**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: CC3/2019**

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

14-09-2020 PD. PHAHLANE
DATE SIGNATURE

**In the matter between:**

**THE STATE**

**and**

**FREDDY RAMATHIBE MABAPE**

**ACCUSED**

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**SENTENCE**

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**PHAHLANE, AJ**

[1] On 27 November 2019 the accused was convicted of Premeditated Murder. The matter was postponed to 14th January 2020 for the pre-sentence report to be compiled and obtained on behalf of the accused. However, on that day the report was not ready, and a further postponement was requested for that purpose. Several other

postponements were sought by the accused for the same reason. The report was finally obtained and that having been done, it is now the duty of this court to proceed with the sentencing procedure.

[2] The accused has been convicted of a serious offence. The State argued and submitted that the accused's aim was to kill the deceased when he went to meet with her because he was armed. Advocate Van Der Westhuizen on behalf of the State argued that this is supported by the evidence of Kedibone who testified that the accused said: "*I can see that she is not dead and I will follow the ambulance and finish her off*" - and that being an indication that the accused was determined to do what he said he will do, - which was to finish her off by killing her. This conduct in my view, point to pre-planning or premeditation.

[3] A planned or premeditated murder was described in ***S v Raath***[1] as follows:

> *"…the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at the conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated".*

[1] 2009 (2) SACR 46 (C) at para 16

[4] ***Raath*** was quoted with approval by the Supreme Court of Appeal in ***Kekana v The State (629/2013) [2014] ZASCA 158 (1 October 2014)*** and reaffirmed in ***Kekana v The State (37/2018) [2018] ZASCA 148 (31 October 2018)*** wherein the court stated in paragraph 13 that:

> *"It is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action".*

[5] In ***S v Di Blasi***[2] the court said:

> "*The requirements of society demand that a premeditated, callous [heartless] murder such as the present should not be punished too leniently, lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct."*

[6] I have in my judgment indicated that the accused manifested a plan or premeditation to kill the deceased at the very first moment when he chased both Kedibone and Itumeleng away.

[7] This is in line with what the court stated in ***Raath*** *supra* that the concept of premeditation refers to the method of doing something deliberately, which includes the calculated timing to increase the likelihood of success, or to evade detection or apprehension.

[8] In addition to the evidence that the accused wanted to be alone with the deceased when he chased both Kedibone and Itumeleng away, is the fact that he ran to his

[2] 1996 (1) SACR 1 (A) at 10f-g.

brother's house in Ormonde as a means of evading detection and apprehension by the police.

[9] It is on this basis that Advocate Van Der Westhuizen submitted that the aggravating circumstance in this case is that, the deceased lost her life at the hands of the accused who insisted in his evidence that he was in a love relationship with the deceased and loved her. Counsel further argued that the accused displayed his violent behaviour by dragging the deceased and insisted on speaking to her while it was clear that the deceased did not want to speak with him.

[10] The post-mortem report indicates that the cause of death was determined to be multiple stab wounds. This was supported and confirmed by the evidence of the paramedic, Mr Mushadu who identified various stab wounds that he saw on the body of the deceased and as depicted on the photographs. He also found a knife stuck on the body of the deceased, and thus confirming that the deceased was indeed stabbed. The accused's counsel confirmed that the deceased was stabbed seven times, and this in my view, shows that the deceased suffered and died a painful death.

[11] Advocate Khoza on behalf of the accused submitted, and correctly so, that the interests of justice and society should be taken into consideration when imposing sentence, as well as the deterrence and rehabilitative purposes of punishment. Counsel pleaded with the court to have mercy on the accused and submitted that direct imprisonment will not assist in turning the accused into a suitable member of society.

[12] It is trite law that sentencing the accused should be directed at addressing the judicial purposes of punishment, which are deterrence; prevention; retribution and rehabilitation as stated in the case of ***S v Rabie***[3]**.** Due to the seriousness of the offence it is required that the elements of retribution and deterrence should come to the fore and that the rehabilitation of the accused should be accorded a smaller role.

[3] 1975 (4) SA 855 (A).

[13] In ***S v Mhlakaza & another***[4] the Supreme Court of Appeal pointed out that, given the high levels of violence and serious crime in the country, emphasis should be on retribution and deterrence when sentencing such crimes.

[14] In **S v Swart**[5] the court stated that:

> *"In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. 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"*.

[15] This court referred to, and with approval, the case of ***R v Karg***[6] where the court stated that:

> "*While the deterrent effect of punishment has remained as important as ever, it is correct to say that the retributive aspect has tended to yield ground to the aspect of prevention and correction. That is no doubt a good thing. But the element of retribution historically important, is by no means absent from the modern approach. Is it not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may be inclined to take the law into their own hands*".

