IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
SOUTHERN CIRCUIT, PORTSHEPSTONE

Case No: CC 47/2023P

In the matter between:

THE STATE

versus

MBUYISENI CHRISTOPHER GEMA **ACCUSED**

JUDGMENT ON SENTENCE

Delivered on:

Mngadi J

Introduction

[1] The accused stands convicted on one charge of murder. The charge is read with the provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA). Section 51(1) read with Part 1 of Schedule 2 of the CLAA provides that the prescribed minimum sentence is life imprisonment if no substantial and compelling circumstances are found to exist for a court to impose a lesser sentence. These provisions are invoked by the

State in that the death of the deceased by the accused resulted from physical abuse, as contemplated in paragraph *(a)* of the definition of 'domestic violence' in s 1 of the Domestic Violence Act 116 of 1998 (DVA), as they were in a domestic relationship, as defined in s 1 of that Act. The accused and deceased were in a love relationship from which the deceased conceived triplets, such a relationship falls within the definition of a domestic relationship. The killing of the deceased by strangulation constituted violence in the form of physical abuse.

[2] **Factors relevant to sentence.** The accused's conviction is based on the court's finding that he took the deceased with him, and with whom he was in a love relationship and she was nine months pregnant with triplets, from her home to a spot where he strangled her to death. The court has also found that the aforementioned provisions of the CLAA invoked by the State, and on the grounds stated by the State, as set out above, are applicable.

[3] The State did not prove any previous convictions against the accused. His record of previous convictions (SAP69) shows that he has no previous convictions. At the instance of the accused, the court ordered that a pre-sentence report be prepared, which was admitted into the record as evidence. The defence in mitigation of sentence lead evidence from the accused and from the accused's father Reuben Gema. The State lead evidence from probation officer who prepared the presentence report. The evidence of the defence deals with the personal circumstances of the accused and nothing more turns from that evidence. The probation officer's evidence is in line with the contents of the pre-sentence report handed in as evidence. The accused's defence counsel as well as the State counsel addressed the court.

[4] Ms Qhamukile Sithole, a probation officer, compiled the requested pre-sentence report. She visited the accused and consulted with him. She also visited the accused's home and consulted with his mother, his father and his sister. Unfortunately, when the probation officer started interviewing the family, the mother collapsed and the accused's sister started crying and the probation officer could not get much information from the

family. The probation officer had to respect the family's wish as they requested her to leave.

[5] The accused 's family owns a home at Mahehle location, where his mother and sister currently reside. The accused has also built his own house within the same area, not far from his family home. The area is predominantly rural in nature. The accused is employed by the South African Police Service holding the rank of a sergeant. His mother is a pensioner. His sister is employed. The accused is 50 years old. He is unmarried. He reported that he had five (5) children from different relationships. He is reported to be in good health. He grew up in a stable family environment. He completed matric and later underwent training to qualify as a police officer.

[6] The accused is a first offender. He does not accept full responsibility for the offence. He did not display signs of remorse, nor did he express emotional distress regarding the death of the deceased, testified Ms Sithole.

[7] The probation officer reported that she visited and interviewed the family of the deceased. The mother of the deceased reported that she lost not only her daughter but also her unborn grandchildren. The deceased was her only daughter and a significant pillar of support within the family. She did not know much about the relationship between the accused and the deceased. The accused had not been introduced to the family. She did not know of any support given by the accused to the deceased during her pregnancy. The deceased told her in the evening prior to her death that the accused had requested her to come out and meet with him. The deceased is survived by an eleven (11) year old son. The deceased's son continues to experience severe emotional distress and struggles to cope with the loss of his mother.

[8] The evidence shows that the accused's highest level of education is a matric certificate. He is 50 years old. He was employed as a police officer in the South African Police Services. The accused came from a disadvantaged background. He grew up in a limited resources household. It was quite an achievement for him to pass matric and

get employed as a police officer. The accused as a first offender is regarded as a well-behaving person who avoids being in conflict with the law. The accused ‘s family regard him as a useful person who assist in supporting the family and his children. He has five (5) children with three of the children dependent on him and still at school.

