

SOUTH AFRICA / JUDGMENT

S v Bhala and Others

(Sentence) (CC 62/2019) [2025]

ZAWCHC 61 (21 February 2025)

[2025] ZAWCHC 61

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

CC62/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE NO: CC62/2019

In the matter

between:

THE
STATE
and
CEBISA
CHUMA BHALA
Accused
1
MMELI
KHESWA
Accused
2
MLUNGISI
NTSALAZ
Accused

JUDGMENT

ON SENTENCE -- 21 FEBRUARY 2025

LEKHULENI J

Introduction

[1] Femicide and gender-based violence remain a scourge that continues to ravage our country to its core. This case exemplifies the gravity and depth of this unrelenting problem. The three accused persons were convicted by Mantame J on 06 May 2024 on three counts, namely murder, possession of unlicensed firearms, and possession of ammunition. The

matter was subsequently allocated to this court in terms of section 275(2)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA") to impose sentence when Mantame J was acting at the Supreme Court of Appeal. After considering the evidence recorded and the trial court's judgment, I proceeded to consider the question of sentence. In terms of section 274(1) of the CPA, I invited the parties to present evidence to inform the court of the proper sentence to be passed. Accused 1 and 2 chose not to present viva voce evidence. Instead, their counsels submitted pre-sentence reports and addressed the court in mitigation of sentence in terms of section 274(2) of the CPA. Accused 3 testified in mitigation of sentence. A probation officer's report in respect of accused 3 was also handed in as an exhibit in these proceedings. The state advocate did not present evidence in aggravation of sentence on behalf of the state but addressed the court on sentence in terms of section 274(2) of the CPA.

[2] I pause to mention that sentencing proceedings herein commenced late last year. The court was addressed in respect of accused 1 and 2. However, due to the delay in obtaining a pre-sentence report in respect of accused 3, the matter could not be finalised expeditiously as was expected. The probation officer only provided the report in respect of accused 3 after the court directed the probation officer to attend court to explain what was holding or delaying them in compiling the pre-sentence report for accused 3. The report was only filed on 27 January 2025.

[3] The context in which the offence occurred is always germane to sentence. For this reason, I will briefly summarise the background facts and the trial court's findings in returning a verdict of guilt against the three accused. The three accused were arraigned in this court on the following charges: count 1, murder, an alternative to count 1, conspiracy to commit murder; count 2, possession of unlicensed firearm; and count 3, possession of ammunition.

[4] The three accused pleaded not guilty to the three charges proffered against them at the trial. They exercised their right to remain silent. However, the accused made formal admissions in terms of section 220 of the CPA. They admitted that the deceased was the person

mentioned in the indictment, that is, N[...] D[...] with date of birth, 18 November 1996; that the deceased was a female person who died on or about 28 June 2017. The accused further admitted that they are not holders of a valid license for firearms of any calibre nor ammunition of any calibre and that the deceased was shot and killed a day before she was to testify in another criminal matter in Cape Town Regional Court as a complainant in a rape case under Milnerton CAS: 398/05/2016.

- [5] The accused also admitted that on 28 June 2017, N[...] D[...] was declared dead by Shadi Mukiapini from the Department of Health - Du Noon Clinic; that on 4 July 2017 Dr Linda Liebenberg performed a medico-legal post-mortem examination on the body of the deceased as named in the amended indictment; that from the time of the infliction of injuries until the time of the post-mortem examination, the body of the deceased did not sustain any further injuries; that the

facts

and findings as set out in the post-mortem report completed at the time of the examination are correct; that the facts and findings related to the cause of death of the deceased as determined at the post-mortem examination and noted on the said post-mortem are correct.

Background

Facts

- [6] For the purposes of the judgment on sentence, I deem it proper to set out the facts of this case and briefly explain the reasons for the trial court's finding, as that will give context to the consequent sentence imposed below. The facts of this matter are so deeply unsettling to describe. The life of a vibrant young woman was brutally and abruptly ended for a sheer sum of R10 000 pursuant to a tripartite conspiracy to murder agreement concluded by the three accused before this court.
- [7] Accused 1 and accused 2 are husband and wife and are married by customary law. In October 2016, accused 2 was charged with committing an act of sexual penetration (rape) against a complainant N[...] D[...], a 19-year-old woman, the deceased in this matter, by inserting his penis into her vaginal without her consent. Pursuant to the alleged rape, accused 2 was assaulted by the family of the rape victim. These people assaulted accused 2 for the abhorrent act and dragged him to Section 28 in Du Noon, where they removed all his clothes and left him naked. They took photos of him and posted them on Facebook. Accused 2's sister called the police, and accused 2 was rescued and taken to Groote Schuur Hospital.

