the accused was under orders when committing the offence, but on a proper reading of Section 112(2) statement, there was no order for the accused to kill the deceased but to effect the arrest. The accused is the one who decided to kill the deceased after he was identified by Engelbrecht. Even though there was an instruction to kill the deceased, it was an unlawful instruction which the accused was not obliged to follow.

39. The crime was committed when a political environment in the country was at a boiling point. We are now in a democracy, and the country is at a time experiencing service delivery protest, fees must protests etc and at times they tend to be violent and at times results in a loss of life. What happens in the 1980's relating to police brutality must not be repeated in the current milieu. The right to assembly, freedom of association is enshrined in the Constitution and the police must not be weaponised to surprise those rights.

40. In the matter of *State v Phallo and Others* (354/98) 1999 ZASCA 84 (19 November 1999) at par 42, the Supreme Court of Appeal when dealing with sentence involving police officers who committed offences stated that;

“[42]...A police officer who places supposed loyalty to colleagues committing crimes above his or her police duties should know that the courts of law will take an extremely serious view of such conduct and will not hesitate to impose a severe sentence.”

41. Members of the community and the general population of South Africa has an interest in the outcome of the trial of the accused. However, it is not an object of sentencing to satisfy public opinion but to serve the public interest. There is an expectation from the members of the community for such crimes to be punished harshly, which is in my view a reasonable expectation because the crime was committed by police officers. On the other hand the Court must not lose sight under which such crime was committed.

42. In quoting *Stemmet 2017*, Ms Clark stated that,

“The South African Police (SAP) were at the frontline enforcing the State of emergency declared in the 1980’s. ‘The SAP was the Nationalist’ most important pillar of strength in essence, the police were the... first line of defence against those who threatened the system... It was the police force that had to physically implement their (state’s) policies.”

43. This is against the backdrop that apartheid was not only rejected by the South African citizens, but by also the international community. The Apartheid Convention was already in place at the time of the murder of the deceased.

44. In the matter of *State v Mhlakaza* 1997 (2) All SA 185 (A), Harms JA when dealing with the interest of the society stated that,

“The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public

opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence, even if the sentence does not satisfy the public. In this context the approach expressed in *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) par 87-89 (per Chaskalson P) applies mutatis mutandis: public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public."

45. Further that;

"Given the current levels of violence and serious crimes in the country it seems proper that in sentencing especially such crimes the emphasis should be on retribution and deterrence."

46. In *State v Krag* 1961(1) SA 231(A) it was held that, "If sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

47. The death of the deceased did not only negatively impact his family, but also the community that the deceased served as a student activist and most importantly, Mr Nyakane who witnessed the cold-blooded killing of the deceased when he was still young in his life. The parents of the deceased died before finding closure. The deceased's sister testified about how the deceased was loved by the community and that if he was alive, he was going to be a politician and champion the fight against corruption.

48. The murder was committed before the coming into effect of Act 105 of 1997 which prescribes life imprisonment and 15 years sentences for specified crimes. Murder under these circumstances does not fall under the purview of Section 51(1) and (2) of Act 105 of 1997 which prescribes life imprisonment and 15 years imprisonment.

49. In *State v Kekana* 2019(1) SACR 1 (SCA) at Para 22 the court stated that;

“The provisions of the CLAA do not create different or new offences but are relevant to sentence. 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.”

50. In the 2003 (1) SACR 13 (SCA) (26 September 2002) at para 18, The Court when dealing with penal jurisdiction stated that.

“[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus, ‘robbery with aggravating circumstances’ is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.”

51. Simply put, the introduction of Act 105 of 1997 was mainly done to prescribe particular sentence for specified crimes but the charge of murder does not change its content it remains murder.

52. Evidence accepted by the State shows that the murder was committed by a group of people acting in common purpose or common concert in fulfilment of common purpose. Based on the admitted evidence, it is difficult to make a finding that the murder was premeditated or planned. But I find it difficult to understand that an operation to arrest an individual can involve such a high number of police officers from different police units, if their intention was not to kill.

53. Ms Simpson on behalf of the accused contended that the murder is not premeditated as the intention to kill the deceased was only formulated when the accused and his colleagues were inside the room of the deceased. Ms Simpson further contended that the Court should consider imposing a sentence in terms of Section 276(1)(h) or 276(1)(i), taking into account the age of the accused, the health condition of the accused as he was suffering gout ailment which can affect his mobility if incarcerated for a lengthy period of time. The fact that he is the one who confessed to a journalist which resulted in this matter being investigated and the accused being prosecuted.

