REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: SS 42/13
DPP REF NO: JPV 2013/026
DATE: 20th June 2013

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

20/6/13
DATE

SIGNATURE

In the matter between:

THE STATE

and

MGIBELO, THEMBI JANE ENKILE Accused

JUDGMENT ON SENTENCE

MUDAU, AJ:

[1] The accused and the deceased were previously in a love relationship. Their first child died shortly after birth. Their second child was born in 2008. However, from the age of three months, their surviving child has been in the

care and custody of the deceased's mother together with two other siblings, in Venda. The accused had planned and deliberately set on fire a shack wherein the deceased and his girlfriend were sleeping after dousing the shack with an inflammable liquid. The deceased died from the burn wounds whereas his girlfriend barely survived. As a result of this incident, the accused was convicted of murder as well as attempted murder read with the provisions of s51 of the Criminal Law Amendment Act 105 of 1997. The accused was also convicted of arson.

[2] Section 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 provides that, if a person is convicted of murder that was pre-planned, a life sentence is the prescribed sentence. It is trite law that if any court which convicts someone of murder which has been pre-planned is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than that prescribed, it shall enter those circumstances on the record of the court proceedings. It is only then that the court may impose such lesser sentence than that prescribed.

[3] The accused who is 33 years of age, unmarried, was born and raised in the Free State province. She is the second born of four siblings. Of her two surviving children, the eldest, an 11 year old daughter, lived with her. The accused is a standard 7 drop-out and had never been employed. From 2003, she operated a shebeen without a licence at the Delmo squatter camp. It is from this activity that she was arrested for dealing in liquor without a licence 4 times. In all these instances she paid admission of guilt fines. With the income

derived, she helped to support her unemployed parents and siblings. The accused's parents depend on old age grants from the State. In 2008, she was diagnosed HIV positive and is currently taking treatment. The accused was granted bail almost immediately after her arrest for this incident and was on bail until 31 May 2013.

[4] Murder, attempted murder and arson are not only very serious offences, but are prevalent not only in the jurisdiction of this court, but country wide as well. The gravity of the offences the accused has been convicted of cannot be over-emphasised.

[5] The attack on the deceased and the surviving complainant can only be described as most callous, cruel and brutal. This was pure savagery. These were defenceless victims who had no means of escape as the fire was started at the door of the shack which had no windows. Fanned by the inflammable liquid, the fire was quick to spread which gave the victims no chance to break out of the burning shack. Hours later, the deceased succumbed to his painful injuries with his body almost unrecognisable and the surviving victim, scarred for life.

[6] At a glance, this case has features of a "crime of passion", but a proper consideration of all the relevant facts show that on the contrary, the conduct of the accused was motivated by revenge or vengefulness. The confrontation between the accused and the surviving complainant, the threats to burn the latter's shack, started at about 9am on the 14th November 2012. The accused

who was armed with a bottle of paraffin and a box of matches, had to be restrained before she could set the shack alight.

[7] The accused's threats to burn down the complainant's shack continued between 1 and 2pm later that afternoon when the accused returned with other women, but this time, armed with what the witnesses described as petrol in a milk container. Once more the accused was begged not to carry out her threats. She later returned to the same address only to find the "dogs" as she had described the two victims, not there. She traced them to where this incident occurred.

[8] From the above facts, it is clear that the accused's conduct was well planned and acted upon throughout over a period of at least 16 hours. The accused was determined to carry out her threats which she communicated to various people. She had time to cool off and to reconsider her actions. After setting the shack alight, whilst the deceased and the complainant were fighting for their lives, the deceased expressed the desire to finish off the deceased. The accused's murderous intent makes these crimes more aggravating.

[9] An essential characteristic of a crime of passion is when an offence is committed "*without rational reflection whilst the perpetrator was influenced by barely controllable emotion*" see *S Mvamvu*[1]. This case is accordingly distinguishable from a typical scenario "*in which an accused reacts*

[1] *S v Mvamvu* 2005 (1) SACR 54 (SCA) at 59; *S v Mvamvu* 2005 1 ALL SA 435 (SCA) at 439 para 13.

spontaneously to perceived provocation, driven by anger, without sufficient time to consider his actions" (see *Dikana v S*[2]). In this case, the accused did not unexpectedly and shockingly discover the deceased with the complainant. By her own version she was aware of their relationship. By her version, the deceased had a history of numerous love relationships. The accused and the deceased were not married. The accused had no obligation to stay in her relation with the deceased but could have moved on with her life.

[10] On the occasion of these incidents, she went looking for the complainant and had wanted the deceased to publicly denounce their relationship. She must have known, as the State witnesses testified, that the accused did not love her anymore.

