REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

28/9/2022
DATE SIGNATURE

Case number: SS52/2020

In the matter between:

THE STATE

and

SUSANA CATHARINA HESTER MAGDALENA NOETH **ACCUSED 1**

BERNARD NOETH **ACCUSED 2**

SENTENCE

AFRICA AJ:

[1] Both accused 1 and 2 have been found guilty of serious offences. Mrs. Susana Noeth has been convicted of being an accessory after the fact to Murder and Mr. Bernard Noeth has been convicted on two counts of Murder, read with the provisions of section 51(2)[1] of the Criminal Law Amendment Act 105 of 1997, ('the CLAA'), as amended[2].

It is now the unenviable but necessary task of this court to impose an appropriate sentence.

[2] In deciding on an appropriate sentence, the court must consider the "triad consisting of the crime, the offender and the interest of society"[3] "These elements of the triad contains an equilibrium and tension.

[3] The 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 or the exclusion of others. 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 their circumstances and the impact of the crime on the community, its welfare and concern"[4]

[4] The infliction of punishment is pre-eminently a matter for the discretion of the trial court and it is a cherished principle that courts should, as far as possible, have an unfettered discretion in relation to sentence; which calls for constant recognition. This is the hallmark of an enlightened criminal justice system.

The statutory mandatory minimum sentencing regime is applicable to certain serious offenses but the trial courts are permitted to depart from the prescribed minimum sentences whenever they find *"substantial or compelling circumstance*" warranting a departure. This court is mindful that a criminal sentence cannot, in the nature of things, be a matter of precise calculation.[5]

[1] Part 2 of Schedule 2.
[2] Also read with sections 92(2), 256, 258, of the CPA 51 of 1977.
[3] S v Zinn 1969 (2) SA 537 (A) at 540g.
[4] S v Banda and others 1991 (2) SA 352 (B) 355.
[5] Crime and punishment in South Africa 1975 page 150

[5] It is however commonly accepted that there are many purposes of sentencing. Firstly, is the desire to punish a person who is the wrongdoer and who has offended against society and caused harm to others. Secondly is the intention to prevent the wrongdoer from committing a similar offence again. Thirdly is to send a message to other would be offenders not to engage in this kind of activity and Lastly is the aspect of rehabilitation.

[6] Another factor to be borne in mind is the question of mercy.[6]

[7] The individualization of punishment requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law.[7] Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

MITIGATION OF SENTENCE

[8] MRS NOETH testified in mitigation that she is 39 years of age, married to accused 2, with no children born of the said marriage. She was employed at the time of her arrest and her highest level of education, is matric. During her incarceration, neither her mother nor her siblings visited her but are they still on speaking terms. She has been in custody for a period of ±2 years 8 months and request this court to impose a suspended sentence. She does not abuse substances and have been put on medication to treat her depression, anxiety and panic attacks.

On questions by this court, she intimated that she wants to go home to tell people to do the right thing and to think before they act. At the time of her arrest, she employed as a HR manager for 10 years.

[6] S v Rabie 1975 (4) SA 855 (AD) at 862:

[7] S v Scheepers 1977 (2) SA 154 (A) at 158F – G

[9] During cross examination, she said that she was sorry for hiding her husband but that was a choice she had made.

[10] Mr Noeth testified in mitigation that he was born in 1977, married to accused 1, and has no children. Prior to his arrest, he opened a pet shop business. His highest level of education is matric with a certificate in warehouse management. Both his parents are deceased and none of his family members came to visit him, whilst incarcerated. He has been in custody for ±2 years 8 months and has lost everything. Mr. Noeth states that his drug use has had a bad effect on his life but don't know how to rid himself of this habit. He says that he feels sorry for the families of the deceased but states that he was never involved.

