IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: SS45/2016

DATE: 7 DECEMBER 2017

In the matter between:

THE STATE

and

ANTHEA KLEYNHANS

S E N T E N C E

BOQWANA, J:

Introduction

On 24 October 2017 the accused was convicted by this Court on charges of murder and child abuse of L. K. S. ("the deceased") who was three years old at the time the offences were committed. It is trite that in determining a fair, balanced and appropriate sentence the Court must consider the triad

consisting of the crime, the offender and the interests of society. See S v Zinn 1969 (2) SA 537 (A) at 540G.

In Motloung v S (A240/11) [2013] ZAFSHC 110 (30 May 2013) with reference to S v Rabie 1975 (4) SA 855 (A) at 861D-E Mocumie J (as she then was) observed at paragraph4:

> "(c) Then there is the consideration of mercy or compassion or plain humanity [or what is now, in the new democratic order known as 'ubuntu']. It has nothing to do with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society."

In determining an appropriate sentence the Court must keep in mind the main purposes of punishment. In R v Swanepoel 1945 AD 444, at 45,5 these were described as deterrence, prevention, reformation and retribution. In Rabie *supra*, with reference to Gordon, The Criminal Law of Scotland (1967) page 50, the following is stated at 862A-B:

> "The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation…. The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."

Prescribed Minimum Sentences

The legislature has prescribed minimum sentences in respect of a variety of instances involving serious and violent crimes, with the introduction of the Criminal Law Amendment Act 105 of 1997 ("the Criminal Law Amendment Act"). Section 51(2) read with Part II of Schedule 2 of the Criminal Law Amendment Act prescribes a minimum sentence of 15 years in the case of a first offender, when murder was committed in circumstances other than in Part I.

In terms of Section 51(3)(a) the Court may deviate from the minimum sentence prescribed, if it finds that there are substantial and compelling circumstances justifying imposition of a lesser sentence. In that regard, it shall enter those circumstances on the record of the proceedings and thereupon impose such a lesser sentence. For a Court to come to that conclusion it must consider the totality of the evidence before

it, together with other relevant factors traditionally taken into account when sentencing, together with the principles or purposes of sentencing set out in the judgments I have referred to above.

In the well-known decision of S v Malgas 2001 (1) SACR 469 (SCA) the Supreme Court of Appeal ("the SCA") set out how the concept of substantial and compelling circumstances should be approached. The Court summarised approach at 470 to 471, as follows:

> "A. Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
>
> B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts.

D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardized response that the Legislature had ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence,

it is entitled to impose a lesser sentence.

J. In doing so, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."

The concept of substantial and compelling circumstances has not been defined in the legislation. It has been left up to the courts to decide, based on the circumstances of each case, as to what constitutes compelling and substantial factors. What is important to note is that such circumstances are not required to be exceptional, in the sense of being seldom encountered or rare. Departure would be warranted if there is justification to do so, having regard to the due weight of all the relevant factors cumulatively. In contrast it will be improper to deviate from the minimum sentence purely for personal preference or flimsy reasons.

Inherent Jurisdiction to Impose Life Imprisonment

The State has asked the Court, despite the minimum sentence prescribed, to exercise its discretion, as stipulated in section

276(1)(b), by imposing a term of life imprisonment in that the actions of the accused were particularly heinous, warranting such imposition. In Director of Public Prosecutions, Transvaal v Venter 2009 (1) SACR 165 (SCA) at paragraph 19 the Court held that:

> "[19] It needs to be borne in mind that the sentences provided for in the Act are minimum sentences for the prescribed offences and *Malgas* was directed to whether a lower sentence might be called for in a particular case. But an evaluation of the cumulative effect of all the circumstances, in accordance with the approach in that case, might well indicate that a higher sentence is called for. I think that is applicable in this case. For had there not been the strong mitigating circumstances that I will presently come to, I think a court might well have been justified in imposing a sentence far in excess of the minimum. It is only by applying those mitigating circumstances that I have come to the conclusion that a proper sentence would be something less."

