IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER : SS15/2015

DATE : 14 MARCH 2017

In the matter between:

THE STATE

and

LINDANI NAKANI Accused

S E N T E N C E

BOQWANA, J:

Introduction

The accused was convicted of the murder of Busiswa Centane Rwayi ('the deceased'), committed under circumstances falling within the purview of section 51 of the Criminal Law Amendment Act 105 of 1997 ("The Criminal Law Amendment Act") in that the offence that he committed was planned or premeditated.

The considerations that the Court looks at when sentencing are well-established. In determining sentence, the Court has to look at what has become known as the triad, namely, the crime, the offender and the interests of society. See S v Zinn

1969(2) SA 537 (A) at 540G.

In S v Rabie 1975(4) SA 855 (A) the Court stated that the punishment should fit the criminal as well as the crime, be fair to society and that should be blended with a measure of mercy according to the circumstances of the case.

Referring to R v Swanepoel 1945 (AD) 444, the court in S v Khumalo and Others 1984(3) SA 327 (AD) at 330 D-E held that deterrence was the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment. It further held that the other purposes of punishment are accessory to deterrence. The retributive theory has to do with punishing a past wrongful act, whilst reformative, preventive and deterrent theories are all about the future, "*in the good that would be produced as a result of the punishment*" as observed in Rabie *supra* at 862A-B.

It was pointed out by the Court in the case of R v Karg 1961(1) SA 231 (A) at 236A-B that while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. The Court went on further to state that if sentences for serious crimes are too lenient the

administration of justice may fall into disrepute and injured persons may be disposed to taking the law into their own hands.

Prescribed minimum sentence

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 in 1997.

Section 51(1) read with Part 1(a) of Schedule 2 of the Criminal Law Amendment Act prescribes a minimum sentence of life imprisonment where murder was premeditated or planned.

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 than that which is prescribed. 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 purpose 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 its approach at 470-471 as follows:

A. "Section 51 has limited but not eliminated the court's discretion imposing sentence in respect of offences referred to in Part 1 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, standardised and consistent response from

the courts.

D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypotheses 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 standardised response that the Legislature has 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 so doing, 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 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 justified if there is justification to do so, having regard to the weight of all the relevant factors cumulatively. In contrast it would be improper to deviate from the minimum sentence purely for personal preference of flimsy reasons.

Mitigating and aggravating circumstances:

The accused did not lead evidence in mitigation of sentence, Mr Theunissen presented factors to be taken into account when sentence is considered, on behalf of the accused, *ex parte* and which he argued should be regarded as substantial and compelling. I have also had regard to the evidence that was led in the main trial by the accused which is relevant to the consideration of mitigating factors. It would have been noticed that a sizeable amount of evidence relevant to the

question of sentence was led during the main trial.

The State on the other hand, during the sentencing proceedings, led the evidence of Nomvuyo Centane ('Centane'), the deceased's sister, and also pointed to factors that should be considered as aggravating. Mr Moeketsi submitted that there were no substantial and compelling circumstances warranting deviation from the minimum sentence prescribed.

I deal with all the issues submitted by the parties during the sentencing proceedings, as well as the evidence that was led during such proceedings and during the main trial.

The offender:

The accused's personal circumstances.

The accused is a 38 year old unmarried man. He has two minor children aged 10 and 16, from different mothers. Prior to his incarceration in relation to this case, he worked as a policeman with the South African Police Service at the Bellville Railway Station, having started there in June 2010. Before that he worked at Kuyasa Police Station in Colesberg. He had been there since 2008, having been transferred from Namaqualand. He finished his matric and was also trained as a police officer at the Police College. The accused has had a

home in the Eastern Cape. It appears from the evidence in the main trial that he was a breadwinner to his Eastern Cape family. Mr Theunissen submitted that, as a police officer, the accused was a good standing member with no previous disciplinary records. Captain Mandlakhe Cryprian Ntshingila testified during the main trial that as the accused's commander he never experienced any personal problems with him and they got on well with each other. Departmentally he was not aware of any complaints against the accused. Colonel Jacobus Phillip Fredericks testified that the accused was a disciplined member, very neat with his uniform. His private vehicle was also neat inside out. It was also submitted on behalf of the accused that he attended church and was a worshiper. The accused sought to show in the main trial by the questions he put to the witnesses that what he did on the day of the incident was out of character, evidenced by, amongst other things, the manner in which the firearm was left in the vehicle, which according to him, was indicative of a person who was acting abnormally. The accused has no previous convictions.