54. Mr Davhana on behalf of the State contended that the murder is premeditated. Accused showed no remorse, He failed to come forward at an opportune time and disclose his involvement in the murder of the deceased and for that the accused must be sentenced to life imprisonment alternatively 25 years imprisonment.

55. It is with no doubt that at 66 years old the accused is of an advanced age. Both parties agreed that the crime is punishable with a custodial sentence, though on different terms. It is also trite that there is no penal provision for the murder committed and the Court has inherent penal jurisdiction to impose any sentence based on the circumstances of this matter.

56. In *State v Klaas* 2018(1) SACR 643 (CC) at para 46, the Constitutional court when dealing with appeal of a 58-year-old accused who had already served 4 years at the time when the matter was heard, stated;

“[46]...In my view, the applicant's personal circumstances pale into relative insignificance when regard is had to the seriousness of the offences and the need to protect the public...”

57. In *S v Hewitt* 2017(1) SACR 309 (SCA), the court when sentencing the accused who was 75 years old for crimes committed thirty years back, stated;

“[15] The appellant's poor health is certainly a matter which must be considered. And so is his advanced age. However, as the court a quo

observed, he does not suffer from a terminal or incapacitating illness, as he leads an active life, which includes personally and successfully running a commercial citrus farm, and is even able to drive his employees home daily. It was also not disputed that the medical treatment and care that he requires would be available in prison. Regarding his age, whilst courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment.”

58. The health of the accused was also presented as a mitigating factor. The hospital records shows that accused was last treated for the gout ailment in January 2024 and this was as a result of the accused defaulting on his treatment. The clinical psychologist although, not a medical doctor acknowledged that the gout ailment can be treated in a correctional facility. It shows that if the accused's ailment is properly treated it is controllable and it will not affect his mobility or incapacitate him. Since the matter has commenced last year, there was no instance when accused complained of any difficulty relating to his condition. Also accused expressed his love for gardening which indicates that he leads an active lifestyle.

59. Mr Davhana in argument contended that most of the evidence in this matter was destroyed. The exhibit that they used to prosecute the accused, was found from the attorneys who represented the family of the deceased at the inquest hearing. The accused to a large extent in disclosing his involvement in the murder of the deceased assisted in the investigation of the matter and also for him to be criminally prosecuted. Ms Simpson contends that if the accused did not disclose his involvement to the journalist, there was not going to be a case against the accused. This submission may be correct, but it is the ex-wife of the accused who told the accused to approach a journalist and disclose his involvement and that was in 2019.

60. The accused after disclosing his involvement in a murder and with full knowledge that the HAWKS (that is a unit in the police) is looking for him, he decided to go and stay in his brother's plot without handing himself to the police until he was traced to that plot by the HAWKS.

61. It is further contended by Ms Simpson that the accused is remorseful for his action an averment which finds favour in the Clinical psychological report. The Supreme Court of Appeal in *S v Matyityi* 2011 (1) SACR 48 (SCA), when dealing with remorse, stated;

“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 an 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. 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. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.”

62. According to the Clinical psychologist report, the accused was informed by Stander after murdering the deceased that he will be protected. The inquest finding is one of the manners in which the accused was protected. His firearm was taken away from him after committing the murder and the intention in my considered view was to fulfil the promise they made to protect him. Fast forward into democracy and in the spirit and ethos of the Constitution, TRC proceedings were initiated, where murderers of the apartheid era were given an opportunity to disclose their evil past in return of indemnity from prosecution, but accused deemed it not necessary to participate in the process, despite being fully aware of such.

63. It is only in 2019 after attempting to commit suicide that the accused decided to approach a journalist and disclose his evil past. The evidence does not indicate what led to change of heart. The accused does not take the court into confidence and tell what motivated him to commit the crime? It is appreciated that the accused was in the police that was in defence of apartheid policies, but he was not the only officer who was part of the operation. All the police officers who he mentioned that they were there, did not all fire shots at the deceased, but himself and Stander. The order was simple and straightforward to arrest the deceased. Twelve shots were fired at a person who was sleeping.