This was endorsed by the Court in S v Mthembu 2012 (1) SACR 517 (SCA), which stated at paragraph 8 that the

heading, “Discretionary minimum sentences for certain serious offences” and repeated references to the words “not less than” in section 51(2) of the Criminal Law Amendment Act “is the clearest indicator that the legislature did not intend to fetter the discretion of the sentencing court ...”

It further went on to say, at paragraphs 10 and 11, that:

> “As Marais JA made plain in S v Malgas 2001 (1) SACR 469 (SCA) (para 18), the legislature has - deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case called for departure from the prescribed sentence’. He added (para 25): ‘What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences that has been supposed in some of the previously decided cases ...’
>
> Plainly what we are dealing with is a legislative provision that fetters only partially the sentencing discretion of the court. That much emerges from ss (3)(a) which entitles a court to impose a lesser sentence than the sentence prescribed if it is satisfied that substantial and compelling circumstances exist which justify the imposition of such lesser sentence. It follows that, even

were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just."

Having said that, it must be stated that it is proper and fair for the court to state reasons why it contemplates imposing a sentence higher than the minimum prescribed. The important point being that the sentence should not be determined in the abstract but by taking into account all material circumstances. See S v Mathebula and Another 2012 (1) SACR 374 (SCA) at paragraph 10 (although that case dealt with the regional magistrate who could only exceed the minimum sentence prescribed by five years, as stipulated in section 51(2) - the High Court's discretion is however inherent). The Mathebula case must therefore, in my view, be read with paragraph 19 of the Venter case *supra* which I have already referred to.

In the final analysis, therefore, the Court has a discretion, which is not fettered by the minimum sentence legislation insofar as its ability to impose a sentence higher than the minimum prescribed, in appropriate cases.

As Marais J put it in Malgas *supra* at paragraph 8, the purpose of the minimum sentence legislation was that of:

"... ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it."

I return to this issue later and the approach the Court will take in this case. The purpose of this exercise was to elucidate the law on this particular point and on what the Court can or cannot do. How this Court will approach sentencing in this case will follow. For now, I wish to set out all the circumstances of this case which I have to take into account in imposing sentence. I first deal with the offender.

Offender

Personal circumstances

The accused did not testify for purpose of sentencing, her counsel made submissions *ex-parte*. The probation officer's report was handed in by agreement between the parties. The accused's personal circumstances therefore are extracted from

the probation officer's report, submissions made by her counsel and the evidence on record, led during the trial.

The accused is a 39-year-old unmarried woman. She has two minor children aged 10 and 13 respectively and a 20-year-old adult child. They are all girls. According to the probation officer's report the accused had four siblings, one of which is deceased. Both her parents are still alive. The accused is the third eldest child, who grew up with both parents. She and her siblings were brought up according to Christian values and they knew the difference between right and wrong.

After a number of years, her parents' relationship became unstable, with regular conflict involved. Her parents got divorced and the accused primarily lived with her mother and maternal grandmother. According to her family, the accused had never displayed any violent behaviour and her family fails to understand why the offence was committed.

During the period of October 2011 and January 2012, the accused lived with the deceased's biological father, A. Jakobus Stols (“A.”), with whom she had a relationship, as well as with the deceased in an RDP house owned by her father in Happy Valley, *Eersterivier*. They paid rent of approximately R300,00 per month to the accused's father. Prior to moving

into this house, the accused lived in Sarepta, *Kuilsriver* with her mother and two children in a Wendy house situated at her sister's and brother-in-law's premises. Her eldest daughter lived in the main house with the accused's sister and brother-in-law. It appears from the probation officer's report that prior to her incarceration, the accused's living arrangements were as described above, i.e. she resided in Sarepta with her mother, maternal aunt and children in a two-bedroomed Wendy house. Kuilsriver is described as an area with multiple social problems, such as unemployment, substance abuse, crime and gangsterism.

