

SOUTH AFRICA / JUDGMENT

S v Mphahlele (SS 111/2021) [2023] ZAGPJHC 792 (14 July 2023)

[2023] ZAGPJHC 792**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Bhoola

CASE / FILE NUMBER

SS 111/2021

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Source record**FLYNOTES:**

CRIMINAL – Sentencing –
Primary caregiver
– Murder – Domestic
dispute – Psychological and emotional trauma – Gave
child poison to consume after altercation
and abuse from child's
father – Interest of society demands that serious crimes
warrant serious sentences –
Best interests of children must
be weighed in balance with imposition of an effective sentence
which is fair and just –
Rights of children are priority and
amount to substantial and compelling circumstances allowing
deviation from imposition
of minimum sentence – Correctional
supervision of five years warranted and preferred over direct
imprisonment –
Constitution, s 28.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO. SS 111/2021
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES

NOT
REVISED
In
the matter between: THE
STATE
and
MPHAHLELE
BASETSANE JOHANNA
ACCUSED

JUDGMENT

– SENTENCE

BHOOLA AJ

Introduction

- [1] This is a sentence following a conviction of murder arising from a trial after a plea of guilty was changed to a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] On the 15th of September 2022, I convicted the accused of one count of murder as contemplated in section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act.)
- [3] The State proved no previous convictions against the accused. Counsel for the defence submitted suitability reports for correctional supervision as a possible option for sentence, as well as a probational officers report. There was no victim impact report submitted.
- [4] Ordinarily, a conviction on the offence of murder read with section 51(2) of the Minimum Sentence Act attracts a minimum term of imprisonment of 15 years for a first offender.
- [5] The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. Each case must be determined on its own merits. I must consider all relevant circumstances and factors, apply the relevant weight thereto and then strike a balance between the various interests. I must be mindful not to sentence in anger and not too hastily consider irrelevant factors. I must impose a sentence that is logical, coherent, unemotional, and illustrate that various submissions and deliberations were considered.[1]

General principles

- [6] In considering an appropriate sentence, the most important principle is the so-called triad as stated in *S v Zinn*[2] where the court held when considering an appropriate sentence:

“What has to be considered is the triad consisting of the crime, the offender and the interests of society”.

Apart from the triad, I must also consider the impact of the victim.[3] In imposing an appropriate sentence, I must blend the sentence with an element of mercy.

- [7] S v M,[4] provided guidelines to follow when dealing with instances where the accused persons who are primary caregivers of young children with tender ages are concerned. The case dealt with the balancing of Constitutional imperatives of the best interest of children as envisaged in section 28 of the Constitution and the sentencing of the Accused in terms of the Criminal Procedure Act. The Accused in this matter was a single mother of three boys aged 16,12 and 8. In the court of first instance, she was convicted of fraud, and a report from correctional supervision indicated that she was a suitable candidate for correctional supervision. In spite of the report, the court sentenced her to four years direct imprisonment.
- [8] The High Court converted the sentence of four years imprisonment to section 276(1)(i) of the Criminal Procedure Act 51 of 1977. After having refused leave to appeal in the Supreme Court of Appeal, she approached the Constitutional Court who addressed the duties of the sentencing court in the light of section 28(2) of the Constitution and the relevant statutory provisions when the person being sentenced is the primary caregiver. The Amicus Curiae argued due to considerations of the interests of the Accused’s children, a correctional supervision order should be imposed in place of custodial sentence. The State contended that the sentence of the High Court should not be interfered with because the best interest of the children were considered. The importance of this case is the guidelines set by the court when dealing with such situations, regarding sentencing primary caregivers. The factors enlisted to be considered are:
- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
 - (b) A probation officer’s report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved.
 - (c) The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
 - (d) If on the Zinn triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