[11] MADEI CHIKHORA testified that Priviledge Chikhora (deceased) is her sister and they were very close. The deceased has 2 minor children, aged 6 and 11 respectively. She has taken over the responsibility for caring for the children. The youngest child still believes that his mother is alive as she can't bring herself to tell him the truth; instead she lies and tells him that his mother will come home.

Madei says that looking after the children has been hard and is she still affected by her sister's death.

ADDRESS IN MITIGATION

[12] Adv. Mvatha on behalf of Mrs Noeth, submits that the court must have regard to the triad factors as enunciated in the case of *Zinn.* He requests this court to be mindful of the aims of punishment; that accused 1 has been in custody for 2 years 8 months and that she is a first offender. He argues that the findings of this court should serve as a mitigating factor, in favour of accused 1. Further that the children and family of the deceased are without a doubt negatively affected, but that such loss can in no way be attributed to accused 1 as she was not linked to the murder. He submits that this court will be doing an injustice, if accused 1 was sentenced to direct imprisonment, given the time she has already spend in custody. He requests this court to show mercy, in allowing accused 1 to redeem herself and to become the responsible working citizen.

[13] In terms of section 103 of Act 60 of 2000, Adv. Mvatha held no instructions that accused 1 owns a firearm.

[14] Adv. Botha on behalf of accused 2 submits that this court must have regard to triad factors and referred this court to the case of *S v Lucas*[8] where is was said that imposing a sentence is one of the most difficult tasks a presiding officer has to grapple with and has been described as a painfully difficult problem, which involves a careful and dispassionate consideration of all the factors.

Notwithstanding his conviction, accused 2 maintains his innocence and is it argued that this court may deviate from the prescribed minimum sentence, if the circumstances calls for such departure. Being mindful of the case of *Malgas*[9]*,* the defence requested this court to blend its sentence with mercy.

[15] This court was requested to have regard to the principles of Ubuntu which is synonymous with restorative justice, in deviating from the minimum sentence regime. It was argued that accused 2 has nothing, except his life.

[16] In terms of section 103, the defence request accused 2 not to be declared unfit to possess a firearm, as his position in life may change, one day.

ADDRESS IN AGGREVATION

[17] In aggravation of sentence, the state urged this court to be mindful that the legislature[10] deemed fit as punishment, that the accessory can be sentenced the same as the perpetrator and that in the circumstances of this case, accused 1 should be held accountable for the roll that she played. Adv. Badenhorst argued that by protecting accused 2, accused 1 took away a families' right to justice. He argued that she protected accused 2 over a protracted period and that she rightfully admitted to protecting him.

[8] (CC72/2019) [2022] ZAGPPHC 346 (13 May 2022).

[9] 2001 (1) SACR 469 (SCA).

[10] Sec 257 CPA 51 of 1977 "If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

[18] In respect of accused 2, the state argued that 2 families and 4 children, has been destroyed at the hands of accused 2. It is argued that accused 2 has placed no substantial and compelling circumstances before this court and neither is the principle of Ubuntu a substantial and compelling factor. Further, that sight must not be lost of the fact that these were cold blooded murders perpetrated by accused 2, who has shown no remorse.

[19] " …Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."[11]

[20] There has never been a time when these words ring more true than today, when this country is engulfed in a sea of violent crimes ravaging vulnerable sections of our society like women, with a never-ending scourge of femicide and GBV[12], which continues to plague South Africa.

[21] This court is mindful of the case of *Mudau v The State*[13] where it was stated that:

> "…violence (against women) has become a scourge in our society and should not be treated light, but 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. This is in some respects a negation of many of the fundamental rights such as equality, human dignity and bodily integrity" (emphasis added)

[22] The state submits that this court must mete out a harsh sentence, in response to the circumstances of this case. Indeed, courts have a role to play in the promotion and development of a culture that is founded on the recognition of

[11] S v Chapman 2020 JDR 0344 p5.
[12] Gender Based Violence.
[13] (547/13) [2014] ZASCA 43 (31 March 2014.

human rights, in particular with regard to those rights enshrined in our Constitution.

