**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU–NATAL DIVISION, PIETERMARITZBURG**

**CASE NO. CC 29/14P**

In the matter between:

**THE STATE**

versus

**RAJIVEE SONI** **THE ACCUSED**

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**J U D G M E N T O N S E N T E N C E**

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**HENRIQUES J**

**Introduction**

[1] This matter has garnered much publicity both in the print and electronic media. It has been described as a 'legal soap opera'. The use of these words in my view, whilst it may help in selling newspapers, detracts from the seriousness of the offences and the impact these events have had on the family of the deceased, particularly his elderly parents, two daughters and on the family of the accused, particularly his son and daughter.

[2] The accused was convicted on the following counts:

(a) Count 1 - the murder of Bhavish Sewram (the deceased) committed in circumstances contemplated in s 51 Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), as the State proved the offence was planned and premeditated, and that the accused conspired with and formed a common purpose with, inter alia, Sugen Naidoo (Naidoo), Brian Treasurer (Treasurer), Sabelo Advocate Dlamini (Dlamini) and Mfaniseni Wiseman Nxumalo (Nxumalo);

(b) Counts 2, 3 and 4 - defeating and obstructing the course of justice;

(c) Count 5 - assault with intent to cause grievous bodily harm; and

(d) Count 6 - Conspiracy to commit murder.

[3] It is common cause that in terms of the CLAA, the prescribed minimum sentence on count 1 is that of life imprisonment. In securing convictions against the accused, the State proved that the accused conspired with and formed a common purpose with others and embarked on a campaign involving a number of schemes, being counts 2 to 5, to embarrass, humiliate and denigrate the deceased in the hope that this would eventually drive the deceased and his family from Pietermaritzburg. When these schemes failed, he conspired and formed a common purpose with others to kill the deceased (counts 1 and 6). The accused's apparent motive for this and the reason for his conduct, was as he believed the deceased and his wife, Kerusha Soni (Kerusha), had engaged in an extra-marital affair.

[4] The transcript of these proceedings as well as the s 115 plea of the accused, indicated that the accused forgave his wife for the alleged affair and they reconciled. As a consequence of their reconciliation, their second child, Ariv, was conceived. Given that the deceased and his family were close friends of the accused and that they enjoyed the same social circle, a 'peace meeting' was arranged between the family of the deceased and that of the accused. According to the accused at such 'peace meeting' the deceased apologised to him for his conduct and they 'buried the hatchet' and reconciled their friendship. Although their friendship was not the same as before, according to the accused they were civil and cordial to each other and there were no hard feelings. This defence was advanced to answer the State's allegations of the apparent motive for the accused's conduct.

[5] Imposing sentence is one of the most difficult tasks[1] which a presiding officer has to grapple with. It has been described as a 'painfully difficult problem'[2] and it involves a careful and dispassionate consideration of all factors. The court must consider the factors referred to in *S v Zinn*[3] 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.

[6] 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 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.

**Issues**

[7] The issues which concern me at this stage of the proceedings are the following namely:

(a) In respect of count 1, whether to impose the prescribed minimum sentence of life imprisonment. The defence submitting that there are substantial and compelling circumstances as contemplated in s 51(3) of the CLAA warranting a deviation from such sentence, namely that this was a crime of passion coupled with the fact that the accused is the primary caregiver of his daughter, Sonali; and

(b) Secondly in respect of counts 2 to 6, the appropriate sentences to be imposed.

I propose to deal firstly with the provisions of the Criminal Law Amendment Act.

**The Criminal Law Amendment Act**

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[1] *S v EN* 2014 (1) SACR 198 (SCA) para 14.
[2] *S v Rees* 1984 (1) SA 468 (W) at 470A-B.
[3] *S v Zinn* 1969 (2) SA 537 (A).

[8] The minimum sentences have been ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances which justify a departure therefrom.[4] In addition, the Supreme Court of Appeal (SCA) has indicated that the minimum sentences must not be departed from for 'flimsy reasons' and is the starting point when imposing sentence.

[9] In terms of *Malgas*, in the event of substantial and compelling circumstances not existing, then a sentencing court is entitled to depart from imposing the prescribed minimum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be disproportionate and unjust to do so. This is often referred to as the proportionality test.

**Substantial and compelling circumstances**

[10] What is meant by substantial and compelling circumstance? Our 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 the domain of a sentencing court. A court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders.

[11] When sentencing an accused person, a court has to evaluate all the evidence including the mitigating and aggravating factors to decide whether substantial and compelling circumstances exist. A court must be conscious of the fact that the legislature has ordained a particular sentence for such an offence and there must be convincing reasons to depart therefrom, which reasons must be stipulated on the record.

[12] For circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender. Where a court is convinced, that after consideration of all the factors, an injustice would occur if the minimum sentence is imposed, then it can characterise such factors as constituting

[4] *S v Malgas* 2001 (1) SACR 469 (SCA); s 51(3) of the CLAA.

substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.

[13] In *S v Vilakazi*[5] the court explained that particular factors, whether aggravating or mitigating, should not be considered individually and in isolation as substantial or compelling circumstances. Ultimately, in deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence as there is potential for the offender not to repeat the crime and be rehabilitated.

**Mitigating and aggravating circumstances**

[14] SS Terblanche in the book *The Guide to Sentencing in South Africa* 3 ed (2016) at 209 describes mitigating and aggravating circumstances as those which present during and after the commission of a crime which may influence the sentence. There is no generally applicable list of mitigating and aggravating factors and whether a factor is mitigating or aggravating is determined by the presiding officer in each particular case when imposing a sentence. In *S v Ramba*[6] the court indicated that aggravating and mitigating factors are all these factors which a court can properly take into account in aggravation or mitigation of sentence.

[15] The passing of sentence often requires 'balancing' of mitigating and aggravating factors and requires a sufficient amount of weight to be attached to each of these factors. It may often occur that aggravating factors might outweigh the mitigating factors even to the extent that mitigating factors have no effect on the sentence, such as when life imprisonment is imposed. A party wishing to rely on a mitigating factor must provide sufficient factual basis for that by producing evidence to satisfy the court that the mitigating factors justify a departure from the prescribed minimum sentence.

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[5] *S v Vilakazi* 2009 (1) SACR 552 (SCA).
[6] *S v Ramba* 1990 (2) SACR 334 (A) at 341i-342a.

[16] The accused elected not to testify in mitigation of sentence but Messrs *Van Schalkwyk SC* and *Howse* made submissions from the bar, to be considered by the court when determining an appropriate sentence and which they argued should be regarded as substantial and compelling circumstances, warranting a deviation from the prescribed minimum sentence on count 1.

[17] The accused, through his legal representatives, indicated that there was no need to present evidence. In addition, by consent between the State and the defence, various exhibits were handed in during the sentencing stage of the proceedings. These are exhibit 'LLLL', the victim impact statement of the deceased's father, Mr Parmanand Sewram; exhibit 'MMMM', the defence documents in support of the substantial and compelling circumstances, and exhibit 'NNNN', the letter of endorsement from the Family Advocate in the divorce proceedings date stamped 28 November 2017. It was recorded by consent that the collateral information contained in such exhibits was admitted and not disputed. In essence the accused submitted that substantial and compelling circumstances existed warranting a departure from imposing the prescribed minimum sentence. In support of this he relied on the fact that he was the primary caregiver in respect of Sonali and the financial primary caregiver in respect of Ariv. This will be dealt with later on in the judgment.

[18] The approach adopted by Mr *Van Schalkwyk SC* and Mr *Howse* was to divide their submissions on sentence, Mr *Howse* dealing with the factual submissions and Mr *Van Schalkwyk SC* dealing with the legal principles and the case authorities. Written submissions on sentence dealing with the legal principles were handed in by Mr *Van Schalkwyk SC,* which I found helpful.

[19] The factual matrix upon which the defence relied were the facts found proven by the court, having regard to the judgment on conviction, the facts accepted by the State in the address in mitigation and those contained in the defence bundle.