- (e) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
 - (f) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.
- [9] Sentencing remains pre- eminently a matter for the discretion of the trial court. I am free to impose whatever sentence I deem appropriate provided I exercise my discretion judicially and properly. Consequently, I must exercise my judicious discretion and balance the triad including the rights of the victim. I must ensure that one element is not unduly emphasised at the expense of the others in arriving at a just and fair sentence.[5] Correct facts and legal principles are essential in sentencing.
- [10] I must ensure that mercy is applied to the following considerations arriving at a just sentence:
- (a) that it is a balanced and humane state of thought,
 - (b) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence,
 - (c) It has nothing in common with maudlin sympathy for the accused,
 - (d) It recognises that fair punishment may sometimes have to be robust,
 - (e) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger and
 - (f) The measure of the scope of mercy depends upon the circumstances of each case.[6]
- [11] I must also consider the functions of sentencing[7] and apply the simpliciter of the theories of punishment, being the absolute, relative, and/or the unitary theory. [8] The absolute theory focuses on the seriousness of the crime which warrants punishment, the relative theory encapsulates the preventative theory, the deterrent theory, and the rehabilitative theory where the purpose is the reformation of the Accused person. The Unitary theory as the name suggest is a consideration of the combination of all the theories of punishment when arriving at a just sentence.

The Offence

- [12] Murder is a heinous crime. It is serious and prevalent. In summation, the facts of the case arose from a domestic situation. The complainant was 18 at the time she committed the offence. Her partner, and boyfriend who is the biological father of her three children, cheated on her with the neighbour. At the time of the incident, they had two children: a five-year-old and an eighteen-month-old (the deceased). She was also pregnant at the time. On the day of the incident, she left the deceased with her father who was with another women and proceeded to the tavern to consume alcohol. The accused's boyfriend was dissatisfied

with her actions. He returned home at some stage during the day of the incident, when she was present at home, and assaulted her. The deceased was moved around between the accused, her sister-in-law and her biological father. Ultimately, when the accused was at home, the accused's sister-in-law brought the deceased home to the accused so that she could feed the deceased. The sister-in-law left the accused alone with the deceased. The accused, then gave the deceased poison to drink which led to the deceased's demise. She subsequently admitted what she had done although not immediately.

- [13] The seriousness of the offence committed, was illustrated by the photographs and medico-legal reports. These were submitted as exhibits by agreement between the legal representatives. It paints a bleak picture of the ruthless murder of an innocent helpless toddler who could not speak or fend for herself.
- [14] According to the relevant post-mortem report, the cause of death of the deceased was determined to be consistent with aldicarb poisoning. The deceased was reported to have had a history of poisoning. An examination fluid exuded from her nose, and there were fine grey granules observed in her stomach and bowel, which is consistent with aldicarb poisoning. According to the toxicology report chlorpyrifos and terbufos sulfone was detected in the stomach contents. The deceased sustained no physical injuries.
- [15] What was discomfiting was the fact that a mother would kill her own child who was defenseless and helpless. She transferred her psychological and emotional trauma she experienced as a result of the disagreement and her hatred for her boyfriend into action which caused the demise of the deceased.
- [16] The judgment in respect of the conviction alluded to the evaluation of the circumstances in which the crime was committed bears reference and relevance in sentence.
- [17] In the *S v Mtshali*[9], the accused pleaded guilty to and was convicted of the charge of murder of her eight-year-old daughter and three-year-old son. The court was provided with both a correctional officer's report. The accused had lost her mother, never knew her father, had been assaulted and abandoned by her children's father, was unemployed, and was of below average intellectual functioning. Prior to killing her children, the accused had been severely depressed and had felt helpless and abandoned; she had attempted suicide and had killed the children in a manifestation of 'altruistic Fidi suicidal behaviour' murdering them in order to relieve their present suffering and because she saw no hope for them.
- [18] The court held, that the murders were clearly not planned or premeditated, and were substantial and compelling circumstances

present which justified the imposition of a lesser sentence. A suspended sentence of imprisonment, together with a correctional

supervision order with conditions specifically appropriate to the accused's situation, constituted a fair and suitable punishment. The accused was sentenced to 10 years' imprisonment, wholly and conditionally suspended for five years; and to three years'

correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977, subject to detailed conditions.