The accused's emotional state:

The accused testified in the main trial that he suffered from severe depression for which he has been receiving treatment over a period of time, i.e. since 2010, which he testified was caused by the stress in the relationship initiated by the

deceased. He testified that he was hospitalised for that condition on two occasions, being 2010 and 2012. He sought a transfer to the Eastern Cape to get away from the situation with the deceased but his application was turned down. He blamed the management of the police for not applying their minds to the psychiatric report prepared by Dr Dhansay motivating for his transfer and for the situation he finds himself in.

Mr Theunissen submitted that even though the Court was not persuaded that the emotional condition of the accused led to automatism when he was convicted, it still played a part as one of the factors to be considered in sentence.

During the main trial, evidence as well as argument was led extensively on the emotional condition of the accused. The accused alleged that he was ill-treated and abused by the deceased emotionally, psychologically and socially from the beginning stages of their relationship. He testified that he suffered in that relationship for many years due to the deceased's conduct. He testified further that when he moved from Colesberg to Cape Town in 2010, he did so on the strength of the deceased's commitment to help financially, having advised her that he was building a house in the Eastern Cape and that he could not afford the rental in Cape Town.

When he got to Cape Town, the deceased became a changed person scolding and disrespecting him in front of the children. She did not keep to her financial commitment. The two started by sharing a rented flat in Kensington with the two minor children of the deceased, for which the accused contends he paid rent in full with no help from the deceased. They later moved to a house in Delft. Many fights and tempestuous incidents, which I need not repeat, occurred during the duration of the relationship, having started even before the accused moved to Cape Town. The accused moved out of the Delft house in 2012 to live at the police barracks in Pinelands, although he states that he would go to the Delft house on his off days mainly because of Aqhama, the deceased's younger daughter with whom he had a close relationship and regarded as his own daughter. In fact he regarded both of the deceased's daughters as his own but was closer to the younger one. At some point however, he decided that he will never set foot at their house in Delft again, after he was grabbed by one of the policemen that had been called by the deceased. The policemen told him to leave the house.

Perhaps to highlight some of the incidents that occurred in the relationship: The accused testified that the deceased failed to disclose her HIV status to him, which made him think that she was intending to kill other people. He discovered this in 2011

when the deceased laid in hospital after being severely ill. He nevertheless decided to stay in the relationship. State witnesses, Centane and Bongeka Mhambi ('Mhambi') testified about how the accused sent them messages or called them accusing the deceased of infecting or wanting to infect him or 'the whole world' with HIV. The accused put to Mhambi during cross-examination that he only sent a message that the deceased was suffering from HIV and AIDS and was evil. Nevertheless the accused was tested and found to be negative. The accused also testified about another incident that occurred in October 2012, when he was living between the barracks and the Delft house when he caught the deceased with a man in a sexually compromising position. He stated that he heard about many other affairs that the deceased had, which made him feel humiliated and used. He also testified that he was refused intimacy by the deceased and concluded that she must be involved elsewhere. According to him, the deceased denied that she was having affairs with other men. The accused refused to admit that he did not want to see the deceased with other men or that he was jealous of her or that he was annoyed by her behaviour. He however confronted her frequently about these alleged affairs and followed up on information he received by phoning the alleged culprit. The accused once attempted suicide using his firearm. He testified that Centane once told him that he was obsessed with the

deceased, which he refuted.

The evidence of the state witnesses Mhambi and Centane and that of the accused's witness Vuyani Memani(‘Memani’) confirmed the tumultuous nature of this relationship. Centane and Mhambi relayed the deceased’s side of the story, saying that she was abused in the relationship by the accused and decided to get an interdict. At some point, the accused assaulted her although that matter was resolved and it, according to the accused, happened in 2013 long before the interdict. The interim protection order was handed in, in Court as an exhibit.

I do not accept that the accused was the victim that he portrayed himself to be in this relationship. At best, and on careful assessment of the evidence, both parties hurt or mistreated one another in some way or the other. The accused who confronted the deceased about the boyfriends that he alleged she slept with in his house. He kept going to the Delft house even though he had moved into the barracks (I accept that he regarded the house at Delft as his home too). At some stage he knocked at the window of the deceased’s bedroom until it broke, suspecting that there was a man in the house. He once called a neighbour, by the name of Request, to witness an argument between him and the deceased and

disclosed the deceased's HIV status upon being called crazy by her. These are but examples of things the accused said or did to the deceased. I accept that the deceased may have done many things that caused the accused a lot of pain, but he kept going back to her even after he moved out and found a place at the barracks. If the message was not expressed verbally by the deceased that the relationship was over, the events that took place from the beginning of the relationship and systematically over the years were telling and would have made it quite clear to the accused that this relationship was not working and he had a choice to walk away.