[20] Several authorities were relied on for the submission that it was in order for the accused to make submissions from the bar in relation to sentence and in the event of the State disputing them or contesting them, the State was obliged to lead evidence in rebuttal, alternatively to give the accused fair warning that it objects to the factual matrix submitted by him to enable the accused to make a decision to testify on oath, alternatively in keeping with the accused's fair trial rights that he was

aware that the failure to testify would be accompanied by the risk of certain of these submissions being rejected.[7]

[21] Mr *Du Toit*, on behalf of the State, during the sentencing proceedings, apart from handing in exhibit 'LLLL', the victim impact statement of the deceased's father, likewise, led no evidence and elected to make submissions from the bar. I shall now deal with all the evidence and the submissions made by the parties during the sentencing proceedings and consider these and the triad of *Zinn* in deciding the issues.

I propose to deal firstly with the personal circumstances of the accused.

**The offender: The personal circumstances of the accused**

[22] The accused is currently 42 years of age and it was submitted is generally a law-abiding citizen. The incidents, it was submitted, were precipitated by difficulties in his marriage and the crimes committed fell within the ambit of such difficulties. He is therefore not a danger to society. He grew up in a staunch, conservative Hindu family, is a productive person and an asset to society. He has four sisters and his mother is still alive. She is currently 73 years of age and lives directly next door to him. She underwent triple heart bypass surgery in 2016 and is not in good health. The accused oversees the building which his mother owns and which provides her with her only source of income. It was also submitted that as a consequence of the accused being incarcerated, his nephew would have to abandon his studies to run the building for the accused's mother and also the accused's business.

[23] The accused has for the past 10 years consulted with Dr Sanjay Maharaj, a cardiologist. He has been diagnosed with hypertension and non-occlusive coronary disease. Mr *Howse* submitted that at present such diagnosis is not life-threatening but it is potentially problematic given the family history and considering the circumstances under which the accused's father died. [8] In addition, the accused suffers from depression and is on medication. In prison he may not have access to the same medication such as what he is being prescribed now.

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[7] *S v Khumalo* 2013 (1) SACR 96 (KZP); *S v Caleni* 1990 (1) SACR 178 (C) at 181e-f and *S v Olivier* 2010 (2) SACR 178 (SCA).
[8] Page 23 exhibit 'MMMM'.

[24] The accused was married to Kerusha Soni on 25 March 2006 for approximately 11 years until their divorce on 8 December 2017. The marriage had its difficulties which were compounded as a consequence of the alleged relationship between Kerusha and the deceased and the subsequent criminal trial. The accused testified about this. In the divorce proceedings the parties concluded a settlement agreement, specifically relating to their two minor children.

[25] The settlement agreement which was concluded between the parties and signed on 25 November 2017 was considered by the Family Advocate's offices. The relevance of same relates to the minor children borne of the marriage, Sonali Soni, a girl born on 18 December 2006 and Ariv Soni, a boy born on 13 December 2013. In terms of the final order of divorce,[9] the accused and his wife were declared co-holders of full parental responsibilities and rights as contemplated in s 18(1) and 18(2) of the Children's Act 38 of 2005. Sonali would reside primarily with the accused and Ariv's primary residence was that of Kerusha.

[26] The letter of endorsement from the Family Advocate[10] reads as follows:

'The Family Advocate does not endorse the separation of minor siblings. However, this has been an established care regime over a period of time. The Family Advocate therefore endorses the Settlement Agreement pertaining to the manner in which the parties shall exercise their Parental Responsibilities and Rights, regarding their children.'

[27] Mr *Howse*, relying on exhibit 'MMMM', submitted that the accused provides all the financial support in respect of the children and pays all their educational and medical expenses. This was the position even prior to the divorce.[11] To substantiate that the accused pays for all the expenses of the minor children, extracts of bank statements confirming payments made to St John's Diocesen School, St Charles College and a letter from Discovery[12] was put up in support of the contributions made to a medical aid scheme in respect of himself and the two minor children. In addition, medical expenses not covered by the medical aid were also paid for by the accused.

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[9] Pages 1 and 2 exhibit 'MMMM'.
[10] Exhibit 'NNNN'.
[11] Pages 18 to 20 exhibit 'NNNN'.
[12] Page 7 exhibit 'MMMM'.

[28] It was further submitted that apart from the educational and medical expenses, the accused also contributes to all other monthly expenses of the minor children which averages approximately R5 000 per month per child. Mr *Howse,* informed the court that he was reliably instructed that Kerusha was not able to meet their expenses and if the children were required to primarily reside with her and the accused was incarcerated, he would no longer be able to maintain the children in the lifestyle that they have become accustomed to. No further facts were placed before the court in support of this submission.

[29] He submitted that this would have not only a severe financial impact on their lives, but would also affect them dramatically emotionally. He indicated the accused was the primary caregiver of Sonali and primary financial caregiver in respect of Ariv. Although Mrs Soni is able to take care of the minor children, she is not able to do so financially and consequently the accused's incarceration will drastically affect the children and have a dramatic effect on all their lives. This constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment in respect of count 1.

[30] The accused engages in philanthropy and reference here was made to the undisputed evidence of Ricky Ganhes who testified that the accused purchased bread from him on a regular basis for distribution to the poor in the Eastwood area in Pietermaritzburg. In addition, having regard to exhibit 'MMMM', he contributes an amount of R1 500 every month to a feeding programme run by SANZAF,[13] diligently attends and participates in various religious ceremonies conducted at the temples in Pietermaritzburg[14] and has since 2012, contributed the sum of R3 000 per month to the KZN Cerebral Palsy Association in respect of a child Emihle in order for her to attend the day care centre.[15]

[31] Mr *Howse* submitted that the accused conducts himself in a highly commendable manner and his contribution to society and his philanthropy constitutes a substantial and compelling circumstance.

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[13] Page 24 exhibit 'MMMM'.
[14] Page 25 exhibit 'MMMM'.
[15] Pages 26 and 27 exhibit 'MMMM'.

[32] In dealing with exhibit 'LLLL', the victim impact statement of the deceased's father, Mr *Howse* submitted that an important fact had been omitted as the deceased's parents, wife and two children, have instituted a civil claim against the accused in respect of loss of support resulting from the death of the deceased. The accused has defended this action and if a long term of imprisonment is imposed, his capacity to pay any damages will be severely affected, if he is unsuccessful in defending such action.

**The offences**

[33] Insofar as the offences are concerned, when dealing with the nature of the offences, Mr *Howse* stressed that the court accepted the motive advanced by the State for the accused embarking upon such criminal conduct. Reference was made to the indictment, specifically paragraph 4, which referred to his emotional devastation and the fact that these emotions remained constant throughout the period it was alleged the accused embarked on the conduct. Mr *Howse* indicated that he was not going to allege diminished responsibility, but indicated that the accused's emotional state was a relevant factor and constituted substantial and compelling circumstances as the court accepted this as the motive for the accused's conduct being the alleged affair and that these emotions ran high throughout the entire period it was alleged these offences were committed.

[34] The relevance of motive at the sentencing phase, he submitted, is important. When the court imposes a sentence, the court must consider such sentence against the background that prevailed, namely the evidence of the accused that he was emotionally devastated when he found out about the deceased and his wife's alleged affair, and that this formed the backdrop for and precipitated the aggression and the various endeavours he had embarked upon.

[35] He also encouraged the court to consider the undisputed evidence of the accused relating to the deceased's conduct and that the deceased was not an 'innocent victim' in relation to the events which precipitated the alleged assault. In this regard he referred to the snowball incident, the incident at Sonali's birthday party when he was pushed into the pool, the humiliating text messages that were exchanged on the Whatsapp group, specifically that from the deceased which related to the accused's lack of formal education. He submitted that one must

consider the accused's evidence and the date when the alleged conduct began in February 2012.

[36] Mr *Howse* indicated that in respect of count 2, when one considers the seriousness of the offence that is alleged, both Sugen Naidoo and the prosecutor were of the view that Mariamma Kisten's evidence as contained in her affidavit would not sustain criminal charges and consequently there was no prejudice to the deceased.

