IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO. CC 49/2021

In the matter between:

THE STATE

and

NDUMISO SICELO METHULA **Accused**

SENTENCE

LAING J

[1] The question of what sentence is appropriate after a finding of guilt attracts no easy answer. Much has been written about the subject. If anything, then it would be useful merely to commence the final phase of the trial, where the accused has been found guilty of the offence with which he has been charged, by stating the obvious: an appropriate sentence depends substantially on the facts of each case. And each case is unique.

[2] The triad of factors enunciated in *S v Zinn* remains as relevant as ever for purposes of sentencing.[1] The court must consider the crime, the offender, and the interests of society. Over time, the triad has been refined and expanded, but the essential principles remain the same.

[3] Terblanche summarises the basic principles of sentencing as follows:

> '(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.
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> (2) An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration 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 factor, the crime and the offender, are the first two elements of the triad of *Zinn*.
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> (3) An appropriate sentence should also have regard to or serve the interests of society, the third element of the *Zinn* triad. 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.
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> (4) In the interests of society the purposes of sentencing are deterrence, prevention and rehabilitation, and also retribution.
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> (5) Deterrence has been said to be the most important of the purposes of punishment, although this has been shown to be an oversimplification. Deterrence has two components, namely deterring the offender from re-offending and deterring other would-be offenders.
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> (6) Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of very serious crime, where long terms of imprisonment are appropriate, it is not an important consideration.
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> (7) Prevention as a separate purpose of punishment is rarely discussed any longer.

[1] 1969 (2) SA 537 (A).

(8) Retribution, as an expression of society's outrage at the crime, has been held not to be as important as it was in the past but may nevertheless be of great importance, depending on the facts of the case. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence. Retribution can also be related to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime.

(9) Mercy is contained within a balanced and humane approach to consideration of the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. There is no room for a vindictive and vengeful attitude from the sentencing officer.'[2]

[4] The above summary of basic principles is drawn from the case law that has developed over time. It has been relied upon in recent cases; see, for example, *S v Tsotetsi*.[3]

[5] The nature of the offence in the present matter is such as to fall within the ambit of the minimum sentencing provisions contained in section 51(2) of the Criminal Law Amendment Act 51 of 1997 ('CLAA'). The court is required to sentence the accused, as a first offender, to imprisonment for not less than 15 years unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

[6] Both counsel referred to the decision in *S v Malgas*, [4] which is recognized as a seminal case on the interpretation of the above minimum sentencing provisions. In that regard, Marais JA held as follows:

> '[t]hat [the legislature] has refrained from giving such guidance as was done in Minnesota from whence the concept of "substantial and compelling circumstances" was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being *generally appropriate* for crimes of the kind

[2] SS Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis, 3ed 2016), at 151-2.
[3] 2019 (2) SACR 594 (WCC).
[4] 2001 (1) SACR 469 (SCA).

specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.'[5]

[7] Various commentators have referred to four key principle that the Supreme Court of Appeal identified in *Malgas*: (a) the prescribed sentences are the starting point; (b) if a departure therefrom is called for then the court should not hesitate to depart; (c) for purposes of determining whether a departure is called for, a court must weigh up all considerations that are traditionally relevant to sentencing; and (d) there must be a departure when the prescribed sentence would be unjust.[6]

[8] In *S v Vilakazi*,[7] to which counsel for the state referred, the Supreme Court of Appeal confirmed the principles laid down in *Malgas*. However, the court also emphasised the principle of proportionality; a court is required to consider all the circumstances of a case.[8] More will be said about this later.

[9] The defence, in mitigation, led the evidence of the accused himself. He testified that he is 45 years old and holds a diploma in information communication technology and a certificate in financial management. He has been employed at various times in the banking and furniture retail sectors. He was retrenched in 2019. The accused is also the director of a private company, currently not generating any income, and has an interest in a Gqeberha based business, owned by a friend.

[10] The accused went on to confirm that his two minor children, A and M, who previously testified in the matter, are in the care of a maternal uncle and his wife, in Cape Town. He has had infrequent contact with them since the commencement of these proceedings. He also has an 18-year-old daughter, who stays with a maternal aunt and her grandmother in Gqeberha; she is presently seeking employment. The accused also explained that he is in close contact with the older daughter of the deceased, Ms Mbawu, who testified previously. His parents live in Gqeberha and receive a pension, to which he sometimes contributes.

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[5] At paragraph [18].
[6] Terblanche, *op cit*, at 76-8.
[7] 2009 (1) SACR 552 (SCA).
[8] At paragraph [3].

[11] Continuing his evidence in mitigation, the accused emphasised that he had contact with the father of the deceased, Mr Magengelele, who forgave him for his actions and indicated that he held nothing against him. The accused, concluding his testimony, apologized to the family, and asked for their forgiveness.

[12] The defence led no further witnesses.

[13] The state, in turn, submitted a letter on behalf of the deceased's family, in terms of which they stated that it was difficult to forgive the accused. This was because the death of the deceased had divided the family. It had also led to resentment, sadness, and a sense of helplessness, resulting in the deteriorating health of the deceased's aunt and her father. Such feelings had been intensified by a perception that the accused was not truly remorseful about what he did. His children missed their mother, they were not performing well scholastically. Finally, the incident had resulted in additional expenses for the family, including the need to pay for the security of the house at Ncera Village 3.

[14] The state led no witnesses in aggravation.

[15] At this point, it is necessary to decide whether substantial and compelling circumstances exist to justify the imposition of a lesser sentence. To his advantage, the accused is a first offender. He has a tertiary education and entrepreneurial skills that could contribute to the well-being of society. He has described the destructive nature of his relationship with the deceased and how this affected his actions. He has accepted responsibility for the consequences thereof and has expressed regret and considerable remorse about the incident. There are, however, no dependents who would be severely prejudiced by his incarceration. There was no evidence of any underlying health concerns. Whether viewed individually or collectively, the above factors do not constitute substantial and compelling circumstances.

