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 NO: A271/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 31 JULY 2024
SIGNATURE [redacted]

In the matter between:

SIBONISO COLLEN DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

SIPUNZI AJ

Introduction

[1] On 5 September 2022, the appellant was convicted of murder of his partner. At the time of the conviction, it was found that the murder was committed in circumstances that are listed under section 51(2) Schedule 2 Part 2 of the Criminal Law Amendment Act, 105 of 1997 (CLAA). On 20 September 2022, he was sentenced to undergo life imprisonment. The appeal is against the sentence.[1]

[1] In terms of section 16 of the Superior Court Act, 10 of 2013

[2] A brief outline of the context upon which the appellant and deceased led their lives will be apposite. Established facts are that the appellant and the deceased were living together as a couple since 2011. They also shared one bank account and bank card for their household needs. On occasion, they would have disagreements on their manner of spending or use of their joint bank account. Over time, the appellant also suspected that the deceased was unfaithful to him. These would cause them to quarrel and have physical fights. During a fight on 19 November 2021, the appellant stabbed the deceased, fatally injuring her. Thereafter, he unsuccessfully tried to take his own life. Hence, the conviction and impugned sentence of the appellant to life imprisonment.

[3] The main challenge to the sentence imposed was that the sentencing court misdirected itself when it resolved that, in the consideration of sentence, it was entitled to invoke the provisions of section 51(1) Part 1 Schedule 2 of the CLAA. This was on the basis that when the state had accepted the plea explanation of the appellant that was consistent with the provisions of section 51(2) of the CLAA, and that the court was bound by such facts, which were also equally accepted by the court for the purposes of the conviction that followed the appellant's plea.

[4] On the other hand, on behalf of the respondent it was argued that the approach adopted by the trial court was correct. On this argument, the respondent relied on the case of *S v Kekana*[2] where the court held that, "the trial court was entitled to consider life imprisonment as a sentencing option, irrespective of the State's acceptance of an unsubstantiated plea in terms of s 51(2). The dictates of justice and the need to avoid absurd consequences demanded this. It must also be borne in mind that irrespective of the minimum sentences provided for in the CLAA, the court retains its inherent power to consider life imprisonment, if the gravity of the offence required so."

[5] The main issue for consideration becomes whether the trial court was entitled to follow *S v Kekana* and consider sentence under s 51(1) of the Act, as opposed to s 51(2). This question can only be resolved by a fact-based analysis of the events that preceded the fatal stabbing of the deceased. The point of departure would be an

[2] S v Kekana 2019 (1) SACR 1 (SCA), paragraph 28

observation that the deceased and the appellant were involved in a perpetual violent relationship that prevailed long before and during the time the fatal injuries were inflicted on the deceased. The evidence from the deceased's brother, the co-worker of the appellant who was a pastor and the deceased friend, were all to the effect that the couple endured a relationship that was characterised by violence and trust issues.

[8] This background shines a spotlight on whether the appellant's actions on 19 November 2021 were premeditated or, put differently, whether his actions were an execution of a plan, thereby falling within the ambit of section 51(1) of CLAA. According to the appellant, 'during the fight, he took a knife and stabbed the deceased several times on her body. That happened in a spur of the moment, he did not have time to think about what he was doing as things happened fast. He acted out of emotion and did not have the direct intent to kill the deceased but had reconciled himself with the possibility that he could kill her.'[3]

[9] If regard is also had to the accounts of those whom the appellant consulted a few days before the incident, it is incontestable that the appellant entertained the thought of killing the deceased and himself. It also appears that this was his way of addressing or resolving the unbearable state of their relationship. However, to the extent that there may have been a premeditation of the stabbing of the deceased, particularly on 19 November 2021, the evidence, if also considered in light of the appellant's account of events, does not establish a connection between his stabbing of the deceased and his prior utterances to the three persons who also sought to counsel him against the thought of killing the deceased and himself.

[10] If it was accepted that the appellant stabbed the deceased during a fight, in the spur of the moment and without thinking, then the finding that the murder of the deceased was premeditated, does not find support in the factual matrix and therefore, cannot stand. The implication of this finding is that the principle set out in *S v Kekana* would be of no application to the facts at hand. Therefore, the application of s 51(1) of CLAA, which prescribe a sentence of life imprisonment to the consideration of sentence of the appellant was a misdirection. In its stead, the applicable provisions

[3] Statement in terms of s112(2) of CPA 51 of 1977, Exhibit A, paragraph 10, 13 and 14

ought to have been those in section 51(2), which prescribed a minimum sentence of fifteen (15) years imprisonment, in the case of the appellant.

[11] This brings one to what would be a just and equitable sentence in the given circumstances. At the outset, it must be pointed out that the main guiding principles in sentencing are well documented and can be summarized as follows:[4]

'(1) The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The sentence should not be too light or too severe.

(2) An appropriate sentence should reflect the severity of the crime, while at the same time considering to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the *blameworthiness* of the offender, or be in *proportion* to what is deserved by the offender. These two factors, the crime and the offender, are the first two elements of the triad of *Zinn*.