[37] Likewise in count 3, there was no prejudice to the deceased but such conduct was indicative of the emotional devastation suffered by the accused. He acknowledged that in count 4 there appears to have been a more concerted effort insofar as the laying of the charges was concerned, but that one must bear in mind the blameworthiness of Sonali Sookraj. She testified that she wanted revenge against the deceased. The accused's emotional devastation and that of Sonali Sookraj he submitted, should feature when imposing sentence, and the fact that there was no prejudice to the deceased.

[38] Insofar as count 5 is concerned which was the alleged paintball incident, Mr *Howse* submitted that it was difficult to understand what the accused wanted to achieve. The harm caused was testified to by Sugen Naidoo who observed the deceased's injuries. Apart from his evidence, there was no clear evidence as to the nature of the injuries and what exactly had transpired. If one considers counts 2 to 5 jointly, the offences are not so serious and consequently in respect of the sentence to be imposed in these counts, the court is at liberty to impose non-custodial sentences.

[39] Mr *Howse* submitted that in respect of count 6, the accused was in an emotional state at the time. Professor Sithebe testified to this and indicated that the accused became emotional on several occasions. In respect of count 1, both Sugen Naidoo and Morné Emersleben testified concerning the accused's emotional state. They both testified that the accused wanted to exact revenge on the deceased. The emotional trauma which the accused had suffered appeared to be the main motivating factor for the conduct throughout.

[40] The State has proved no previous convictions against the accused and he has no pending cases against him and is a first offender in respect of these offences. There is no indication that he has a propensity to perpetrate violent crimes. These were isolated incidents precipitated by the deceased's alleged affair with his wife which resulted in him being emotionally devastated. He indicated that the accused is aware that the offences of which he has been convicted are serious, more so that in relation to count 1, the murder of the deceased which attracts the prescribed minimum sentence of life imprisonment. He conceded that a custodial sentence is the only option.

I propose to now deal with the submissions in relation to the aspect involving the primary caregiver and the needs of the accused's minor children.

**Primary caregiver and the needs of the accused's minor children**

[41] It was submitted by Mr *Howse* that in respect of the accused, it is undisputed that in terms of the submissions placed before the court and the documentary evidence contained in exhibit 'MMMM', the accused is the primary caregiver of Sonali and having regard to the contact arrangements, is the primary caregiver of Ariv, certainly from a financial perspective. Having regard to the divorce order, it is apparent that the accused was awarded primary residence of Sonali. In addition, even though the accused and Kerusha Soni are co-holders of parental responsibilities and rights of the minor children, the divorce was settled giving recognition to the accused being the primary caregiver of Sonali.

[42] The contact arrangements[16] record the following contact by the parties with the minor children, namely:

(a) Mrs Soni exercises contact with Ariv for four days in a week which would include picking him up after school on a Tuesday and keeping him for three consecutive nights until the Friday morning. She is also entitled to keep him for an additional night either on a Friday or Saturday night which is to be alternated between the accused and Mrs Soni. In the event that Ariv is with Mrs Soni on a Friday, then he is to be dropped off with the accused at two

[16] Pages 5 and 6 of exhibit 'MMMM'.

o'clock on a Saturday. In the event of him being with her on a Saturday, then he is to be dropped off with the accused at two o'clock on the Sunday.

(b) The accused[17] is to exercise contact with Ariv from Sunday to Tuesday morning when he is taken to school. He is also entitled to exercise contact with him on another day being either a Friday or Saturday to accommodate for alternate weekend arrangements between him and Mrs Soni.

(c) In respect of Sonali and Ariv, the accused is to exercise contact every alternate Friday from after school to Saturday at two o'clock. Mrs Soni is to exercise contact with Sonali/Ariv every alternate Saturday when she is not exercising contact with Sonali on a Friday, from two o'clock on a Saturday to two o'clock on a Sunday. In addition, the agreement records that Mrs Soni is responsible for preparing their children's lunches each morning and taking the children to school each morning. On the days that she is not exercising contact, then the accused is exercising contact. The agreement also records that in the event of Sonali wishing to spend more time with Mrs Soni, then the accused will have no objection thereto and contact which the accused has with Ariv would apply to Sonali.

[43] The agreement records that the accused is responsible for payment of all educational expenses for the minor children up to tertiary education and all medical expenses in respect of the minor children.[18]

[44] Mr *Howse* recorded that Sonali has a troubled relationship with Mrs Soni and historically has lived with the accused in his home and he plays a key role in her upbringing. The settlement agreement and the divorce order gave meaning and effect to this arrangement which has existed prior to the divorce. The relationship between Sonali and her mother, he referred to as being "complex". It is important for Sonali's development, specifically her emotional development that the accused continues to play an active role in her life and also that of Ariv. It is for this reason that it was submitted that the accused not be sentenced to a period of life imprisonment as experience has shown that persons facing a determinate sentence are treated far more differently from 'lifers'.

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[17] Although reference is to the defendant, there appear to be typographical errors in the agreement.
[18] Pages 6 and 7 paras (vii) to (viii) exhibit 'MMMM'.

[45] In addition, he requested me to issue orders directing that the accused be held in a prison close to his home and that visits between him and the children are face-to-face contact visits. In support of these submissions he referred to the report of an educational psychologist, Tarryn Blake.[19] It was conceded that although this report was compiled on 19 January 2018, it was not for purposes of the sentencing proceedings, rather it was done in the best interests of Sonali and as a consequence of the fact that both parents were concerned about her academic functioning, specifically relating to concentration and attention. Ms Blake in her report indicates that the family relationships are reportedly poor with much conflict. Sonali's parents reported that she did not have a good relationship with her mother. Consequently, it was submitted that the report must be read in conjunction with the contents of the settlement agreement in relation to the contact and primary residence arrangements concluded concerning the minor children.

[46] A report from Floss Mitchell, a counselling psychologist,[20] confirms that Sonali has been a patient of hers since April 2015. At her request, Kerusha informed Floss Mitchell of the outcome of the court proceedings on 19 September 2018. In her report Floss Mitchell indicates that she has regularly communicated with Sonali's parents whilst Sonali was in therapy with her. She opined that Sonali has been negatively affected over the years from the unfolding legal matters and the complex and understandably tense relationship between her parents. She further records that Sonali has had her primary residence with the accused and that their relationship is emotionally close and Sonali is anxiously dependent on the accused at this time. The divorce settlement agreement endorses that fact.

[47] She recommends that if possible and if the accused is imprisoned, visits between him, Sonali and Ariv should take place on a face-to-face situation in the presence of the prison services' social worker or psychologist. The motivation for such request is the concern for Sonali's emotional wellbeing as a consequence of the serious loss and adjustment she will face because of her father's incarceration.

[48] In making these submissions Mr *Howse* submitted that a parallel can be drawn between the sentence and the recommendations imposed by Steyn J in the

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[19] Pages 9 to 16 exhibit 'MMMM'.
[20] Page 17 exhibit 'MMMM'.

matter involving *S v Stokes*.[21] A copy of the transcript of the sentence delivered was handed in. Mr *Howse* has requested that in the event of a determinate sentence being imposed, then recommendations ought to be included as Steyn J did in relation to the Department of Social Development as a consequence of Mr Stokes being the primary caregiver of his minor daughter.

[49] In addition, Mr *Howse* submitted that this was an unusual, extraordinary and complex matter warranting careful consideration. Substantial and compelling circumstances existed sufficient to require a deviation from the mandatory prescribed minimum sentence in respect of count 1 as the accused is the primary caregiver of Sonali and, in addition, the reports submitted support the submissions that directions be issued for the accused's contact with the minor children whilst he is incarcerated.

[50] Not unsurprisingly, Mr *Howse* went so far as to suggest that as in the *Stokes* matter in which the minor child, Tahlia was a special needs child, Sonali was 'very close to that'.

I now propose to deal with the comparative sentences I was referred to in respect of crimes of passion.

**Comparative sentences imposed for 'crimes of passion'**

[51] Mr *Van Schalkwyk SC* relied on several cases for the submission that the prescribed minimum sentence was not the appropriate sentence where crimes of passion are involved.