The accused testified that the severe emotional stress he suffered for over many years was aggravated by the interim protection order that the deceased obtained against him. In this regard the issue that drove him to the state of emotional disintegration was the fact that he had to hand in his service pistol, after being unsuccessful in convincing the magistrate that his firearm be excluded from the interim order, on the return day of the hearing of the application of the protection order, i.e. on 3 July 2014. It will be recalled that, according to the accused, having his firearm on his person which was his working tool was important because without it he could not work overtime. The benefit of overtime is that he needed the money he received for overtime for his family financial

responsibilities. According to the accused, the interdict reminded him of all the things he had been through with the deceased over the years and it triggered and created a state of heightened emotional stress that led him not to act rationally by shooting and killing the deceased.

According to Mr Theunissen, the accused landed in a relationship which caused dysfunctional behaviour from time to time and although it would have been very wise for him to leave the relationship, it was difficult for him to walk away even after discovering infidelity and a number of other things which caused great emotional reaction for him. He was ill and had to be given time off from work many times. According to Mr Theunissen, this emotional factor is substantial and compelling on its own for the Court to take into account.

The nature of the offence

The accused has been convicted of a very serious offence. The particular circumstances surrounding the killing of the deceased in this case are gruesome and need some special mention. The evidence indicates that the deceased was killed in a cruel manner by use of a firearm belonging to the accused. According to Constable Vuyolwethu Mini ('Mini'), he collected 19 exhibits on the scene which comprised 4 bullets and 15 cartridge cases. Benedict Terrence Hill('Hill') testified

that during the examination of the vehicle of the accused, fired bullets were found in the vehicle. Hill examined 15 cartridge cases and four fired bullets he received and concluded that they came from the same firearm, a 9mm Z88 semi-automatic.

Both Mini and Hill testified that a 9mm Z88 semi-automatic pistol was used by the members of the SAPS. It is designed to carry 15 rounds of bullets, but it was possible for it to carry 16 in total by putting an extra bullet into the chamber of the weapon. Hill agreed that it could be concluded that if the firearm carried 15 rounds, the fired cartridges would have been fired from the empty magazine that was found next to the firearm. It was not disputed by the accused that the magazine carried 15 rounds and that the entire magazine was emptied by firing all the bullets that were contained therein onto the body of the deceased.

Hill testified further that he observed during the autopsy that the deceased had bullet entry and exit wounds on the right arm and the right and left side of the stomach area as well as on the back and buttocks.

Dr Estavao Bernardo Afonso's evidence, who conducted the post-mortem of the deceased, revealed a vicious attack on the deceased. His testimony was that there were 42 gunshot wounds on the body of the deceased, comprised seven

perforating gunshots on the right arm of the deceased translating into fourteen wounds consisting of seven entry and seven exit wounds, sixteen entrance and re-entrance wounds to the right side of the torso and twelve on the left side of the torso. According to him, the deceased died of multiple gunshot wounds. Seven projectiles were recovered, i.e. three from the clothing and four from the body. The internal injuries observed included bowel perforation, laceration of the kidney, fracture of the forearm, pelvis and the tenth rib. The fourteen wounds present on the right forearm meant that the weapon was fired seven times on the right arm. Therefore, seven bullets entered and exited the arm. Some of those bullets re-entered the body through the pelvis and the abdomen. Other wounds were from direct shots into the abdominal wall, the chest, the lower back, the pelvic and the hip area as well as the buttocks of the deceased. Two of the gunshot wounds that went through the tenth rib literally fractured and broke the tenth rib.

The force of the gunshot also injured the right lung causing the bruise on the lung resulting in a little bit of blood around the lung. The wounds were about 6 to 7 millimetres in size. It appears that the abdominal area of the deceased was completely damaged with the pelvic walls fractured and one gunshot injuring her uterus. Dr Afonso testified that given the extensive nature of the wounds even if the deceased had

received immediate surgical treatment, he doubted that the surgery would have had a positive outcome. Therefore the deceased had very little chance of surviving, if any. The post-mortem findings illustrate the dreadful nature of the killing of the deceased.

The killing of the deceased was found to have been planned. As stated in the main judgment, on 25 June 2014, the accused, who was on leave, was called to the Bellville Police Station and informed about the interim interdict. Crucially, the orders contained in the interim protection order were, *inter alia*, that he was not to assault or threaten to assault the deceased and the children nor use foul, insulting or abusive language, nor harass them; that he was not to enter the deceased's residence/premises at Delft and that his firearm was to be seized by a police officer in Pinelands.