The accused is unemployed. Her children are financially supported by her sister and mother for clothing, school fees and other needs.

When the accused lived in Happy Valley with A. and the deceased, her children lived with her mother in Sarepta, with the youngest child visiting her in Happy Valley on a frequent basis. The youngest daughter was five years old at the time and attended crèche in Sarepta.

The accused finished schooling up to Grade 12, after which she found employment at various places. First, she worked as a general worker at Seberhoge Transport in Faure and

thereafter went to work at a company called Elpron in Somerset West as a receptionist for a period of 10 years. That company was liquidated, according to the evidence on trial, sometime in mid-2011.

During her evidence in the trial the accused testified that she continued looking for a job but was not successful. It was submitted on her behalf that she found employment in 2014 at Fresh Shop, Sarepta, as a cashier, for one year. She then, between 2015 and 2016, became employed as a caregiver of an elderly person, until that person passed away. From then she was unemployed. From time to time she would try to earn income to assist with the needs of the children. It was submitted on her behalf that she was not in a position to get permanent employment because of this case.

Both minor children are currently in the care of the accused's mother, who is 62 years old. The youngest child's father pays maintenance and both children receive social grants. Ms Levendall submitted that once the accused is sentenced the grandmother would be able to apply for a foster care grant. The adult daughter, who lives in the main house, at the same Sarepta address, is currently employed.

The accused had applied for an RDP house. It is submitted

that she decided not to reside in it because of this case and also did not want to uproot the children. She rented this house out at R2 000,00 a month. Due to her incarceration, she has asked her mother to oversee the rental of that house and to use the rental for the care of the minor children.

Relationship with the deceased's biological father, A., and alcohol abuse

It was submitted on behalf of the accused, in keeping with the evidence during the trial, that she abused alcohol due to her frustrations and that alcohol played a role in the commission of these crimes. It was further submitted that whilst that did not excuse her behaviour, she lived in an area with a high level of unemployment and with individuals who abused alcohol.

According to Ms Levendall, the violence she displayed did not come from nowhere, particularly in a situation where she was not violent towards her own children. According to her, a question should be asked therefore as to where this violent behaviour came from. She submitted that the accused was also an object of abuse while she lived with the deceased's father. She was verbally and physically abused by him.

According to the probation officer's report, A. was said to be

possessive, disrespectful and would make decisions without consulting the accused. According to the accused he unexpectedly brought the deceased to live with them, without consultation, which the accused was not happy about and which caused conflict in the relationship. Although these did not justify her behaviour, so it was proposed, they contributed to the choices she made in how she "cared" for the deceased.

The accused was, according to the probation officer, described as a loving, compassionate, considerate, friendly, soft-spoken, hardworking and caring person, who was always willing to help others. She was a member of a church and attended church services.

It was stated that before and after the incident she displayed no violence, she no longer drinks alcohol and is a first offender. Insofar as the offences are concerned, it was submitted that the accused admitted responsibility and acknowledged that she hit the child in the manner that she did and caused her death. In regard to the injuries inflicted on 23 January 2012, she has not pointed a finger at someone else, even though she could not explain how other injuries were inflicted. She, accordingly, can be rehabilitated.

Ms Levendall submitted further that the accused is a primary

caregiver and has been in the lives of her minor children and that care should be taken by the Court on how an excessively long term imprisonment will affect the minor children.

The Nature of the Offences

The accused was convicted of serious offences of murder and child abuse. The postmortem report, which is central to the State's case, revealed the gruesomeness of the assaults administered on the deceased's body. It uncovered a systematic pattern of abuse which was perpetuated over a period of time. Old scars, healing or recent wounds as well as fresh injuries were noted virtually all over the body of the deceased. Both postmortem and X-ray reports concluded that non-accidental injury syndrome or child abuse was present.

The accused admitted that from October 2011 to January 2012 she beat the deceased and her reason for doing so was because she was soiling herself frequently, which at some point she thought the deceased did deliberately. The deceased's toilet problems started about a week after she arrived. The accused initially did not beat the deceased as she thought it was a mistake owing to a new environment, the

beatings started when the deceased soiled herself next to the toilet.

