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**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Case No: CC49/2022

In the matter between:

THE STATE

And

L[...] S[...]

ACCUSED

Coram: YAKE AJ

Argument: 25 May 2026

Delivered: 25 & 27 May 2026

Summary: Section 51(3) (a) of the Criminal Law Amendment Act 105 of 1997 - no substantial and compelling circumstances advanced justifying departure from the prescribed minimum sentence.

ORDER

- 1 Count 1: Sentenced to Life imprisonment
 - 2 Count 2: Sentenced to Eight (8) years imprisonment
 - 3 Count 3: Sentenced to Eight (8) years imprisonment
 - 4 Count 6: Sentenced to Life imprisonment
 - 5 Count 7: Sentenced to Twenty (20) years imprisonment
 - 6 Count 8: Sentenced to Five (5) years imprisonment
 - 7 In terms of Section 280(2) of the CPA, the court orders that the sentences imposed on counts 2, 3, 6, 7 and 8 shall run concurrently with the sentence in count 1.
 - 8 In terms of section 103 of the Firearms Control Act, Accused automatically unfit to possess firearm.
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JUDGMENT ON SENTENCE

YAKE AJ

Introduction

- [1] Mr. S[...], on 25 February 2026, you were convicted on six counts:
- Two counts of murder of Mr. Zola Spaji (“Spaji”) and Mr. Sizwe Feke (“Feke”) respectively;
 - Two counts of attempted murder of Mr. Luxolo Kowa and Constable Sivuyile Qokombane respectively;
 - One count of Illegal possession of a prohibited firearm; and
 - One count of Unlawful possession of ammunition.

The two convictions on murder were committed under the circumstances falling within the purview of section 51(1) of the Criminal Law Amendment Act¹, (“The CLAA”); the conviction on illegal possession of semi-automatic firearm in contravention of section 3 of the Firearms Control Act², (“The Firearms Control Act”) falls within the purview of section 51 (2) of the CLAA; the two convictions on attempted murder together with one count of unlawful possession of ammunition, in contravention of section 90 of the Firearms Control Act are all subject to the general principles of sentencing, as such the Court has unfettered discretion to impose a suitable sentence.

[2] Pursuant to your conviction, the matter was postponed for the Defence to obtain pre-sentence report and as well as the State to obtain victim impact statements. While regrettable, such postponements are not uncommon in matters where prescribed minimum sentences are applicable, as the Court must be furnished with all relevant information before pronouncing sentence. These reports are essential, for they provide the Court with a comprehensive insight into the accused’s personal circumstances, background, and prospects for rehabilitation. In *S v Lewis*³, it was held that ‘the main purpose of a pre-sentence report is to provide guidance to the exercise of the sentence discretion. It aims to assist the presiding officer in gaining a better understanding of the offender and the reasons for his crime.’ Sentencing is therefore not to be imposed in a vacuum;

¹ Act 105 of 1997

² Act 60 of 2000

³ *S v Lewis* 1986 (2) PH H96 (AD)

rather, it must be approached with due regard to the seriousness of the offences, the circumstances of the offender, and the interests of society.

[3] Upon resumption, the court heard evidence in mitigation of sentence from your mother, Ms. V[...] N[...] S[...], together with submissions by the defence counsel, Ms. Adams. These will be considered in due course when your personal circumstances are addressed. Counsel for the State, Ms. Cecil, tendered no oral evidence but advanced submissions in aggravation of sentence.

[4] All reports were duly compiled and admitted into evidence as exhibits.

The

Court has had the benefit of considering these reports in conjunction with the evidence adduced during the trial and the submissions advanced by both counsel.

[5] It follows that in respect of convictions on murder and illegal possession of semi-automatic firearm, this court does not have unfettered discretion to impose any sentences it deems meet. The court must impose the applicable prescribed minimum sentences and can depart from it, if substantial and compelling circumstances justifying such a departure are found to exist.

[6] The Supreme Court of Appeal (SCA) in *S v Matyityi*⁴, affirming its earlier decision in the *locus classicus* case of *S v Malgas*⁵ stated as follows:

‘As *Malgas* makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of state, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing

⁴ *S v Matyityi* 2011 (1) SACR 40 (SCA), para 23.

⁵ *S v Malgas* 2001 (1) SACR 469 (SCA).

reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as “relative youthfulness” or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness.’