The accused testified that when he was asked about the firearm by the police officer that served the interim order on him on 25 June 2014, he told the police officer that his firearm was at his workplace because he was under the impression that it was there, as he ordinarily would have not taken it when he was not on duty. He testified that he only discovered it on the morning of the return day of the protection order, i.e.3 July 2014 which was the morning he was due to appear in Court.

The explanation that he gave for him only discovering the firearm on that day was that he was planning to work the nightshift on that day and he would normally cut his hair before he goes to work. When he opened his safe at the barracks where he kept his Q20 oil which he used to lubricate his hair cutting machine, he discovered that the firearm was with the Q20 oil in the safe. He decided that he was going to return the firearm on the evening when he went to work for his nightshift.

I found that the accused's compliance with the interim Court order did not seem to be foremost in his mind. He could have been more vigilant in his actions if he wanted to comply with the Court order. Firstly, by ensuring that the firearm was definitely at his workplace and handing it over to a police officer (in Pinelands) as required by the interim protection order or at Bellville Police Station if that was not the procedure that was allowed or applicable. Even if it were to be accepted that he only discovered it on the morning of 3 July 2014, having learnt that it was not at the workplace as he thought it was, it was incumbent upon him to immediately take it to the police station and hand it in that morning. He admitted that the Bellville Police Station was right across the street from the Bellville Magistrates Court where he was due to appear that morning. He instead left the firearm at the

barracks when he attended Court. According to him, he thought he could convince the magistrate that the firearm should be excluded from the interim protection order. Having failed to convince the magistrate, the first thing would have been to take the firearm immediately to the police station at either Pinelands or Bellville so as to comply with the Court order forthwith, before going to hospital, which was his alleged destination. He could still drive. The accused, however, did not do that. That, as I found, led to an inescapable conclusion that the accused did not want to return the firearm. Even if he was on his way to hospital to get himself admitted as he says he was, he did not call his commander to dispatch someone to fetch the firearm at the barracks or even to meet him at the hospital as he alleged that to have been the plan. Furthermore, his reason for taking the firearm with him to hospital was to comply primarily with the Provincial Procedure which stipulates that police officers are not allowed to have their firearms in their possession if they are to lay in hospital for a long period of time and not to comply with the Court order.

The accused took a firearm loaded with a full magazine with him and landed up in Delft. Whether the planning to shoot the deceased was done whilst driving with an intention to go to hospital or he changed his mind along the way is not relevant.

What is relevant is that he drove to Delft with a loaded firearm ,he then got out of the vehicle, had a conversation with the deceased asking her what is it that she wanted from him now. According to him, he was insulted by the deceased and thereafter he did not know how he drew his pistol and what happened thereafter. He however admits that the deceased died in his hands because the firearm was in his possession. He did not dispute that he fired the shots, emptying the whole magazine that carried 15 rounds of bullets.

Impact of the deceased's death on the family

Centane, the sister of the deceased, testified that the deceased had two minor daughters who are seven and sixteen years old respectively. The children had been staying with her since their mother's passing in 2014. Since December 2016 the father of the youngest child decided to take the child. She had been maintaining both children until the father of the youngest took her. Centane testified that it was up to the Court to impose a sentence that it considered appropriate. She had forgiven the accused but she would not forget what happened.

Interest of society

Domestic violent cases are prevalent in our society. Many cases involving murder or violent crimes between husbands

and wives or those in intimate relationships are too frequent in our courts. In Kekana v The State (629/13) [2014] ZACSA 158 (1 October 2014) Mathopo AJA (as he then was), remarked at para 20 as follows:

> "Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in S v Chapman when this court said the following:
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> > 'Women in this country... have a legitimate right to walk peacefully on the streets, to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.'"

It is aggravating that the accused was a trained police officer who had a duty to protect the community and enforce the law. Police officers are particularly enjoined to protect vulnerable

members of the society from domestic violence and abuse. They are expected to do all they can to assist defenceless victims of those relationships. The power they have is not to be used to attack helpless members of the public, let alone those in close relationships to them, no matter how sour those relationships. In the situation in this case the deceased was vulnerable and unarmed.

What is more concerning and serious is that the deceased had done all she could in terms of the law to protect herself. She had gone to Court to seek protection for herself from the accused. Whether or not the interim protection order was warranted is not the issue. The issue is that it existed. The deceased, for her own reasons, saw it fit to approach the Court and ask for protection against the accused and she was granted that protection by means of an order that prohibited the accused from going to their house in Delft and from carrying a firearm.