(3) An appropriate sentence should also have regard to or serve the interests of society, the third element of the *Zinn trial.* The interests of society can refer to the protection society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that public opinion be satisfied.

(4) In the interest of society, the purpose of sentencing are deterrence, prevention and rehabilitation, and retribution.' (Footnotes omitted.)

[12] The approach to a specific circumstances where the provisions of the CLAA find application is set out in *S v PB*:[5]

[4] SS Terblanche *Guide to Sentencing in South Africa* 3ed (2016) at 151-152.
[5] *S v PB* 2013 (2) SACR 533 (SCA) para 20.

'...The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

[13] Guided by the triad principle outlined above, it is worthy to highlight that the appellant was a first offender; had no children; suffered serious bodily injuries from the subsequent attempt to take his own life; pleaded guilty to the charge and expressly apologised for his conduct. At the time of his arrest, he was gainfully employed, working for a furniture making company.

[12] The crime of murder in issue was perpetrated in the course of domestic violence that was induced by accusations of infidelity and which had been unfolding over a long time. Upon reflection to the facts at hand, it is befitting to echo the observations of the court in *S v Kekana*[6]. The court observed that, "Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also 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 for their lives. This is in some respect a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."[7]

[13] The impact of gender-based violence on the society at large has also been reiterated on many occasions. The bottom line is that the community expects of the courts to take measures to ensure that those who are determined to compromise others' quality of life are removed from society for long period of time. This would be necessary for purposes of redress of their anti-social behaviour; to allow them time for reflection for purposes of rehabilitation and deterrence. They would only be reintegrated back to community when they regained their sense of humanity.

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[6] S v Kekana (629/2013) [2014] ZASCA 158 (1 October 2014)
[7] Ibid, paragraph 20

[14] When it comes to the approach on sentencing and proportionality of sentence where the CLAA finds application, there is a wealth of legal jurisprudence developed by the courts over time. It has been echoed many times that 'All factors traditionally taken into account in sentencing continue to play a role; none should be excluded from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick, being the substantial and compelling circumstances and which may cumulatively justify a departure from the sentence prescribed by the Act in any given circumstances.'[8]

[15] On the question of the proportionality of sentence to be imposed herein, counsel for both parties were engaged at length on what would be the most suitable sentence. There was a consensus that a sentence of fifteen years imprisonment would not reflect the required balance and would therefore be inadequate. The prevailing sentiment was that the court ought to consider a term of imprisonment in excess of the prescribed minimum.

[16] Comparatively, in *Mudau v S*[9], the appellant had pleaded guilty and was convicted of the murder of his wife. He had admitted to hitting her with a stick and that she consequently died from the injuries he inflicted. The appellant also suspected his wife of infidelity. The trial court imposed forty years imprisonment. On appeal, it was reduced to 20 years imprisonment. In *S v Mhaule*[10], the accused was convicted on a charge of murder of his ex-lover. He murdered her because she had terminated their love relationship, and he was refusing to accept that. He chopped her on the head, killing her instantly. He was sentenced to twenty (20) years imprisonment. In *DPP, Gauteng v Pistorius*[11], the appellant had been convicted of murder of his lover, on the basis of *dolus eventualis*. He shot her multiple times with a firearm. A sentence of six years imprisonment imposed by the trial court on a lesser offence of culpable homicide on appeal was substituted with a sentence of thirteen (13) years and five (5) months term of imprisonment.

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[8] *S v Malgas* 2001 (1) SACR 469 (SCA) paragraph 25.
[9] *Mudau v S* (547/13) [2014] ZASCA 43 (31 March 2014).
[10] *S v Mhaule* (CC 05/2020) [2020] ZAMPMBHS (12 February 2020).
[11] *DPP,* Gauteng v Pistorius (950/2016) [2017] ZASCA 158; 2018 (1) SACR 115 (SCA); [2018] 1 ALL SA 336 (SCA (24 November 2017).

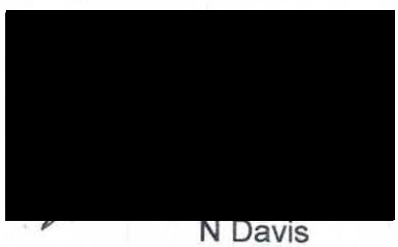
[17] Upon the consideration of the legal precedent and principle outlined above, and their application to unique circumstances of the case at hand, one shares the view that fifteen (15) years imprisonment would be inadequate. In the absence of substantial and compelling circumstances, a sentence that would reflect the required balance is a custodial sentence more than the prescribed minimum sentence.

[18] In the result, the following order is proposed.

1. The appeal against the sentence is upheld.
2. The sentence imposed by the trial court is set aside and substituted with the following sentence: The appellant is sentenced to undergo twenty years imprisonment.
3. The sentence is ante dated to 20 September 2022.

N Sipunzi
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree



N Davis
Judge of the High Court
Gauteng Division, Pretoria

I agree

[redacted]

M P N Mbongwe

Judge of the High Court

Gauteng Division, Pretoria

Appearances

For the appellant

Adv. L Augustyn

Instructed by the Legal Aid South Africa

For the respondent

Adv. Molatudi

Instructed by the Director of Public Prosecutions