[7] The main objectives of sentencing, entail four primary elements, namely: deterrence, prevention, retribution, and rehabilitation. Bearing in mind that these objectives will not necessarily apply equally in every case, rather the circumstances of each case will determine which objective must be prioritized. What is of importance is that the sentencing court must always strive to achieve a proper balance among them. *S v Swart 2004 (2) SACR 370 (SCA)*.

[8] Closely linked to these objectives, is the triad of facts as laid down in the classic case of *S v Zinn*⁶, which requires consideration of the offender’s personal circumstances, the gravity of the offence that the offender has been convicted of, and the interests of society. When considering the personal circumstances as contemplated in the *Zinn* supra, it is appropriate to also examine whether the offender has demonstrated genuine remorse. As Ponnann JA observed in *S v Matyityi*⁷ supra; that ‘there exists a clear distinction between mere regret and true remorse.’ True remorse involves a sincere acknowledgment of wrongdoing and a willingness to make amends, whereas mere regret may simply reflect dissatisfaction at being apprehended.

[9] Similarly, the Court must guard against approaching its sentencing task in a spirit of anger or with a deliberate attempt to demonstrate severity, or to set an example merely to satisfy public opinion, for that is not the object of sentencing.

In *S v Masda*⁸ the court referred to *S v Mhlakaza and Another*⁹ where it was held

⁶ *S v Zinn* 1969 (2) SA 537 (A).

⁷ *S v Matyityi* 2011 (1) SACR 40 (SCA)

⁸ *S v Masda* 2010 (2) SCAR 311 (SCA) at 315

that the object of sentencing is not to satisfy public opinion, but to serve public interest; a sentencing court that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly appropriate and fair sentence even if the sentence does not satisfy public opinion.”

[10] The Court is also mindful of the fact that whatever sentence to be imposed, it should be blended with a degree of mercy which is the hallmark of a civilized and enlightened criminal justice system. See *S v Rabie*¹⁰. At pages 866, Corbett JA in *Rabie*¹¹ supra eloquently summarized the approach in exercising mercy as follows:

‘A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.’

[11] Further sentencing principles require the Court to give due regard to the rights and interests of the victims and their families. As such the Court must ensure that the sentence imposed reflects society's condemnation of such violent conduct, while also affirming the dignity and humanity of the victims whose lives

⁹ *S v Mhlakaza and Another* [1997] 2 All SA 185 (A) at 189

¹⁰ *S v Rabie*¹⁰ 1975(4) SA 855 (A) at 861-2

¹¹ Footnote 7

were so brutally taken. In this way, the sentence serves not only as a measure of retribution and deterrence but also as a reaffirmation of the values upon which our constitutional order is founded.

The Offender

[12] I pause to consider your personal circumstances as drawn from the pre-sentence report compiled by Probation Officer Ms. Chantal Clarke, the evidence tendered by your mother, the submissions advanced by your counsel together with evidence led during trial. These circumstances may be summarized as follows:

[13] You were born in Ugie, Eastern Cape, on 5 June 1990, and are presently 35 years of age. However, at the time of the commission of the offence you were 31 years old. You were raised primarily by your mother, as your father was not involved in your upbringing, your parents were never married. You are the second-born child among your siblings.

[14] In pursuit of employment opportunities, your mother relocated to Gauteng while you were still young, resulting in you and your siblings being placed in the care of your maternal grandmother. During 2006/2007, the family moved to Site B, Makhaza, Khayelitsha, at which time you were approximately four years old. In 2014, your mother relocated to Cape Town to rejoin the family. Throughout your upbringing, a neighbour, Mr. Simon Maphape, assumed a paternal role and provided guidance and support in your development.

[15] You are unmarried and the father of two minor children, each born of different mothers. Your first child, a son named I[...] L[...], was born in 2017 and currently resides in the Eastern Cape with his mother, Ms. Sive. Your second child, a son named Z[...] M[...], was born in 2019 and resides with your

mother. In 2015, at the age of 25, you established contact with your biological father and four siblings from his side of the family. Since that time, you have developed and maintained a close and supportive relationship with them. Your father however passed away in 2017.

[16] You completed your matric at Sinako High School. Thereafter, you enrolled at Standford College to pursue studies in Information Technology. However, you discontinued your studies during your second year, as you were compelled to seek employment in order to provide financial assistance to your mother.