The terms of the protection order were to protect the deceased against the very same conduct that was perpetrated on her by the accused. According to the accused, the deceased told the Court that morning that she did not feel safe. The interim protection order stated that the accused should not go to their house in Delft and secondly that his firearm should be seized

by a policeman. The accused breached both of those orders and did the opposite of what he was told and expected to do by the Court. He did precisely what the interdict sought to prevent.

The question of diminished criminal responsibility

In some cases, while non-pathological criminal incapacity was rejected as a defence, it was still found to have had an overwhelming effect on the conduct of the accused. In Director of Public Prosecutions, Transvaal v Venter 2009(1) SACR 165 (SCA) at para 22, Mlambo JA (as he then was) went through a series of cases of the SCA that dealt with this issue such as S v Laubscher 1988(1) SA 163 (A) where the Court found the appellant to have acted with diminished criminal responsibility and suspended half of his six year sentence. The appellant, in the Laubscher case, had fired a total of 21 rounds from his pistol in his parents-in-law's house having been denied access to his child. A criminal psychologist and a psychiatrist testified on his behalf that he had been undergoing severe stress as a result of his rejection by his parents-in-law as well as his inability to have access to his child. Mlambo JA referred to various other decisions involving similar scenarios. It is not necessary to mention all of them save to say that Mlambo JA noted that these judgments were decided at the time when it was 'business as usual' and the sentencing

discretion of the courts as yet unfettered by the minimum sentencing legislation as is currently the case.

Mlambo JA accepted in the Venter case *supra* that the appellant experienced ongoing stress caused by the incident that occurred in Burundi involving the rape and murder of a 14 year old girl, which he was incarcerated in prison for. This was exacerbated by alleged advances of a fellow officer to his wife. The appellant had prior to the incident showed suicidal tendencies. On the day of the incident he consumed a lot of alcohol. The Court accepted that the appellant had lost some sense of objectivity. He had also suppressed his memory of what happened in Burundi as he could not come to terms with it. The Court found that the appellant's lack of objectivity cannot be viewed in isolation. The appellant behaved in a manner that showed a state of mind suggesting that everything had revolved around him and any action by his wife and children interpreted by him as amounting to them leaving him, justified murdering them. The Court was of the view that the trial Court gave insufficient weight to the seriousness of the crime. The appellant killed his wife and children brutally. The Court observed that it was in the interest of society that persons who commit such serious offences are appropriately sentenced.

In that case, the Court found that the matter called for a sentence that took cognisance of the appellant's personal circumstances, the seriousness of the offences and the need for severity and deterrence, the latter element is at the core of the community interest in how courts should deal with violent crimes. It increased the sentence given by the lower Court to 18 years. In that instance the prescribed minimum sentence was 15 years.

In a separate judgment, concurring with Mlambo JA, Nugent JA concluded as follows at para 70:

> "It is tragic whenever a man reaches a stage of despair that resigns him to suicide but the law would fail if it did not make it absolutely clear that his wife and children are not his property to take with him to eternity. I said earlier that but for the respondent's considerable despair the proper sentence would have been life imprisonment."

In S v Mgibelo 2013(2) SACR 559 (GSJ) an accused who had been in a previous relationship with the deceased set fire on a shack where her ex-boyfriend, the deceased in that case, was sleeping with his girlfriend after dousing it with an inflammable liquid. The deceased died of burn wounds. The Court found the accused had planned deliberately to set the fire. It held at

para 9:

"[a]n essential characteristic of a crime of passion is when an offence is committed 'without rational reflection whilst the perpetrator was influenced by a barely controllable emotion'". (See S v Mvhamvhu 2005(1) SACR 54 (SCA) at para 13). The court went further to say that:

"This case is accordingly distinguishable from a typical scenario 'in which an accused reacts spontaneously to perceived provocation, driven by anger, without sufficient time to consider his actions. In this case, the accused did not unexpectedly and shockingly discover the deceased with the complainant. By her own version, she was aware of their relationship. By her version, the deceased had a history of numerous love relationships. The accused and the deceased were not married. The accused had no obligation to stay in her relationship with the deceased but could have moved on with her life.

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

The Court found there to be no substantial and compelling circumstances and imposed a sentence of life imprisonment. Another important case is that of S v Dikana 2008(2) All SA 182(E) where the court rejected that the offence in that case involved a crime of passion. At para 7 it observed that a period of some three hours had elapsed between the perceived provocation and the murder and the intention to murder was formulated at least two hours before the commission. The accused in that case felt undermined and angry when he suspected his girlfriend was having sexual intercourse with another man. He said he felt dizzy and walked away thinking about what to do. He secured a bottle, filled it with paraffin and told a witness he was considering burning the two deceased. He then set alight a shack they were in, killing them. The Court found that the accused acted with premeditated, purposeful, sustained control and efficiency of execution throughout. It confirmed sentences of life imprisonment on the murder charges.