[8] Accused 2 was later released from hospital and subsequently detained at Milnerton Police Station. He thereafter appeared at Cape Town Court and remained in Pollsmoor Correctional Facility pending the hearing of his trial for the rape matter. The Rape trial commenced in the Regional Court in Cape Town on 2 May 2017. The accused pleaded not guilty to the charge. On 08 June 2017, the matter appeared for trial in the Regional Court, and the matter was heard and postponed

for further trial to 29 June 2017.

[9] Warrant Officer Wilmot Shane Isaacs, the investigating officer of the rape matter bearing CAS 398/05/2016, testified in this matter that on 29 June 2017, he went to the residence of the complainant, the deceased herein, to pick her up to testify in the Regional Court. Upon arrival, the complainant's mother informed him that the complainant was shot and killed on the night before the trial date. However, Warrant Officer Wilmot Isaacs proceeded to Court to notify the senior prosecutor of what happened. According to Warrant Officer Isaacs, as a result of the complainant's death, the Regional Court in Cape Town withdrew the charges against accused 2, and accused 2 was subsequently released from prison.

[10] The events leading to the murder of the complainant, in the rape matter N[...] D[...] can succinctly be recounted as follows:

[11] Whilst detained in Pollsmoor Correctional Facility for the alleged rape of N[...] D [...], accused 2 met accused 3. Accused 3 was also incarcerated at Pollsmoor Correctional Centre and facing a rape charge as well. While in prison, accused 3 informed accused 2 that he (accused 3) could arrange to kill the complainant, N[...] D [...], so that the charges of rape against accused 2 could be withdrawn. Pursuant thereto, accused 2 agreed with this suggestion. Accused 2 then called accused 1, his wife, and informed her that there was a gentleman (a fellow detainee – Accused 3) at Pollsmoor prison who promised to help him by killing the complainant (rape victim) and that that would be done for free.

[12] Later, accused 3, who was also facing a rape charge, was then released from prison, leaving accused 2 behind (in prison). After accused 3 was released from prison, on 27 June 2017, accused 3 met accused 1 and requested money from her to carry out the murder/shooting of the rape victim, N[...] D [...]. He asked for an amount of R10 000.00 to carry out the murder. Accused 1 informed accused 3 that she did not have that amount but would borrow it from others. Accused 3 was accompanied by another dark male at that time. On that day, accused 3 and his companion left accused 1 at about 14h00 and proceeded to visit other family members of accused 2. Accused 3 advised accused 1 that they wanted to see accused 2's family members for the purposes of security for payment of killing the complainant, N[...] D [...]. They visited the address of her husband's (accused 2) sister.

[13] On 28 June 2017 at about 19h00, a day before the hearing of accused 2's rape trial, accused 1 received a call from accused 3, who informed her that he had done his job and that N[...] D [...] had been killed. Accused 3 asked for the money and accused 1 promised to give it to him the following day. The following day, at about 09h00, accused 1 received a call from

accused 3 asking for the 'blood money' for killing the deceased. Accused 1 then proceeded to Shoprite to withdraw R5000.00 and handed it to accused 3. Accused 1 promised to pay the balance of R5000 at the end of that month.

- [14] After that encounter, accused 1 and 3 had several WhatsApp communications. Those communications formed part of the trial record. Upon further investigation, the police arrested accused 3 on the morning of 28 July 2017. The arresting officer, Sergeant Siqqolana, interviewed accused 3 and requested him to open his cell phone. Some WhatsApp messages linking the three accused to the murder of N[...] D[...] were retrieved from accused 3's phone. Of interest to Sergeant Siqqolana was a conversation between Accused 3 and a person who was saved as Mmeli's wife, i.e. accused 1. When Sergeant Siqqolana read those messages, he gathered that accused 3 and accused 1 (Mmeli's wife) knew each other. Sergeant Siqqolana testified at the trial that accused 3 confirmed that accused 2 told him to collect the money from accused 1. An array of phone calls and messages confirmed that accused 3 and 1 were in constant contact.
- [15] In the WhatsApp communication, inter alia, accused 3 told accused 1 that no one had seen them in the area where the incident had taken place. Furthermore, in their chats, there was a photograph of the deceased. The arresting officer could easily identify the deceased on that photograph as he attended the crime scene where the deceased's body was recovered. At the bottom of that photograph was written "RIP CHOMMIE". Sergeant Siqqolana asked accused 3 about these messages. In response, accused 3 stated that he did not want to make any confession but explained to the arresting officer of the plot that was hatched at Pollsmoor Prison with accused 2 to kill the deceased N[...] D[...] so that the charges against accused 2 could be withdrawn.
- [16] Sergeant Siqqolana proceeded to download and to print all those WhatsApp messages. According to Sergeant Siqqolana, the deceased was murdered on 28 June 2017. However, their chat on WhatsApp between accused 1 and 3 started on 3 July 2017. Sergeant Siqqolana explained during the trial that accused 1 and accused 3 had frequent and intimate chats. They shared about each other's day-to-day situations. It was apparent that accused 3 was smitten with accused 1. In fact, from reading the WhatsApp messages, the arresting officer noted that accused 1 and 3 appreciated each other considerably. From the WhatsApp communication, accused 1 saw accused 3 as his role model in the crime syndicate sector and wanted to emulate him. In the messages, accused 3 indicated that he did all that he did because he loved accused 1. Otherwise, others did not want to do the thing because the money was less than what they were used to get. This was all included in their WhatsApp chats.
- [17] At the trial, Sergeant Siqqolana explained that he also arrested accused 1 on 28 July 2017 at her place of work, Visual Security, Montague Gardens. When he effected this arrest, he was accompanied by Sergeant Majikijela. They immediately took accused 1 to Milnerton Police Station. While they interviewed accused 1, she initially told them that she did not know accused 3. Sergeant Siqqolana proceeded to ask for accused 1's cell phone. He further asked