The beatings grew worse as the deceased soiled herself more frequently, virtually every second day. The accused conceded that she beat the deceased severely more than the once or twice incidents she described in detail during her evidence and that the reason she could not remember specific events was because she hit her quite a lot.

According to her, she also drank alcohol, not only on weekends but during the week as well. She would beat the deceased whilst under the influence of alcohol and the following day would notice blue or purple marks on the deceased's buttocks, legs and upper body. She would feel ashamed of how aggressive she could be, having inflicted such pain on the deceased's body. At times the deceased would exclaim “eina, eina, eina”, or “ouch, ouch, ouch” whilst she washed her body. The accused would resent and tell herself that it would not happen again, but it would and this continued for all the months the deceased was under her care. She never told anybody about this nor tried to get help. She thought it was all under control.

She admitted that she noticed the blue marks on the

deceased's body after 15 November 2011, meaning that from that time at least the deceased was already being severely beaten, and she continued enduring more gruesome beatings thereafter on a frequent basis. So, as the deceased soiled herself every second day, she would have experienced severe beatings approximately more than once a week from about mid-November 2011.

The gravity of the beatings, at least by end November/early December period, was supported by Dr Kennis's evidence, who examined the deceased in early December for wounds on her feet. When he examined the rest of her body, he observed bruises and blue marks scattered all over her body. The abdomen was swollen and tender and that could have been caused by blunt force injury. He concluded that this was the worst kind of child abuse he had ever seen.

Dr Quarrie also testified during cross-examination that in her experience as a professional forensic pathologist she had never seen a child more severely beaten than in this case. According to her this was the most extreme that she had seen of a child sustaining such blunt force injury and she had seen children who had died with fewer injuries in their bodies. She stated that when force is applied on children, there was a risk that a child would die because he or she is smaller and has

smaller organs and so, one has to consider that any injury to a child is potentially fatal, in her opinion. The post-mortem photographs submitted as an exhibit paint a devastating picture of what was done to the deceased's body.

In her evidence, which was comprehensive and which I will not entirely repeat, Dr Quarrie sketched out the extensive nature of multiple bruises, lacerations and abrasions of varying sizes and age, over the deceased's body, which exhibited repetitive and grave assaults, some of which were rarely seen in children. Fractures on the forearm and skull were noted, with Dr Pitcher also noting a fracture on the toe.

The wounds also showed that severe pain was inflicted on the deceased in different ways, varying from not only being beaten by a belt and hand, but her ears were twisted, neck grabbed, and she was possibly pinched on her belly multiple times. Circular and circumscribed burn wounds were noted on top of both of her feet, with one foot showing the existence of overlapping wounds at different stages of healing.

Both the accused and A. attributed these wounds to possible insect bites but Dr Quarrie stated that those are wounds that would have been caused by a round item such as cigarettes, a car cigarette lighter or any other heated object with a round

pattern. This, according to Dr Quarrie was synonymous with child abuse. The deceased was in the care of the accused and/or her father during the three-month period when these burn wounds occurred. Aside the burn wounds and the butterfly-like scars on the deceased's belly, that the accused denied knowledge of, the accused admitted that she repeatedly assaulted the deceased severely during the three months in her care.

During the infliction of the fresh injuries, apart from the extensive multiple deep red-purple contusions on the buttocks, limbs and other places showing severe beating, pointed objects were applied to the deceased's leg, her arm was twisted and broken, with the breaking of the ulna bone, showing that she was blocking blows. Her wrist was held firm so that she could not run away (according to the accused). She was also smacked hard on the mouth, causing a cut on the lip.

The beating on the day in question, which is the day of her death, was prolonged as indicated by extensive haemorrhage and overlapping contusions. The deceased also sustained three focal injuries on her head and two fractures on the skull, showing that she must have been hit by or against a hard object three times or once against a three-pronged object.