[52] In *S v Khwela*[22] the accused, a 44 year old first offender was convicted of murder of the man who formed a love relationship with the woman whom the accused had previously had a love relationship. In sentencing the accused, the court held that the emotional conflict and disturbance which resulted from the broken love relationship could well have had a bearing on the mind of the accused who killed an ex-lover's new lover. The court imposed a sentence of 22 years' imprisonment even though the murder was pre-planned and even though at the time of the commission of the murder there was no suggestion that the accused was in any heightened emotional state of mind.

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[21] *S v Stokes* case number CC233/05, unreported judgment delivered on 22 March 2017, KwaZulu-Natal High Court, Durban.
[22] *S v Khwela* 2001 (1) SACR 546 (N) at 547d-550b.

[53] In *S v Meyer*[23] on appeal the death sentence which had been imposed was altered to one of eight years' imprisonment. The court of appeal found that such was an appropriate sentence despite there being 'voorbedagte rade'.

[54] In *S v Shoba*[24] the accused, who had murdered his lover, on appeal the court held that the trial court considered the emotional conflict situation which had prevailed and the death sentence was altered to a sentence of 12 years' imprisonment. In *S v Hlatswayo & another*[25] a sentence of 20 years' imprisonment was imposed on each of the accused who had been hired to kill the deceased by a woman who alleged that the deceased had raped her. Such was a particularly gruesome murder in which the deceased was repeatedly assaulted with a wheel spanner and subsequently set alight. Because the body did not burn completely, one of the accused remained and stood guard over the body whilst the other left to purchase more petrol.

[55] In *S v Mathe*[26] Gorven J imposed a sentence of 10 years' imprisonment in respect of a murder conviction. The court held that even though the accused had pleaded guilty, this was of little moment, but that the emotional struggle of dealing with the history of infidelity and lack of honesty by his fiancée, constituted substantial and compelling circumstances. The accused had murdered his fiancée whom he alleged had a history of infidelity. She was murdered in circumstances where she indicated that the last affair had ended but the accused discovered that this was not the case.

[56] In *Director of Public Prosecutions v Mngoma*[27] the Supreme Court of Appeal increased the sentence in respect of a murder conviction of an accused in circumstances where he had killed his lover four days after suspecting her infidelity. The sentence was increased from five years' to 10 years' imprisonment. The court of appeal held that the accused was under serious provocation and experienced extreme hurt and anger caused by the deceased's infidelity. Although 12 years'

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[23] *S v Meyer* 1981 (3) SA 11 (A) at 16G-H and 17B-F.
[24] *S v Shoba* 1982 (1) SA 36 (A) at 41A-B.
[25] *S v Hlatswayo & another* case number CC37/2015, unreported judgment of Madondo DJP, KwaZulu-Natal High Court, Northern Circuit.
[26] *S v Mathe* 2014 (2) SACR 298 (KZD).
[27] *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA).

imprisonment was appropriate, the appeal court deducted two years for time served in prison and under correctional supervision.

[57] In *S v Mnisi*[28] the Supreme Court of Appeal held that a sentence of five years' imprisonment was appropriate in a case where the appellant had shot the deceased who had been in an adulterous relationship which the accused resented and found humiliating. The court found that the accused had acted with diminished responsibility as a consequence of provocation and emotional stress preceding the shooting.

[58] In addition, an important factor which must be considered when sentencing the accused, Mr *Van Schalkwyk SC* submitted, was the moral blameworthiness of the accused. The cases draw a clear distinction between the moral blameworthiness of the hired killer and the person who hires the killer. Reference was made to the decision of *S v Ferreira & others*.[29]

[59] In conclusion, both Mr *Van Schalkwyk SC* and Mr *Howse* submitted the following constituted substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence in respect of count 1, namely:

(i) the accused is a primary caregiver of his two minor children. His daughter Sonali has serious psychological problems;

(ii) the accused's mental and emotional state at the time of the offences must be considered and he ought to be seen as acting with diminished responsibility, he could not reconcile himself to what had occurred between the deceased and his ex-wife Kerusha ;

(iii) one must also not lose sight of the fact that the murder was a crime of passion and the court accepted the motive submitted by the State for the commission of the offences.

I now propose to deal with the State's submissions.

**The State's submissions**

[28] *S v Mnisi* 2009 (2) SACR 227 (SCA).
[29] *S v Ferreira & others* 2004 (2) SACR 454 (SCA).

[60] Mr *Du Toit* submitted that there was no reason to depart from the prescribed minimum sentence in respect of count 1. That despite the accused's apparent 'religious fervour' this pales in significance if one compares it with what he did over a period of 18 to 20 months. The accused had no regard to Sonali when he committed these offences. He had no regard to the family of the deceased or the two daughters of the deceased. All he had regard to, Mr *Du Toit* submitted, was his ego and his selfish needs. He was going to punish the deceased no matter what. He indicated that the accused did not put the matter to rest. Even though he testified regarding the so-called 'peace meeting', it would appear that he embarked on this conduct over a period of 18 to 20 months until he avenged the deceased's alleged affair with his wife. The accused had several opportunities to stop and put the matter to rest. If one considers the incidents in relation to counts 2, 3 4, 5 and specifically count 6, after his interaction with Professor Sithebe, he had an opportunity to stop. He did not, he went further and then solicited the services of Brian Treasurer to finally put the matter to rest.

[61] Even though the submission was made that the accused is not a danger to the community, he submitted that he is, in that the accused used corrupt policemen to do his bidding for him. He used money to obtain his ends. The accused has not shown any sign of remorse but the cold reality of imprisonment has now struck him, hence the reason why one hears of his philanthropy and his contribution to society. Mr *Du Toit* submitted that the accused would suffer from depression irrespective of whether a period of 12 years' or 20 years' imprisonment is imposed. The accused set out without any thought of the consequences to commit a series of offences. At the time he had no concern for the deceased's family and who was to support the deceased's two children and his parents. Now that he has been convicted of committing these offences, his concern is 'if I go to jail who is going to support my two children, specifically Sonali?'.

[62] In response to the suggestion that I should follow the example set by Steyn J in the matter of *S v Stokes* when sentencing the accused, Mr *Du Toit* submitted that this ought to be left to the prison authorities as they are best placed to deal with the visits between his family and also to deal with his medical problems. He also re-emphasised the fact that there was a concerted effort on behalf of the accused to get rid of the deceased. He indicated that this was not a crime of passion and neither

was any emotional storming involved as indicated by Mr *Van Schalkwyk SC* and Mr *Howse*. He indicated that this was cold blooded conduct by the accused which continued over a period in excess of a year until it ended with the death of the deceased in May 2013.

[63] Although there was a close relationship between Sonali and her father and the fact that she had a troubled relationship with her mother, how and when it started is as a consequence of the accused's own behaviour. The problems between him and his wife is when the trouble started. Mr *Du Toit* indicated that both sets of children would have to adjust, those of the deceased and those of the accused. He indicated that it was ironic of the accused to suggest that his children will now suffer and no longer be accustomed to the lifestyle they enjoyed whilst he was out of prison, but now they will have to adjust to a 'lower lifestyle' because of his incarceration. What about the children of the deceased and the kind of lifestyle that he, his wife and his parents enjoyed and were forced to adjust to, when they were robbed of the deceased?

[64] He indicated that one wonders why the accused was awarded primary residence of Sonali when he knew that he was facing a possible prison sentence. He indicated that the accused displayed no remorse or regret for his conduct. His actions occurred over a lengthy period of time and he involved corrupt policemen in his conduct and persons who were vulnerable both emotionally, referring here to Sonali Sookraj, and financially, referring here to Mariamma Kisten. His lack of remorse must count against him when the court is imposing sentence. In addition, he involved and took advantage of so many persons, specifically the 'corrupt policemen' who lost their employment and who were the breadwinners in their families.