for her cell phone number. Sergeant Sigqolana proceeded to check the number given to him by Accused 1 against the number saved as Mmeli's wife in Accused 3's

cell phone. The two numbers matched. Subsequently, Sergeant Sigqolana asked accused 1 how she had chats with accused 3 and accused 1 somehow claimed not to know accused 3. When she was so confronted about her chats with accused 3, accused 1 stated in isiXhosa, "How is Mlungisi (accused 3)? Why would he say I should delete the messages, but he did not delete them." Sergeant Sigqolana found out that accused 1 deleted her chats with Accused 3.

[18] Soon thereafter, accused 1 said she wanted to come clean and make a confession. The arresting officer proceeded to advise her of her rights. Sergeant Sigqolana explained to accused 1 that someone would take a confession statement and not him if she wanted to make a confession. Accused 1 appeared not to have a problem with the explanation. It was on this background that a confession was taken from Accused 1, who explained in detail the plot to kill N[...] D[...]. At the trial, the admissibility of the confession was challenged. However, after a trial within a trial, the court accepted accused 1's confession as admissible evidence against her.

[19] In his further investigation, Sergeant Sigqolana asked Accused 1 the whereabouts of accused 2. Accused 2 was arrested at accused 1's premises in Strand and taken to Milnerton Police Station. At Milnerton Police Station, the arresting officer interviewed accused

2. Likewise, accused 2 informed him that he wanted to make a confession, and Sergeant Sigqolana informed his Commander, Colonel Mapapu. Indeed, arrangements were made, and the confession was taken after accused 1's constitutional rights were explained to him. In the said statement, accused 2 explained how the plot to kill the complainant was hatched with accused 3 and how he was finally released from prison after the complainant in his rape matter was murdered. At the trial, the admissibility of this confession was also challenged. However, after holding a trial within a trial, the trial court accepted the confession as admissible evidence against accused 2.

[20] The state called several witnesses to testify. Despite all the evidence levelled against them, the accused chose to remain silent and not testify after the closure of the state's case.

[21] In considering the matter, the trial court found that it was not disputed that accused 2 was arrested for alleged rape of the deceased, N[...] D[...], in May 2016. He appeared in Cape Town Regional Court, after being remanded at Pollsmoor Prison. Again, the court noted that it was not disputed that whilst in prison, accused 2 communicated frequently with his wife, accused 1. At some point, accused 2 called his wife and stated that there was a gentleman (accused 3) who promised to help him kill the rape victim for free. This appeared to have been the version of Accused 1 and 2 in their confessions. However, after accused 3 was released from prison, it became clear that the said killing was to be effected at a cost or a fee of R10 000.00.

