

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: CC12/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO
..... SIGNATURE
..... DATE

In the matter between:

STATE

VERSUS

B[...] M[...]

ACCUSED

JUDGEMENT – SENTENCE

MLOTSHWA AJ

1. The accused is a 32-year-old male person. He is not married but was staying with the deceased for over 17 years. They had three children:

1.1 L[...] aged 14 and

1.2 R[...] aged 12

1.3 The third born child unfortunately passed away in July 2023 when the accused was in custody awaiting trial of this matter.

2. The accused was brought up by his mother as his father passed away in 2000 when the accused was about 9 years old. He has two siblings, a sister T[...] who is disabled as a result of an injury she sustained in an accident. His younger brother is mentally retarded.

3. The accused went to school up to Grade 12 which he did not pass. He has N3 in engineering diploma credits which he did at the Sedibeng College in Vereeniging. Before his arrest he was working for himself making window and door burglar guards for clients. He used to earn about R1 800.00 per week.

4. He has been in custody since the day of the incident which is 24 October 2022. He has now been in custody awaiting the trial of this matter for just over a year.
5. The accused has no previous convictions.
6. The accused has been found guilty of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 and of his then partner, M[...] E[...] T[...] who was 31 years old at the time of the murder.
7. When determining the appropriate sentence, the classic triad enunciated in **S v Zinn**¹ is to be taken into account. This court has to consider the gravity of the offence, the circumstances of the offender and the public interest.
8. In **State v Banda and Others**² Friedman J explained that:

“The elements of the triad contain an 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. This is not merely a formula, nor a judicial incantation, the mere stating whereof

¹ 1969 (2) SA 537(A)

² 1991(2) SA 352 (B) at 355A-C

satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns.”

9. As aforesaid the accused is the father of two minor children aged 14 and 12 years old. It is therefore imperative to this court in the light of section 28 of the Constitution and other relevant statutory provisions to take into account when sentencing the accused that he is a father of the two minor children whose mother has unfortunately died at the hands of their father, the accused.

10. Section 28 (2) of the Constitution provides that “(a) child’s best interests are of paramount importance in every matter concerning the child”.

11. In **S v M**³ it was held that:

*“Indeed, it is the very sweeping character of the provision that has led to be asked about its normative efficacy. For example, in **Jooste, Van Dijkhorst J** stated:*

‘The wide formulation of section 28(2) is ostensibly so all-embracing that the interests of the child would override all other

³ 2008 (3) SA 232(CC)

legitimate interests of parents, siblings, and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That clearly could not have been intended. In my view, this provision is intended as a general guideline and not a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.”

12. Section 28 of the Constitution like all other rights conferred by the Constitution is subject to the limitation clause contained in section 36 of the Constitution as the Constitutional Court found in **Sonderup v Tondelli and Another**⁴ that the international obligation to return a child to the country of his or her residence for determination of custody would constitute a justifiable limitation under section 36 of section 28 rights. It was found that this limitation on section 28(2) was counterbalanced by the duty of courts to weigh the consequences of the court's decision on children”. See **S v Mphahlele**⁵ and **S v Howells**⁶

13. Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

⁴ 2001 (2) BCLR 152(CC)

⁵ [2023] ZAGP JHC 792 (14 July 2023)

⁶ 1999 (1) SACR 675 (C)

14. The question to be asked in this case is whether the accused is a primary caregiver to the minor children. In **S v M**⁷, a primary caregiver was described as “the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly”. Of course as the court found “as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise”.
15. According to the accused the children are presently taken care of by their paternal grandmother, that is, the accused mother Mrs L[...] M[...] of House number [...], E[...], [...], Sebokeng, Vereeniging. Strictly speaking the accused is therefore presently not the primary caregiver of the children.
16. It is therefore clear that if the accused is sentenced to a custodial sentence, although it would be ideal for the children to be brought up by a parent, the impact on the children will be minimal as their status will not change and are presently being taken care of adequately. The children’s best interests are therefore sufficiently taken care of.

⁷ *supra*

17. As the Constitutional Court further found in M⁸ that the purpose of emphasizing the duty of the sentencing court to acknowledge the interests 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 possible in the circumstances from avoidable harm.
18. Further an appropriate order may be made that the Department of Welfare and Population Department be requested to see to it that the children are properly cared for during their father's imprisonment and are kept in touch with him.
19. The accused testified in mitigation of the sentence. He testified that he is remorseful of what happened. He realized that he is the one that has caused hardship to his children. He is the one that broke the fiber of his family. He testified that he is not going to commit a similar offence again.
20. The accused testified that he and friends drank two bottles of Three Ship Whisky which did affect him and that he would not have acted the way he did if he had not consumed liquor. In this instance the remarks of Holmes JA in **S v Ndholvu**⁹ are apposite when he said:

⁸ *supra*

⁹ 1965(4) SA 692C-E

“Intoxication is one of humanity’s frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily overindulge and thereby do the things which sober he would not do. On the other hand, intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a feel design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the court has a discretion, to be exercised judicially upon the consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed.” See also **S v Luxolo Mandita Mpongoshe**¹⁰.

