



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GQEBERHA)**

**CASE NO.: CC 44/2022**

In the matter between:

**THE STATE**

and

**ZAMUXOLO SMALL JACOBS**

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**JUDGMENT ON SENTENCE**

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**GQAMANA J**

[1] *“Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased’s partner, who had the duty and responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitates the imposition of sentence to serve not only as a deterrent but*

*also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against commission of such crimes.”<sup>1</sup>*

[2] This case as well highlights the plight of vulnerable women in our society, who are often unable to defend themselves against their violent partners. The deceased during her lifetime was involved in a romantic relationship with the accused. Sadly, evidence shows that during the course of such relationship use of drugs and alcohol was the order of the day. Even on the horrific day that the deceased died, both her and the accused had smoked drugs and consumed alcohol. The accused’s actions occurred in the heat of the moment while he was under the influence of drugs and alcohol, and were fuelled by jealousy.

[3] The Supreme Court of Appeal in *Mudau v S*,<sup>2</sup> said the following:

*“[6] Domestic violence has become 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.”*

[4] In this case it is now time for the court to sentence the accused, for the offence that he has been convicted for. In imposing a fair sentence, I must consider the well know triad factors as was referred to in *S v Zinn*,<sup>3</sup> namely, the personal circumstances of the accused, the nature of the offences that

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1 See *S v Van Staden* [2017] ZANHC 21 (20 March 2017).

2 [2014] ZASCA 43 (31 March 2014).

3 1969 (2) SA 537 (A).

have been committed and the interests of society. In doing so, I should strike a balance and avoid over-emphasising one and under-emphasising the other. Furthermore, there should be a measure of mercy.

[5] In *S v Rabie*,<sup>4</sup> Corbett JA (then) said:

*“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.”*

[6] In the present matter, my point of departure is that the statutory prescribed minimum sentence of life imprisonment in terms of the provisions of s 51(1) of the Criminal Law (Sentencing) Amendment Act 38 of 2007, read with Part 1 of Schedule 2 of Act 105 of 1997, as amended by Act 12 of 2021 should be imposed unless, I find that there are substantial and compelling circumstances justifying a deviation.

[7] In *S v Malgas*,<sup>5</sup> it was emphasised that:

*“... legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering*

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4 1975 (4) SA 855 (A) at 866.

5 2001 (1) SACR 469 (SCA).

*sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.*

*The specified sentences [are] not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.”*

- [8] Following and applying the judgment in *Malgas (supra)*, Nugent JA in *S v Vilakazi*,<sup>6</sup> had the following to say:

*“[15] It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that, it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the ‘offence’ in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act ‘vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘justify’ it.”*

- [9] It is against the above legal principles that I should consider the appropriate sentence to be imposed. In doing so, I must also have regard to the accused's personal circumstances, the mitigating and aggravating factors.

- [10] The personal circumstances of the accused are as follows: he is 34 years of age and unmarried. He has two minor children, (ages 6 and 3) and both of them are under the care of their mother. The accused however contributes R500.00 per month maintenance towards their social welfare. Before his arrest for this case he was employed by Kariega Municipality on a casual

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<sup>6</sup> 2009 (1) SACR 552 (SCA).

basis earning an income of R1 400.00 per month. His income was used partly for his monthly needs and that of the deceased. His highest qualification scholastically is grade 10. He has been in custody awaiting trial for 14 months. He has two previous convictions of robbery that were committed more than 10 years ago and these convictions would not be taken into consideration for purposes of sentence.

[11] The State presented the victim impact assessment statement and it is evident therein that, the deceased's death had a serious impact on her family. Although she was unemployed, but apparently she was able to provide for her family financially. The deceased left behind two minor daughters and sadly her children would now grow up without a mother, due to the accused's actions. The deceased's father has not come to terms with her death and sadly, her aunt resorted to find solace by excessive and abuse of alcohol as a coping mechanism.

[12] In *S v Nyangwa*,<sup>7</sup> Goosen J (then) had the following to say:

*“The prevalence of the crime of murder is such that cognizance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all the rights vested in that person: dignity, equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered. It is for this reason that the rule of law requires that the perpetrator should, generally, be visited with harsh punishment. The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. It is this which our theory of criminal justice posits as the basis for deterrence. But, as a society founded upon the respect for and protection of human dignity, our criminal justice system also acknowledges that, wherever possible, the consequences should be ameliorated where there is a prospect that the perpetrator may be rehabilitated and reintegrated into society upon the completion of the sentence imposed.”*

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<sup>7</sup> (CC25/2018) [2019] ZAECPHC 46 (7 August 2019).

- [13] The above remarks are equally relevant to this case. The offence herein was perpetrated by the accused at the heat of the moment while he was under the influence of drugs and alcohol. The accused's conduct was fuelled by anger and jealousy, because the deceased wanted to leave him and to go and socialise with a group of men who had been smoking Tik with her at Charlie's house in Gwali Street, where the accused had found her earlier. The deceased also did not sleep at home the night before the incident.
- [14] I want to highlight the fact that the accused has committed a serious offence. A life of a young woman at her prime age and a mother of two minor children was lost. Although the accused used violence, it was not excessive in that, he had stabbed the deceased once. Further, the accused did not waste the court's time, he admitted his actions and the consequences thereof, although he held firm on his defence that, he had no intention to kill the deceased. I have convicted him of murder on the basis that, he knew and foresaw the possibility of his actions causing the deceased's death and reconciled himself with that possibility.
- [15] Counsel for the State ardently argued that, the prescribed life sentence must be imposed because there are no substantial and compelling circumstances to deviate from it. In my view the following factors taken cumulatively, namely, the circumstances under which the offence occurred in that, he was under the influence of drugs and alcohol, his error of judgment influenced by use of such substances, his conduct shortly after the incident (i.e. him run out to look for transport to take the deceased to hospital), the period in custody awaiting trial and his personal circumstances are substantial and compelling circumstances justifying a deviation from the prescribed sentence.

[16] However, having said that, the accused cannot escape a long period of imprisonment and that sentence would serve as a deterrent and retributive effect. The accused is still relatively young and deserve a second chance and hopefully he will utilised the period in prison to rehabilitate himself and to refrain from use of drugs so that he could be reintegrated to society upon completion of his sentence. Sadly, whatever sentence I impose will not bring back the deceased, but hopefully it will bring closure to her family.

[17] Accordingly, the accused is sentenced to 20 years' imprisonment.

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**N GQAMANA**

**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Counsel for the State : *Adv T Gqamane*

Instructed by : Director of Public Prosecutions  
Gqeberha

Counsel the Defence : *Adv H Bakker*

Instructed by : Legal Aid South Africa  
Gqeberha

Heard on : 5, 6, 7, 8 and 9 February 2024

Sentence delivered on : 9 February 2024