Then in S v Mngoma 2009(1) SACR 435 (E) at para 6 and 7, the appeal Court found the killing was not an immediate response to the provocation of infidelity. It was not an almost uncontrollable act of violence provoked by the discovery of a lover caught red-handed in an act of adultery. The Court increased a sentence from 5 to 12 years. In that case the

prescribed minimum sentence was 15 years imprisonment as premeditation was not proven and a plea of guilt was accepted that the murder was committed with a form of intention known as *dolus eventualis*. The State agreed that there were substantial and compelling circumstances justifying departure from the minimum sentence such as the age of the accused (in that case 24 years), education, lack of previous conviction, confessing to his employer, handing himself to the authorities and pleading guilty.

In a more recent SCA decision of S v Kekana *supra* which involved the murder of a wife by her husband, the appellant, (the accused in the court *a quo)* had pleaded guilty and gave a statement explaining how the offences of murder and arson were committed. The appellant and the deceased had a tempestuous relationship as in this case. The appellant accused the deceased of extramarital affairs and the parties quarrelled continuously, like in this case. They threatened to kill each other and the deceased told him on several occasions to pack his belongings and leave the common home. On the day of the incident he set the house alight having locked the deceased in the bedroom. The appellant having been incensed by finding some of his clothes packed in a bag, he confronted the deceased, went outside to fetch petrol that he had bought, in his version, for putting in his vehicle and

poured the petrol on the bed in which the deceased was lying. When asked by her what he was doing, he said that that was the night she should die. He continued to spill the petrol in the passage, kitchen and dining room and set it alight. When he saw the flames he drove to Booysen's Police Station and reported his conduct. He pleaded guilty and the statement he made was accepted by the State and he was convicted. It was argued on behalf of the appellant that the trial Court erred in finding that the murder was premeditated. The submission was that the appellant had acted in a spur of a moment and was burning with rage when he killed the deceased by setting fire to the house- it was only when he saw his packed clothes that he decided to kill. The killing, it was argued, was thus not premeditated.

The SCA found that the relationship was a turbulent one characterised by accusations of infidelity. It found that it was not the first time that the deceased had packed the appellant's clothes into a bag and left them at the door. The appellant dealt with such incidents before without any fatal consequences. It was difficult to understand how the fact that he found his clothes packed in a bag and placed near the dining room could have triggered anger such as to lead to the death of the deceased.

It was argued in Kekana *supra* that there were substantial and compelling circumstances to deviate from the sentence of life imprisonment in that the accused had pleaded guilty; had shown remorse for his actions; was a first offender and therefore there were prospects that he could be rehabilitated and also that he was in a turbulent relationship with the deceased where lack of trust played a major role; he felt abused and belittled by the deceased and that when his clothes were packed in a bag in the dining room he felt provoked and snapped. Despite all those factors, the Court found that the cruel and painful death of the deceased at the hands of her husband, the fact that she was killed in the one place that she ought to have been safe, the sanctity of her home, were aggravating. Worst of all, after the house was set alight he failed to rescue her and secure medical assistance for her. The Court found that the callous and heartless attitude in not checking the condition of the deceased was clear proof of his lack of remorse. It agreed with the trial Court that this conduct did not manifest genuine remorse in the manner described in S v Matyityi 2011(1) SACR 40(SCA) at para 13. Talking about S v Matyityi supra, there is an important issue that was not touched on by Mr Theunissen when submitting mitigating factors and that is a question of remorse. Perhaps, it is convenient to deal with that issue now.

Remorse

The accused throughout his evidence indicated that he was remorseful and regretted what had happened. The Court is S v Matyityi *supra* at para 13 examined the question of remorse by stating the following:

> "...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*, what motivated the accused to commit the deed; what has since provoked his

or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions…" (Own emphasis)

In Matyityi *supra* the Court increased the sentence from 25 years to life imprisonment on the basis, *inter alia,* that the respondents conducted themselves with a flagrant disregard for the sanctity of human life or individual physical integrity. They acted in a manner that was unacceptable in any civilised society particularly one that ought to be committed to the protection of the rights of all persons including women (See para 24).