21. The effect of alcohol when passing a sentence has been recognized for centuries as Wessels J in **Fowlie v Rex**¹¹ stated as follows:

“It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree of punishment has been recognized in almost every system of jurisprudence. In the digest (48.19.1) we find the distinction being drawn between the punishment of a sober man

¹⁰ [2020] ZAECGHC 8

¹¹ 1906 TS 505 511

and of a man who had been drinking and Matheus says :Ebrius aliquo mitius puniri debet quia non prosito sed impetu delinquit. Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened.”

22. The State on the other hand contended that the accused displayed no remorse. The post-murder behavior of the accused should also be taken into account when one assesses whether or not the accused is remorseful. In **S v Matyityi**¹² Ponnann JA stated the following regarding remorse:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from the appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look”.

23. The offence of murder that the accused has been convicted of is a very serious offence. It is very prevalent. Gender based violence

¹² 2011 (1) SACR 40 SCA

is a serious scourge in our country. As Advocate Masete has correctly pointed out that we hear and read almost every day about the country's outcry about this type offence. There has even been a dedicated period in the calendar year titled 16 Days of Activism against Gender-based Violence which is an international campaign to challenge the violence against women and children, which runs every year from 25 November to 10 December.

24. In **S v Mudua**¹³ an unreported judgement by Mathopo AJA, as he then was, he stated the following:

“Domestic violence has been a scourge in our society and should not be treated lightly, but deplored and severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity.”

25. The applicable sentence for the murder is subject to the provisions of section 51(2) of Act 105 of 1997 (the Minimum Sentences Act). In this instance the minimum sentence is fifteen years' imprisonment.

¹³ 2010 JDR 0641 (SCA): (547/13) [2014] ZASCA 43

26. It is trite that where the minimum sentence is applicable, a court can only deviate therefrom if substantial and compelling circumstances are found to justify the imposition of a lesser sentence. In **S v Malgas**¹⁴ it was stated that when dealing with crimes falling under the regime of the Minimum Sentences Act, it is no longer “business as usual” and that minimum sentences should not be departed from lightly and for flimsy reasons which could not withstand scrutiny.

27. The deceased died a painful, brutal, violent and sadistic death. The accused assaulted her with his fists and kicked her with booted feet for a prolonged period of time. According to both Trudy and Motsamai the assault was over 30 minutes. One shudders to think of the pain felt by the deceased as the blows landed on her body so many times. The accused’s actions were really callous, heartless and really cold.

28. The accused has deprived the deceased’s minor children of a mother. The grandparent is left with the invidious task of bringing up these children with the meager government child grant.

29. As aforesaid, the crime of murder is very prevalent. What makes this crime more despicable is that it was committed against an intimate life partner. Crime in South Africa is out of control. The

¹⁴ 2001 (1) SACR 469 (SCA)

society expects courts to pass sentences that should deter would-be criminals. The minimum sentences Act was passed more than 20 years ago, mainly to curb the spiraling of the offences mentioned in the Act, one of which is murder. The minimum sentences as contained in the Act seem to hardly deter criminals for if this was the case then there would be a steady decline in the rate of murders and more especially murders committed against life partners.

30. It is trite that the minimum sentences are ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances which would justify a departure therefrom.

31. The court has to evaluate all the circumstances cumulatively including the mitigating and aggravating circumstances to decide whether substantial and compelling circumstances exists in the matter to justify a departure from the ordained sentence. The court must be alive to the fact the legislature has ordained a particular sentence for the offence the accused has been convicted.

32. The court has to balance the aggravating and mitigating factors in this matter. The court has further to take into account that you are a father of two minor children. According to you the deceased is the one that hit you first.

33. Due to the seriousness of the offence you committed, although the court has to exercise a measure of mercy, **S v Rabie**¹⁵, it is required that the elements of retribution and deterrence should come to the fore, and that your rehabilitation should be accorded a smaller role. The Supreme Court of Appeal in **S v Mhlakaza and Another**¹⁶ also pointed out that, given the high level of violent and serious crimes in the country, when sentencing an accused person for such offences, emphasis should be on retribution and deterrence. It is therefore not wrong to conclude 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 victims of crime may be inclined to take the law into their own hands.