[11] In *Fati v S*[3] (unreported), it was held that "*where a person unilaterally terminates an amorous relationship with another, it is prudent to exercise caution and not to adopt a prescriptive approach when determining whether or not the reaction of the rejected party is rational*".

In the *Fati* case, the accused had pleaded guilty to the murder of her boyfriend a month after she had seen him with another woman. In *State v Mngoma* (above), the accused inferred that his girlfriend had been unfaithful and killed her four days after the incident. In the *Mngoma* case as well, the accused had pleaded guilty to murder and thus shown remorse.

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[2] *Dikana v S* [2008 2 ALL SA 182 (E) at page 186); *S v Mngoma 2009 (1) SACR 435 (E) at p 439 para 6-7.*
[3] *S v Fati* 2010 JDR 0282 (ECG) page 4 para 9.

[12] In this case however, I find that hers were crimes of vengeance and clearly distinguishable from the cases referred to above. According to the version of the State which I had found to be more probable, the deceased had terminated his relationship with the accused long before the incidents of the crimes. The accused has shown no remorse for her conduct. In spite of incriminating evidence from her cell-phone, the accused maintained her innocence throughout the trial. Neither did she testify in in mitigation of sentence.

In the often stated case of *S v Malgas*[4], the Court, in considering "substantial and compelling circumstances", stated the following (at 1231A–D):

> "*Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to 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. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders."*

[13] Consistent with this approach, the SCA in *S v Rosslee*[5], upheld the State's appeal against a 20 year jail term which was substituted for a life term of imprisonment. In the latter case, it had been found that the murder of the

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[4] *S v Malgas* 2001 (2) SA 1222 (SCA).
[5] S v Rosslee 2006 1 SACR 537 (SCA).

accused's girlfriend was premeditated after the deceased left the accused for someone else. In broad outline, the facts of this case are exactly the same.

[14] On the facts of this case, the accused is clearly not a candidate for a non-custodial form of sentence. I did not hear any argument or submission to the contrary. As the accused is a mother to two minor children, it is imperative to have regard to the interest of these children in mind when a proper and just sentence is considered. In *S v M*[6] it was stated that:

> "*The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the Zinn approach, one of which is a non- custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.*"

For this reason and at my instance, the father of the accused's first child testified. It was the father's version that he was willing and in a position to take care of their child.

[15] With regard to the accused and the deceased's child, the primary care giver was the deceased and his mother with whom the child has been staying since the age of 3 months, as early as the 31 May 2013, I directed the registrar of this court to ensure that the welfare authorities in this province as well as in Limpopo (in respect of the deceased's minor children) should be notified to take whatever steps would be necessary in the interest of these children.

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[6] *S v M* (Centre for Child Law as *Amicus Curiae*) 2007 (2) SACR 539 (CC).

[16] In *S v Moodley*[7] page 5 para 6 an unreported judgment by Hartzenberg J with which Makhafola AJ (as he then was) concurred, it was however stated that:

> "*Where however a non-custodial sentence will not be an appropriate sentence, even if the interests of the children cry for the care of the parent, the court will be constrained to impose a custodial sentence.*"

[17] With due regard to all the factors in mitigation and aggravation of sentence, I fail to find in the accused's favour the presence of "substantial and compelling circumstances" that justify the imposition of lesser sentences than those prescribed. The offences committed were unnecessary. The accused's personal circumstances are common place and are overshadowed by the gravity of these crimes. In respect of count two (attempted murder), in view of the manner in which the crime was committed as well as the permanent scars suffered by the complainant, there is justification to consider a sentence beyond the minimum sentence prescribed.

[18] Having regard to all the factors in mitigation and aggravation of sentence, the following sentences are justified:

Count 1 the accused is to serve a life term of imprisonment.
Count 2 the accused is to serve ten years imprisonment.
Count 3 the accused is to serve five years imprisonment.

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[7] S v Moodley 2008 JDR 0691.

The sentences in respect of counts 2 and 3 are to run concurrently with the sentence on count 1. In terms of section 103 (1) of the Firearms Control Act No 60 of 2000, the accused is unfit to possess an arm.

T P MUDAU
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for the State	: Adv Muller
Counsel for the Defence	: Adv Yabo
Dates of Hearing	: 14 May 2013; 15 May 2013; 16 May 2013; 17 May 2013; 20 May 2013; 21 May 2013; 23 May 2013; 27 May 2013; 29 May 2013; 31 May 2013
Date of Judgment	: 6 June 2013
Mitigation of Sentence	: 13 June 2013
Date of Sentence	: 20 June 2013