[17] At the age of 25, you obtained employment at Edgars, Cavendish Square, where you worked as a sales agent for a period of three months. Between 2016 and 2017, you were engaged on a contractual basis as a salesman for Assupol Life Ltd, earning income on commission. You were subsequently employed by WBHO Construction Company as a construction worker at the Waterfront. To supplement your income, you engaged in the sale of paraffin and other goods and also operated as a money lender. From these earnings, you contributed to the support of your children and family.

[18] Since 2022, you have been suffering from a chronic illness for which you are receiving ongoing medical treatment and chronic medication. Proof of such chronic illness was admitted into the record as an exhibit.

[19] You are not a first offender. In 2018, you were convicted of the offence of possession of an unlicensed firearm. For that offence, you were sentenced to a term of four years' imprisonment, which was wholly suspended for a period of five years, on condition that you were not convicted of any statutory offence relating to the possession of a firearm or ammunition during the period of suspension.

[20] The evidence tendered by your mother did not materially assist the court. Her appearance was directed more towards seeking assistance with your alleged child, a matter which ought to have been raised with the probation officer during her consultation. I decline to engage with the implausible allegation that you have a 28-year-old child while you are yourself 35 years of age, as such a claim is logically untenable. In effect, her testimony undermined your position, for she presented a version inconsistent with that which you had already placed before this Court. Your personal circumstances should therefore be seen and weighed against the aggravating factors with the context in which the offences in question took place as the key factor.

The Offence

[21] The factual matrix that led to your conviction are as follows: on the evening in question, Mr Luxolo Kowa, an Uber driver, conveyed the deceased, Mr Zola Spaji, to Dlavu Close. Upon arrival, while the two remained seated in the vehicle conversing, three unidentified males approached and started firing shots at them. Mr Kowa managed to flee the scene and sought assistance. During his absence, members of the South African Police Service arrived and took cover in nearby houses. It was at this juncture that you appeared and advanced towards the direction of Constable Qokombane and discharged a firearm. Constable Qokombane and his colleagues returned fire, and in the process you sustained a gunshot wound to the thigh. A firearm was subsequently recovered in close proximity to where you fell.

[22] When Mr Kowa returned to the scene, he identified you as one of the assailants who had fired shots at them earlier. The bodies of the deceased, Mr Zola Spaji and Mr Sizwe Feke, were later discovered at eMsindweni informal settlement, situated not far from Dlavu Close. You were thereafter arrested.

[23] There can be no doubt that the offences of which you stand convicted of are of the utmost seriousness. Murder constitutes an irreversible violation of the constitutional right to life, as enshrined in section 11 of the Constitution. What renders this matter particularly heinous is that the killings of the deceased were committed by more than one individual. This is borne out by the cartridges recovered at the scene, which were traced to different firearms, in addition to the weapon found in your possession. To this day, the motive for these killings remains unknown as you denied any involvement in the offences throughout trial. In taking the lives of the deceased, you infringed upon their fundamental rights to life, freedom, and security, including the right to be free from all forms of violence, as envisaged in sections 11 and 12(1)(c) of the Constitution.¹²

[24] Equally, the attempted murders of Mr. Kowa and Mr. Qokombane cannot be regarded as offences of lesser gravity. The motive for the shooting of Mr. Kowa remains known only to you, and it was by sheer fortune that he managed to escape the scene unharmed. In contrast, Mr. Qokombane was targeted while discharging his lawful duties. As correctly submitted by the State, you discharged your firearm repeatedly at Mr. Qokombane, thereby unequivocally demonstrating your intention to kill him.

[25] Your actions did not merely extinguished two lives; the deceased were deprived of the opportunity to live full and meaningful lives, to see their children grow, and to contribute to their families and communities. Their loved ones are left behind to grieve their violent demise, carrying the trauma and pain of their loss. The ripple effect of these crimes extends far beyond the immediate families, instilling fear and insecurity within society at large. You must count yourself fortunate that you did not succeed in killing Kowa and Qokombane, for in that event you would have faced four counts of murder.

¹² Constitution of South Africa Act 108 of 1996

Impact of offences on the family of victim

[26] Mr Phumlani Spaji, the maternal cousin of the deceased Zola Spaji, consulted with the probation officer and deposed to a victim impact statement. It was reported by Mr Spaji that the deceased is survived by three sisters and a minor son, O[...], who was six years old at the time of his father's passing. The family is experiencing financial hardship in raising O[...], who still requires support for his education and cultural initiation. At the time of his death, the deceased was in a relationship with O[...]'s mother and was providing financial support to both his son and his extended family.