In the present matter, the accused went to the police to report himself after the incident. He phoned his commander and his brother and told them that he had killed the deceased shortly after the incident. When he had to testify however, he told the Court that he did not remember shooting the deceased and all that happened on that day. One wonders if he was truly remorseful for his actions as he did not take the Court fully to his confidence regarding what happened on the day of the incident. It is concerning that his memory was selective on very crucial aspects of the incident, especially on parts that tended to be incriminating, such as why he drove to the deceased's house if he meant to go to the hospital, but

suddenly remembers when he got to the deceased's house in Delft and parked his vehicle and spoke to the deceased. His memory then again disappears shortly thereafter with 'lights going off' on the crucial part of the case which is the shooting incident.

What also bothers me is that the accused does not seem to take full responsibility for his actions. Yes, he does acknowledge that someone passed on in his hands, but yet he continued to shift the blame to the deceased: that had she not cheated on him, slept around with boyfriends and did all the things she did and finally obtaining an interdict against him, he would not have been faced with the situation he is now. That does not strike me as someone who understands the plight of another to the point of being truly contrite for his actions.

The accused also blamed the family of the deceased for conspiring against him, and the management of the police for not giving him a transfer to the Eastern Cape and if they had given him the transfer based on the motivation by Dr Dhansay regarding his emotional state, he would have been away from the deceased and would not have been faced with the situation he is faced with now. The blame was continuously laid at everyone else's feet for putting the accused in the situation he finds himself in.

That, in my view, colours the regret that the accused says he has and puts question marks on whether indeed his penitence and sorrow is genuine for the plight of the deceased and for her demise. The deceased was also still a relatively young woman, at 37 years old, with a future ahead of her. She was a productive member of the society, working with a house and owning a motor vehicle. She was also an independent, single mother with children. She is lost to her family and friends, untimely so.

Are there substantial and compelling circumstances?

Against the background of all the cases I have referred to, it must be accepted that the accused was devastated by the interim protection order against him primarily because he had to surrender his firearm and in turn lose out on overtime pay which he needed to help meet his financial situation, for which he blamed the deceased. As was observed in the cases I have referred to above, the action of the accused, (i.e. the shooting of the deceased), did not happen in a spur of a moment as a spontaneous reaction to provocation, driven by anger or other emotion where the accused had no sufficient time to consider his actions.

The accused testified that the trigger to his action was the

interdict. Although he says he was insulted by the deceased prior to the shooting, he does not say his reason for acting in the manner he did that day was the insult. He says it was the interdict. In any event, it could not have been the insult itself that he reacted to because, on his own version, he had been insulted many times before by the deceased and he never shot her.

Furthermore, it appears to me that he went to the deceased's house already feeling provoked about the interdict and knowing what he wanted to do when he got there. He started by confronting her about the interdict asking "what do you want from me now".

It is noteworthy that the accused knew about the interim interdict for just over a week before the incident. In other words he did not only learn about the interdict on 3 July 2014.

When his request to exclude the firearm from the interdict was not granted in court on 3 July 2014, he sat in his vehicle a bit, drove to the barracks, thought he should admit himself to hospital, took sleeping clothes, his firearm and two magazines and drove to the deceased's house.

In my view, there was a delayed reaction as opposed to a

spontaneous one. Although a delayed reaction may not necessarily eliminate the effect of provocation it waters it down considerably. (See S v Mngoma *supra* at para 6). The accused had time to reconsider his actions.

What also distinguishes this case from the so-called '*crimes of passion'* is the element of premeditation or planning that is present. This case possibly borders on the category of '*crimes of vengeance'* as opposed to those of passion. On his own version, the accused and the deceased were no longer in a relationship *per se*. He went to tell her not to refer to him as her boyfriend, accompanied by two policemen at one point. He told himself he would never set foot in their house in Delft again after he was told to leave and manhandled by the policemen that were called by the deceased. He did not know why there was a need for an interdict as there was no real communication between him and the deceased then. He testified that the deceased and her family conspired to have his firearm taken from him. Therefore whilst it should be accepted that the accused acted out of emotion it was not a spontaneous act that occurred in a spurt of uncontrollable anger. At least there is no evidence to support that. A period lapsed, as I have already stated, between the Court appearance and the shooting incident.

A striking feature between the Kekana case *supra* and this case is the relationship that was filled with turmoil over a period of time.

In the present matter, the accused had over a period of time been in situations where his emotions were heightened. A situation in point was when he caught the deceased with another man. He had his firearm with him then, he was also devastated by what he saw but he did not react by shooting at the deceased or the man he caught her with. I understand that the distinction in this instance was that there was no interdict at the time requiring his firearm to be returned, however his state of emotional distress had been heightened on many occasions before.