[19] The Constitutional Court in *S v M*[10] highlighted: that every child has the right to enjoy special care. Children are vulnerable and require a nurturing and secure family for their development. To this extent, sentencing courts must perform their function in matters concerning the rights of children in a manner which at all times shows due respect for children's rights and that brings to bear focused and informed attention to the needs of the children at appropriate

moments in the sentencing process. The question whether the sentencing courts had proper regard for the children's best interests when imposing sentence is a serious matter that strikes at the core of the administration of justice. The interests of justice demand that this court, as the ultimate guardian of both the Constitution and children, investigate whether the High Court and the Supreme Court of Appeal have exercised their discretion in line with the requirements of section 28 of the Constitution.

[20] In *S v S* and *The State together with Centre for Child Law*,[11] the issue raised was whether the sentencing court and the Supreme Court of Appeal in their reasons, followed the correct approach to sentencing as set out in *S v M*. [12] The applicant contended that both the courts failed to establish whether she was the primary caregiver with the result the sentence imposed ignored the best interests of her children. She argued, had both the courts followed *S v M*[13], the sentencing court would not have imposed a custodial sentence. The applicant was charged for forgery, uttering and fraud. Based on a probation officer's report she was sentenced to imprisonment for two years, which was conditionally suspended for five years. On the count of fraud, she was sentenced to five years' imprisonment with conditional correctional supervision in terms of section 276(1)(i) of the Act. The court based its judgment on the basis of the report in that should a custodial sentence be imposed, there would be an adequate family support system to care for the children and that Mrs S's mother-in-law would assist Mr S to care for the children.

Interest of Society

[21] Murder has become a national sport in our country. The community has been demoralised, outraged, and discouraged. Society has a legitimate expectation that apprehensible criminal activities as displayed by the accused should not be left undetected and unpunished. It demands and commands that serious crimes warrant serious sentences and society expects that the courts send out a clear and strong message that such acts of gruesome criminality will not be tolerated and will be dealt with effectively.[14]

[22] Violent conduct in any form cannot be tolerated and it is expected of courts to impose heavier sentences, to convey the message to the accused and prospective offenders that such conduct is unacceptable and morally apprehensible. It is expected of the courts to seriously restore and maintain safe living conditions for all citizens equally. When barbaric behaviour is displayed, the pendulum leans more in the direction of deterrence and retribution over that of prevention and rehabilitation.[15] However, this depends on the facts of the case before the court.

Victim impact report

[23] There was no victim impact report formally submitted to the court. According to the report of Mr N Mapitsa, the boyfriend of the accused was interviewed who is the father of the deceased and did not express any emotion regarding how he felt about the deceased.

[24] It is apposite to these facts that I would now balance and evaluate a just sentence by considering the mitigating and aggravating factors.

Personal circumstances of the accused

Mitigating factors

[25] The accused elected not to testify in mitigation of sentence. The correctional supervisor Mr N Mapitsa and a probation officer, Ms A Vergeer from Department of Social Development testified and provided the court with pre-sentence reports. From a reading of their reports, the following can be extracted as mitigating factors:

- (a) the accused was born on the 28th of August 2002 in Krugersdorp, in Gauteng. At the time of the incident, she was 18 years old and at the time of sentencing she is 20 years old. Her father passed on during 2008 and she is currently unmarried and is incarcerated since the 11th of October 2020. During the incident, her mother had taken her older son with her and had gone to Krugersdorp. On the day of the incident, she lived with the deceased and her boyfriend who was the biological child of the deceased.
- (b) On the day prior to the incident, she had an argument with the deceased's biological father because he did not sleep at home. He slept next door at his cousin's place with another woman. He was cheating on her.
- (c) According to Ms Vergeer's report, the accused came across as being neglected and not well looked after. She had no long-term goals, lived from hand to mouth and was very poor.
- (d) The social worker contended that the accused appeared to be emotionally immature and does not seek her children's best interests. She is not emotionally or financially able to care for her children. She cannot express herself verbally and behaves in an almost "childlike" behaviour. She contended if the accused had to return home, she will continue living in the same manner as before her arrest with little no responsibility and accountability for her actions.