[27] Mr. Spaji conveyed that the family was devastated by the ruthless manner in which the deceased met his death, as he was regarded as a respectful and caring man. His cousins expressed anger towards you and implored the Court to impose an appropriate punishment for what they described as a heinous crime. Mr. Spaji continues to grieve deeply, particularly when confronted with the deceased's belongings at home.

[28] It was further reported that the deceased's son became extremely emotional during the funeral and, at the graveside. He uttered the words: *"his father must not worry, he will find the person that killed him."* The deceased's partner suffered an anxiety attack, fell ill in the aftermath and is struggling to cope with his loss. Although the deceased had a funeral policy, the burial nonetheless imposed significant financial strain upon the family.

[29] The probation officer further consulted with Mr. Bulelani Feke, who also deposed to a victim impact statement concerning the death of Mr. Sizwe Feke. It was reported that the family expressed reluctance to engage with the

probation officer, citing fear for their safety. The deceased is survived by his mother, siblings, and a son aged twenty-one years.

[30] Mr. Bulelani Feke described the deceased as a loving, caring individual of good humanity, who maintained a close relationship with his son, mother, and extended family. He reported that the death had a profound and adverse impact on the family, particularly on the deceased's mother, who developed hypertension and now requires chronic medication. His mother is blaming herself that she did not raise the deceased well. The tragedy was compounded by the fact that the family was still mourning the murder of their eldest brother, who was killed by the deceased, when, a year later, the deceased himself passed away. As the family they have unanswered questions.

[31] Mr. Feke acknowledged that the deceased had not lived an innocent life but emphasised that no person deserves to die in such a manner. He explained that the deceased had been financially responsible for his mother and son; in his absence, his mother now relies solely on her pension grant. The family has suffered financial strain, as the deceased had no burial policy. His son, left without parents as his mother also passed away. He endured immense grief and was emotionally affected when he had to undergo circumcision shortly after his father's death. The family, still burdened by grief and hardship, seeks closure and has requested that you be sentenced to life imprisonment.

[32] Mr. Luxolo Kowa, who also compiled a victim impact statement and consulted with the probation officer, reported that following his dismissal from the South African Police Service, he sought alternative employment as an Uber driver. He recounted that, at the time of the incident, he experienced numbness and shock, his thoughts consumed by the proximity of death during the shooting. He was deeply traumatised by the sight of the deceased, and the event

has since had a psychological impact upon him. He reflected with anguish that his children might have been left without a father to provide for them.

[33] Mr. Kowa stated that he now suffers from persistent insomnia, occasioned by recurring flashbacks of the incident. He described feelings of depression and admitted to increased reliance on alcohol as a means of alleviating his distress. He has withdrawn socially, preferring isolation within his home, and lives in constant fear for his own safety and that of his family, particularly his children.

[34] He further reported that the incident imposed a financial burden upon him, as he was required to repair a damaged vehicle that did not belong to him. In an effort to continue with his life, he has resorted to denial, though the psychological scars remain evident.

[35] Constable Sivuyile Qokombane also deposed to a victim impact statement and consulted the probation officer. He reported that he experienced severe aftershocks following the incident, as this was his first encounter in his line of duty. He described feelings of devastation and emotional turmoil, particularly as he reflected upon his three children who, had he perished, would have been left without a father. The incident further impacted his family, as his mother became ill upon learning of the events and now suffers ongoing stress whenever he is required to report for duty. Qokombane has since sought a transfer to the Eastern Cape, though his efforts have thus far been unsuccessful. He continues to endure recurring flashbacks of the incident, which weigh heavily upon his wellbeing.

Interests of Society

[36] The Courts have, on numerous occasions, reflected upon the horrific and repulsive nature of offences of this kind. The interests of society demand that those who commit such crimes must be punished, and in deserving cases, the punishment must be severe. The prevalence of murder, attempted murder and the illegal possession of firearms in South Africa necessitates the imposition of stern sentences, so as to send a clear and strong message that such conduct will not be tolerated. Society requires not only the effective punishment of those who commit serious crimes, but also protection from people like you. Should the courts fail to deal adequately with offenders, public confidence in the justice system will be eroded. This, in turn, may prompt members of society to take the law into their own hands; an eventuality which the court must guard against.

