Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE GARIEP LOCAL CIRCUIT DIVISION OF THE HIGH COURT
HELD AT UPINGTON

Case No: **K/S 26/2022**
Heard on: **30 & 31/10/2023**
Delivered on: **31/10/2023**

In the matter between:

THE STATE

and

THYS MONDZINGER Accused

JUDGMENT ON SENTENCE

MAMOSEBO J

[1] The accused was convicted of Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) on 30 October 2023. A minimum sentence of life imprisonment is prescribed in the Act and this

Court can only depart from the minimum sentence if it finds substantial and compelling circumstances to exist. In the absence of any, this court cannot deviate from imposing the prescribed sentence for flimsy reasons as cautioned in *S v Malgas* 2001 (1) SACR 469 (SCA).

[2] A summary of what transpired is necessary. The accused was the deceased's boyfriend and they were expecting a baby. The deceased was 34-weeks pregnant when she met her untimely death. The accused had earlier that morning been with the deceased to the Magistrates Court apparently for the deceased to withdraw the protection order that was granted against him. That did not happen. Later that same day, they visited a tavern where they spent some time together until the accused took the deceased home. Early that evening, while the deceased was walking in the company of one Mr Andries de Vis she saw the accused in the company of Ms Van der Westhuisen (Gaikikolela) approaching from the opposite direction. She got frightened and retreated, resultantly falling on her back in a ditch. The accused asked her if he had not taken her home. He produced an okapi knife and stabbed her indiscriminately.

[3] The accused elected not to testify nor was any evidence led on his behalf in mitigation. His counsel, Mr Moeti, placed the following on record from the bar: That he is 44 years of age. His highest level of education is matric completed in 1998. Even though both his parents are still alive he was raised by his alcoholic grandparents. He is the second of three siblings. He is unmarried with 3 children from 3 different mothers. His eldest is a daughter aged 22 years and in Grade 8 who lives with her grandparents in Loxton, in the Northern Cape. The second, also a daughter is 15 years old and in Grade 5. She resides with her mother. The last born is 9 years old and also stays with her mother. He did not attend the burial of the deceased because he was incarcerated.

[4] The accused has been in custody since his incarceration on 05 May 2022, a period of 17 months. He was once assaulted in 1998 which resulted in him undergoing a head or brain surgery but stopped taking medical treatment a year later because he was employed and could not take leave from work. These, submitted his counsel, were factors that, when considered cumulatively, would qualify as substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. Mr Moeti, relied on *Ngcobo v The State* [1344/2016] 2018 ZASCA 6 (23 February 2016) and *S v Vilakazi* 2012 (6) SA 353 (SCA) para 14. It was urged upon this Court that a suitable sentence under the circumstances would be a determinate period of imprisonment that would enable the accused to rehabilitate.

[5] The accused's previous convictions marked exhibit "I", of abuse of dependence forming substances and rehabilitation and possession/use/trading/produce of prohibited dependence forming medicine or plant committed on 04 February 2001 where he paid an admission of guilt fine of R260. 00. On 25 December 2002 he committed an offence of housebreaking with intent to steal and theft as well as use of a motor vehicle without the owner's consent. On 26 November 2003 he was convicted on both counts and the court took the two counts together for purposes of sentence. He was sentenced to 12 months imprisonment wholly suspended for three years on specified conditions. The previous convictions are older than 10 years and unrelated to the offence of murder. A lid must be placed on the aged offences and I will therefore not take them into consideration for these purposes.

[6] Ponnan JA in *S v Samuels* 2011 (1) SACR 9 (SCA) at para 9 made the following illuminating remarks:

> "*[9] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck."*

[7] Ms Engelbrecht, for the State, submitted a victim impact report exhibit "J" compiled on 09 February 2023 by the probation officer RF Newman, employed by the Department of Social Development, Upington. He has a 4-year degree in social work and 25 years' experience in the field. The deceased was 34 years old at the time of the murder. She had five children and the probation officer interviewed her eldest daughter who is 18 years old and in Grade 12. She was not in court on 30 October 2023 because she was sitting for her matric examinations. The deceased's youngest child is four years old. The gender of the deceased's children is four daughters and one son. The deceased was the eldest of three siblings. She was not married and both her parents are deceased. The deceased and the accused were in what the probation officer terms *'a short relationship'* before her tragic death. The period is not specified in the report. The probation officer recorded that the family is traumatised

and still coming to terms with their loss. They have not found closure yet.