[4] 1997 (1) SACR 515 (SCA) at 519*c-e*
[5] 2004 (2) SACR 370 (SCA)
[6] 1961 (1) SA 231 (A) at 236A-B

[16] Planning and premeditation have long been recognised as aggravating factors in the case of murder[7]. When the Criminal Law Amendment Act 105 of 1997 (the Act) was enacted it was intended to prescribe a variety of mandatory minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes, and the relevant section being section 51(1) of the Act, which has been explained to the accused at the commencement of the trial. The offence for which the accused was convicted for carries a mandatory sentence of life imprisonment. However, irrespective of the minimum sentences provided for in the Act, the court retains its inherent power to consider the sentence of life imprisonment unless substantial and compelling circumstances exist, which calls for a deviation from the imposition of the prescribed sentence.

[17] In determining an appropriate sentence which is just and fair, I must have regard to the triad of factors pertaining to sentence, namely: 'the offence or crime, the offender and the interests of society' as pronounced in ***S v Zinn***[8]**.** None of these factors should be under or over emphasised. The Court must therefore take into account your personal circumstances as the accused Mr Mabape; the nature of the crime you committed including the gravity and extent thereof, as well as the interests of the society. The general rule as pronounced by the Appellate Division in ***S v Rabie*** *supra* is that the 'sentence or punishment to be imposed should fit the criminal as well as the crime and it must be fair to society.

[18] With regards to the first leg of the triad – ie. the offense, there is a constitutional requirement that the punishment imposed, including where it is set by statute, must not be disproportionate to the offense. This is ascertained by looking at the applicable aggravating and mitigating circumstances. Several aggravating factors relating to the crime may be considered, and one such factor being the severity of the crime. With regards to the second leg of the triad – ie. considering the personal circumstance of the offender, requires that the sentence fit the offender. The third leg of the triad

[7] See S v Khiba 1993 (2) SACR 1 (A).
[8] 1969 (2) SA 537 (A).

requires that a sentence serve the interest of society. This incorporates the traditional purposes of punishment (ie. Prevention; deterrence; rehabilitation; and retribution) into the sentencing considerations.

[19] In ***Madau v S***[9] the court stated that:

> *"Courts must therefore always strive to arrive at* a *sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves* a *very high degree of responsibility which should be carried out with equanimity"*

[20] In ***The DPP v Portia Thulisile Tsotetsi***[10] the court said the following:

> *"Imposing sentence is one of the most difficult tasks*[11] *which a presiding officer has to grapple with. It has been described as a 'painfully difficult problem'*[12] *and it involves a careful and dispassionate consideration of all factors. The court must consider the factors referred to in* ***S v Zinn***[13] *being the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed. The court must also consider the recognised objectives of sentencing being prevention, rehabilitation, deterrence and retribution.*
>
> *The seriousness of the offences, the circumstances under which they were committed, and the victim are also relevant factors in respect of the last element of the triad. The personal circumstances of the accused including his age, education, dependants, his previous*

[9] (764/2012) [2012] ZASCA 56 at para 13 (09 May 2013).
[10] (170/2017) [2017] ZASCA 083 (02 June 2017)
[11] S v EN 2014 (1) SACR 198 (SCA) para 14.
[12] S v Rees 1984 (1) SA 468 (W) at 470A-B.
[13] S v Zinn 1969 (2) SA 537 (A).

*convictions, if any, his employment and other relevant conduct or activities call for consideration in respect of the second element. An appropriate sentence should also have regard to or serve the interests of society, as the first element of the* ***Zinn*** *triad, which is the protection of society's needs, and the deterrence of would-be criminals*".

[21] Referring to ***S v Matyityi***[14], the Supreme Court of Appeal in ***Aliko v The State***[15] stated that:

*"This court stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored*".

[22] The accused did not give evidence in mitigation of sentence, but his counsel made submissions from the bar and placed on record, the personal circumstances of the accused as follow:

22.1 That he is 30 years old.

22.2 He is not married and does not have any children

22.3 The passed matric and was employed as a boiler fitter earning a salary of R6000.00 per month. He used his earnings to assist his sister's children with schooling; and

22.4 He is a first offender.

[14] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

[15] (552/2018) [2019] ZASCA 31 (28 March 2019) at para 17.

[23] The State submitted that it is important for the court to take judicial notice of the amount of violence perpetrated against women and the fact that femicide is prevalent within the South African society.