There are a number of niggling factors in my mind including those I have already canvassed. The accused was not married to the deceased, they had no biological children together. Nothing bound the accused in this relationship, he could have moved on taking into account that the relationship was troubled from day one. Whilst I am mindful of the tumultuous nature of the relationship, I am unable to agree that the tragic consequences were unavoidable when the accused had a choice and was advised by a work colleague and some of those close to him to leave the relationship. If the deceased

was this ‘horrific’ human being that she was painted to be by the accused in this Court, in whom he had lost interest, he should have left her.

The accused admittedly did not deal with the stress he suffered as he should have. He only attended one or two counselling sessions between the period of 2010 and 2012. He also did not avail himself to lawful remedies to deal with conflict. He resorted to solving the disputes between him and the deceased by killing her.

The deceased on the other hand followed the law by seeking protection against him when she approached the courts for an interdict. What she sought protection from happened the very same day of the court appearance on return day, orchestrated by an accused person who is a trained policeman and a law enforcement officer, choosing to defy a court interdict, first by not returning for the firearm and second by going to the very place he was prohibited to go to. The question that rings in my mind is what else could the deceased have done to protect herself? Once again, this is not to say the interdict was warranted, if it was not, the accused was well within his rights to challenge it in Court. The return day was postponed or extended only for a few weeks to 30 July 2014. What is also concerning is that the deceased did not go to the accused or

confront him about whatever issues she had with him that caused her to seek an interdict, he went to her.

It is troubling that the entire magazine was emptied on the deceased considering that a trigger had to depressed for each shot. This is not a case where the firearm was depressed once and fired shots automatically. Furthermore, the accused did not shoot one or two shots because he could not control himself after an altercation. He emptied the entire magazine on the deceased after he was ordered to stay away from her. It is evident that the accused intended to ensure that she was finished or had no chance of making it. From the emptying of the magazine it could be deduced that the accused wanted to ensure that the deceased got killed. I have already found that the intention was direct. He further went there with a fully loaded firearm having failed to return it as per the Court order. The deceased was flooded with 15 bullets, causing 42 wounds ravaging mainly her right arm and the torso area of her body.

The accused did not try to rescue the deceased after the shooting nor seek help or medical assistance for her, as a true sign of showing remorse about what he had done. It is the neighbours that tried to seek help for the deceased.

Mogammat Sedick Davids, the deceased's neighbour who

testified in the main trial, stated that a man driving a white vehicle after the shooting had taken place came back to the scene and felt the pulse of the deceased and said she is gone and went back to his vehicle and drove off.

Having outlined all the factors, I am of the view that aggravating factors outweigh mitigating factors in this case. Reasons for that are evident from what I have outlined above. I have taken into account the accused's personal circumstances; his emotional condition which he says got the better of him that day. In that regard I have found that he had choices to move away and had time to reconsider his actions. Furthermore, as I have shown he did not take the Court into his full confidence in the main trial.

I am mindful that the accused is relatively still a young man who was financially supporting his family and a first offender and that he embroiled himself in a situation that led to tragic consequences. He struck me as an intelligent man during the trial. With all those personal factors and the history of the relationship between the accused and the deceased, I cannot ignore aggravating factors which are screamingly louder, including but not limited to, the nature of the offence, the fact that the accused was a policeman, who had a duty to uphold the law, that he had defied a Court order by not returning his

firearm and by going to the deceased's house and committed the offences shortly after appearing in Court, and that he planned the killing of the deceased and that he used all the bullets in the firearm to kill the deceased ensuring that she had no chance of surviving. I am aware that the accused has young children who would be growing up without having a father present in their daily lives.

The Court is however confronted with a serious and a violent crime. It is so prevalent that there is a special focus in our country dedicated to dealing with violence against women and children. Some fail to use the available means of resolving conflict and are quick to resort to violence that even leads to deadly consequences.

In this case, the deceased sought to protect herself from being killed by means of a protection order. Protection orders are there to assist the vulnerable who are victims of domestic violence and harassment. They are there to prevent reoccurrence of such conduct by stating what the alleged perpetrator should refrain from doing. The accused defeated that whole object.

A clear message must be sent by our courts that when an interdict cannot assist those seeking protection and the whole

purpose is defeated, leading to the death of a victim the law will take its full course. Violence as a means of resolving conflict has no place in our democratic society.

In view of all the factors, cumulatively, I find there to be no substantial and compelling circumstances to deviate from the minimum sentence ordained for this type of crime.

In the result I make the following order:

1. The accused is sentenced to life imprisonment in respect of the count of murder.

2. In terms of the Firearms Control Act 60 of 2000, the accused is unfit to possess a firearm.

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BOQWANA, J