[16] Turning to the crime itself, counsel for the state emphasised the seriousness of the incident. In *S v Ximiya*,[9] Makaula J had this to say:

[9] (CC91/14) [2015] ZAECBHC 9 (19 February 2015).

> '[The] death of a human being through killing has devastating and dire consequences for the family of the deceased person. It results in financial, emotional, traumatic and psychological problems on those close and around the deceased. Its adverse effects can never be adequately described and the pain it causes cannot be measured in any way. The pain and helplessness that one feels cannot be verbalized.'[10]

[17] Murder is one of the oldest and strictest of taboos. The preservation and integrity of civilization itself depend on the prohibition of such an act. It is in most, if not all, communities a cardinal offence. Within a South African context, murder removes, forever, a person's fundamental right to life. There are few crimes as serious.

[18] In the present matter, the deceased died in horrible circumstances. She was dragged from the kitchen by the father of her children, armed with a knife. She was stabbed not once but three times in the chest, with sufficient force to fracture her ribs and collapse her lung. She died, eventually, from a stab wound to the heart. The forensic pathologist called by the state, Dr Ntloko, testified that the deceased would have experienced considerable pain. These are, most clearly, aggravating factors in relation to the determination of sentence.

[19] In *S v Dyantyi*,[11] Petse ADJP (as he was then), remarked as follows:

> '…when it comes to punishment, courts must, after taking due cognisance of all relevant factors, impose sentences that reflect the revulsion of society at the commission of such crimes. This is, however, not to say that the courts should abdicate their sentencing discretion and allow themselves to be swayed by public opinion; it is, rather, more to say public interest dictates that the concerns of society and society's disapproval of certain crimes should receive some recognition in the sentences that courts impose, especially those offences that strike at the very heart of the values and ethos of our Constitution.'[12]

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[10] At paragraph [2].
[11] 2011 (1) SACR 540 (ECG).
[12] At paragraph [21].

[20] In *Vilakazi*, the Supreme Court of Appeal pointed out that, in cases of serious crime, the personal circumstances of the offender must, by themselves, necessarily recede into the background.[13] The state, in the present matter, has cited the decision in *S v Rohde* to argue that the crime of which the accused has been convicted is the ultimate and most extreme form of gender-based violence.[14] The nature of the crime and the interests of society, contends the state, call for the imposition of a life sentence, alternatively twenty years' imprisonment.

[21] The defence, in contrast, has referred to *S v Scott-Crossley* to point out that the accused must not be sacrificed on the altar of deterrence.[15] The circumstances of the case, including the blameworthiness of the offender, must be considered.

[22] In *Vilakazi*, Nugent JA underscored the relevance of the principle of proportionality.[16] The punishment must be proportionate to what the offender deserves, no less and no more; humans ought to be treated as ends in themselves, never merely as a means to an end. Whereas the mitigating factors mentioned by the defence failed to serve as substantial and compelling circumstances in relation to the minimum sentencing provisions, they cannot be ignored when applying the principle of proportionality.

[23] In the present matter, two such factors stand out. These will be discussed further, below.

[24] The first factor is what was described in earlier proceedings as the toxic nature of the relationship between the accused and the deceased. Although their relationship may have begun positively, with mutual displays of love and affection towards each other, it deteriorated over time to a violent mix of suspicion and jealousy, resentment and anger, ongoing tensions, and, ultimately, a killing. From the evidence led, it cannot be said that the deceased was entirely innocent in the history of the relationship. At times, her strong personality and temper may well have exacerbated the friction between the couple.

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[13] *Vilakazi*, n 7 *supra*, at paragraph [58].
[14] 2019 (2) SACR 422 (WCC), at paragraph [54].
[15] 2008 (1) SACR 223 (SCA), at paragraph [35].
[16] *Vilakazi*, n 7 *supra*, at paragraph [18].

[25] The second factor is the extent to which the accused has gone to express his contrition. Although the state questioned the sincerity of his remorse, the court cannot overlook the evidence presented. He wrote to the deceased's family and to his friends, acknowledging the hurt and devastation that he had wrought; he met with the deceased's father, seeking reconciliation; he faced the deceased's family in court, apologizing for his actions and asking for forgiveness. The state was correct in testing the accused's sincerity. The question must be asked, however, about what more he could have done. There is little if anything to indicate that his contrition is not real.

[26] In *Director of Public Prosecutions, Gauteng v Pistorius*,[17] the Supreme Court of Appeal could not find that the accused was genuinely remorseful because he had not taken the court fully into his confidence. That cannot be said of the accused in the present matter. Under cross-examination, the accused admitted that he lost his temper. It was the way they argued, he said, that had a bearing on what followed; their aggression was the catalyst for his actions.

[27] The court, in the end, must weigh and balance the set of aggravating and mitigating factors that have become defined during these proceedings. It must apply the principles helpfully summarised by Terblanche and arrive at an outcome that rests, ultimately, on an equilibrium achieved between the competing forces generated by the nature of the crime, the personal circumstances of the offender, and the interests of society.

[28] Consequently, the court makes the following order:

> The accused, having been found guilty of the offence of murder, is sentenced to imprisonment for a period of 18 years.

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JGA LAING

JUDGE OF THE HIGH COURT

[17] 2018 (1) SACR 115 (SCA).

APPEARANCE

For the State:	Adv S Mtsila
Instructed by:	Director of Public Prosecutions Makhanda 046 602 3000
For the Accused:	Adv N Dyantyi
Instructed by:	Legal Aid South Africa Qonce 043 604 6600
Date of delivery of judgment:	02 May 2024.