She suffered a fracture on her toe and her ribcage was bruised, indicative of squeezing, as there were no palpable external injuries in that area of the chest.

Old injuries were noted on the scalp, which the accused said she knew nothing about. Dr Pitcher also noted an old rib fracture. It must be noted that Dr Dreyer from Oudtshoorn testified that from the deceased's medical history, whilst in Oudtshoorn, she had never been treated for anything other than infections and ailments that young children would occasionally suffer from.

As already known, the deceased died of multiple injuries caused by blunt force trauma inflicted within 18 hours pre-mortem, which injuries the accused admitted she inflicted on the day of the deceased's death (albeit only admitting to using the belt and hand).

Impact of Death on the Deceased's Family

The State called the deceased's biological mother, Lara Boer, and her paternal grandmother, Katy Stols, as witnesses for purposes of sentencing. They both testified about how full of life the deceased was, always with a smile on her face and that she always attracted a lot of people to her. Boer handed

a photo of the deceased to the Court. She testified about how her daughter's death affected her. She stated that she struggled to sleep and that she attended counselling conducted by someone at her community. She resented herself and felt that she could have tried harder to look for her child, where the child lived with her biological father. She felt that she could not trust men again with children. She also felt that the accused was a mother just like her and knew what she was doing.

Katy, who was very emotional when she testified, stated that her mother, Maria Stols, who looked after the deceased when Katy was at work, cannot get over the deceased's death. She walked around with the deceased's obituary in her handbag. She, Katy, was broken by the deceased's death. She felt that she could not go on, as she had helped raise the deceased like her own child. She still goes for counselling. She still has a lot of questions for the accused about how the deceased died.

Accused's Actions and Showing of Remorse

It is so, that the accused admitted to killing the deceased and to assaulting her for the period that the deceased was under her care. She denies that she intended to kill the deceased

and was found guilty of murder on the basis of *dolus eventualis*. In the judgment on conviction, I dealt with the fact that, although the accused admitted that she killed the deceased, there remained a gaping hole as to how the serious injuries on the head, and fractures on the skull, were caused, whereas the accused stated that she only used a belt to hit the deceased; similarly with the injuries to the ribcage, toe and pinpointed injuries on the legs.

It can therefore not be said that the accused took the Court into her confidence and was completely candid about what actually happened on that day. I accept that whilst the accused failed to explain those injuries she did not point to anyone else, but admitted that those would have been only caused by her as the deceased was in her care. It may be that, as the State puts it, the evidence was overwhelming. A. was at work and the deceased was in her care and therefore she had no option but to admit to those injuries and could not point to anyone else.

The accused did not tell anyone about her actions. Had it not been for Dr Gilbert's discovery on that day and insistence that the matter be reported to the police and a postmortem be conducted, the deceased could have been buried with no-one knowing what happened to her, like in many other cases that

go unreported, as stated in the study that Ms Ajam for the state referred me to, which I shall come to shortly.

Interests of Society

Ms Ajam referred to a 2009 study, published in the Bulletin of the World Health Organization 2013, titled "The Epidemiology of Child Homicides in South Africa" by Shanaaz Mathews & Others, which, *inter alia,* refers to statistics which showed that homicide resulting from child abuse and neglect was most common in children under five years old in South Africa the majority of which were girl children. According to the study, as at 2009 nearly half, (44.4%) of all child homicides, involved fatal child abuse. Deaths involving child abuse are underreported. The study also showed that child abuse is endemic in South Africa.

Ms Levendall submitted that when the Court considers the interests of society, it must take into account that members of the community could have done more to help prevent the fatal child abuse. Members of the community who saw signs of abuse did not react by protecting the deceased from the abuse. A. allowed the abuse to occur in his house. Boer could have done more to look for her child, the paternal grandaunt who was told by the doctor about the abuse asked

the doctor not to report the matter to the police (according to the doctor); she returned the deceased to her father, Childline failed to act (if regard is to be had to the doctor's evidence), maternal aunts noticed that something was not right with the deceased but did not do much either, the great-grandmother was informed about the soiling problem and the grandmother often spoke to the deceased and I must add, in Stellenbosch at the family gathering on a Saturday before the deceased's death, the deceased's swollen hands were noticed, but nothing was done thereafter, by those who noticed the hands, after both A. and the accused denied assaulting the child. Accordingly, too many people noticed something was not right, but not enough was done.