- [22] The trial court observed that although there was initially no amount for accused 3 to carry out this murder, it appears that upon his release and upon discussing the matter with his team, he requested the sum of R10 000.00 from accused 1, who at the time was gainfully employed at Visual Security as Security Guard. In rejecting the defence of threats alleged by accused 1, and correctly so, in my view, the trial court noted that if indeed accused 1 did not want to be involved in the planning and commission of the crime, she would have asked accused 3 that she had nothing to do with her husband's arrangements to murder the complainant, and that accused 3 should leave her alone, and/or if indeed there were threats, she should have reported the matter to the police. That was not done.
- [23] The court considered the WhatsApp communication between Accused 1 and 3 and observed that accused 3 declared his love and pursued Accused 1 in their conversation whenever they chatted. The trial court rejected the version of accused 1 that she was threatened and found that if accused 1 was indeed threatened by accused 3, accused 3 could not have proceeded with the killing of the deceased and or called her cell phone and advised her that the job was done on the evening of the day of the shooting. This resulted in them making an appointment to meet at Shoprite the next day at 09h00, when she withdrew an amount of R5000.00 and gave it to accused 3.
- [24] Furthermore, from 3 July 2017 to 26 July 2017, the WhatsApp messages that were exchanged between the two suggested that they were comfortable with each other. In these messages, they shared jokes, and on 4 July 2017, accused 1 asked "if all is quiet", referring to the murder. In response, accused 3 stated that "all is quiet, but he was advised not to set foot at that place, since some identified him on that day". Accused 3 stated that his confidante was keeping an eye for him. On 6 July 2017, accused 3 stated in the WhatsApp messages that others (his team members) did not want to do the job since they were going to get less money, but since he loved accused `1, they did it.
- [25] Importantly, on 13 July 2017, accused 3 asked accused 1 how she is now that her husband is back from prison. Accused 1 stated that she does not know how she can thank them. Accused 3 told her not to worry. However, he reminded her they should not fight at the end of the month. They communicated until the date of accused 3's arrest.
- [26] To the extent that this matter turned on circumstantial evidence, the trial court found that the inference to be drawn from the facts proven by the state, was that accused 1 and 2 conspired with accused 3 to kill the deceased using a firearm. The post-mortem report proved that the deceased sustained three (3) bullet wounds, and some bullets were stuck in her head. The court concluded that for accused 3 to kill the deceased, he had a firearm and ammunition. Consequently, the planning and execution of the murder were executed successfully by accused 1, 2 and 3. They were accordingly found guilty as such.
- [27] Against this background, I turn to consider the question of sentence.

- [28] In passing sentence, I must record that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.[1] This court has a duty to impose an appropriate sentence. When determining an appropriate sentence there is, as was pointed out in *S v Rabie*, [2] a duty on the presiding judicial officer to approach the determination with a mindset of mercy or compassion or plain humanity. This has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society.
- [29] In *S v Mhlakaza*, [3] the Supreme Court of Appeal, per Harms JA, held 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. The court noted that it remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.

Aims of Punishment

- [30] A sentencing court does not always have an untrammelled discretion to determine sentence or a clean slate on which to work. In certain cases, and this applies to the murder conviction against the three accused for reasons that I shall deal with below, a prescribed sentence is provided for by the Criminal Law Amendment Act 105 of 1997. However, I must mention that in determining an appropriate sentence, it is trite law that the court should bear the main objectives of criminal punishment in mind, namely retribution, prevention of crime and the deterrence of criminals as well as the possibility of rehabilitating the accused.[4] Given the current levels of violence and serious crimes in our country, it seems proper that, in sentencing especially such crimes, the emphasis should be retribution and deterrence. Deterrence has two aspects: deterring the prisoner and deterring others.[5]

- [31] Although it is correct that an accused should not be sacrificed on the altar of deterrence, it, becomes necessary from time to time for the courts to send a strong message to society and would-be offenders to curb the proliferation of crimes.[6]

The Triad

- [32] The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused.[7] That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn*, [8] described as a 'triad' consisting of the crime, the offender and the interests of society'. The elements of the triad contain equilibrium and a tension. A court should, when determining sentence, strive to

accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.[9] I as much as it is important not to overemphasise the seriousness of the offense or the interests of society so is it important not to overemphasise the personal circumstances of an accused person.[10] All three elements are equally important and indissociable. I turn to dealing with the elements of the triad in this matter *ad seriatim*.

The personal circumstances of accused 1

[33] It is trite that in passing sentence the personal circumstance of the accused must be considered carefully, not only in so far as they led to the act but also to the extent that the intended punishment will affect the accused personally. In this case, the personal circumstances of accused 1 have been set out succinctly in the probation officer's report and by the defence counsel, Ms Andrews, during her argument on sentence. Accused 1 is 36 years old and resided in Du Noon prior her arrest. She has no previous convictions and no pending matters. She has been married to accused 2 by customary union since 2014.

[34] Accused 1 reported to the probation officer that accused 2 abused her and was unfaithful to her. He would often abuse her emotionally, verbally and physically. Accused 1 has three children aged 17, 15 and 13, respectively. At the time of the commission of the offence, as well as at the time of arrest, accused 1 was not the primary carer of her biological children. The eldest child resides in Grabouw, and the probation officer reported that Ms C[...] T[...] adequately cares for the child. The second child was in the care of his great-grandmother in the Eastern Cape until the great-grandmother passed away. The child is currently in the care of another family member, and the last time the probation officer contacted the child,

the child was doing well. The third child is residing in Cape Town with a family member and is well taken care of.