[24] It is true that violence against women is endemic in our society and the country at large, and it is the duty of the courts to protect women and the society in general from the scourge of these violent actions and to send a clear message that this behaviour is unacceptable.

[25] In the unreported judgment of ***S v Ngubeni***[16] Adams J stated that:

> *"Violence against women and children is a scourge which appears to be damaging the very fabric of our society. It is an indictment against us. It should be eradicated. The vast majority of South Africans no doubt abhors the scourge of femicide seemingly based on male dominance and a perverse abuse of power by a male person over a female person".*

[26] The Supreme Court of Appeal in ***Director of Public Prosecutions v Mngoma***[17] said the following:

> *"A failure by our courts to impose appropriate sentences, for violent crimes by men against women, will lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic. Courts should take due cognisance of the salutary warning expressed by Marais JA* ***in S v Roberts 2000 (2) SACR 522 (SCA)*** *at para 20 where he stated:*
>
> *"It [the sentence] fails utterly to reflect the gravity of the crime and to*

[16] Case no SS184/2016 at para 26, Gauteng Local Division, Johannesburg.
[17] 2010 (1) SACR 427 (SCA) at para 14.

*take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they have intimate relationships".*

[27] In the unreported judgment of ***Mudau v S***[18] Mathopo AJA stated that:

*"Domestic Violence has become a scourge in our society and should not be treated lightly but deplored and severally punished. Hardly a day passes without a report in the media of a woman or 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 fundamental rights such as equality, human dignity and bodily integrity".*

[28] The State argued that the accused had not shown any remorse. Remorse remains an important factor and lack thereof, must however not be overemphasised in relation to the other factors that must be considered. It is trite that if the accused shows genuine remorse, punishment will be accommodating, especially when the accused has taken steps to translate his remorse into action. Remorse is an indication that the accused has realised that a wrong was done and has to that extent, been rehabilitated. It is therefore important when the court must decide - as to the degree of mercy to be applied when sentencing.

[29] The Supreme Court of Appeal in ***S v Mabuza***[19] recognised that remorse or the lack thereof may be considered when determining sentence.

[18] (547/13) [2014] ZASCA 43 at para 6 (31 March 2014).
[19] 2009 (2) SACR 435 (SCA)

[30] In S v Brand [20] the court stated that:

> *"True remorse was an important factor in the imposition of sentence, as it suggested an offender who, firstly, realised that he had done wrong, and, secondly, undertook not to transgress again. True remorse led to accommodating punishment by our courts"*.
>
> *And at 304a-d* that:
>
> *"Remorse is only a valid consideration at sentence if the contrition is sincere and the accused takes the court fully into his or her confidence"*.

[31] Genuine remorse was also correctly described by Ponnan JA in ***S v Matyityi*** *supra* when he stated that:

> *"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. 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. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. 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. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions"*.

[20] 1998 (1) SACR 296 (C) at 299i-j.

[32] When sentencing an accused person, the court must evaluate all the evidence, including the mitigating and aggravating factors, to decide whether substantial and compelling circumstances exist. Having said that, if the court departs from the prescribed sentence, there must truly be convincing reasons to depart therefrom, which reasons must be specified.

[33] The decision whether the circumstances of this case call for the imposition of a lesser sentence than the sentence prescribed in terms of section 51 (1) of the Act means the mitigating factors would have to be weighed with the aggravating factors[21].

[34] It is trite that every case be determined according to its own merits and it is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances. This is in keeping with the principle that the imposition of sentence is pre-eminently in the domain of a sentencing court.

[35] The general principles governing the imposition of a sentence in terms of section 51 (1) of the Act as enunciated by the Supreme Court of Appeal in the case of ***S v Malgas***[22] cannot be ignored. Marais JA stated that:

> "*The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While 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.*".

[36] The court in ***S v Matyityi*** referring to ***Malgas*** *supra* reaffirmed that:

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[21] S v Sikhipha 2006 (2) SACR 439 (SCA)
[22] 2001 (1) SACR 469 (SCA)

*"The starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation"*.

[37] Advocate Khoza on behalf of the accused submitted that he is not able to address the court or make submissions with regards to substantial and compelling circumstances, nor will he make any submissions with regards to remorse. One can only understand the difficulty, bearing in mind that the accused has throughout the trial proceedings maintained his innocence, but when asked to give the reasons why he fled or ran away from Daggafontein at the time he testified, he made a startling admission that: "*I became scared that I have killed a person and the community was looking for me*".

[38] In ***S v Vilakazi***[23] the court stated that:

*"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"*.

