



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. CCD48/17

In the matter between:

THE STATE

v

DHAYALAN PILLAY

ACCUSED

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

HENRIQUES J

Introduction

[1] Violence by men towards women is endemic in this country. South Africa's femicide rate is five times higher than the global average. It is the duty of courts to impose harsh sentences to recognise the seriousness of the situation.

[2] The accused was convicted of the murder of Annelene Pillay (the deceased), committed under circumstances contemplated in s 51, Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA), in that the State alleged the offence was planned or premeditated (count 1), and, possession of a firearm in

contravention of s 3 of the Firearms Control Act 60 of 2000 read with s 51, Part II of Schedule 2 of the CLAA (count 2).

[3] Imposing sentence is one of the most difficult tasks which a presiding officer has to grapple with. It has been described as a 'painfully difficult problem' and it involves a careful and dispassionate consideration of all factors.

[4] The court must consider the factors referred to in *S v Zinn*,¹ being the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed. The court must also consider the recognised objectives of sentencing being prevention, rehabilitation, deterrence and retribution.

[5] The seriousness of the offences, the circumstances under which they were committed and the victim are also relevant factors in respect of the last element of the triad. The personal circumstances of the accused including his age, education, dependants, his previous convictions (if any), his employment and other relevant conduct or activities call for consideration in respect of the second element. An appropriate sentence should also have regard to or serve the interests of society, as the first element of the *Zinn* triad, which is the protection of society's needs, and the deterrent of would-be criminals.

Issue

[6] The issue which concerns this court is whether to impose the prescribed minimum sentences of life imprisonment in respect of count 1 and 15 years' imprisonment in respect of count 2, or whether to deviate from such sentences?

Criminal Law Amendment Act

[7] The minimum sentences have been ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances which justify a departure therefrom.² In addition the Supreme Court of Appeal has indicated that the minimum sentences must not be departed from for 'flimsy reasons' and are the starting point when imposing sentence.

¹ *S v Zinn* 1969 (2) SA 537 (A).

² *S v Malgas* 2001 (1) SACR 469 (SCA); s 51(3) of the Criminal Law Amendment Act 105 of 1997.

[8] In terms of *S v Malgas*,³ in the event of substantial and compelling circumstances not existing, then a sentencing court is entitled to depart from imposing the prescribed minimum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be disproportionate and unjust to do so. This is often referred to as the proportionality test.

What are substantial and compelling circumstances?

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

[10] It is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances. This is in keeping with the principle that the imposition of sentence is pre-eminently the domain of a sentencing court. A court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. For circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.

[11] Where a court is convinced, that after consideration of all the factors, an injustice would be done if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.

[12] In *S v Vilakazi*⁴ the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Ultimately, in deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and

³ 2001 (1) SACR 469 (SCA).

⁴ *S v Vilakazi* 2009 (1) SACR 552 (SCA).

aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated.

Mitigating and aggravating circumstances

[13] The accused did not lead evidence in mitigation of sentence but Mr *Mkhumbuzi* made submissions from the bar to be considered by the court when sentencing the accused and which he argued should be regarded as substantial and compelling circumstances.

[14] Mr *Singh*, on behalf of the State, during the sentencing part of the proceedings, led the evidence of the deceased's sister Chrisantha Pillay, the evidence of Dr Hina the pathologist, and presented exhibit "1", which is the CCTV footage depicting the incident. This evidence was submitted to show that no substantial and compelling circumstances existed warranting a deviation from the prescribed minimum sentence, and in addition, to show that the offence in count 1 was planned and premeditated.

[15] I shall now deal with all the evidence and the submissions made by the parties during the sentencing proceedings and consider these and the triad of *Zinn* in determining the issue.

The offender: The personal circumstances of the accused

[16] The accused is a 32 year old unmarried man with no children. Prior to his arrest he was involved in a relationship with the deceased and was looking forward to getting married and starting a family with her. He completed Grade 11 in 2002 but was unable to further his studies due to financial constraints. He comes from a family of four siblings who reside with their parents. From the age of five his father suffered ill-health to the extent that he was not able to support his family financially any more. His father required full-time care, day and night, and as a consequence his mother, who was the sole breadwinner in the family, assumed responsibility for raising all of

his siblings and seeing to the responsibilities of the household. His mother was employed as a machinist at Rapp Clothing earning very little.