[35] As far as her schooling is concerned, accused 1 stated that during her primary schooling, her parents separated. She then moved to her maternal grandparents with her biological mother. Accused 1's mother passed away when accused 1 was 11 years old, and her maternal grandmother then raised her. Accused 1 reported that she struggled academically and was consequently much older than her peers in her grades due to repeatedly failing her grades. The highest grade she completed was Grade 8. She dropped out in grade 9 when she was 18 years as she fell pregnant. She was compelled to leave school to care for her firstborn child. She worked for various companies and when she was arrested, she worked for Visual Security as a security guard

and earned a sum of R6000 per month.

[36] Concerning the offence, accused 1 reported to the probation officer that her husband was innocent in respect of the rape matter, and she was aggrieved and miserable that her husband had to be arrested for something she believed he did not do. She stated that she had no role in the murder of the deceased, directly or indirectly. The probation officer noted

in her report that, in her professional opinion, accused 1 has not demonstrated genuine remorse for all the counts she was convicted of. The probation officer recommended a sentence of direct imprisonment.

The personal circumstances of accused 2

[37] Accused 2 is 34 years old and is married to Accused 1. He is not a first offender. He was convicted of contravening section 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act in that he unlawfully and intentionally compelled or caused a child to be in his presence while he engaged in sexual intercourse. He has two children with accused 1. The first child of accused 1 is not his biological child. Accused 2 did not go very far at school. He only completed Grade 5. According to accused 2, he dropped out of school due to his parents not having enough money to pay for his transportation to and from school. Furthermore, accused 2 reported that his parents could not afford to buy him a school uniform.

[38] He worked as a taxi driver before he was arrested for the rape matter. He estimated that his monthly remuneration was R8000. However, this amount varied from month to month. Accused 2 informed the probation officer that his income was sufficient to provide for all his needs and his parents' basic needs and monthly financial expenses. As far as his health is concerned, accused 2 reported that he has been diagnosed with hypertension and is receiving treatment for this ailment.

[39] Accused 2 reported to the probation officer that at the time of the commission of the offense, he was incarcerated at Pollsmoor prison for the alleged rape case lodged against him by the deceased. In prison he met accused 3 who belonged to the same gang in prison with him. According to the accused 2, he was in a romantic relationship with the deceased before he entered into a relationship with accused 1.

[40] Accused 2 further stated that he continued his love affair with the deceased victim even during his marriage relationship

with accused 1. However, accused 2 alleged that before the deceased victim laid the alleged charges of rape against him, he allegedly

ended their relationship. The reason he ended the affair with the deceased victim was due to the deceased victim allegedly causing

trouble between accused 1 and 2. Accused 2 also reported that the deceased victim became a financial burden to him, which he was no longer able to sustain.

[41] As far as the murder charge is concerned, accused 2 reported to the probation officer that whilst he was incarcerated for the rape case of the deceased victim, he met accused 3 at Pollsmoor prison. Accused 2 asserted that he can recall accused 3 volunteering his services to assassinate the deceased victim. Accused 2 further averred that this was, however, only a developing discussion between him and accused 3. They never agreed in any way for

accused 3 to proceed with the killing of the deceased victim. However, he was surprised when he found out in court during his appearance that the deceased victim was killed.

[42] Accused 2 stated that the police then informed him and presented him with evidence of a suspected developing relationship

between his wife and the accused 3. Accused 2 reported that he agreed to give a confession statement out of rage as well as to avenge his wife and accused 3 for their suspected developing romantic relationship. Accused 2 denied that he was involved in the murder of the deceased. The probation officer recommended that the accused be sentenced to direct imprisonment in terms of section 276(1b) of the CPA.

The personal circumstances of accused 3

[43] Accused 3 is 42 years sold. He is not a first offender. He was convicted of assault in 2009 and of possession of unlicensed firearm and ammunition in 2010. In 2018, he was convicted of fraud. Accused 2 attended Njijini Primary School in Mount Frere and completed grade 9 in 1999. He moved to Durban to live with his father in 2000 and attended secondary school. Accused 3 testified that he did not have a good relationship with his father as his father was abusive to the accused's mother in front of the accused and he did not agree with that. Accused 3 testified that he attended Grade 10 for a few months and dropped out of school to seek employment opportunities to assist his family.

[44] He completed driving lessons and obtained a driving licence. Accused 3 started working as a driver in 2001 for a few companies in Durban. He moved to Cape Town in 2007 and lived in Du Noon. He worked for various companies until he was arrested in 2017 regarding this matter. He is not married and has six children, all born out of wedlock. Three boys and three girls aged 20, 19, 16, 15 and 12. The older three children are currently residing in the care of their maternal families. Their mothers are deceased. The two daughters aged 15 and 12 are currently residing with their mothers at Indwe, Eastern Cape.