[39] In the case of ***Matyiti*** the Supreme Court of Appeal held that the circumstances of the crimes were heinous and that the statutory minimum term of life imprisonment was not disproportionate. It accordingly altered the sentence of 25 years imprisonment imposed by the trial court, to one of life imprisonment on each count. The court further held that "*neither the age of the appellant*,

[23] S v Vilakazi (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) at para 58 (3 September 2008).

*nor his background and circumstances, constituted substantial and compelling circumstances*".

[40] Having regard to the purposes of punishment and the seriousness of the crime committed by the accused, there is no doubt in my mind that the only appropriate punishment for the accused is a sentence of long-term imprisonment. I have taken due consideration to the personal circumstances of the accused and the only factor in his favour is that he is the first offender. He turned 31 years old on 10 May 2020. The probation officer noted in her report that the accused has informed her that he has recently found out that he has a two-year old child with his former girlfriend but has never met the child because he has been in custody. The accused family however indicated that they do not have any details regarding the child and have not taken any steps to verify the authenticity of allegations by the mother of the child. She also noted that after completing high school, the accused furthered his studies at Seshego FET College and completed a higher learning certificate in Electrical Engineering in 2013.

[41] In 2016 he relocated to Johannesburg where he found employment at Distille, working as a general worker and earning R 5000 monthly. The accused informed the probation officer that "*he spent the majority of his salary to fulfil his basic needs such as shelter, food and clothing and would assist his family when requested*" . This is contradictory to what was submitted by his counsel that he earned R 6000 per month and assisted his sister's children with schooling. The probation officer further noted that the accused repeatedly stated that he was wrongfully convicted as he did not commit the offence. He feels frustrated that he is imprisoned and stated that his future is jeopardised for an offence he did not commit. She noted that the accused has not expressed any remorse because he does not acknowledge the wrongfulness of his action. She recommended that the court impose a sentence in terms of section 276 (1)(b) of the CPA.

[42] I have already indicated that the accused elected not to testify in mitigation of his

sentence and that his counsel submitted that he is not able to address the court with regards to remorse. The court appreciates that the accused has the right not to testify and remain silent, which can be exercised throughout the proceedings. It is therefore difficult for this court to really know and understand whether the accused is remorseful, given the fact that his evidence was to the effect that he loved the deceased and wanted to make things right between them.

[43] I therefore align myself with the authorities which find that the expression of remorse, is an indication that an accused person has realised that the wrong has been done, and that it will only be validly taken into consideration if he takes the court into his confidence. I am of the view that the accused have not shown any remorse. The excessive and brazen nature of the violence displayed by the accused in the course of viciously and brutally killing the deceased by stabbing her multiple times with a knife which was found stuck on the body of the decease, is an aggravating factor which the court cannot turn a blind eye to.

[44] In considering the personal circumstances of the accused and his lack of remorse; the aggravating features of the offence; the purposes of punishment, and all the other factors to be considered when imposing sentence, I am of the view that the personal circumstances of the accused are just ordinary circumstances.

[45] In ***S v Nkomo***[24], Lewis JA stated that:

> *"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course, these must be*

[24] 2007 (2) SACR 198 (SCA) para 3.

*weighed together with aggravating factors. But none of these needs be exceptional*."

[46] In ***S v Lister***[25] the court stated that:

*"To focus on the well-being of the accused at the expense of all other aims of sentencing such* as *the interest of society is to distort the process and to produce in all likelihood* a *warped sentence"*.

[47] In ***S v Ro and Another***[26] the majority of the Supreme Court of Appeal held that:

"*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*".

[48] I agree with and I am bound by these decisions. Having considered all the circumstances of this case, I can find no other suitable sentence other than the prescribed sentence of life imprisonment and I cannot find any justification why this court should depart from imposing a sentences of life imprisonment. I am of the view that the aggravating factors in this case far outweigh the mitigating factors and that there are no substantial and compelling circumstances which warrants a deviation from the imposition of the prescribed minimum sentence.

[49] In the circumstance, the following sentence is imposed:

1. The accused is sentenced to Life imprisonment.

[25] 1993 SACR 228 (A)
[26] 2010 (2) SACR 248 (SCA)

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PD. PHAHLANE
Acting Judge of the High Court,
Gauteng Division, Pretoria

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|---|---|
| For the State | : Adv Van Der Westhuizen |
| Instructed by | : Deputy Director of Public Prosecutions, Pretoria |
| For the Accused | : Adv Khoza |
| Instructed by | : |
| Date of Sentence | : 14 September 2020 |