34. In affirming that retribution should carry more weight because of the seriousness of the crime which an accused person has been convicted of, when the court considers the aspects relating to the purpose of punishment, it was put in **S v Swart**¹⁷ as follows:

“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper

¹⁵ 1975 (4) SA 855 AD at 862D-F

¹⁶ 1997(1) SACR 515(SCA)

¹⁷ 2004(2) SACR 370(SCA)

weight must be accorded to each, according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.

35. As aforesaid, the deceased was killed in a ruthless manner and showed that the accused has no regard for human life. It is very scary that a partner could be so heartless and coldblooded towards a woman with whom he has spent over seventeen years and is the mother of his three minor children. The sentence must surely show the indignation of the society about this type of crime.

36. The Constitution of our country provides that “everyone has a right to life”. It is therefore the duty of the courts to protect the citizens of the country and the society in general from the scourge of these violent crimes, and to send a clear message that this behavior is unacceptable and will not be tolerated.

37. The society has a legitimate expectation that apprehensible criminal activities as displayed by the accused should not be left unpunished. The society demands and commands that serious crimes warrant serious sentences and expects that the courts send a clear and strong message that such acts of gruesome criminality will not be tolerated and will be dealt with effectively. See **S v Holder**¹⁸

¹⁸ 1979 (2) SA 70 (A)

38. It is hoped that you will use the time in custody to attend to the necessary programs offered by the Correctional Services fruitfully to attend to your anger management problems, to learn that life is not about you only, other people have rights too. Hopefully you will learn that bullying and controlling other people especially a life partner is not ideal.
39. In your case, the court has to consider that, as aforesaid, you are a father of two young children. The court has therefore not to look at your personal circumstances only but also take into account the interests of your children, their mental and physical health, their safety, education, primary needs, care and protection.
40. As aforesaid, the minor children are being taken care of by the accused's mother. Their financial needs may also be met in the form of the government's monthly child grant which was in any event due to them though through the deceased.
41. This court is mindful that a sentence must also be fair to the accused as well as to the community and be blended with a measure of mercy. This court has considered the best interest of the children. The court has considered the test to be applied by sentencing courts when sentencing a primary caregiver to a custodial sentence as set

out in the M¹⁹ matter. I have applied my mind as to whether the minor children will be adequately cared for while the accused is incarcerated, and this court is satisfied that whilst they are cared for as alluded to above, the measures incorporated in the order of this court has catered for the children's wellbeing and their best interests are considered.

42. This court has also taken into account the other sentencing options like a fine, a suspended sentence, a correctional supervision sentence and is of the opinion that due to the heinous crime committed by the accused, all are unsuitable. As was stated in **S v Shaik**²⁰ that:

“The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right to an accused to demand the most favourable possible treatment. A fair trial also requires-fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime”.

43. Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist which call for the imposition of a lesser sentence than the prescribed

¹⁹ *supra*

²⁰ 2008 (1) SACR 1 (CC) para 43

minimum sentence in terms of the Act, I am of the view that this the court may deviate from imposing the minimum sentence of 15 years' imprisonment due to the undisputed fact:

43.1 you and the deceased do not have a history of physical violence towards each other,

43.2 you are a first offender;

43.3 that to some extent you should have been angered by the deceased not sleeping at home and leaving the minor children to their own vices,

43.4 that you were under the influence of alcohol,

43.5 that you have now spent over a year in prison awaiting the trial of this matter;

43.6 fact that the deceased kept on insulting you;

43.7 You are remorseful and you realise that you are the one who broke the fiber of your family; and most importantly;

43.8 You are now the sole parent of two minor children who needs the guidance of a parent.

43.9 The court will however not lose sight of the fact that the ordained sentence for the offence you committed is 15 years.

44. In the circumstances the court makes the following order:

1. You are sentenced to twelve (12) years' imprisonment;
2. You are declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000;
3. The Registrar of this Court is requested immediately to approach the Department of Welfare and Population Development with a request:

3.1. That the Department of Welfare and Population Development investigate the circumstances of the accused's two minor children without delay and take all appropriate steps to ensure that;

3.1.1. The children are properly cared for in all respects during the accused's incarceration;

3.1.2. The children remain in contact with the accused during his period of incarceration and see him on a frequent basis, insofar as prison regulations may permit; and

3.1.3. Everything reasonable possible is done to ensure the reunification of the accused with his children on the accused's release from prison and the promotion of interests of the family unit thereafter.

**MLOTSHWA J
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

APPEARANCES

STATE: Adv Khosa

The office of the Director of Public Prosecutions, Gauteng North

DEFENCE: Adv P Masete

Legal Aid South Africa