[45] One of the accused's children, a 15-year-old son is residing with the accused's mother at Njijini Location in Mount Frere, Eastern Cape. The child concerned was raised by his paternal grandmother since the age of one year. The accused's mother is 76 years old and is suffering from sugar diabetes, arthritis and high blood pressure. Accused 3 reported that he was the main breadwinner in his family and financially supported his family and children. Even though he was not living with his children, he reported that he was financially contributing to their upbringing. His mother has confirmed accused 3's financial support towards the family and children. The probation officer noted that the accused's mother indicated she has been experiencing financial difficulties since the incarceration of the accused 3. Accused 3's mother is raising her grandson and is dependent on SASSA's old age grant, which she also pays for her policies and buys groceries from the grant.

- [46] During his evidence in mitigation of sentence, accused 3 stated that he has been in custody for almost 8 years and is suffering from a chronic illness; however, he is taking the required medication to manage the chronic illness. He reported to the probation officer that he feels stressed by the current case, and he attended a counselling session in 2022. The accused is not accepting responsibility for the offence he was convicted of. He stated during his evidence in mitigation of sentence that he is not the one who pulled the trigger and that the person who pulled the trigger is not in court. He denied any involvement in the murder and reported to the probation officer that he did not commit the offence he was convicted of.
- [47] The probation officer in the pre-sentence report recommended that the punishment of direct imprisonment is appropriate for the court's consideration as it ensures that the accused is no longer a risk to society, as well as providing him with an opportunity to reflect on the wrongfulness of his alleged actions.

The Crime

- [48] The seriousness of the crime depends upon the outlook of society, the indignation with which the crime is held in the eyes of society. In other words, the more repugnant a crime is in the eyes of society, the more public outrage is elicited, and the greater the punishment should ideally be. It is against this backdrop that this court considers the seriousness of the crime committed by the three accused. The three accused have been found guilty of murder and of possession of an unlicensed firearm and possession of ammunition. The offence for which the accused persons have been convicted of are of considerable severity. What is particularly heinous in this case is the fact that the murder was deliberately planned in the prison cells and purposely executed by taking the complainant's life in a tragic manner.
- [49] It bears emphasis that the way the murder was planned and executed generates a profound sense of disgust and condemnation. I am mindful that the rape matter was pending before the trial court. However, I am of the view that the complainant was violated when she was raped. It is axiomatic that society considers rape to be a very serious matter, particularly as it is so prevalent an offence. This is so because it constitutes a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.[11]
- [50] The complainant's constitutional right to freedom and security envisaged in section 12(1)(c) of the Constitution which include the right to be free from all forms of violence was hideously infringed. When she courageously stood before the court to assert her rights to human dignity, her voice filled with resolve and determination, she was tragically killed to exempt accused 2 from accountability or retribution for the rape charge levelled against him. In disrespect of the law, the accused flagrantly violated her inherent dignity, more so, the right to have her dignity respected and protected. The complainant could not obtain justice for the alleged violation of her body by accused 2. As correctly pointed out by the probation officer, the consequences of an offence of this nature are that it might deter victims of rape from coming forward out of fear that they would be at further significant risk of harm.

- [51] Concernedly, the deceased victim was due to testify the following day when she was killed and silenced. The truthfulness of the charge she levelled against the accused could not be concluded because she was mortally silenced. Statements made by accused 1 and 2 to the probation officer that the deceased victim had lied when laying charges against accused 2 violates the deceased's dignity and portrays her as being untruthful for laying false charges against accused 2. She cannot answer for herself because she has been eternally silenced. It can reasonably be inferred that she had a strong case against accused 2 and hence the latter realised that the only way to escape was to remove her from the face of the earth. I find this very troubling and disconcerting.
- [52] She died a painful death. The degree of violence exerted upon the deceased during her killing is deplorable. As correctly pointed out by the state, this crime was a femicide, and this court needs no introduction to it as it is dealt with daily by this court. It remains a serious threat to our country and needs to be dealt with decisively in a manner proportionate to the magnitude of the problem it represents. The death of the deceased was a planned hit on her life for the benefit of the accused, in particular accused 1 and 2. Demonstrably, accused 1 and 2 were reunited after her killing, and accused 3 was paid for his part in the murder. This was a well-planned murder of the deceased, which is frowned upon and cannot be allowed.
- [53] When one considers the medico-legal post-mortem examination report by the pathologist, the deceased suffered 3 gunshot wounds: one to the right upper arm, one to her head below her right earlobe, and the third to the head from the back. What aggravates this matter is that the deceased was shot in front of her home, which ordinarily served as her safe haven.

The interest of society

- [54] Society's interest in the effective punishment of murder offenders by the courts is obvious. Society demands that people who commit heinous crimes must be punished, bearing in mind that the main purpose of punishment discussed above.[12] Society should be protected against crime, which is attained through the prevention of crime and the deterrence of criminals by

administering punishment to those convicted of crime. In *S v Banda and Others*, [13] Friedman J held that the feelings and requirements of the community, the protection of society against the accused and other potential

offenders must be considered, as well as the maintenance of peace and tranquillity in the land needs to be taken into account.