- (e) According to the probation officer, the accused has a poor level of education, has no employment, and has no fixed working position or income. She cannot provide for her children emotionally nor can she provide for them financially and cannot express herself verbally. is fairly young immature and does not behave responsibly.
- (f) The accused completed grade six at the Unity Primary School. She had to leave school because her parents could no longer afford further education. The accused was a slow learner. The accused financial situation was such that she did not have any permanent employment and was a temporary and unskilled who often accepted work as a domestic worker where she earned R150.00 per day doing washing.
- (g) Mr N Mapitsa of the Department of Correctional Services prepared a report dealing with the suitability of the accused for a sentence of correctional supervision. He expresses the view that the accused does qualify for such a sentence in terms of section 276(1)(h) should the court consider correctional supervision as a sentencing option.
- (h) Ms Vergeer expressed that view that the minimum sentence option is applicable. Community based sentences on their own are not adequate sentences. Her opinion is that the accused needs to undergo therapy and treatment while in prison to assist her in identifying some life skills and copying mechanisms. She drew a distinction between the advantages and disadvantages of custodial and non-custodial sentences. She opines that direct imprisonment and/or correctional supervision in terms of section 276(i) is recommended whereafter she will be released on parole or correctional supervision after serving the sentence. The option also exists for the minimum sentence to be imposed due to the seriousness of the offence. She considered that

direct imprisonment would serve as a deterrent have a rehabilitative effect and will or might deter the accused and others from committing the same type of offence. She opined should the court elect to sentence the accused in terms of section 276(1)(h) of the CPA, she must be under correctional supervision for the entire duration.

[26] Counsel for the defence, Advocate Mavatha contended that the accused was found guilty of murder in terms of section 51(2) of the Minimum Sentence Act which prescribed mandatory sentence is 15 years. His submission was substantial and compelling circumstances exist for the court to deviate from the minimum sentence. He relied on the following factors as being substantial and compelling:

- (a) the accused pleaded guilty and made section 220 admissions. Attempts at a section 105A plea bargain failed and the accused tendered a plea of guilty which was changed to not guilty.
- (b) the accused was remorseful. The moment the police arrived she informed them what happened and did not mislead them. She admitted to her wrongdoing and took responsibility for what she did.

- (c) the accused was subjected to emotional and physical abuse by her boyfriend who had assaulted her on the day in question. The accused consumed alcohol and therefore her mental status cannot be ignored. She was pregnant, her child was born in prison. Her emotional level was not high. The fact she is twenty and has three children speaks volumes of her upbringing where she received no guidance.
 - (d) She is youthful and has three children to raise. There was no structure in her upbringing.
 - (e) The court should also consider the fact that the accused was incarcerated since the 11th of October 2020.
- [27] He submitted that the recommendation by Mr Mapitsa was that section 276(1)(h) is an effective sentencing option. He referred the court to S v M[16] and submitted a juvenile was sentenced to six years imprisonment and the SCA found that that the court misdirected itself and replaced it with five years in terms of section 276(1)(i). He submitted although the facts are not the same, many factors mitigate in favour of the accused. This case was to illustrate that correctional supervision can be imposed in serious cases. His submission that the accused should be given a second chance and imprisonment will not serve as rehabilitation and that the court must consider accused pre- sentence detention.

Aggravating circumstances and impact on the victim

- [28] The aggravating factors according to the reports of Mr. Mapitsa and Ms Vergeer are as follows:
- (a) that the accused consumed alcohol at the time of the commission of the offence;
 - (b) that the seriousness of the offence cannot be ignored which attracts a minimum sentence and;
 - (c) she poisoned her own baby.
- [29] Advocate Mkhari described the aggravating factors as follows: the correctional supervision report and the pre-sentence report conflict each other in material facts. He submitted that this is a serious offence. He contended that youthfulness is no longer a factor for consideration as a substantial and compelling circumstance, it cannot be said that the accused did not understand. She was well aware she gave her child the poison. She did not summon the elders for help. She waited for the police. There was no remorse. She ought to have directed her anger towards her boyfriend and not the minor child.