Minimum Sentence Regime

[37] I pause to deal with the minimum sentence regime. It is trite that where the Legislature has ordained a prescribed minimum sentence, the court is bound to give effect thereto unless it finds that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Only if the evidence discloses circumstances which are truly substantial and compelling, rendering the prescribed sentence unjust in the particular case, may the court deviate therefrom. Mere personal hardship or ordinary mitigating factors will not suffice. The threshold is deliberately high, and rightly so, given the seriousness of the offences for which minimum sentences have been enacted. This principle is firmly entrenched in our jurisprudence and serves to promote consistency, certainty, and proportionality in sentencing.

[38] Section 51 of the Criminal Law Amendment Act provides.

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or
(b) if the matter has been referred to it under section 51 (2) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years.

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years.

(iii).....”

[39] Section 51 (3) (a) provides 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, the court shall enter those circumstances on the record of the proceedings and must then impose such lesser sentence.

[40] In *S v Malgas*¹³, the Supreme Court of Appeal stated:

‘[25] What stands out quite clearly is that, the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they, who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.’

¹³ (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001), para 25

Do substantial and compelling circumstances exist?

[41] It is trite that the concept of “substantial and compelling circumstances” has not been defined by our legislation. It has been left up to the courts to decide based on the circumstances of each case, as to what constitutes substantial and compelling factors. Importantly, such circumstances need not be exceptional in the sense of being rare or seldom encountered. Rather departure from prescribed minimum sentence would be justified if, upon a cumulative consideration of all relevant factors, the court finds convincing reasons to impose a lesser sentence. However, the courts have consistently cautioned against departing from the minimum sentence lightly or for flimsy reasons. There must be truly convincing reasons justifying such departure. *S v PB 2013 (2) SACR 533 (SCA) para 20*.

[42] In *S v Malgas supra*, the Supreme Court of Appeal made it clear that “it is no longer business as usual”, the legislature intended that the prescribed sentences be imposed unless there are truly convincing reasons for departure. Courts are cautioned that the minimum sentence should not be departed lightly and for flimsy reasons which could not withstand scrutiny, as this would defeat the deterrent and retributive objectives of the minimum sentence regime. And certainly, put the administration of justice into disrepute.

[43] In *S v Vilakazi*¹⁴ the Supreme Court of Appeal explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. In deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When considering the personal circumstances of an accused, the court must be

¹⁴S v Vilakazi 2009 (1) SACR 552 (SCA)

alive that only some carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence. The SCA went further to state that, the court may not move away from imposing the minimum sentence on “flimsy reasons”.

[44] At paragraph 58 the court went further to state:

‘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 questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment are in themselves largely immaterial to what that period should be, and those seem to be the kind of flimsy grounds that *S v Malgas* case said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted, his or her circumstances might assist in making at least some assessment.’

[45] In *S v Matyityi*¹⁵, the court referred to the fact that such deviations must be based on convincing reasons. Ponnan JA, at para 14, said: 'Turning to the respondent's age: ...Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth.'

[46] Against the backdrop of the authorities referred to, it is settled law that the imposition of the prescribed minimum sentence must be approached with caution. Courts are enjoined to adopt the proportionality test, having regard to the triad considerations.

¹⁵ Footnote 2 supra

[47] Ms Adams, urged the court to find that substantial and compelling circumstances exist which justify a departure from the prescribed minimum sentence. In support of this submission, reliance was placed upon the following factors:

- (a) that you have been in custody for a period exceeding four years awaiting trial;
- (b) that you have no history of violence;
- (c) that you can still be rehabilitated;
- (d) that your HIV status requires you to take medical condition for it;
- (e) that you once suffered from TB whilst incarcerated and
- (f) that your personal circumstances as a whole should be considered.

[48] Counsel contended that, taken cumulatively, these circumstances ought to be regarded as substantial and compelling, thereby warranting deviation from the prescribed minimum sentence. She proposed that a sentence of twenty years' imprisonment be imposed on each count of murder. In respect of the convictions for attempted murder, unlawful possession of a firearm, and unlawful possession of ammunition, she requested that the sentences be ordered to run concurrently with the counts of murder. No submissions were advanced in relation to section 103 of the Firearms Control Act.

[49] Ms. Cecil, on the other hand, argued that you failed to take this court into confidence by not giving any evidence under oath whether during trial or in mitigation of sentence. This, according to Ms. Cecil, demonstrates lack of genuine remorse. She submitted that the evidence against you was overwhelming. Referring to the authority of *Radebe v the State*¹⁶, Ms Cecil argued that the mere fact of having spent four years in custody cannot, on its own, be regarded as a substantial and compelling circumstance. Similarly, your

¹⁶ Radebe v The State 2013 (2) SACR 165 SCA

personal circumstances cannot be said to constitute such a circumstance. In light of the gravity of the crimes and the interests of society, she submitted that there are no substantial and compelling circumstances.