- [55] Society is looking at the courts for their protection against people who commit crimes like the three accused. If the courts fail to deal appropriately with criminals, society will lose confidence in the courts, and this will prompt society to take the law into their own hands.

Substantial and compelling circumstances

[56] The Criminal Law Amendment Act 105 of 1997 is applicable in this matter. The murder of the deceased was planned by the three accused. Premeditated and planned murder attract life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 unless the accused show the existence of substantial and compelling circumstances to deviate from the prescribed minimum sentence. Mr Uys, the state advocate, submitted that the court should invoke the provisions of this Act and sentence the accused to direct imprisonment as prescribed.

[57] As far as the seven years of imprisonment while awaiting trial is concerned, Mr Uys relied on the Supreme Court of Appeal case in *State v Ludidi and others*,^[14] (“Ludidi”) in which the accused were found guilty of premeditated murder based on a contract killing of the husband of the fourth accused in the matter. The accused had been in custody for a period of 5 years and 8 months. In that matter, the court stated:

“The high court did not misdirect itself when it found that the lengthy pre-sentencing incarceration did not amount to substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentence of life imprisonment.”^[15]

[58] Mr Uys contended that a closer examination of Ludidi reveals that the reason for delays must be examined to effectively sentence accused persons. Where the prosecution causes the delay, an accused person cannot be prejudiced by this.

[59] The defence, on the other hand, argued that the court should consider the personal circumstances of the accused and depart from the prescribed minimum sentence. The defence also contended that the accused have been in custody for seven years and six months and that this should weigh heavily in favour of the accused. Ms Andrews, counsel for accused 1 and Mr Dzakwa for accused 2, mainly relied on *S v Vilakazi*,^[16] where the court stated that it would be unjust if the period of imprisonment while awaiting trial is not considered in any custodial

sentence imposed. Mr Ngoza, on behalf of accused 3, implored the court to consider a sentence in terms of section 276(1)(h) or (I) of the CPA as such a sentence will offer stricter supervision and monitoring of the accused in the community. In addition, Mr Ngoza pointed out that section 276(1)(h) will allow the accused to remain in the community and be involved in the correctional services program.

[60] The approach of the courts to sentence when the Criminal Law Amendment Act applies is now well established. It has been emphasised in *S v Malgas*,^[17] (“Malgas”) that when sentencing for crimes specified in the Act, a court is required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the prescribed period of imprisonment as the sentence which should ordinarily be imposed unless there are substantial and compelling circumstances warranting a departure from the prescribed sentence.

- [61] In *Malgas*, it was held that it is impermissible to deviate from the prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny' but, this apart, all factors relevant to determining sentence remain relevant when the Act applies, and a sentencing court must look to the 'ultimate cumulative impact' of all of these factors to determine whether a departure from the prescribed sentence is justified.[18] In *S v Price*,[19] the court pointed out that subsequent to the commencement of the Criminal Law Amendment Act 105 of 1997, it was no longer to be "business as usual" when sentence was imposed for the offences referred to in the legislation. It was noted that the legislature had provided a new "benchmark" against which the sentence to be imposed must be assessed.
- [62] In this case, I have considered the personal circumstances of the accused and the period they spent in prison pending the finalisation of this matter. From the reasons that follow, I believe that cumulatively, it does not constitute substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. From the evidence presented, the delay in hearing this matter cannot be attributed to the accused or the state. The matter had to be investigated thoroughly in the lower court before it could be transferred to the High Court for hearing.
- [63] The accused applied for bail in the lower court, but their bail application was refused as they failed to satisfy the requirements of section 60(11)(a) of the CPA. Primarily, the three accused remain in custody for this extended period because their bail application was refused. Thereafter, the matter was transferred to the High Court for trial after the investigations were concluded. The matter appeared
- for the first time in the High Court in September 2019 and was subsequently enrolled on the pre-trial roll in this court.
- [64] It is common cause that at the beginning of 2020, COVID-19 struck, and its restrictions in terms of the State of National Disaster, were only lifted around July 2022. This created a delay in the matter and even a backlog to other matters enrolled in this court. Subsequent thereto, a trial date for this matter was allocated for 10 October 2023 and the matter proceeded without any further delay. At the conclusion of the evidence, the accused were found guilty, and the matter was set down for sentencing proceedings on 26 June 2024. At the beginning of the sentencing proceedings, accused 3 terminated the mandate of his Legal Aid attorney and appointed advocate Ngoza to represent him. Once all the pre-sentence reports were filed, sentencing proceedings proceeded.
- [65] Mr Ngoza submitted that the pre-conviction period of imprisonment is so inordinate and must weigh heavily in favour of the accused when the court imposes the necessary sentence. I must stress that a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence to be imposed is proportionate or unjust.[20] In other words, the period in detention pre-conviction and sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is

justified.[21] In addition, a life sentence means a sentence which extends for as long as that person is alive. To this end, I agree with the view that a court cannot approach a life sentence as anything other than a sentence imposed for the rest of that person's life. It has no determinate maximum period.[22]