Evaluation

- [30] The accused in this matter was charged with a serious offence of murder which falls under the purview of part II of schedule 2. As a first offender of murder, the accused attracts a minimum sentence of 15 years imprisonment in terms of section 51(2) of the Minimum Sentence Act.

- [31] I do, however, have a discretion in terms of section 51(3) of the Minimum Sentence Act to impose a sentence lesser than the prescribed minimum sentence, if I find substantial and compelling circumstances exist which, when viewed cumulatively, justify the imposition of a lesser sentence.[17]
- [32] It is my duty to ensure that the sentence I impose must not be disproportionate in the circumstances and I must accordingly be satisfied that the factors warranting a lesser sentence is of such a nature that it is indeed substantial and compelling, so it enables me to depart from the prescribed minimum sentence. I cannot deviate from the minimum sentence for flimsy reasons and should not be departed from without “weighty” justification for doing so.[18] Furthermore, I am mindful that if the prescribed sentence would be unjust or disproportionate to the offence committed, then it must be departed from. However, the court’s inherent jurisdiction and the unfettered discretion permits the court to impose whatever sentence it considers fair and just.[19]
- [33] In evaluating the mitigating factors, counsel for the defence wants me to consider the plea of guilty as a substantial and compelling factor. It is trite that a guilty plea in circumstances where the case against the accused is strong, does not serve as a mitigating factor but remains a neutral factor.[20] The evidence in this matter would have been overwhelming. DNA evidence linked the accused to the crime scene. The SCA in *S v Matyityi*[21] held in such instances, a plea of guilty was not a relevant factor in determining an appropriate sentence.
- [34] Counsel contended that I must accept that the accused is remorseful. In *S v Matyityi*[22] the court explained remorse as a gnawing pain of conscience for the plight of another and genuine contrition can only come from an appreciation of an acknowledgement of the extent of one’s error, whether the offender is sincerely remorseful and not simply feeling sorry for herself at having been caught, is the factual question.
- [35] For a court to find that an accused person is genuinely remorseful, it needs to have a proper appreciation of what motivated the accused to commit the deed; what had since provoked her change of heart; and whether she does indeed have a true appreciation of the consequences of those actions. I have considered the fact that the accused elected not to testify in mitigation of sentence, which is her Constitutional right and prerogative to do so. To me her silence had negative connotations and consequences in that she had nothing to say about her actions.[23] These factors lie purely within her knowledge. The implication of this is that generally where an accused elects not to testify, a finding of remorse cannot be made by the presiding officer.[24] I am mindful of the applicant’s low emotional intelligence and her inability to express herself verbally.
- [36] Counsel requested that I take into consideration the accused presentence detention. I am mindful that the accused has been incarcerated as an awaiting trial prisoner since the 11th of October 2020, which is a fairly lengthy period of time. I have no problem taking this into consideration when imposing an appropriate

sentence. On a strict interpretation of the law, this does not amount to a ‘substantive and compelling circumstance.’ That having been said, nothing prevents this court, to consider the period that the accused had been incarcerated, pending her trial, for the purpose of imposing the appropriate sentence. According to *S v Radebe*’s[25] case, pre- sentence detention is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proportionate to the crime committed and therefore justified.

[37] Ultimately, in the present case, I have to weigh up two competing rights. On the one hand I must consider the best interests of the children and on the other hand I must impose an effective sentence which is fair and just. Mr N Mapitsa contends should the court decide to impose correctional supervision, the accused is a suitable candidate for correctional supervision. Mrs A Vergeer contends that direct imprisonment is a suitable sentence.

[38] When considering the best interests of the children, section 28(1)(g) of the Constitution provides “every child has a right “ not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child....” Additionally, section 28(2) of the Constitution provides “-

“not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time.” Additionally, section 28(2) of the Constitution

provides” a child’s best interest are of paramount importance in every matter concerning the child.”

[39] When considering section 28 of the Constitution, I cannot simply only consider the accused’s personal circumstances, but I must prioritise and balance the rights of the children ensuring that the children’s mental and physical health, their safety, education, primary needs, care, and protection are then balance the pendulum.