[23] Accused 2, in the view of this court, deemed the deceased no more than objects or things to be discarded with, as if their lives were worthless and insignificant. He did not see them as mothers or daughters or aunts or human beings but simply refuse to be disposed of. Their bodies were left to rot, like carcasses, not worthy of dignity and respect. The gravity of the violence unleashed on the unsuspecting deceased was merciless as they ill-fatedly, fought for their lives. They say a picture is worth a thousand words, yet words fail to describe what anguish and suffering the deceased endured, when they were so brutally and callously strangled and suffocated to death, having done nothing wrong to deserve it. The deceased was defenseless and helpless not suspecting that their lives would be cut short, so untimely. These women were simply out looking for a job to feed their families and ended up trusting a vile stranger who seemed genuine in extending a helping hand.

[24] Goldstein J in the case of *S v Ncheche*[14], stated:

> "I now deal with the interest of society. The unprecedented spate of violence, and especially …against women and children, is escalating at an alarming rate. Helpless, defenceless women feel unsafe, even in the sanctity of their own homes, and look to these courts to protect their interests and the courts can protect these interests by meeting out harsh sentences."

[25] Accused 2 gained nothing of worth for the perpetrating and inflicting this wicked, cruel and horrific suffering on the deceased and their families. Communities are outraged and if we fail to take account of that outrage, we risk encouraging the breakdown of law and order and communities taking the law into their own hands.

[26] Indeed ordinary law-abiding citizens in this country are at their wits end about these ongoing and senseless crimes involving violence against women and sight should not be lost of the fact that society view these crimes as heinous and abhorrent. Society deserves to be protected against perpetrators of

[14] 2005 (2) SACR 386 (W) @ page 391, 395.

unprovoked violent crime. Our courts have held the view that those who commit violent crime should be made to account before the law and if found guilty, punished accordingly. In *S v Makwanyane & another*[15], the court stated:

> "The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law... "

[27] This court is mindful that in *R v Karg*[16] it was stated that 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. Society's sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight, in cases of this nature.

[28] In an effort to curb the wave of violent crimes which threatens to destroy our society, the legislature enacted section 51 of the Criminal Law Amendment Act 105 of 1997. Courts are reminded in *Malgas*[17] that when considering what

[15] 1995 (2) SACR 1 (CC), at paragraph 117.
[16] 1961 (1) SA 231 (A) at 378-379.
[17] 2001 (1) SACR 469 (SCA).

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

[29] The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.[18] Traditional mitigating factors *alone* cannot be considered to be substantial and compelling circumstances.[19]

[30] This court is also mindful in assessing the proportionality of the prescribed sentence in a particular case; the sentencing court must determine what a 'proportionate' sentence would be, considering all the circumstances traditionally relevant to sentencing. The proportionality of a sentence cannot be determined in the abstract.

[31] In *S v Ganga*[20] it was stated that, a court must still seek to differentiate between sentences in accordance with the dictates of justice. Seeking guidance in *Malgas*, it was stated that the greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetuating an injustice. That can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, disproportionate to the crime, the criminal and the legitimate needs of society.

[32] In *S v Vilakazi*[21] Nugent JA said the following:

> "In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that *Malgas* said should be avoided."

[18] Malgas supra "Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."
[19] S v Obisi 2005 (2) SACR 350 (W).
[20] 2016 (1) 600 (WCC).
[21] 2009 (1) SACR 552 (SCA) para 58.

[33] This court have regard to the degree and extent of the violence used in the commission of this heinous offence, the nature and weapon used, the brutality and cruelness of the attack, the fact that the deceased were trying to earn a living, the nature and character of the deceased who was defenseless at the time, the fact that the attack was unprovoked, the fact that accused 2 acted with direct intent, the physical, emotional and psychological trauma that the deceased' families endures every day of their lives, the loss of a mother a sister or an aunt and the destruction of innocent children, being robbed of a mother's love. The fact that the families of the deceased could not find closure, whilst accused 2 was fleeing and being protected by accused 1.