[65] In addition, he submitted that it is highly unlikely that the accused's family would not assist and assist in the support his children. He further indicated that there was no provocation by the deceased or any behaviour which was indicative of these being crimes of passion. In addition, there were no substantial and compelling circumstances which exist if one considers all the factors holistically. In addition, Mrs Soni has her own business and it has not been suggested that she is unable to take care of the children. In fact it was placed on record that since the guilty verdict and the accused's bail being revoked on 19 September 2018, Sonali and her brother

have been living with Mrs Soni, albeit for a short period of time. Both families have been affected by this conduct and consequently they both have to adjust their standard of living.

[66] In dealing with the submissions relied on by the State in respect of the motive and the submissions made by Mr *Howse*, Mr *Du Toit* indicated that having regard to the summary of substantial facts and the response to the request for further particulars supplied by the State to the request of the accused, in respect of count 1, the State alleged that the accused's motive for conspiring with and inciting others to kill the deceased was because he believed that this wife, Kerusha and the deceased were having a romantic relationship. The State intended to convey that the accused formed a suspicion that his wife was in a romantic relationship but the State did not allege that a relationship existed between the accused's wife and the deceased.

[67] In response to a question relating to the exact nature of the emotional devastation the State alleged the accused suffered, the response was that the exact nature of such emotional devastation was unknown to the State.

I now propose to deal with the victim impact statement.

**Victim impact statement**

[68] In aggravation of sentence, the victim impact statement[30] of Parmanand Sewram, the deceased's father, was handed in by consent. In such victim impact statement Mr Sewram Senior indicated the extent of the loss suffered by the family as a consequence of his son's death. He indicates that it was not only a loss to the family but also to the community as a whole as the deceased was a generous individual and utilised his time, money and resources for the benefit of members of the community. He fed the poor, donated to charitable institutions and assisted persons no matter their race, culture, gender, age and disability. In addition the deceased, a doctor, would assist the sick and elderly and help them obtain old age and disability grants and render free medical services in the medical camp organised by the Satya Sai Organisation.

[69] He dealt with the fact that the deceased's mother, his wife, underwent surgery to have three stents inserted and as a consequence of the death of their son, this

[30] Exhibit 'LLLL'.

aggravated her existing heart condition. The deceased assisted them financially and assisted them in renovating their home to make it more age-friendly.

[70] The deceased's death had a huge emotional impact on them both, as a consequence of which they sought and received counselling from trauma counsellors and attended counselling sessions with psychologists to cope with their day to day routine. Shortly before his death, their son had made an offer to purchase a home for them but such sale could not be finalised as a consequence of his untimely death. In addition, he referred to various tributes which were received from the community which are annexed to the victim impact statement.

[71] That then concluded the submissions made and the evidence presented.

**Analysis**

[72] I have considered the detailed oral and written submissions of Mr *Du Toit*, Mr *Van Schalkwyk SC* and Mr *Howse* and in deciding on appropriate sentences have had regard to the following bearing in mind the triad of *Zinn*, the victims and the children of the accused.

[73] The minimum sentences are the starting point when imposing a sentence. In respect of count 1, being the murder count, the prescribed minimum sentence is that of life imprisonment. There are no prescribed minimum sentences applicable to the remainder of the counts.

[74] I have already dealt with the circumstances in this judgment as to when a court will deviate from imposing the prescribed minimum sentence, namely, when there are substantial and compelling circumstances found to exist or when to impose the prescribed minimum sentence would be disproportionate having regard to the crime, the offender and the interests of society.

[75] In addition, various other factors have been considered over the years as the jurisprudence in respect of sentencing has developed, specifically in relation to the CLAA. One sees how our courts when sentencing have taken cognisance of the impact which offences have had on the interests of the victim and the best interests of children and the effects it will have on the care of a child when a primary caregiver is to be sentenced to a custodial sentence.

[76] I propose to deal with the aggravating factors submitted by *Mr Du Toit,* and mitigating factors and submissions raised by the accused in respect of why the prescribed minimum sentence of life imprisonment ought not to be imposed in respect of count 1. One may recall that in relation to count 1 in the judgment on conviction the court found that the murder of the deceased was planned and premeditated and further that the accused conspired with Naidoo, Treasurer, Dlamini and Nxumalo in furtherance of a common purpose to kill the deceased.

[77] At the hearing of the argument in mitigation of sentence both *Mr Van Schalkwyk SC* and *Mr Howse*, quite correctly so, in my view, did not detract from these facts found to have been proved. They acknowledged, rightly so in my view, that the accused ought to be punished for this offence and further, that a substantial term of imprisonment ought to be imposed. The submission however, being that a determinate sentence ought to be imposed as a consequence of the factors placed before the court, specifically to enable directions to be given for contact between the accused and his children.

I propose to deal with the submissions in relation to the accused's health issues.

**The accused's health issues**

[78] Among the factors which the accused asked to be considered was his health. The submission was made that the accused has certain health issues and given his family history there is a strong likelihood that these will become more severe. Having regard to the various decisions on this like, for example *S v Berliner*;[31] *S v C*,[32] this does not necessarily result in an accused being kept out of prison. In addition, the authorities have indicated that there are sufficient medical facilities in prison which can cater for the accused's present medical needs.

[79] Ill health, in my view, on the facts of this matter is presently not a factor to prevent a custodial sentence from being imposed. There have been no additional facts placed before me, warranting me not to impose a substantial period of imprisonment. In addition, should the accused's medical condition deteriorate to such an extent that he becomes terminally ill, he can then exercise his rights in terms

[31] *S v Berliner* 1967 (2) SA 193 (A).
[32] *S v C* 1996 (2) SACR 181 (C) at 186a-b.

of the provisions of the Correctional Services Act and apply to be considered for medical parole, subject to him satisfying the requirements for same.

[80] It is correct that the accused has no previous convictions and is a first offender. Most notably, the accused is to be commended for the success he has achieved given the nature of the businesses which he has built up over the years and the various obstacles and hurdles he has faced in doing so. He testified about being the only son, being required to step into his father's proverbial shoes, and take over the running of the business when his father fell ill but, most importantly, when his older sister fell ill and passed away. He was not able to finish his primary education and most importantly, did not go on to obtain a tertiary education. His success in business is certainly commendable, in my view, given the tremendous obstacles he must have faced being the only son having to step into the shoes of the bread winner, his father.

[81] It was submitted that his incarceration will place a tremendous burden on his elderly mother and his family. His nephews will have to abandon their studies and assist in the running of the business. This is an extremely unfortunate situation, and no matter how sympathetic I may me, it is unavoidable. The accused made a success of a business opportunity through sheer will and determination, displaying business acumen, and I cannot exclude the possibility that his nephews may do likewise. In addition, in this day and age, many people work and study part-time and as difficult as this may be, if one has the determination and the drive, one can do so. It may just take a little longer to obtain a tertiary education.

[82] From the evidence presented by the accused and as testified to by his brothers-in-law, he shares a close relationship with his family. I am certain that they will step in and assist not only in the running of the business but in taking care of his mother's needs. His sister, he testified, lives with his mother which in my view, will assist somewhat.

I propose to deal with the issue touched on in relation to remorse.

**Remorse**

[83] Whilst I accept that the accused is entitled to plead not guilty and challenge the State to prove its case against him, the accused has shown no remorse for his

conduct. A lack of remorse has often being referred to as being an aggravating factor. In *S v Brand*[33] the court held:

'. . .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.'

[84] I align myself with the authorities which find that an expression of remorse, is an indication that an accused person has realised a wrong has been done. It has also been said that it is only a valid consideration if the penitence is sincere and the accused takes the court into his or her confidence.

[85] *In S v Matyityi*[34] Ponnan JA defined remorse as:

'. . .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.' (Footnote omitted)

[86] The authors of *Du Toit Commentary on the Criminal Procedure Act* in the commentary on s 274 noted that:

'Even though there is a possibility that a convicted person who has not shown any remorse at the time of sentencing, may do so in the future, a sentencing court cannot speculate in that regard and, in effect, downplay the seriousness of the absence of remorse.'

[87] In *S v Hewitt*[35] the court per Maya DP held the following:

'During mitigation of sentence the appellant still showed no remorse for his vile deeds. . .Whilst lack of remorse is not an aggravating circumstance, it would have redounded to the appellant's favour if he had shown some appreciation and contrition for the devastation he caused.'