[40] The accused in this matter has been in custody since the 11th of October 2020. The five-year-old son was in the care and protection of the accused mother. Ever since the accused has been in custody, the biological father of the children did not visit nor support the five-year-old son. The accused then gave birth to her third child whilst incarcerated in prison. The minor child was able to stay with her in prison and when the child turned two years old the child was placed informally in the temporary the care and custody of the maternal grandmother.

[41] The maternal grandmother receives a child support grant for her own 13-year-old child and uses that money to support the accused’s minor children. Additionally, although her income is minimal, she earns R40-60 per week from recycling plastic.

- [42] Both the accused's minor children are of a tender age of five and two and they do not possess birth certificates and there is no child support grant in place for them. They also do not attend school. The accused was unable to provide any emotional and financial support to the five-year-old and the maternal grandmother who lived an onerous and who lived from hand to mouth provided for him. The biological father abdicated his responsibilities.
- [43] When sentencing the accused, due consideration must be given to the welfare and well-being of the minor children. My primary function is to cause the least possible discomfort to the minor children's care and protection and minimize any dangers and potential threats that they may suffer. In doing so I must balance the competing rights of maintaining the integrity of family care and the duty on the State to punish criminal misconduct.
- [44] The accused's personal circumstances are placed before this court. Mrs Vergeer, the probation officer contended that due to the serious nature of the offence committed the court should impose direct imprisonment. In order to protect the best interest of the children, and to muster constitutionality in terms of section 28, the accused needs to undergo therapy and treatment while in prison to assist her in identifying life skills and coping mechanisms so that she is confident to return and raise her children with the necessary care and protection. Her emotional intelligence will increase, and she will deal with the grief the death of her deceased child.
- [45] Murder is a serious offence. The message must go out that such ruthless and inhumane actions will be dealt with severely. Society will also have the knowledge that the accused's conduct did not go unnoticed, and the courts would have gained the respect and confidence of society. Direct imprisonment would serve as a deterrence, a punishment, have a rehabilitative effect and will or might deter the accused and others from committing similar types of offences.
- [46] I am mindful that sentencing must also be fair and merciful. I have considered the best interest of the children, their plight, and the fact they are possible candidates for children who are in need of care and protection as they are currently informally placed in the temporary care of their grandmother. I have applied my mind to the test adopted by sentencing courts, where a custodial sentence of a primary caregiver is in issue as set out in *S v M*. [26]
- [47] In summation then, the accused two children are of a tender age, five years and two years of age. Ever since she was in custody the five-year-old was living with her mother. Her two-year-old is also living with the mother. Since her incarceration from 11th October 2020, she was not providing any emotional or financial support to the five-year-old child. She was providing emotional support to the two-year-old child for 18 months and the child is now living with his other sibling with the maternal grandmother. It was established that the current whereabouts of the father of the children were unknown, and he is possibly incarcerated. Since the accused's incarceration he did not provide nor visit his children any of his children. In *S v M* [27], the court stressed the importance of paying appropriate

attention to the interest of the children “ is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”[28]

[48] The Constitutional Court held in *S v Williams*[29] that, whilst deterrence was previously considered the main purpose of punishment with other objects being accessory, the introduction of correctional supervision as a sentencing option has resulted in a shift from retribution to rehabilitation. This still requires an assessment of the traditional triad of the personal circumstances of the appellant, the nature of the crimes under review and the interests of society. Two important cases have due consideration in this regard due to the primary caregivers being sentenced. In *S v M*[30] the accused was sentenced to correctional supervision in terms of section 276(1)(h) of the CPA and in *S v S*[31] the accused was sentenced to section 276(1)(i) of the CPA. The reason for the difference was that in the former case no one was available to take care of the minor children and in the latter case the accused’s husband was available to take care of the minor children whilst she was serving her term of imprisonment.

