

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO.CC 16A/24

In the matter between:

Heard: 08 April 26

Delivered: 09 April26

THE STATE

Reportable	Yes /No
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VS

T[...] F[...]

JUDGMENT ON SENTENCE

MJAME AJ

INTRODUCTION

[1] Everyone in this country has the right to life. This right is entrenched in Section 11 of the Bill of Rights of our Constitution Act 108 of 1996.The sentence involves gender-based violence and

femicide perpetrated by the accused against his partner. The progression of physical violence ended up in the death of the accused partner, S[...] M[...].

- [2] Mr F[...] was convicted of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

This is a stage for the court to impose sentence upon the accused.

- [3] Sentencing is indeed regarded as one of the most difficult tasks which a presiding officer in any criminal matter has to deal with.

It has been described as a painful difficult problem and involves a careful and dispassionate consideration of all factors.

- [4] Imposing a sentence is an action that requires the Court to work purposefully at finding the most appropriate sentence in a manner which accords with an accused's fair trial that embodied in section 35 of the Constitution. Our courts emphasized repeatedly that a sentence imposed must always be individualised, considered and passed dispassionately, objectively and upon careful consideration of all relevant factors on the basis that retribution and revenge alone do not drive sentencing¹

- [5] When considering an appropriate sentence, the court should have regard to all relevant factors as well as the circumstances of a case, especially the factual matrix which underpins such facts against the aims of punishment and triad.

- [6] A court is required to consider the four objectives of punishment, (that is, deterrence, prevention, retribution and rehabilitation), in

¹ S vs Lourens (16424, 205/16, 26/2016 ZA WCH 58, 2016(2) SACR 624 WC at paragraph 15

view of the triad of factors as set out in **S vs Zinn**² . These factors are:

- (i) the personal circumstances of the offender, including his character, conduct in life and personality, and everything that influenced the commission of the offence,
- (ii) the nature and seriousness of the offence committed, and
- (iii) the interests of the community, including the necessity of level of uniformity in sentencing.

[7] However, In S vs Swart ³, Nugent JA (as then he was) said that “

“the serious crimes will normally require that the retribution and deterrence come to the fore and that rehabilitation will play a relatively smaller role.

Given the circumstances and the manner in which these horrific offences were committed by the accused, this is one of those cases where retribution and deterrence comes to the fore and the rehabilitation of the accused takes a backseat. It must give expression to the relative gravity of the offence, the prevalence of domestic violence, which culminates in the murder of women and act as a deterrent for would be offenders in domestic partnership that such conduct will not be countenanced.”

NATURE AND SERIOUSNESS OF THE OFFENCE

[8] The offences which accused has been convicted of are without any doubt, very serious. Murder is regarded as such as a serious

² 1969(2) SA537 (A)

³ 2004 (2) SACR 370 SCA

offence that if falls within the categories mentioned in the Schedule of Act 105 of 1997.

Our courts, and society considers human life as being precious and more particularly dispensation such as ours, where the right to life is guaranteed and regarded as sacrosanct. Not only does it end the life of a loved family member, but it leaves much hardship and pain for the remaining family members. It is without doubt a painful reality that no sentence will ever bring back the life of the deceased person. In this matter deceased had an intimate relationship with the accused which means that the death of the deceased resulted from gender-based violence. Society's outraged at the gruesome killings in a domestic relationship has attracted a prescribed minimum sentence in cases of this nature. Women are victims of gender-based violence including intimate femicide.

[9] The Court in *S vs Robertson*⁴ stated that:

'It is so easy to glibly use the phrases and terminology of femicide and gender-based violence in part because of the relentless frequency of its occurrence in our society, communities and homes, that is hardly causes anyone to bat an eyelid or to raise an eyebrow This disease of gender-based violence and femicide.... Permeates the psyche of our country.'

[10] In *Mudau vs State*⁵, the Court emphasizing the seriousness of this kind of offence stated that: -

"Domestic violence has become scourge in our society and should not be treated lightly."

⁴ 2022 ZAWCHC 104,2023 (2) SACR 156(WCC) par 2

⁵ 2014 ZASCA 43(31/03/2014) par 7

It has to be deplored and also 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 for their lives. This is in some respects a negation of many of their fundamental rights as equality, human dignity and bodily integrity.”

- [11] Our Courts have consistently held that the vulnerable individuals such as women must be protected and treated with dignity. It is noteworthy that sentences imposed does not satisfy the public opinion but must serve the public interest. (See *S vs Mafu* ⁶, *S vs Karg*⁷, *S vs Schietekat*⁸)

There is a strong feeling of annoyance, displeasure and opposition to gender-based violence. Women in particular are experiencing worry and ease. They are very eager and concerned to have something done for their safety and security.

- [12] The deceased was brutally killed by her husband. He sustained multiple gunshots wounds on the skull, neck, chest, abdomen, upper limbs and thighs. All these injuries inflicted on a defenceless woman.

PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [13] The accused T[...] F[...] testified under oath in mitigation on sentence.

He testified that he is 47 years old. He is a first offender.