[9] It remains unknown what the accused’s motive for killing the deceased was. The killing of the deceased by strangulation is a barbaric brutal act. The deceased was heavily pregnant with triplets. She was due to go to hospital the following day to give birth. The accused having arranged with her to take her to hospital. There is no evidence that the deceased had done anything to provoke the accused. The deceased, due to her relationship with the accused, the fact that he was a police officer, and she was pregnant with his children, must have felt safe in the presence of the accused. She had been in a love relationship with the accused for a period of about five years.

[10] It has been argued on behalf of the accused that there are substantial and compelling circumstances for this court to impose a sentence less than the prescribed minimum sentence of life imprisonment. The main consideration is that the accused is a first offender, he was gainfully employed and he contributed in supporting his family. He has been in custody awaiting trial for a period of close to three years.

[11] It is argued on behalf of the State that there are no substantial and compelling circumstances for this court to consider imposing a sentence less than the prescribed minimum sentence of life imprisonment. The accused did not tell the court what caused him to kill the deceased. He has shown no remorse. The accused in killing a heavily pregnant women killed the unborn children. The deceased, being heavily pregnant with the accused’s unborn children, looked upon the accused for protection. The deceased suffered a gruesome agonizing death. Her body was left exposed in an open spot on the side of the road.

[12] The only weighty mitigating factor in favour of the accused, in my view, is that he is a first offender. It must also be accepted in favour of the accused that there is no

evidence that he had pre-planned the murder of the deceased. There are numerous aggravating factors. The accused as a police officer is employed to uphold the law. The deceased and her unborn children were in a most vulnerable position. The accused as the boyfriend of the deceased and as the father of the unborn children had, apart from a legal duty, a moral duty not to harm the deceased and the unborn children. He took the deceased from the privacy and sanctity of her home, harmed her and she never returned to her home. He took the life of his own innocent children before they were even born. He literally squeezed the life of the deceased by strangling her until she died. It is regrettable that he shows no regret and no reflection. It appears that the death of the deceased and his unborn children have had no impact on him as testified by Ms Sithole.

Legal principles

[13] In *S v Rabie* 1975 (4) SA 855 (A) at 866A-C the court held that:

'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.' In *S v Zinn* 1969 (2) SA 537 (A) the court stated the factors to be considered to determine an appropriate sentence is the triad consisting of the crime, the offender and the interests of society. The triad epitomises the essence of a balanced, effective sentence which meets all the sentencing objectives.

[14] The purposes of punishment are deterrence, retribution, rehabilitation and prevention. Deterrence is meant to deter the offender and would be offenders from committing crime. Retribution is directed at imposing punishment as payment for the damage caused by committing the crime to the victim and the society. The offender by committing a crime has incurred a debt and serving the sentence is a form of payment. Prevention emphasises that the purpose of imposing punishment is to prevent the commission of crime. Rehabilitation focuses on imposing a punishment that will have

the effect to rehabilitate the offender, making him a better member of society. In *R v Karg* 1961 (1) SA 231 (A) at 236A-B the court held that: 'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

Terblanche in his book *Guide to Sentencing in South Africa (2nd ed)* states that: 'true retribution is effected only by imposition of an appropriate sentence, by a sentence which is in proportion to what is deserved by the offender.'

[15] In *S v Malgas* 2001 (2) SA 1222 (SCA) paras 7-9 it was held that the court should approach the question of sentence conscious of the prescribed minimum sentence which should ordinarily be imposed ensuring a severe, standardised and consistent response from the courts to the commission of such crimes. In deciding whether there are substantial and compelling circumstances, factors traditionally taken into account when sentencing offenders must be taken into consideration. The ultimate cumulative impact of mitigating factors must be such as to justify a departure from imposing the prescribed minimum sentence. Crimes like murder committed in the course of domestic violence calls for robust sentences wherein deterrence and retribution is emphasised over the personal circumstances of the offender. See *Mudau v S* [2014] ZASCA 43 para 6; *S v JN* [2024] ZAMPMBHC 60 para 10.

[16] In *S v Vilakazi* [2008] ZASCA 87; 2009(1) SACR 552 SCA para 58 it was held: ' Once it becomes clear that the crime is deserving of substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what period should be and those seem to me to be kind of 'flimsy' grounds *Malgas* said should be avoided.'

[17] In *S v SMM* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 13 at 297 the court, having remarked that the vexed question of sentence is always an extremely difficult exercise, stated that: 'sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.'