[8] Ms Juliana Rooi is now 19 years old and was 17 years when her mother passed away. Her siblings are 11, 8, 7, and 4 years old. She is in boarding school since the beginning of the year affording her an opportunity to focus on her studies. The other siblings currently reside with the ex-boyfriend's sister for the time being. She was reminded that once she completes her studies she will have to take over the responsibility as a guardian for her siblings. She says the youngest one is still enquiring as to the whereabouts of their mother. It is sad to now have to live separated from her other siblings. She still has ambitions to study further and pursue a career.

[9] In *S v Matyityi* 2011 (1) SACR 40 at para 17 Ponnan JA remarked:

> "*[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness.*"

[10] Ms Engelbrecht in countering the submissions made on behalf of the accused argued the following: First, the submission pertaining to the accused's personal circumstances that this Court should, as intimated in *S v Vilakazi* 2012 (6) SA 353 (SCA) at para 58, find that the accused's personal circumstances must recede into the background. Secondly, there was no evidence led whatsoever about the accused's head injury which purportedly occurred in 1998 and counsel submitted that evidently, the accused has had a fruitful and complete life because he not only stopped taking the medical treatment but he was also gainfully employed and had a number of children. The second submission pertained to the period the accused spent incarcerated. Should the court regard this factor in isolation it does not explain the violence perpetrated on the deceased for no apparent reason.

[11] In aggravation of sentence, Ms Engelbrecht, presented the following: the gravity of the offence of murder and its prevalence in the province and relied on this Court's unreported case of *Sello Khoenyane v The State* CA & R 6/2020 (07 August 2020) where the court dismissed the appeal of the accused whose ground of appeal was that he was incarcerated for 13 months. Ms Engelbrecht submitted that the 17-month period awaiting trial on its own cannot be a decisive factor warranting a deviation from the prescribed minimum sentence. It is trite, following *Malgas*, that a more standardised approach must be followed in sentencing.

[12] This was no ordinary murder but a femicide. More aggravating are the injuries sustained by the deceased especially when inflicted by a loved one occupying a position of trust and who had a duty to protect the deceased. The fact that the foetus was viable for life outside her mother's womb should be taken as an aggravating factor. It is a fact that

whilst victims of abuse look to the State for protection and obtain protection orders our court rolls are still filled with matters of victims murdered while in possession of protection orders.

[13] I venture to demonstrate why direct imprisonment is the appropriate sentence under these circumstances. Murder is a heinous and abhorrent offence. When committed on a 34 weeks pregnant woman is even more repugnant. Evidently, the accused is a violent person. This assertion is supported by the medical evidence and the protection order issued against him. He must be removed from society. He not only offended against the right to dignity of the deceased by attacking her in a ditch stabbing her indiscriminately and mercilessly but also had flagrant disregard to the sanctity of human life. Women and children in this country have a right to be protected against beasts like the accused. The conduct of the accused is unacceptable in a civilised society.

[14] There are no substantial and compelling circumstances to justify a lesser sentence. In actual fact, bringing in a purported injury at this late stage without any substantial evidence is, in my view, clutching at straws. The accused has continued to live normally for over 20 years since the alleged injury was inflicted but, should a need arise, the medical facility at the correctional services will be better equipped to assist him. This claim should not detract from the fact that the accused must take responsibility for his actions. I attach weight to the seriousness of this crime and the interests of society in crimes involving gender-based violence. The murder was, borrowing the phrase from Ponnan JA, *breathtakingly brazen and executed with a callous brutality.* The deceased was a defenceless woman posing no danger to anyone. Her life was unnecessarily cut short by a narcissistic jealous boyfriend. This is a typical case where the personal circumstances of the accused must recede into the background.

[15] The most appropriate purposes of punishment in this case are deterrence and retribution. The accused has not demonstrated any remorse for having committed such a monstrous offence. He even went to the extent of accusing his own brother of misconstruing the confession made to him about the murder. I am of the view that rehabilitation, without more, cannot precede the other more appropriate forms of punishment and therefore satisfied that a sentence of life imprisonment would be just.

[16] The accused was acquitted on the charge of killing the unborn baby solely because it is not a criminal offence in our courts until Parliament considers creating a statutory offence to cater for unborn babies. Undoubtedly, there is a far outcry for Parliament to take this bold step. The moral convictions of our society demand that a statutory offence of feticide (the killing of a foetus), completely different from a legal abortion, be created to protect the unborn babies. I urge the Department of Justice to give this plea some serious consideration in the interests of justice.

[17] Having regard to all the circumstances encountered here, the following sentence is imposed:

In respect of murder read with s 51(1) of the Criminal Law Amendment Act, the accused is sentenced to imprisonment for life.

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MAMOSEBO J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the State Adv MA Engelbrecht

Instructed by:	The Director Public Prosecutions
For the Accused:	Mr JP Moeti
Instructed by:	Legal Aid South Africa (*judicare)*