[34] In *S v Rohde*[22] the following was held:

> "It is the lowered perception of women as human beings, all of whom are entitled to human dignity and equality, which results in the unhealthy social paradigm that they can be victims, and in fact end up as victims of crime because they are women. The judiciary must guard against such perceptions and creating the impression that the lives of women are less worthy of protection."

[35] In *Matyityi*[23] it was stated that remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. In the present matter neither accused has not shown remorse or an appreciation of the consequences of their actions. This court is mindful of the case of *S v Makudu*[24] where it was stated that the behavior of an accused during trial may be indicative of a lack of repentance or intended future defiance of laws by which society lives and therefore be a relevant factor in considering sentence…"

[36] The argument advanced that because accused 1 did not perpetrate the murders, her actions cannot be linked to the loss suffered by the deceased

[22] 2019 (2) SACR 422 (WCC) para 54.
[23] 2011 (1) SACR 40 (SCA).
[24] 2003 (1) SACR 500 (SCA).

family, is untenable. After becoming aware of the commission of these heinous offences, she knowingly and intentionally helped accused 2 to evade justice, and for him not to be held accountable for his actions.

[37] The state correctly argued that accused 1 took away a families' right to justice and in my view, closure. Her reason for doing so was because she loved him. The actions of accused 1 is simply devoid of compassion, empathy and understanding of the plight of the deceased' families, who was left searching for answers. She simply has no appreciation and acknowledgement of the extent of her actions. As stated in *S v Ro and Another*[25]*:*

> "To elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution"

[38] Having considered all the circumstances of this case, I am of the view that a suspended sentence would be wholly inappropriate, notwithstanding the time spend in custody. The sentence to be imposed must send a clear message that offences of this nature cannot be tolerated in a society where the rights of all citizens warrants equal protection of the law.

[39] On a balanced consideration of the totality of the evidence, this court finds no substantial and compelling circumstances to deviate from the minimum prescribed sentence, nor can this court deviate for flimsy reasons which cannot withstand scrutiny. This court deems the sentences to be imposed, as <u>just, proportionate to the crime, the criminal and the legitimate needs of society.</u>

[40] <u>ACCORDINGLY ACCUSED 1 IS SENTENCED TO:</u>

[25] 2010 (2) SACR 248 (SCA).

Ad count 3 Accessory after the fact to murder: Five (5) years direct imprisonment in terms of section 276 (1)(i) CPA 51 of 1977.

[41] ACCORDINGLY ACCUSED 2 IS SENTENCED TO:

Ad count 1 Murder[26]: Fifteen (15) years direct imprisonment.

Ad count 2 Murder[27]: Fifteen (15) years direct imprisonment.

[42] In terms of section 280 CPA 51 of 1977, it is ordered that the sentences in respect of counts 1 and 2 will run CONSECUTIVELY.

Ancillary Orders:

- In terms of section 103(1) of the Firearms Control Act 60 of 2000, both accused will remain *ex lege*, unfit to possess a firearm.
- Notice in terms of section 299A explained to the family of the deceased.
- Appeal rights explained and understood.

[26] read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997, ('the CLAA'), as amended
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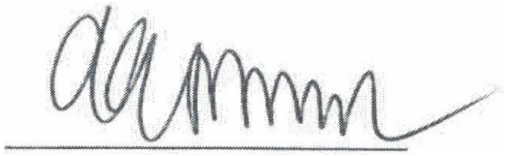

A AFRICA
ACTING JUDGE OF THE HIGH COURT

Date Heard	27 September 2022
Judgment handed down	28 September 2022

Appearances:

On behalf of the State	Adv Badenhorst
On behalf of Accused 1	Adv Mvatha
On behalf of Accused 2	Adv Botha