

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

CASE NO: SS 121/2022

_____ **18 August 2023**

In the matter between:

THE STATE

And

JO-ANN SWARTBOOI

Accused

JUDGMENT

Mdalana-Mayisela J

- [1] This is the judgment on sentence. I delivered the *ex tempore* judgment in respect of the trial and conviction which followed upon it. The two judgments should be read together.
- [2] The accused was charged on count 1 with murder of Timothy Joseph Jacobs, read with section 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended (“the CLAA”); and count 2 with defeating or obstructing the course of justice.
- [3] She pleaded guilty to murder with intention in the form of *dolus eventualis*, and count 2. On 2 May 2023 she was convicted on both counts. The state proved no previous conviction. She testified in mitigation of sentence and presented a pre-sentencing report. The state presented a victim impact report.
- [4] Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions (*S v RO and Another 2000 (2) SACR 248 SCA*).
- [5] First, I deal with the offender and offences. The accused has been convicted of the offences where the CLAA is applicable. The provisions of section 51(2) of the CLAA were explained to the accused before pleading in Court. The state did not make a submission whether there are or no substantial and compelling circumstances warranting a deviation from imposing the prescribed minimum sentence of 15 years on count 1, it left it in the hands of the court.
- [6] Section 51(2)(a)(i) of the CLAA provides that notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years. Subsection (3) provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

- [7] The legislature has not defined substantial and compelling circumstances, it has left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role, none is excluded at the outset from consideration in the sentencing process (*S v Malgas 2001 (1) SACR 469 SCA at 470-471 paras E and F*).
- [8] I now deal with the mitigating and aggravating factors in order to decide whether there are substantial and compelling factors. The accused's personal circumstances are as follow. She is 38 years old. She was in an intimate relationship with the deceased for 12 years. Together they have three children, Trayton 11 years old, Tyler 9 years old and Tiffany 4 years old. She passed matric. She furthered her studies in Education department at Ekurhuleni West College but did not complete the course because she found employment. She returned to finish the course with a different institution, but it turned out that the college was a fake. From 2017 to 2018 she was employed as a general worker at PNA store earning R4000.00 rands per month. At the time of the commission of the offences she was not employed and was responsible for caring for the family. She is a Christian and is affiliated to Roman Catholic Church. She has no previous conviction. She spent 1 year 9 months in prison awaiting trial.
- [9] It was submitted on her behalf that the following factors are substantial and compelling:
- [9.1] She pleaded guilty;
 - [9.2] She is the first offender;
 - [9.3] She showed remorse;
 - [9.4] She spent 1 year 9 months in prison awaiting trial;
 - [9.5] She has three minor children, the youngest being a 4 year old girl;
 - [9.6] She was involved in an abusive relationship with the deceased;
 - [9.7] She was provoked by the deceased and committed the offences at the spur of the moment;

- [10] The State submitted that the accused has been convicted of a serious and prevalent offence of murder which involves domestic violence. The deceased was killed and his body was burned in his home which is supposed to be his place of safety. The accused's firstborn son, Trayton is very traumatized because he witnessed his mother killing his father. The deceased was a bread winner providing for his family, including his unemployed parents.
- [11] It is common cause that the intimate relationship between the accused and deceased was abusive. In *S v Ferreira and Others (245/03) [2004] ZASCA 29* the Supreme Court of Appeal in the majority judgment stated the following:
- “what has to borne in mind in each case, however, as remarked by Wilson J in Lavallee is that abused women may well kill their partners other than in self-defence and that the issue in each case is not whether the accused is an abused woman but whether the killing was objectively justifiable in self-defence. I would add: or subjectively seen as justifiable in mitigation of sentence. In Osland a similar point was made where it was said by Kirby J that the question is whether the evidence in each case establishes that the abuse victim is suffering from symptoms or characteristics relevant to the legal rules applicable to that case.”*
- [12] The accused informed the probation officer that she lacks friends because the deceased deprived her the opportunity to make friends. She had a good connection with her neighbors, but she never had time to spend with them because she was usually in the house. She spent most of her time at home with her children. She baked and cooked for them since they adored her cooking. She would also be at home doing housework and caring for her family. She does not like arguments, she always tried to refrain from the fights with the deceased. Her sister Berlicia Swaartbooi confirmed the above information and added that the accused is very patient as well to the probation officer.
- [13] She began smoking cigarettes on occasion in 2009. She quit smoking in 2010 and returned in 2022 after being imprisoned. She resumed smoking because the prospect of the offence was too much for her and any time she feels overwhelmed, she bites her nails to the point of hurting her fingers. As a result, smoking would keep her from biting her nails. She used to drink alcohol but stopped when she became pregnant with her last child. When she was under the influence of alcohol, she was well behaved and tranquil. Berlicia also confirmed this information. The probation officer opined that the description of the accused's character and background show that she had been trying to leave a positive and somewhat desirable life.