[88] It has been placed on record that the accused is anxious to finalise the sentencing proceedings to enable him to proceed with appeal proceedings. I also accept that he has a right to appeal this court's judgment. Some show or indication of an appreciation of the devastation that the deceased's death caused to his family and his children would have gone a long way. It could also have been voiced by his eloquent counsel on his behalf, whilst simultaneously not jeopardising his appeal. However, having said that, although a lack of remorse is not an aggravating

[33] *S v Brand* 1998 (1) SACR 296 (C) at 299i-j.
[34] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.
[35] *S v Hewitt* 2017 (1) SACR 309 (SCA) para 16.

circumstance, it would certainly have been indicative that the accused appreciated the loss of the deceased's life, considering that he was a friend and they had on the accused's evidence, reconciled their friendship.

I now propose to deal with the aspects of the accused as a primary caregiver.

**The accused as a primary caregiver**

[89] Section 28 of the Constitution enjoins the court as the upper guardian of minor children to consider the best interests of children. Among the factors to be considered are the interests of the children when sentencing a primary caregiver.

[90] In *S v M (Centre for Child Law as Amicus Curiae)*[36] Sachs J, dealing with the need to consider the interests of children during sentencing proceedings of an accused who is a mother of minor children, said the following in para 33:

'Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.'

[91] The following guidelines are set out in *S v M* para 36:

'There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

*(a)* A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

*(b)* A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the

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

interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

*(c)* If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

*(d)* If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

*(e)* Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.'

[92] A court considering a custodial sentence must have regard to the impact such sentence might have on children and has a duty to ensure that as far as possible, the children's rights are protected (*S v de Villiers* 2016 (1) SACR 148 (SCA)). A child's best interests are of paramount importance in every matter concerning the child as referred to in s 28(2) of the Constitution.

[93] One of the issues which concerned me during argument on sentence was whether I needed to obtain a social worker or probation officer's report when dealing with this aspect. I raised this with Mr *Van Schalkwyk SC* during the course of argument, and he submitted that it was not necessary to do so in this matter as all the relevant facts to be canvassed by a social worker or probation officer had been placed before me. Given the submissions and reports it would serve no purpose for me to do so other than to delay the sentencing proceedings.

[94] In *MS v S (Centre for Child Law as Amicus Curiae)*,[37] the Constitutional Court in dealing with a sentence of a young mother and the information needed in order to arrive at an appropriate sentence, said the following in para 64:

'In *S v M*, information about the position of the young children and their care during their mother's incarceration was entirely lacking. Here, by contrast, an informative probation-officer report dealing with the position of the children was available to the sentencing court, and carefully considered by the sentencing magistrate. A second report was later commissioned by the family and, after remittal to the trial court for inclusion in the record,

[37] *MS v S (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC).

evaluated together with the other evidence. Two reports were thus before the High Court and the Supreme Court of Appeal. Neither suggests that the fundamental needs or the basic interests of the children will be neglected if their mother is incarcerated.' (Footnotes omitted)

[95] The Constitutional Court went further and stated the following in para 65:
'After hearing argument, this court obtained a further report from a curator. Nothing in the report of the curator suggests that the children will be inadequately cared for should their mother be incarcerated in accordance with the sentence imposed on her.'

[96] Having regard to *S v M, MS v S supra* and *S v Chetty*[38] and considering the contents of exhibit 'MMMM', I agree that I have been furnished with all the relevant information in this regard and it was not necessary to call for same. The authorities referred to indicate that the court exercises its discretion to obtain the services of a probation officer and a social worker in circumstances where it is not in possession of all the facts upon which a proper determination can be made.

[97] In addition, I am of the view that Sonali and Ariv are not children in need of care as their mother, Mrs Soni, can care for them in the absence of the accused. I have no doubt that Ms Floss Mitchell can continue to assist Sonali make the adjustment and the family of the accused.

[98] The distinguishing feature in this matter is that in terms of the divorce order the primary residence of Sonali was awarded to the accused. In addition, various expert reports have been referred to dealing with this aspect. This has been the position in light of the difficulties which Sonali has had in her relationship with her mother. However, a most important feature of the settlement agreement, as well as the divorce order issued, is the fact that the accused and Mrs Soni retained their parental rights and responsibilities. In other words, Mrs Soni did not relinquish her parental rights and responsibilities in relation to Sonali and neither did the accused relinquish his parental rights and responsibilities in relation to Ariv.

[99] The use of the words 'primary caregiver' in clauses (b) and (c) on page 2 of the settlement agreement is in my view misleading. If one reads it in context, what actually is being referred to is the primary residence of each child. Each child has historically had their residence with that particular parent. One seldom sees in

[38] *S v Chetty* 2013 (2) SACR 142 (SCA).

settlement agreements reference to primary caregiver. In addition, it also makes provision for an increase in contact between Sonali and Mrs Soni if Sonali expresses a desire to do so.

[100] A proper reading of the settlement agreement also incorrectly refers to the parties in certain paragraphs. When Mrs Soni exercises contact with the children, she is responsible for their daily needs. The language used in the settlement agreement is not typically used in settlement agreements and given the timing of the divorce, which significant date neither the accused nor his attorney, Mr Ayoob, could correctly remember, the thought did cross my mind if Mr *Du Toit* is not correct in his suggestion that this was contrived. Be that as it may, the divorce order refers to primary residence and I will not allow this submission to influence me in any way.

[101] I also had regard to the fact that since his incarceration on 19 September 2018, both the minor children have been primarily resident with Mrs Soni. I am thus not persuaded that this ought to be a factor which should deter the court from not imposing a term of imprisonment. In addition, the fact that the accused was the primary financial provider for both children does not detract from the fact that this was a term of a settlement agreement and part of the maintenance orders agreed to.

[102] Mr *Du Toit* is quite correct that when a change of this nature occurs there is a huge adjustment in respect of not only the minor children but also the families involved. At the outset, in the introduction to this judgment, I indicated that the parties affected are the minor children of both the deceased and the accused. In addition, given the financial standing of the accused and the nature of his business it is highly unlikely that his family will not step up should the needs of the children dictate that they require further financial assistance.

[103] All I have been provided with are submissions from the bar that Mrs Soni is not in a position to take care of the children financially to the level that they have grown accustomed to. However, the terms of the settlement agreement make it clear that she has made a contribution towards the financial care of the children and this should not be seen as a factor to deter the court from imposing a term of imprisonment. In addition, she waived her right to claim maintenance from the accused as she runs her ‘own business and is earning sufficient income’.

[104] In *MS v S* para 35 Khampepe J held:

'I am mindful that a sentencing court is not required to protect the children from the negative consequences of being separated from their primary caregivers. It is required only to pay appropriate attention to their interests and take reasonable steps to minimise damage. This requires a balancing exercise that takes account of the competing interests.' (Footnote omitted)

[105] Further at para 45 of the judgment the court held the following:

'I accept, as the curator found, that the children will be adversely affected by the incarceration of their mother, as she is their primary caregiver. However, this on its own does not impose any obligation on the sentencing courts to protect, at all costs, the children from the inevitable consequences of losing their primary caregiver if she is incarcerated. All that is required is that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children, on the one hand, and the need to punish Mrs S for her misconduct, on the other.'

[106] Further at paras 47 and 48 of the judgment the court deals with the aspect of what constitutes a primary caregiver. The court records this as the following:

'What constitutes a primary caregiver is the following:

"Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under s 28(1)*(b)*."

It is incumbent on the courts to start their analysis from the basis of the best interests of the children, as mandated by s 28 of the Constitution, not just the mere interests of the children. If there appears to be a partner of a primary caregiver, the question should then be whether that partner can provide adequate care under s 28(1)*(b)* of the Constitution or whether there is evidence that that parent is inclined to neglect the children's needs, contrary to s 28(1)*(d)* of the Constitution.' (Footnotes omitted)

[107] Further at paras 62 and 63 Cameron J held the following:

'*S v M* has revolutionised sentencing in cases where the person convicted is the primary caregiver of young children. It has reasserted the central role of the interests of young children as an independent consideration in the sentencing process. Yet it would be wrong to apply *S v M* in cases that lie beyond its ambit. The mother in *S v M* was a single parent, and was almost exclusively burdened with the care of her children. There was no other

parent who could, without disruption, step in during her absence to nurture the children, and provide the care they need, and to which they are constitutionally entitled.