I agree with Ms Levendall, this is of great concern to the Court as previously mentioned in the preceding judgment. However, to be fair to the general members of the community and some family members of the deceased, the accused concealed her actions. She conceded that nobody knew that she was abusing the deceased and therefore the severity of her conduct was possibly unsuspected, by most.

It is concerning though, that when direct evidence of suspected child abuse was observed by a doctor; the matter was not escalated to the police. A. was called by the doctor

and told about child abuse, but he listened to the accused. How the deceased was returned to a home where it was evident that she was subjected to torturous treatment, is beyond me. A. blocked the maternal family's access to the child.

The deceased's mother went to the police but she states that she got no help because she did not have A.'s address. She was in the process of getting social workers involved when the death of the deceased occurred, according to her sister, Charmaine Liebenberg. Clearly, if investigations were done and action taken, the deceased could have possibly been rescued. Having said that, it does appear that the accused hid her behaviour even from her own family.

Whilst the community can be blamed for not being vigilant enough, it certainly cannot mean that its interests, of frowning upon the accused's behaviour and its expectations, that strong messages must be sent out there by the Courts that such behaviour cannot be tolerated, should not be taken into account. Does the alleged lackadaisical attitude lessen the interests of the community? Not necessarily so, the pervasive nature of fatal child abuse still needs to be combatted. Hence there are initiatives like the 16 days of Activism for no violence against women and children, which is currently being

observed.

It has been stated however that sentencing must be individualised, accused persons must not be sacrificed at the altar of deterrence. A sentence must be fair and appropriate, taking into account the circumstances of a particular case.

Appropriate Sentence

Returning to the approach the Court should adopt, I will start by saying that I do not think it is appropriate to impose a sentence of life imprisonment in this case. The circumstances of this case are such that they do not warrant the imposition of life, taking into account that there are mitigating factors present which I have had regard to. I think that much is evident from what I have outlined above in relation to the offender, which need not be repeated, coupled with the fact that the accused is a first offender, where ordinarily, for murder the starting point would have been a sentence of 15 years. For child abuse the Court can impose a sentence of up to 10 years in terms of section 305(6) of the Children's Act 38 of 2005.

The Court is of the opinion that, having viewed all the factors, namely, the personal circumstances of the accused, the

seriousness of the offence and the interests of society, a long term of imprisonment, cumulatively, should be imposed, blended with a measure of mercy.

My view is that the offences are very serious and brutal; the evidence led during the trial clearly demonstrates that. Whilst the deceased died of fresh injuries inflicted in one day, one can only imagine the level of pain that she must have endured, for a period of three months, with the most recent of the beatings inflicted on the day of her death, being the Tuesday or Wednesday before, which the accused stated she administered when she was sober and used all her power to beat the deceased, stopping only when she was tired of doing so. This was so severe such that swollen hands were noted by family members at the gathering in Stellenbosch on the Saturday of that week.

The deceased endured the beatings with no-one to run to, because the person she called “Mommy”, that she lived with on a daily basis, when the father was not there, aggressively beat her. She was helpless and defenceless. She was a child of only three years old, weighing a mere 13 kilograms, smaller than the average children of her age. She was still developing emotionally and socially, at that age learning to manage her feelings and talking.

She was caught in-between the decisions of her father and the accused, which she innocently knew nothing about. She was simply uprooted from her loving family in Oudtshoorn, by her father without her mother's knowledge and consent. As a child she could do nothing about that, she is simply dependent on adults to make the right choices for her. Adults, however, failed her and made her the victim of their own frustrations. The accused is however, in my view, rehabilitatable as the circumstances which I have outlined above concerning her, show.