[18] Life imprisonment is the most severe sentence that a court can impose. On the other hand, to kill a person in a domestic or intimate relationship who is heavily pregnant with your own child/children shows total disregard for human life. The accused killed the deceased in the most brutal manner. In *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC) para 38 the court held that a sentence of life sentence is only justified if having considered the individual circumstances of the offender, it is found to be a proportionate sentence to the crime committed by the offender. By his conduct, the accused caused unimaginable suffering to the family of the deceased and her child. He took the lives of four innocent persons, the children just before they were born. The punishment imposed on the accused must truly reflect the harm he has caused. The community at large look to the courts to properly punish those who have committed serious crimes, failing which, there would be no respect for the law. However, for the sentence to be proportionate it must fit the crime, the offender and the interest of the community. The court in dispensing justice is required to do a fine balancing act between competing interests.

Unborn children

[19] The evidence established that at the time the deceased was murdered she was pregnant with male triplets that had reached a viable stage of development, they were in

a position to survive outside the womb of the deceased as recorded in the postmortem report. It appeared that the deceased was murdered to stop her from giving birth the following day although no concrete finding on the evidence could be made in this regard. The State did not charge the accused with the murder of the unborn triplets, because it is not a crime to kill an unborn child. In addition, there is no is no provision in the CLAA that murder of a woman heavily pregnant attracts a heavier sentence. There is also no statutory provision making it an offence to murder an unborn child. The evidence was that the accused, as far as he knew, the deceased was pregnant with twins. But in law, as an example, a person knowing that there are people beyond the curtain who directs shots at those beyond the curtain may be charged with and convicted of murder for each of the persons that died. The law defines murder as the unlawful intentional killing of a human being. A human being is a person born alive. The common law rule is premised on 'born alive'. Hence, murder can only be committed by the killing of a legally recognised person, and a person is not legally recognised until he or she is fully born in a living state. Therefore, the law as it stands for criminal purposes only recognises a person as an independent entity from the moment he or she is born.

[20] The State, with the current definition of the crime of murder, could not charge the accused with murder of the unborn children. It urged me to reconsider development of the common law definition of the crime of murder to include the killing of unborn children for future purposes. Although the accused still could not be charged with such a crime because even if development is granted it could not be granted retrospectively. If the sought development is granted, it will have a prospective effect enabling the State to prefer charges relating to murder of unborn children in future. In *S v Mondzinger* [2023] ZANCHC 79 para 40 the court, whilst relying on *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* [2007] ZACC 9; 2007 (2) SACR 435 (CC) paras 38-39, held that based on the current definition of murder an accused cannot be convicted on a charge of murder of an unborn child. *Masiya* warned the courts that the development of common law cannot have a retrospective effect.

[21] The high court in *S v Mshumpa and Another* 2008 (1) SACR 126 (E) refused to extend the common law definition of the crime of murder to include murder of an unborn child. The judgment constitutes the current state of the law, except if I am of the view that it is wrong. I am of the view that the court was wrong in refusing to develop the common law by extending the definition of the crime of murder to include murder of unborn children at an advanced stage of pregnancy. Section 173 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that high courts have inherent power to develop common law. See article by G A Du Plessis '*Feticide: creating a statutory crime in South African Law* (2013) 24(1) Stell LR 73.

[22] The court in *Mshumpa* provided the following impediments to the development of common law by extending the definition of the crime of murder to include murder of unborn children: present definition of the crime of murder; the courts have no power to create new crimes; principle of legality prohibits conviction for conduct that is not an offence at the time it was committed; the Constitution does not expressly confer any fundamental rights to unborn children; the 'born alive' principle gives legal recognition to an unborn child from birth; failure to develop the law does not leave an unborn child with no protection because the conduct is punished as part of the offence committed against the mother, the practical difficulties like whether the extended definition should require that viability be proved, whether such a crime be restricted to only third party killings, and how such a crime fits in with the offence of illegal abortion under the Choice of Termination of Pregnancy Act 92 of 1996 (Choice Act). The court at para 63 found that it could not extend the ambit of the crime of murder to include unborn children, because there is no counterpart in the Constitution for the protection of the rights of an unborn child, the protection of the unborn child is through the protection of the mother of the unborn child. Lastly, the court at para 64 found it problematic that an extension of the definition by the trial court will not be subject to a referral for confirmation by the Constitutional Court.