[49] Turning now to the accused and applying the test that was set out in *S v M* [32] to the circumstances of the case before me when considering a custodial sentence of a primary caregiver. The accused person prior

to her incarceration in 2020, she was the primary caregiver of the children. Since her incarceration her mother had replaced her as the primary caregiver of her five-year-old son as he was placed in her alternative care. The relevant information was placed before this court by means of various reports and the evidence of the maternal grandmother. To me the five-year-old child has been provided for emotionally, physically, psychologically, and nurtured by the maternal grandmother. The two-year-old child has similarly been placed with the grandmother who is likewise nurturing and providing the necessary support.

[50] The accused has committed a serious crime. Murder is heinous. She murdered her own child. She requires therapy and to be able to deal with the severity of what she did. She needs to work through the process of accountability and responsibility. I do not believe a non-custodial sentence is a suitable form of sentence under the circumstances in terms of section 276(1)(h) of the CPA as the children are living with the maternal grandmother. I have applied my mind as to whether the minor children will be adequately cared for while the accused is incarcerated, and I am satisfied whilst they are cared for as alluded to above, the measures incorporated in my order has catered for the children’s wellbeing and their best interests have been considered.

[51] I am mindful that the minimum sentence in terms of section 51(2) of the Minimum Sentence Act is applicable. I find that substantial and compelling circumstances exist when considering section 28 of the Constitution to allow me to deviate from the imposition of the minimum sentence of 15 years.

- [52] I am mindful of the pre-sentence detention and also that whilst the accused was incarcerated, she was not exposed to any programmes to upskill herself. In light thereof I am of the view that a custodial sentence in the form of rehabilitation will be most effective under the circumstances.
- [53] There are two forms of custodial sentences: direct imprisonment which is usually an extended period and then there is section 276(i) of the CPA which can be considered as imprisonment with fringe benefits, and it is the most lenient form of custodial sentence in the CPA, in line with section 28 of the Constitution. This form of imprisonment would be considered only if the best interest of the children are being considered and provided for. In this case, I am satisfied that the grandmother of the children is able to nurture the children and provide the care and protection that they require considering the fact that the accused has murdered her own child.
- [54] The accused would not be able to provide for her children financially given the fact she has killed her child and requires the necessary emotional and psychological support to rebuild herself and receive therapy and counselling to meaningfully integrate and be reunified with her children. In order to mitigate any hardships during the accused's absence, various orders are put in place by this court with the intervention of stakeholders.
- [55] On the facts before me, it is accepted that the accused, in the emotional state that she was in, did what she did when she was highly emotional, psychologically drained, angry and in a traumatic situation. It is no justification to deprive her own child of her life. She was clearly emotionally immature and not skilled to deal with life's challenges. This is not a case for retribution but rehabilitation. However, I do not believe it is non-custodial rehabilitation for the reasons set out above and that a custodial sentence is warranted when balancing all the factors and interests. The accused has committed a serious offence and grave offence which is distinguished from *S v M*.^[33]
- [56] As a result, I make the following orders:
- (a) The accused is sentenced to a period of correctional supervision of five years in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.
 - (b) The National Commissioner for Correctional Services is directed to ensure that a designated social worker in the employ of the Department for Correctional Services visits the children of the accused, at least once every month during her incarceration, and submits reports to the office of the National Commissioner as to whether the children of the Accused are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