As to the issue of her being a primary caregiver to her minor children, the defence's submissions may on this point not necessarily be accurate. Whilst she was present in the lives of her minor children, her children have been and are cared for and supported by her mother and sister. Furthermore, even when the accused lived in Happy Valley, with A. and the deceased, her children remained with her mother. Although the children would miss growing up with their mother, they will not necessarily be starting a new life with strangers. They have always lived with their grandmother.

Yes, the younger child visited her mother a lot more in Happy Valley and the accused had gone back to Sarepta and lived with them before her incarceration, the children will, however,

not be rooted out of their familiar surroundings. This is similar to the situation recognised in the decision of MS v S (Centre for Child Law as *Amicus Curiae*) 2011 (2) SACR 88 (CC) paraSs 62 and 63 where it was found that Mrs S was not a sole caregiver, as the father of the children who was a co-resident and was willing to take care of them during her incarceration. The Court considers that this issue forms part of the cumulative mitigating considerations and it has considered it.

Conclusion

In conclusion therefore, a long term of imprisonment is warranted. However, mitigating factors are present and a term of life imprisonment asked for by the State is not appropriate in this case. The Court will, therefore, move from the premise that, whilst for murder substantial and compelling circumstances are present, the severity of the offences, taken cumulatively with child abuse, call for an effective term of imprisonment longer than 15 years which would be a fair and balanced sentence recognising both aggravating and mitigating factors.

It will be recalled that the SCA in Mthembu *supra* at paragraph 11, stated that it follows from Section 52(3)(a) that:

"... *even were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its sentencing discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just."*

I am alive to the fact that I am using this reasoning in respect of the cumulative effect of sentences to be imposed in respect of murder, to which section 52 provisions apply, and child abuse, which is not governed by the minimum sentence legislation. By doing so, I am not conflating the principles applicable. My point goes to the effect of the ultimate sentence imposed and the principles which govern fairness and justness in sentencing.

I thought about whether it could be argued that there may be duplicity of offences of murder and child abuse and that they should be viewed as flowing from the same incident for purposes of sentencing. My view is that they are appropriately separate offences and should be recognised as such (with the appropriate measure of mercy) in that the abuse occurred over a period of three to four months prior to the death of the deceased and in many instances severely so; the death of the deceased itself, was caused by fresh injuries inflicted within 18 hours pre-mortem, which the accused admitted to have

been on 23 January 2012.

In the result, having taken all the factors applicable in this case cumulatively into account I make the following order:

(1) In respect of **COUNT 1, OF MURDER, THE ACCUSED IS SENTENCED TO THIRTEEN (13) YEARS IMPRISONMENT;**

(2) In respect of **COUNT 2, OF CHILD ABUSE, THE ACCUSED IS SENTENCED TO SEVEN (7) YEARS IMPRISONMENT,** of which **TWO YEARS** will run **CONCURRENTLY WITH THE SENTENCE IN COUNT 1 OF MURDER.**

(3) The accused is therefore **SENTENCED** effectively **TO EIGHTEEN (18) YEARS IMPRISONMENT.**

(4) The accused is found **UNSUITABLE TO WORK WITH CHILDREN** in terms of Section 120(4) of the Children's Act 38 of 2005.

(5) The Registrar of this Court must, in terms of Section 122(1) of the Children's Act 38 of 2005, notify the Director General: Department of Social Development in writing of the findings of this Court made in terms of Section 120(4) of the

Children's Act 38 of 2005, that the accused is unsuitable to work with children, for **THE DIRECTOR GENERAL TO ENTER THE NAME OF THE ACCUSED AS CONTEMPLATED IN SECTION 120 IN PART B OF THE REGISTER**.

(6) In terms of the Firearms Control Act 60 of 2000, the **ACCUSED IS UNFIT TO POSSESS A FIREARM**.

_____

BOQWANA, J