[23] The courts in appropriate cases have acceded to the development of common law. Section 39(2) of the Constitution grants power to the high courts to develop common law to be in line with the values enshrined in the Constitution and the Bill of Rights. In *Masiya* the Constitutional Court approved the development of the common law by extending the common law definition of rape to include non-consensual anal penetration of females. It is held that it is not in conflict with the principle of legality if such an extension does not have a retrospective effect. It did not see any impediment that the development by the high court is not subject to a referral for confirmation by the Constitutional Court. It also did not regard the development as creating a non-existing crime nor did the court defer the issue for consideration by the legislature.

[24] The development of the common law must be shown to be necessary. There is no doubt that unborn children are the most vulnerable. The legal convictions of civil society call for the protection of unborn children as far as possible. The laws regulating the termination of pregnancy are directed at the protection of unborn children as deserving of distinct protection from the interest of those that have interest in their welfare. They are protected not only against third parties but even against their mothers. These are measures taken by the State to protect prenatal life as part of the duty of the State to protect prenatal life. It cannot be argued that the State has no concern as to what happens to an unborn child prior to birth. There is no provision in the Constitution to the effect that the protection of human life commences at birth. The court in *Mshumpa* para 64 stated that there was merit in making the killing of an unborn child a crime. The Choice Act in limiting the right of a woman to terminate pregnancy protects the rights of an unborn child. In *Christian Lawyers Association v Minister* of *Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T) the court held that the fundamental right to individual self-determination lies at the very heart and base of the constitutional right to terminate a pregnancy, the State has a legitimate role in the protection of prenatal life as an important value in our society. The protection of prenatal life is not in any way different from the protection of human life. Therefore, an argument that a foetus is not a bearer of constitutional rights has no impact in the protection of prenatal life by an appropriate development of the common law. The

development of the common law to protect prenatal life once the foetus is viable is a logical step from the limited protection provided by the provisions of the Choice Act. In the case of unborn children, in my view, it is of no help to try an answer a question whether in general an unborn child is the bearer of constitutional rights or not. A better approach is to ask whether in respect of a particular constitutional right the unborn child is a bearer thereof or not. C Pickles in an article, 'The introduction of a statutory crime to address third-party foetal violence' (2011) 74(4) *THRHR* 546, states that the Choice Act advances female autonomy by providing a means for women to exercise their reproductive rights and at the same time limits these rights as the pregnancy progresses and the foetal viability sets in. Therefore, the Choice Act recognises and protects foetal interests based on constitutional values. The author acknowledges the need for reform and the criminalisation of third-party violence that terminates pregnancy of a viable foetus. However, in my view, the development of the common law need not be deferred for the creation of statutory offence. It should be directed at the protection or preservation of prenatal life once the foetus has reached viability, it should not be made incidental to the protection of any rights held by any other person. In *Carmichele v Minister of Safety and Security and Another* (*Centre for Applied Legal Studies Intervening*) [2001] ZACC 22; 2001 (4) SA 938 (CC) para 36 (quoting with approval from *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC) para 61 and *R v Salituro* 1991 CanLII 17 (SCC); [1991] 3 SCR 654) it was said: 'Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of society' … 'courts must remain vigilant and should not hesitate to ensure that common law is developed to reflect the spirit, purport and objects of the Bill of Rights…whether or not the parties in any particular case request the court to develop the common law under s39(2).' *Masiya* para 33, also quoting the above with approval, added 'where there is deviation from the spirit, purport and objects of the Bill of Rights courts are obliged to develop the common law.'

[25] The court in *Mshumpa* appears to have contradicted itself in holding that there is merit in the argument to develop the common law to make it a crime to kill an unborn child and at the same time to hold that there is no need and that failure to develop the

law does not leave unborn children unprotected as the conduct is punished as part of the offence committed against the mother. If the mother alone or with others is the perpetrator of the crime, they will do so with impunity. Further, the perpetrator is liable to be prosecuted, and if convicted to be punished for the crime for which he has been convicted. If the view is that the killing of an unborn child is not a crime, it follows that no punishment can be imposed for such conduct.