[50] The court has considered the report submitted on your behalf, to the extent that no reference is made to every aspect of the report, but this should not be construed as indicating that it was not fully considered. The probation officer recommended a sentence of long-term imprisonment as an appropriate sentence. The court is mindful that the probation officer's recommendation is limited to being recommendation and not binding on the court.

[51] Having carefully assessed your personal circumstances, particularly attentive to the interests and well-being of your children, who may be adversely impacted by your incarceration, it is clear that you are not the primary care giver of your children as one reside with his mother in Easter Cape while your mother is taking care of the other child. Further consideration is that at the time of the commission of the offence you were 31 years old, however notably you were already an adult and were fully aware of the consequences of your actions.

[52] Furthermore, you have exhibited no remorse for your actions before this court. The probation officer recorded that you continue to maintain your innocence notwithstanding your conviction, and that you failed to display conduct or verbal expressions indicative of genuine contrition. While it has been submitted on your behalf that you remain capable of rehabilitation, it is my considered view that a person who does not acknowledge the wrongfulness of his conduct is far from being rehabilitated. True rehabilitation begins with an appreciation of the gravity and unlawfulness of one's actions; an appreciation which you have not demonstrated.

[53] With regard to the time spent in custody, it is acknowledged that both counsels accept that you spent a period of four years in custody awaiting trial, a

circumstance which cannot be attributed to any fault on your part. The question, however, is whether this factor may properly be elevated to substantial and compelling in the light of the totality of evidence. The court is of the view that, given the seriousness of the offences committed, the time spent in custody cannot be regarded as substantial and compelling circumstance warranting deviation from the prescribed sentence. This view aligns with various decisions of the Supreme Court of Appeal.

[54] The question of whether the period the accused spent in custody awaiting trial, constitutes substantial and compelling circumstances was dealt with in *Ngcobo v S*¹⁷ where the SCA ruled that ‘the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence imposed is disproportionate and unjust. It was held that the 2 years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.’

[55] Once more, this was again investigated by the SCA in *Ludidi and Others v S*¹⁸, where the appellant was incarcerated for 5 years and 8 months. Nicholls JA concluded that pre-sentencing incarceration is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances. The reasons for the prolonged period of detention prior to sentencing is relevant. However, a court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person's life. It cannot be 'reduced' by the period spent in custody awaiting trial and it would be improper for a court to consider the possibility. The court went further to

¹⁷ (1344/2016) [2018] ZASCA 6; 20 18 (I) SACR 479 (SCA) (23 February 2018) paras 7 and 21.

¹⁸ Loyiso Ludidi and Others v S (983/2022; 056/2024) (2024] ZASCA 162; 2025 (I) SACR 225 (SCA) (29 November 2024) para 13.

state that, there unless this is an exceptionally long period of time to which the conduct of the accused persons has not materially contributed, in my view, can never in and of itself, be a substantial and compelling circumstance where life imprisonment is imposed.

[56] Having considered all the surrounding circumstances cumulatively; including the nature and seriousness of the crimes committed, your personal circumstances, the interests of the victims, and the interests of society; it is evident that the imposition of a sentence of direct imprisonment is the suitable sentence under the circumstances. The court is mindful of the interests and well-being of your minor children, who stand to be adversely affected by the incarceration of their parent. Nevertheless, the court finds that none of the factors advanced constitute substantial and compelling circumstances. As stated in *S v Malgas* supra, such factors amount to no more than flimsy reasons. It is the considered view of this court that the imposition of the prescribed minimum sentences would not be disproportionate to the crimes committed; to you as the offender, or to the needs of society. Their imposition will not result in an injustice.

ORDER

[57] In the circumstances you are sentenced as follows:

- (a) **Count 1:** sentenced to Life imprisonment.
- (b) **Count 2:** sentenced to undergo eight (8) years imprisonment.
- (c) **Count 3:** sentenced to undergo eight (8) years imprisonment.
- (d) **Count 6:** sentenced to Life imprisonment.
- (e) **Count 7:** sentenced to undergo twenty (20) years imprisonment.
- (f) **Count 8:** sentenced to undergo five (5) years imprisonment