- [14] She has been a faithful partner who was loving to the deceased. They were together for 12 years. In 2010 she moved in with the deceased. The deceased became abusive towards her ever since the first year of their relationship. However, she persevered in the relationship with the hope that things would change. At some stage the deceased stopped being abusive but not for long because it would take place again once in a while. Berlicia informed the probation officer that she witnessed the abuse taking place in her presence and in the presence of the accused's children. She added that the deceased would swear at the accused, calling her names and the accused would be the one who apologized to maintain peace. Berlicia advised the accused to leave the deceased because the relationship appeared unhealthy, but the accused protected him and said it happened once in a while.
- [15] The accused testified that in 2010 during her first pregnancy the deceased assaulted her with a cooking pan on her stomach. As a result, she lost her first child. In 2011 she dislocated her knee when the deceased pulled her leg. In 2013 or 2014 she got an interdict against the deceased for emotional and physical abuse. The deceased was warned in court to stop the abuse. In 2018 she got a protection order against the deceased for emotional and physical abuse. The deceased was also cheating on her. The deceased's other two children with other women were born during the existence of their relationship. During the relationship they separated with the deceased once and she found herself a place to stay. She experienced financial difficulties and was unable to provide for herself and the children. They moved in with the deceased again. They fixed the relationship but the abuse started again in the presence of the children.
- [16] On the 31st of October 2021, during the day the deceased and accused had an argument about a suspected cheating. The deceased pushed the accused against the wall and told her that she was useless. He then left the house with his cousin without telling the accused where he was going. He returned home at midnight whilst the accused and the children were sleeping. He was drunk and making a noise. He fell on top of the accused. She pushed him away from her and he started swearing. The accused told him to keep quiet because the children were asleep and one of them was sick. However, he continued swearing. The accused pushed him out of the children's bedroom and the swearing continued all the way to the kitchen. There he pushed the accused against the cupboard and the accused pushed him back. The scuffle continued

until they reached their bedroom. Once inside the bedroom the scuffle stopped. The accused took a cricket bat which was behind the door with the intention to assault the deceased because she was still angry at him. She assaulted the deceased, who was standing against the bed, with the cricket bat on the head which caused him to fall on top of the bed. She left him to check on the child who was sick and crying. Upon her return she tried to wake the deceased up but she noticed that he was bleeding from the head and was dead.

- [17] She believed that she acted in self-defence but conceded that she exceeded the bounds of self-defence. The state conceded that murder was committed at the spur of a moment and was an impulsive act. I find that the murder of the deceased was an immediate response to provocation. It was an almost uncontrollable act of violence provoked by emotional and physical abuse by the deceased.
- [18] The accused's firstborn child witnessed the accused assaulting the deceased with a cricket bat on the head but he was hoping that the deceased survived the incident. He did not tell his grandparents or the police about the incident because he was scared of the accused. The accused did not notice that Trayton witnessed the incident. She handed herself over to the police and made a confession because she was feeling bad about what she did to the deceased. In court she pleaded guilty to both charges and gave a plea explanation. She took full responsibility for the offences.
- [19] She informed the probation officer that she is resentful that she robbed her children of their father when they still needed him and she tarnished her character of a mother. She ruined her relationship with the children. In the result, her children have to live in the absence of both parents. She is suffering from emotional distress as a result of the offences she committed. She indicated that she would apologize to the relevant people when the opportunity avails itself. She stated that she is willing to serve any punishment because she acknowledges that she broke the law and hurt her family. She also stated that she understands there is no punishment that can adequately compensate for what she has done or bring the deceased back to life, and she is remorseful. In court she apologized to the deceased's family, her children, the neighbor who threw away the deceased's ashes, and the community for the commission of the offences and the consequences thereof. She thanked the deceased's parents for taking care of her

children in her absence. I find that the accused showed a genuine remorse for commission of the offences.

[20] I have considered the personal circumstances of the accused, the aggravation factors and the submissions made by counsel. I find that the accused's personal circumstances mentioned in paragraph 9 above, cumulatively taken amount to substantial and compelling circumstances warranting a deviation from imposing the prescribed minimum sentence for murder.