[26] There are calls for the 'born alive' rule to be abandoned as it is anachronistic and adopts an artificial and non-scientific concept of when life begins. Various jurisdictions have eliminated the effect of the rule by creating statutory offences to prevent harm to unborn children. This is towards an attempt to recognise the loss of an unborn child as a separate and distinct loss than a mere injury suffered by a pregnant woman. See L Finlay 'When unborn children are killed, how does the law deal with culpability?' The Conversation, 3 October 2018. (*https://theconversation.com/when-unborn-children-are-killed-how-does-the-law-deal-with-culpability-104222*, accessed 20 March 2026). In most jurisdictions an injury to an unborn child, which causes its death after it has been born, is punished as a crime. An attempt to kill an unborn child, which fails, and the child is born alive is prosecuted as an attempted murder, but if it succeeds it is not a crime. The Court of Appeals of California in *Keeler v Superior Court* (1970) 2 Cal 3d 619) remarked in relation to the 'born alive' rule that the question is one of law, not of morality, medicine or popular belief. The inquiry into the rule's present status should be considered in the light of modern life, not in that of the past centuries which witnessed its formation, and that twentieth century advances in obstetrics and paediatrics show that premature infants' lives can be preserved by use of modern hospital techniques and equipment. It means the rationale for the 'born alive' rule has fallen away.

[27] The view is that the 'born alive' rule be abandoned or modified in the same perspective as used in determining civil liability for prenatal injuries. The *nasciturus* fiction in succession law recognises an unborn child from conception for inheritance purposes, if born alive. The relaxation of the 'born alive' rule in other spheres of the law supports the relaxation thereof in the field of criminal law to extend protection to unborn

children. There is concern that there is no assurance that the foetus would have survived the rigours of birth. The concern is, in my view, misplaced. A person charged with murder cannot raise as a defence that the deceased would have been killed by someone else in any case or that there was no assurance that he would not have died of some other causes. The crux of the matter is whether at the time of the *actus reus* was the foetus alive and viable, which must be established beyond reasonable doubt.

[28] The protection of unborn children at advanced stages of pregnancy is necessary and it is long overdue. It cannot be put off in the hope that the legislature shall attend to it in due course. It is absurd that the law recognises the right to prenatal life and for certain purposes as stated above, and thereby grants rights to unborn children, but denies them protection under the law. In my view, there are no cogent reasons for not extending the common law definition of the crime of murder to include killing of unborn children of not less than seven months old from conception. If those involved in such killing did so to save the life of the mother, the defence of necessity is available to them. The so-called impediments referred to in *Mshumpa*, in my view, they don't withstand scrutiny. The State has to prove that the foetus was older than 28 weeks at the time and that it was viable in that it had the potential of being born alive. *See S v Molefe* 2012 (2) SACR 574 (GNP); *S v Jasi* 1994 (1) SACR 568 (ZH); *S v Madombwe* 1977 (3) SA 1008 (R); and *S v Mango* 1980 (3) SA 1041 (V). The extension of the common law definition of murder does not create a new crime. The crime is murder. The victims of the conduct and the perpetrators thereof are not being created by the extended definition. The extension recognises the conduct for what it is, a criminal offence. It is necessary in order to afford protection for the victims and the victims to be, the most vulnerable sector of the community, to place them more or less in the same level as the other victims of crime. It does not, in my view, in any way differ from the position the court was faced with in *Masiya*. I accordingly hereby declare that the common law is developed by extending from the date of this judgment the definition of the crime of murder to include unlawful intentional killing of a viable unborn child of not less than seven months old from the date of conception.

Conclusion

[29] Having considered and weighed the mitigating factors against the aggravating factors, the accused's killing of the deceased who was heavily pregnant with his unborn children is not excusable. He had an opportunity to reflect and to stop what he was doing but he did not. Even if there was no prescribed minimum sentence of life imprisonment, it is found that the sentence of life imprisonment is the proportionate, appropriate, fair and just sentence in the circumstances. It is found that there are no substantial and compelling circumstances for a court to impose a lesser sentence than the prescribed minimum sentence of life imprisonment.

[30] The accused on the charge of murder as set out in the indictment is sentenced as follows:

1. The accused is sentenced to life imprisonment.
2. No order in terms of s 103(1) of the Firearms Control Act 60 of 2000.

Further ancillary orders:

3. State counsel, Mr Miza, to serve a copy of this judgment to the Director of Public Prosecutions: KwaZulu-Natal within fourteen (14) days from the date hereof and return to my registrar a copy endorsed with acknowledgement of receipt for filing.

……

Mngadi J

_____

Adv M Miza for DPP