[66] The murder of the deceased complainant was carefully planned. Its execution involved the co-operation of the three accused. At the risk of repetition, I have considered the personal circumstances of the accused presented during the hearing of this matter and those set out in the pre-sentence reports, I have considered the interests of society, and I have also considered the crime and the circumstances under which it was committed, I have likewise considered the pre-conviction period of incarceration, and I have considered the fact that the accused are not remorseful for the callous killing of the complainant and I am of the view that there are no substantial and compelling circumstances so as to justify a departure from the benchmark laid down by the legislature. In the circumstances, I am of the opinion that the prescribed sentence is proportionate to the crime, the accused and the legitimate needs of society.

Order

[67] In the result, the following order is granted:

67.1 Accused 1 is sentenced to life imprisonment in respect of count 1 (murder) in terms of section 51(1) read with Schedule 2, Part 1 of the Criminal Law Amendment Act 105 of 1997. Accused 1 is sentenced to 15 years imprisonment in respect of count 2 (possession of an unlicensed firearm). Accused 1 is sentenced to five years imprisonment in respect of count 3 (for possession of ammunition).

67.2 Accused 2 is sentenced to life imprisonment in respect of count 1 (murder) in terms of section 51(1) read with Schedule 2, Part 1 of the Criminal Law Amendment Act 105 of 1997. Accused 2 is sentenced to 15 years imprisonment in respect of count 2 (possession of an unlicensed firearm). Accused 2 is sentenced to five years imprisonment in respect of count 3 (for possession of ammunition).

67.3 Accused 3 is sentenced to life imprisonment in respect of count 1 (murder) in terms of section 51(1) read with Schedule 2, Part 1 of the Criminal Law Amendment Act 105 of 1997. Accused 3 is sentenced to 15 years imprisonment in respect of count 2 (possession of an unlicensed firearm). Accused 3 is sentenced to five years imprisonment in respect of count 3 (for possession of ammunition).

67.4 In terms of section 39(2)(a)(i) of the Correctional Services Act 111 of 1998, the sentences in respect of counts 2 and 3 namely, possession of an unlicensed firearm and possession of ammunition, will run concurrently with the sentence of life imprisonment on the murder charge for the three accused.

67.5 In terms of section 103(1)(a) and (g) of the Firearms Control Act 60 of 2000, the three accused are deemed unfit to possess a firearm.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the State: Mr Uys

Instructed by: NPA

For Accused 1: Ms Andrews

Instructed by: Legal Aid South Africa

For Accused 2: Mr Dzakwa

For Accused 3: Mr Ngoza

Instructed by: Madikizela Attorneys

[1] S v Kumalo 1973

(3) SA 697 (A) at 698.

[2] S v Rabie 1975

(4) SA 855 (A) at 861B.

[3] 1997 (1) SACR 515 (SCA) at 518F.

[4] S v Rabie 1975

(4) SA 855 (A) 862 A-B.

[5] S v Mhlakaza and Another 1997

(1) SACR 515 (SCA) at 519F.

[6] S v Sinden 1995(2) SASV 704 (A). See also S v Lemtongthai 2015

(1) SACR 353 (SCA).

[7] S v Clayton Arends and Others (unreported Case No. CC96/09) (EC) at para 8.

[8] 1969 (2) SA 537 (A), at 540G-H

[9] S v Banda and Others 1991

(2) SA 352 (BG) at 355A-C.

[10] S v Sadler 2000

- (1) SACR 331 (SCA) para 18.
- [11] S v Chapman [1997] ZASCA 45; 1997
- (2) SACR 3 (SCA) at 5a-b.
- [12] R v Swanepoel 1945 AD 444 at p455.
- [13] 1991 (2) SA 325 (BP) at 356F.
- [14]
- [2024] ZASCA 162.
- [15] At para 18.
- [16]
- [2008] ZASCA 87; [2008] 4 ALL SA 396 (SCA) at par 60.
- [17] 2001 (1) SACR 469 (SCA) at Para 8.
- [18] At Para 9.
- [19] 2003 (2) SACR 551 (SCA) at 30.
- [20] S v Ngcobo 2018
- (1) SACR 479 (SCA) at para 14.
- [21] S v Romer 2011
- (2) SACR 153 (SCA) at paras 22-23.
- [22] S v Kammies 2019 JDR 2600 (ECP) at para 38

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