That is not the case here. Mrs S is not the children's sole caregiver. She is not “almost totally responsible” for their care. Despite heartache and turbulence, well captured in her evidence and in the social workers' reports, Mrs S is united with the father of her children. He is their co-resident parent. And he is willing to care for them during her incarceration. Although he works long hours, there is nothing to indicate that he will not be able to engage the childcare resources needed to ensure that the children are well looked after during his absence at work. A non-custodial sentence is therefore not necessary to ensure their nurturing. And a custodial sentence will not inappropriately compromise the children's best interests. The sentencing court in my view properly balanced out the constitutional interests at stake.’ (Footnote omitted)

[108] I agree that the rights recognised in s 28 are not absolute and do not assume dominance over other constitutional rights.

[109] The children have a secondary primary caregiver in Mrs Soni and the children are not without support from the accused’s family. I have no doubt that they will assist, both from an emotional and financial perspective in the best interests of Sonali and Ariv. Mrs Soni has acted as primary caregiver for Ariv. There is no suggestion that any difficulties have arisen from her doing so and Ms Floss Mitchell in her report has indicated that although Sonali has had her primary residence with the accused, ‘her parents have however, co-parented’.

[110] The report of Ms Blake indicates that Mrs Soni assisted Sonali with her homework and that her anxiety relates to her father’s court case. Sonali indicated to her that she was desirous of wanting the court case finalised. Sonali has a good relationship with her brother and reported that she found it difficult to go from one home to another and expressed a desire to have one home. I have also noted that Ms Blake in her report indicates that Sonali ‘should be encouraged to develop greater independence from her father and be encouraged to sleep in her own bed’. Although I have not specifically referred to all her recommendations in this judgment I have taken note of them.

[111] In order to deal with the situation arising in the event of incarceration, the Constitutional Court said the following in para 66:

'To mitigate the possibility of the children enduring hardship during their mother's absence, it seems to me that this court should order the Department for Correctional Services to ensure that a social worker visits them regularly, and that he or she provides the department with reports on their wellbeing during their mother's absence.'[39]

[112] In *S v Howells*[40] the court resorted to a similar order to deal with the position of minor children after the incarceration of a mother. I propose to do likewise and issue an order that a social worker visits the minor children of the accused regularly and that he or she provides the Department with reports on their well-being during their father's absence. This will ensure that the children's needs are protected.

[113] I was also asked to impose a determinate sentence and not that of life imprisonment. In addition I was also referred to the decision of Steyn J in sentencing proceedings involving the accused, Ian Stokes. I was asked to consider the directions she imposed in sentencing Mr Stokes and to give consideration to imposing similar conditions when sentencing the accused in this matter.

[114] The distinguishing feature between this current matter and that of Mr Stokes was that Mr Stokes was the primary caregiver of his daughter, Tahlia. His wife was undergoing treatment at a rehabilitation centre and there was evidence submitted to the court that shortly after her birth, given the nature of her difficulties, he was the primary caregiver of their daughter. The evidence was that Mrs Stokes, during the course of their marriage, had undergone extensive bouts of rehabilitation for various difficulties she had experienced.

[115] Such is not the case in this particular matter. In any event the settlement agreement concluded between the accused and Mrs Soni makes provision for the fact that there may be a change in the contact arrangements of the minor children, specifically Sonali, should circumstances change. In all probability it must have been envisaged that there would be an improvement or a change in the relationship between Sonali and Mrs Soni given the fact that Sonali is undergoing treatment.

[116] These submissions were also made to ensure that the accused could be kept in a prison closer to home and for face-to-face visits to be conducted with the children, especially Sonali. I am mindful of the fact that a court imposing sentence

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[39] *MS v S* above.
[40] *S v Howells* 1999 (1) SACR 675 (C).

does not have the power to stipulate in which facility the accused will serve his or her sentence and to prescribe how he is to serve his term of imprisonment. However, to assist both Sonali and Ariv, I will recommend that the Department of Correctional Services, as suggested by Ms Floss Mitchell, engage a social worker to facilitate contact with the accused and his children and that reports are prepared regarding their care.

I propose to now deal with the submissions relating to the fact that these were crimes of passion.

**Circumstances in which the offences were committed**

[117] It was submitted that these were crimes of passion, given the court's finding of the apparent motive for the accused's conduct. The suggestion was made that the accused could not reconcile himself to what in his mind had allegedly transpired between the deceased and his wife and he embarked on this conduct.

**Was this a true crime of passion?**

[118] The question which I have to ask myself in considering the facts of this matter and the authorities I have been referred to, is whether these were true crimes of passion? I have considered the case authorities I have been referred to in support of the submissions in respect of this and whether at the time the accused acted in circumstances of 'diminished responsibility' or 'emotional storming'. It is correct that the court considered the State's submissions in respect of the possible motive for the commission of the crimes as being the accused's perception of a love triangle. The accused's defence was to deny this as being the possible reason for the commission of the crimes. His defence throughout was that he had not committed the offences in question and further that he and the deceased had reconciled their friendship at the 'peace meeting'.

[119] One must also not forget that unlike in the authorities I was referred to in this matter, the accused embarked on a campaign over a prolonged period of time. These various incidents occurred over a period in excess of a year, commencing in early 2012 culminating in the shooting of the deceased in May 2013, hardly a spur of the moment event. The accused had sufficient time and opportunity to reflect on his conduct but still persisted in seeking revenge against the deceased and ultimately conspired with others to murder the deceased.

[120] It was never his defence that he acted in a fit of rage or on the spur of the moment or with any diminished responsibility, which seems to be the case if one has regard to the authorities to which I was referred. These offences, in my view, were not crimes of passion as envisaged in the cases I was referred to.

[121] It follows that I agree with the submission of Mr *Du Toit* that the accused had sufficient time to reconsider his conduct. He could have stopped early on in 2012, even after he had solicited the services of Professor Sithebe, but he did not. He continued, determined as ever to seek revenge and finally rid himself of what he thought to be the cause of all his misery, the proverbial thorn in his side, being the deceased. He consciously embarked on the ultimate revenge and conspired with others to mercilessly kill the deceased, which can only be described as a cold-blooded killing with no care for the sanctity of a human life.

[122] In addition, I do not agree with the submission of *Mr Howse* that in relation to counts 2 to 5, the deceased was not prejudiced. He was arrested, charged and in certain instances was required to appear in court.

**The medical evidence**

[123] The post-mortem report[41] indicated that the deceased died of a perforating wound to the right lung and the heart from a bullet. He was shot in full view of his receptionist and died whilst at the scene. His family attended at the scene and would have had to wait at the scene for his body to be removed to the State mortuary until the police forensic investigators had finalised their investigations at the crime scene. His body lying on the cold floor covered in a space blanket in full view of his grieving family.

[124] It is his aged father having to identify the body of his 33 year old son the following day, being 14 May 2013, and then having to bury his child. They say it is the hardest thing to do ‘a parent having to bury a child’- all the more so one in the prime of his life.

I now propose to deal with the interests of society.

**Interests of society**

[41] Exhibit ‘D1’.

[125] Society demands that offenders be punished for their crimes. Given the nature of the offences which have become endemic in our society, the legislature saw it fit to enact the CLAA. Despite this, however, a court must not over-emphasise one factor and ultimately a balance must be struck. In *S v Kruger*[42] the court remarked '[p]unishing a convicted person should not be likened to taking revenge'. In my view, every sentence that must be imposed must be tempered with a degree of mercy no matter the crime.

[126] A sentencing court must not over-emphasise the public interest and general deterrence. The Supreme Court of Appeal in *S v Scott-Crossley*[43] para 35 said the following:

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.'