[21] I now consider the appropriate sentence for murder and defeating the course of justice. The accused has been convicted of serious offences. She deprived the deceased of his Constitutional right to life. She committed an offence of defeating the course of justice by cleaning the blood on the mattress and burning the deceased's body. What is more aggravating is that she involved an innocent neighbour whom she requested to throw away the deceased's remains. The state submitted that the offence of defeating the course of justice was planned because the accused did not want to go to prison. Her explanation for this offence is that she became scared after noticing that the deceased was dead and did not know what to do with his body. She then decided to dispose of the body in order to conceal what she did. She lied to the children and deceased's family and said the deceased moved to Cape Town for work. I accept that this offence was committed in a state of distress and fear.

[22] The sentence also needs to be victim-centred. The victim or the victim's family must be afforded a more prominent role in the sentencing process (*S v Matyityi 2011 (1) SACR 40 (SCA)*). Ms Kateko Mabuyangwa compiled a victim impact report. Tryton who witnessed the murder of his father, informed Ms Mabuyangwa that the offence changed his feelings and outlook of his mother as he witnessed her dark side and he feared her like he never did before. He felt guilty that he knew what happened to his father but he did not report it to his grandparents due to fear. He felt like a liar and that he was betraying his father. When he learned that his mother killed and burned his father, he felt hurt and cried. He feels that what the accused did to the deceased is evil. He attended counselling at Teddy Bear clinic and he still needs more intervention.

[23] The deceased's father, Mr Bertie Davis and his mother, Mrs Louwelda Nighton informed Ms Manbuyangwa that the deceased and accused's relationship was characterized by

intimate partner violence as they were always fighting in the presence of the children. They indicated that they are very hurt by what the accused did to their son. They feel that what the accused did is inhumane. Their entire family is hurt by the actions of the accused as the deceased was burned beyond recognition. They could not give him a proper burial. A proper post mortem examination could not be conducted. They are traumatized and do not have closure because they could not mourn the deceased. They are unemployed. The deceased was a breadwinner. He took care of them and his children financially. Upon his passing they had to pay for the expenses of three memorial services held for the deceased. They also had to pay two months rental for the deceased's place. They are struggling financially. The deceased's father does piece jobs to assist in taking care of the deceased's children. The deceased's mother had to take over the accused's emotional, financial and physical responsibilities for the children. The children were often sick after their father died and their mother arrested. They present with sleeping problems, anger issues and behavioral challenges. All the victims have indicated their willingness to attend counselling after this case has been finalized.

- [24] The interests of society also need to be considered in sentencing. Domestic violence cases are prevalent in our society. Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished (*Kekana v The State (629/13) [2014] ZASCA 158 (1 October 2014)*). It would be contrary to the values of the Constitution to hold that scourge provides a licence to abused partners to take the law into their own hands in the absence of grounds for lawful self-defence (*S v Ferreira and Others supra*). However, the court must distinguish between punishment and vengeance when exercising its sentencing function.
- [25] Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's particular circumstances at the time of the offence (*S v Mashego (CC142/2017) [2019] ZAGPPHC 95 (22 March 2019)*).
- [26] I have considered all the relevant factors in sentencing, without overemphasizing one factor above others. I have also taken into account the period the accused has already served in prison awaiting trial. In my view a lengthy sentence of imprisonment will not serve justice in the circumstances of this case. The children who are the main victims in

this case are not coping with the loss of their father and the imprisonment of their mother. They need the strong nurturing relationship with their mother. She needs to be integrated in the community to support the children throughout their remaining stages. She also needs to relieve the children's grandparents from the difficulties they are experiencing in raising the children. Furthermore, the accused has reasonable prospects of rehabilitation.

[16] In my view the appropriate sentences that fit the accused as well as crimes, fair to her, the victims and society are those that follow.

Order

[17] The following order is made:

1. Count 1: 9 years direct imprisonment.

2. Count 2: 3 years direct imprisonment

3. The two years of the sentence imposed on count 2 will run concurrently with the sentence imposed on count 1. The effective sentence is 10 years direct imprisonment.

4. In terms of section 103 of the Firearms Control Act the accused is declared unfit to possess a firearm.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

Date of delivery: 18 August 2023

Appearances:

On behalf of the State: Adv LR Surendra
 Adv M Phaaladi

Instructed by: National Prosecuting Authority

On behalf of Accused: Ms S Bovu

Instructed by: Legal Aid South Africa