- (c) In terms of section 47(1) of the Children's Court Act an investigation to be conducted by a designated Social Worker from the Department of Social Development Krugersdorp and to ascertain whether the minor children of the Accused, living with Mrs [M...] [M.....], the maternal grandmother of the accused, residing at Plot Waterval Street Tartan, near Krugersdorp are in need of care and protection as envisaged in terms of section 150 and in accordance with section 155(2) of The Children's Court Act 38 of 2005.
- (d) In terms of section 47(2) of the Children's Court Act [D...] [M...] born [....in 2017] and [K...] [M...] born in [.... 2021] are placed in the temporary safe care of Mrs [M...] [M.....] , who is the maternal grandmother of the two minor children residing at plot Waterval Street, Tarlton, Krugersdorp.
- (e) That the Designated Social Worker who is allocated to investigate the Children's Court investigation, is ordered to assist the minor children through the services of the Department of Home Affairs to cause birth certificates to be issued forthwith in respect of the minor children of the accused.
- (f) That the Registrar of the High Court Johannesburg to forthwith cause proceedings in the Children's Court at Krugersdorp to be instituted by completing Form 2 of the Children's Court with the assistance of the maternal grandmother and cause a copy of this order and the Form 2 to be served on the Senior Magistrate or Head of Office at the Krugersdorp Magistrate's Court and the Chief Magistrate of the Johannesburg Magistrate's Court forthwith.
- (g) A copy of this order is to be served on the Head of Social Development at Krugersdorp, or any Social Worker delegated by the Head of Social Development to oversee the investigations, and who will then be responsible to prioritise the Children's Court proceedings in the Magistrates Court.
- (h) Mrs A Vergeer, a specialist Probation Officer who is in the employ of the Department of Social Development in Krugersdorp is to oversee that the maternal grandmother and the best interest of the two minor children are supervised pending the institution of Children's Court proceedings instituted in the Krugersdorp Magistrates Court.

Ancillary

Orders

- (a) In terms of section 103(1) of the Firearms Control Act 60 of 2000 the accused is declared unfit to possess a firearm.
- (b) In terms of 103(4) of the Firearms Control Act 60 of 2000, a search and seizure order for competency certificates, licences, authorisations and permits, firearms and ammunition are made, and the Registrar is to be notified in writing of the conviction.

- (c) In terms of section 120(4)(a) of the Children's Act 38 of 2005, the accused is deemed unsuitable to work with children.
- (d) In terms of section 122(1)(a) of the Children's Act 38 of 2005, the Registrar of this court must notify the Director General of this court's decision in terms of paragraph C so that in terms of section 122(2) of the Children's Act 38 of 2005, the accused's name is to be entered into part B of the National Child Protection Register.

C B BHOOLA

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances: Court date: 15/09/22, 20/01/2023, 22/03/2023, 05/07/2023, 10/07/2023, 13/07/2023,
Date sentence imposed: 14th of July 2023 On behalf of the State: Advocate Mkhari On behalf of
Accused: Advocate Mavatha

- [1] S v Rabie and another 2013 (2)SACR 165(SCA)
- [2] S v Zinn 1969 (2) SA 537 (A) AT 540G
- [3] S v Khumalo 1973(3) SA 697, S v Matyityi 2011 1 SACR 40 SCA
- [4] CCT 53/06 [2007] ZACC 18
- [5] S v Banda 1991 (2) SA 352(B-G) at 355A
- [6] S v Rabie 1975 (4) SA 855 A.D. at 862 D-F
- [7] S v Loggenberg 2012(1) SACR 462 GSJ
- [8] Snyman CR, Criminal Law Workbook, First Edition
- [9] S v Mtshali 2012 (2) SACR 255 (KZD)
- [10] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008
(3) SA 232 (CC)
- [11] S v S and another [2019] 22
- [12] See footnote 10
- [13] See footnote 11
- [14] S v Holder 1979 (2) SA 70 (A)
- [15] S v Msimanga and Another 2005(1) SACR 377 (O) 381
- [16] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008
(3) SA 232 (CC)

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- [17] S v Malgas 2001 SACR 496 (SCA)
- [18] S v Fatyi 2001 (1) SACR 485 (SCA).
- [19] S v Malgas 2001 (1) 1 SACR 469 (SCA) at para 25
- [20] S v Matyityi paragraph 13.
- [21] See footnote 14
- [22] S v Matyityi 2011 (1) SACR 40 (SCA) para 13, S v Martin 1996 (2) SACR 309 (SCA) par 9.
- [23] S v Matyityi paragraph 21
- [24] S v Matyityi 2011 (1) SACR 40 (SCA)
- [25] S v Radebe 2013 (2) SACR 165 (SCA) at [14]
- [26] See footnote 10
- [27] See footnote 10.
- [29] S v Williams 1995 (2) SACR 251 (CC)
- [30] See footnote 10
- [31] See footnote 11
- [32] See footnote 11
- [33] See footnote 10
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