[127] The judgment further states at para 35:

'It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

[128] As our courts have often said the object of sentencing is to serve the public interest and not satisfy public opinion. In *S v Mhlakaza & another*[44] Harms JA held the following:

'It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'

[129] Referring to Chaskalson P in *S v Makwanyane & another*[45] paras 88-89 in which the court said the following:

'Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts. . .This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.'

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[42] *S v Kruger* 2012 (1) SACR 369 (SCA) para 11.
[43] *S v Scott-Crossley* 2008 (1) SACR 223 (SCA).
[44] *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 518f-g.
[45] *S v Makwanyane & another* 1995 (2) SACR 1 (CC).

[130] In passing sentence today I will also, as I am enjoined to do, take into account the victims' interest in sentencing. The South African Law Commission summarised such interest as follows:

'Individual decisions are announced to a critical public who analyse them against a variety of expectations. They not only ask whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness.'[46]

[131] If one considers the triad of *Zinn* any sentence imposed must contain an element of mercy. Such entails a balanced and humane approach to the consideration of an appropriate punishment and demonstrates that there is no room for vengefulness or a vindictive approach to sentencing. Although the interests of society, specifically the nature of the offences, pose great challenges insofar as sentencing is concerned, one must not lose sight of the fact that this was the accused's first brush with the law.

[132] I will be mindful of the fact that when sentence is passed today that the victim with reference to count 1, has been robbed of his life. Whatever sentence is therefore imposed today should give recognition to the fact that he was a husband, father, son, brother, uncle, doctor and also a useful member of society and that he had hopes and expectations which were abruptly brought to an end when he was callously shot. The importance of due individual recognition was aptly stated by Justice O'Connor in *Payne v Tennessee* 501 U.S. 808 (1991) at 832:[47]

'"Murder is the ultimate act of depersonalization.". . .It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.'

**Conclusion**

[133] In deciding on an appropriate sentence, I have weighed both the mitigating and aggravating factors. In considering these and the nature of the offences, the interests of society, the victims and the accused, I am of the view that to impose the

[46] The South African Law Commission 'New Sentencing Framework' Project 82 (November, 2000) para 1.2.
[47] *Payne v Tennessee* 501 U.S. 808 (1991) at 832.

prescribed minimum sentence would be disproportionate and unjust. I acknowledge that these are serious offences warranting a long term of imprisonment, specifically in relation to count 1, but I must also not lose sight of the fact that it is my duty to balance all factors and come to a just sentence (see *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* 2009 (2) SACR 361 (SCA) para 22).

[134] When I consider the personal circumstances of the accused and his age, to impose the minimum sentence for the offence specifically in relation to count 1, I must also consider the cumulative effect of the sentences on multiple counts as this is a factor which must also be considered.

[135] In *Rammoko v Director of Public Prosecutions*[48] the Supreme Court of Appeal recognised life imprisonment as the ultimate sentence a person can be legally obliged to serve and taking due cognisance of that fact, the sentencing court must not, on the one hand, lightly hold that substantial and compelling circumstances exist on unsubstantiated grounds, nor should the sentencing court, on the other hand, hesitate too long to find that substantial and compelling circumstances exist when this appears to be the position.

[136] Of relevance to the determination of an appropriate sentence is the fact that the murder in count 1 was planned and premeditated. In this regard *S v Raath*[49] para 16 is apposite:

'Planning and premeditation have long been recognised as aggravating factors in the case of murder.'

[137] In this matter, given the circumstances under which the offences in counts 2 to 5 occurred, they are closely related to count 1 and I must consider the cumulative effect of the sentences imposed. In respect of count 6, it stands on its own as it was a separate incident.

[138] In coming to an appropriate sentence in respect of the various counts, I have borne in mind the following, namely:

(a) in respect of count 1, the offence is murder read with s 51 Part I and Schedule 2 of the CLAA;

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[48] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).
[49] *S v Raath* 2009 (2) SACR 46 (C).

(b) in respect of counts 2 to 5, these offences formed part of the scheme which the accused and others embarked on to force, humiliate and denigrate the deceased in the hope that they would drive him from Pietermaritzburg. The failure of these schemes culminated in the commission of the offence in count 1;

(c) in respect of count 6, the accused conspired with Professor Sithebe to murder the deceased;

(d) these events occurred over a period in excess of 18 months;

(e) the accused had sufficient time to call a halt to the schemes and put the past behind him, yet he did not and the offences were carefully planned and thought out and carefully monitored by him to ensure they succeeded especially in respect of count 4;

(f) two families have been affected by this tragedy, the family of the deceased but also the family of the accused, their lives irreversibly altered forever;

(g) no sentence will ever bring back the deceased. Whilst this may be cold comfort to the family of the deceased, I am reminded of what the court stated in *S v Rabie*[50] namely that the punishment should fit the criminal as well as the crime, be fair to society and that it should be blended with a measure of mercy according to the circumstances of the case.

[139] The sentences imposed must also give recognition to the justifiable abhorrence invoked by the callousness of the offences, whilst not destroying the accused on the altar of general deterrence. Having carefully considered all of the submissions, both oral and written and the authorities to which I was referred, I am persuaded that this is a case that I should depart from and not impose the prescribed minimum sentence in count 1 and impose a determinate sentence for the following reasons, namely the age of the accused, the fact that he is a first offender, a useful member of society, he is relatively young and the possibility of rehabilitation cannot be excluded and that he also built a successful business. When viewed holistically

[50] *S v Rabie* 1975 (4) SA 855 (A).

and when considering all the submissions placed before the court, including the reports submitted in exhibit 'MMMM', it would be disproportionate and unjust to impose life imprisonment.

[140] I also take into account that in respect of count 4, the evidence proved showed that the accused made a concerted effort to ensure that these charges against the deceased would result in a successful prosecution given what transpired in relation to the count involving Mariamma Kisten. The offence in count 6 did not involve the same individuals in counts 1 to 5.

[141] Taking into account and having carefully considered all the written and oral submissions of the State and defence, the documents submitted, the personal circumstances of the accused, the victim impact statement, the interests of society, as well as the administration of justice I must always endeavour to temper any sentence with an element of mercy.

[142] I am of the view the following sentences are appropriate:

(a) In respect of count 1: Murder, read with s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, the accused is sentenced to 25 years' imprisonment.

(b) In respect of count 2: Defeating or obstructing the course of justice, the accused is sentenced to 18 months' imprisonment.

(c) In respect of count 3: Defeating or obstructing the course of justice, the accused is sentenced to 18 months' imprisonment.

(d) In respect of count 4: Defeating or obstructing the course of justice, the accused is sentenced to 2 years' imprisonment.

(e) In respect of count 5: Assault with intent to do grievous bodily harm, the accused is sentenced to 18 months' imprisonment.

(f) In respect of count 6: Conspiracy to commit murder, the accused is sentenced to 5 years' imprisonment.

(g) In light of the cumulative effect of the sentences imposed, it is ordered that the sentences imposed on counts 2 to 5 are to run concurrently with the sentence imposed on count 1. Thus the accused is sentenced to an effective 30 years' imprisonment.

(h) The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department for Correctional Services visits the children of the accused, Mr Soni, regularly during his incarceration, and submits reports to the office of the National Commissioner as to whether the children of the accused are in need of care and protection as envisaged in s 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

(i) The Department of Correctional Services is to give consideration to the recommendation in the report of Floss Mitchell relating to the manner in which contact visits between the accused and the minor children are to take place and to, where possible, facilitate the assistance of a social worker during such visits.

(j) The accused is automatically declared unfit to be licensed for a firearm in terms of the provisions of the Firearms Control Act and I accordingly make no order in this regard.

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Henriques J

## Case Information

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| Date of argument: | 21 September 2018 |
| Sentence handed down on: | 26 October 2018 |

## Appearances

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| Counsel for the State: | Mr J Du Toit |
| Instructed by: | The Director of Public Prosecutions, KZN |
| Counsel for the accused: | Mr C van Schalkwyk SC<br>and Mr J Howse |
| Instructed by: | Ayoob Attorneys<br>Suite 2, SDC Centre<br>495 Church Street<br>Pietermaritzburg |