64. Accused also decided to give two stories to one story, one in the Section 112(2) statement and one in the Criminal psychologist report. He writes a letter of apology on the 13 January 2025 after having pleaded guilty on 12 November 2024 to the family of the deceased and this clearly means to me, that, the accused was preparing for his mitigation of sentence. There was nothing precluding the accused to reach out to the family of the deceased and apologise. The surrounding circumstances does not indicate a genuine remorse. The accused is fully aware that he did not participate in the TRC processes which heard this matter in 1997, wait for almost over 20 years to disclose what he did in 1987. I am not persuaded that the accused indeed had a true appreciation of the consequences of his actions.

65. A lengthy period of time elapsed between the time of commission of the offence, the investigation and the prosecution of the accused. It is appreciated that there was no way that the accused could be prosecuted or the case any time before 1994. The matter could also not be prosecuted immediately after the TRC hearings as the accused did not participate in that process and vital evidence was destroyed in the matter. It is only after 2019 that the matter gained full steam, and this was after a change in the investigating officers. The time lapsed is in total 37 years but failure to prosecute the accused timeously cannot be laid in the hands of the prosecution.

66. In the matter of *Hewitt supra*, the court when dealing with a lengthy time taken to prosecute the accused, stated;

“[17] It is indeed regrettable that it took so long to bring the appellant to justice. But this is not an unusual phenomenon in these types of cases. And despite the obvious difficulties posed by the delays, our courts have ably delivered just decisions. I am not satisfied that the sentences imposed by the court *a quo* are not appropriate and that it exercised its sentencing discretion improperly. In my view, the sentences fit the criminal and the crime and fairly balance the competing interests. Although the element of rehabilitation bears little relevance here because of the appellant's age, the sentences would still serve the other important purposes of sentence, i.e. deterrence and retribution. This court therefore has no right to interfere...”

67. The Clinical psychologist opined that the accused is a suitable candidate for rehabilitation and a suitability for such sentence was assessed by Mr Matthee from the Correctional Service. Accused acknowledged that he can be sentenced to imprisonment term, and both counsel of the state and defence are of the view that a suitable punishment is a custodial sentence but on different terms.

68. Correctional supervision as an alternative penalty to imprisonment and can be imposed in any crime the accused has been convicted of. It has been imposed in murder cases, rape, fraud and in dealing and possession of drugs to list the few. In *State v Samuels* 2011(1) SACR 9 SCA the court when dealing with the imposition of correctional services stated;

“It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck... Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional

supervision can be made a suitably severe punishment, even for persons convicted of serious offences.”

69. Based on the circumstances of this matter I am not persuaded that the accused is a suitable candidate for correctional supervision. The sentence must fit the criminal and the crime to serve the interest of the community and be blended with the measure of mercy. In *State v Rabie*, courts are cautioned not to approach sentencing in a spirit of anger because, being human, that will make it difficult for the judicial officer to achieve that delicate balance between the crime, the criminal and the interest of society which is task, and the object of punishment demand of him. Due to the advanced age of the accused, rehabilitation is no longer a consideration. The sentence that is going to be meted to you today is intended to serve two purposes, deterrence and retribution.

70. In a Clinical psychologist report, you indicated that you want to write a book about your life after completion of your trial matter, and that time has now arrived. You will use the time to write a book and fully detail your involvement in the killing of the deceased. Also use the time in your book to educate South Africans who are still living in the racist past to embrace democracy and learn to live side by side with their fellow countrymen. It is unfortunate that the political heads of your time are not standing trial today who are responsible for promulgating draconian and racist laws that led you behave in the manner you did 37 years back. I hope you will also use this opportunity to reflect, and hopefully you will change your mind in testifying on behalf of the state in the matter pertaining to your former colleagues. Also use this time to influence those police officers who killed people who opposed apartheid and are not yet detected to come forward and disclose their part in those killings.

71. Having said the above, I am of the view that the sentence which I am going to impose, will fit the crime that you committed, and you now as a convicted criminal, the interest of society and it is blended with a measure of mercy. As a result, you are sentenced as follows.

1. For the crime of murder, you are sentenced to 15 years imprisonment. That will be your sentence.

MOSOPA, J
JUDGE OF THE HIGH COURT

DATE: 10/07/2025