⁶ 1992 (2) SACR 494 (AD)@ 496g-j)

⁷ 1961(1) SA 231 (AD)

⁸ 1998(2) SACR 707 CPD

He has two young boys, born in 2010 and 2017.

The said children are staying with him. He is a primary care giver. He is also responsible for his elderly parents. He is a business man owning Amabhele Cash loans and is hiring with tents, mobile freezers. His children and parents depend on him financially.

He apologises to the deceased 's family also reading on record the note he penned down for apology. He indicated that he is fully taking the responsibility and remorseful for his conduct. He testified that he regrets the date of the commission of the offence. He testified that the young children are in safe hands being taken care by his siblings.

- [14] Defence also submitted on his behalf that accused is remorseful for the death of the deceased. His conduct after the shooting the deceased handing himself to the police is a sign of remorse. He submits that the personal circumstances of the accused cumulatively constitutes substantial and compelling circumstances for deviation from the prescribed sentence.

Defence referred the court to a case of S vs Soni 2021(2) SACR 241 SCA, S vs Pillay 2018 (2) SACR 192 (KZD) at paragraph 10. in which the court deviated from the prescribed minimum sentence after it considered the mitigating circumstances and personal circumstances of the accused.

- [15] In aggravation of sentence the state called two social workers who compiled the victim impact reports.

Bongiwe Gqomfa, the social worker who compiled the victim impact report in respect of the two children who are staying with the accused person. The report shows that the said children are

taken care of by accused's siblings. They are in conducive environment. The plight of the elder one is to lose her father if he is incarcerated.

Welisiwe Agnes Somlotha, compiled victim impact report of deceased family. It is clear on this report that death of deceased had a negative impact on the family. Deceased was financially providing the family. Her child who is staying with deceased aunt could not accept the death of her mother. She is also disturbed by the fact that she is separated from her siblings who were refused to attend their mother's funeral.

The State also submitted that the court must sentence accused to life imprisonment. The state referred the court to Malgas and, Matyityi case. State submits that there are no substantial and compelling circumstances for deviation from the prescribed sentence.

State further argued that deceased was the wife to the accused. She died in the hands of her lover. Accused did not show any remorse. Domestic violence is a pandemic in this country.

- [17] The offence committed by the accused falls within the prescripts of the minimum sentence as envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997. The prescribed sentence is Life imprisonment, the court may deviate from the prescribed minimum sentence if there are substantial and compelling circumstances which justify the deviation from the prescribed sentence.
- [18] Section 51(3) states that if any court referred to in subsection 1 or 2 is satisfied that substantial and compelling circumstances exist

which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter these circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[19] The guidelines to establish the existence of substantial and compelling circumstances are clearly stated in *S vs Malgas*⁹, where it was stated that : the court may deviate from the prescribed minimum sentence “ if the court on consideration of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, criminal and the needs of the society so that injustice would be done by imposing that sentence , it is entitled to impose a lesser sentence . That the courts may not deviate from the prescribed sentences just for lightly and flimsy reasons.

[20] In *Sv Vilakazi* ¹⁰, it was said that:

*“In cases of serious crimes, 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 that period should be, and those seem to me to be kind of “flimsy” grounds that **Malgas** should be avoided.”*

[21] The defence also mentioned that accused is apologetic towards deceased’s family which is an indication of remorse.

⁹ 2001 (1) SACR 469 @ paragraph 25

¹⁰ 2009(1) SACR 552 SCA @ paragraph 58

The issue of remorsefulness was dealt with in *S vs Matyityi*¹¹, Ponnann JA, as then he was, had the following to say on this aspect: -

“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 genuine of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuine remorseful, it needs to have a proper appreciation of, inter-alia: - what motivated the accused to commit the deed, what had 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.”

[25] It is not clear when the remorsefulness of the accused started. This offence happened in 2020, ever since then accused did never

¹¹ 2011(1) SACR 40 SCA @paragraph 13

apologise to the deceased family. It is only now after conviction he thinks of apology.

[26] If regard is to be had to the manner in which accused killed the deceased person, it becomes clear he had intentions to get rid of her. The extent and the amount of violence used to kill the deceased person, the gruesome and senseless killing was clearly out of proportion and induces a sense of shock..

[27] I am of the view that when the nature and seriousness of the offence committed by the accused, the gruesome manner under which the offence was committed as well as devastating impact on the deceased families are weighed against the personal circumstances of the accused person, it cannot be said that the substantial and compelling circumstances exist that justify a departure from the prescribed sentence. I am mindful that a finding of an absence of these circumstances will result in the gravest of sentences being passed and that the consequences of this are profound, effectively removing an individual from society.

[28] In the circumstances the appropriate sentence to impose is:

The accused is sentenced in terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 to Life Imprisonment.

Court Order: In terms of section 103 of the Fire-arms Act 60 of 2000 accused is declared unfit to possess fire arm.

P.C.N. Mjame

ACTING JUDGE: MTHATHA HIGH COURT

Appearances:

Counsel for the state : T. Qebeyi

Instructed by : NDPP

Mthatha

Counsel for the accused : S. Modi

Instructed by : S Modi Attorneys

Queenstown