[17] After leaving school the accused obtained employment at Croxley Stationery as a despatcher earning approximately R2 000 per month. This was from 2003 to 2005. From 2006 to 2011 he was casually employed at Trade Centre as a stock counter, earning approximately R120 per day. This employment he secured with the assistance of his sister. From 2012 to 2014, he was employed at Transit Automovers and drove vehicles onto trucks for export to other countries and he earned R2 400 per month. Whilst so employed he acquired skills in mechanics and maintenance of the vehicles and was involved in repairs. In early 2016 he was employed at On Track Panel Beaters, despatching invoices and quotes for damaged vehicles and delivering vehicles to customers. He earned approximately R3 000 per month. Thereafter, his uncle, Bolten Chetty, purchased a fleet of taxis and because of his mechanical skills he was employed to work for him. He would be on call when vehicles broke down, day and night, in the Chatsworth area. In August 2016 he was with the driver repairing a taxi in the Welbedacht area and was attacked. During the attack he was robbed of his cell phone and cash and the sound system of the taxi. He was so traumatised by the incident that he purchased a firearm for his safety from someone in Umlazi and has been in possession of an unlicensed firearm since August 2016. He continued working for his uncle earning R3 500 per month together with additional cash incentives which he received from callouts. The rates that he received from the callouts depended on whether or not it was a day or night callout.

[18] He has no relevant previous convictions and no pending cases against him and is a first offender in respect of this offence and there is no indication that he has the propensity to perpetrate violent crimes. He was diagnosed with high blood pressure. Since his arrest on 29 November 2016, he has remained in custody, having abandoned his bail application. In March 2017, whilst in custody, his father died and he did not have an opportunity to pay his last respects. He is aware that the offences of which he has been convicted are serious, more so in relation to count 1, the murder of the deceased.

[19] Mr *Mkhumbuzi* submitted the following were substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences, namely:

- (a) The time the accused spent awaiting trial from the date of his arrest being 29 November 2016 up until the date of the conviction being 23 April 2018.
- (b) Secondly, that the accused abandoned his bail application and on all occasions that he appeared in court, expressed his intention to plead guilty. Pleas were drafted on two occasions but were not accepted by the State.
- (c) He was gainfully employed prior to his arrest and despite this, indicated an intention to plead guilty, knowing full well the nature of the sentence he was facing, being that of life imprisonment.
- (d) That in line with the decision in *S v Matyityi*⁵ he has expressed true remorse and regret.
- (e) His mental and emotional state at the time of the offence must be considered and he ought to be seen as acting with diminished responsibility. He was deeply in love with the deceased and feared losing her after a relationship of ten years.
- (f) Immediately after he committed the offence he dropped the firearm at the scene. As he was driving to Chatsworth, had it not been for the intervention of his cousin who pleaded with him to hand himself over at the Chatsworth Police Station, he would have committed suicide.
- (g) At the time of his arrest, he co-operated fully with the police. Prior to his arrest he had been to the Chatsworth Police Station where he had attempted to hand himself over. He was told to wait for the next shift to come on duty. Whilst waiting there, he was experiencing extreme anxiety and did not stay and decided to go home and return later.
- (h) One must also not lose sight of the fact that this was a crime of passion and the State accepted the facts as contained in the s 112 plea, and there is no element of premeditation or planning.
- (i) Even though he had 23 minutes in which he sat in his vehicle and waited for the deceased to exit her place of employment, this time must be construed in

⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA).

favour of the accused. Even the Whatsapp messages exchanged do not exclude the fact that he operated within the parameters of a crime of passion. He had attended at her workplace after making two phone calls to her work only to be told that she was not there. The Whatsapp messages likewise show concern.

[20] If one considers the triad of *Zinn* any sentence imposed must contain an element of mercy. Although Mr *Mkhumbuzi* conceded that the interests of society, specifically the nature of the offence, pose great challenges insofar as sentencing is concerned, one must not lose sight of the fact that the accused is relatively young and that this is his first serious brush with the law.

[21] In support of his submission that this is a crime of passion and an instance of domestic violence, Mr *Mkhumbuzi* relied on several cases for the submission that an appropriate sentence, given the facts, is one of 15 to 20 years' imprisonment. He further submitted that the cases also acknowledge that incidences of domestic violence and femicide pose huge challenges in our society. The cases referred to namely *S v Mashao* 2015 JDR 2263 (GJ); *S v Magano* 2013 JDR 2733 (SCA) and *Mudau v State* (547/13) [2014] ZASCA 43 (31 March 2014). Despite the heinous nature of the crimes, sentences of 20 years' imprisonment were imposed. In *S v Jantjies* 2014 JDR 2004 (SCA) a sentence of 10 years' imprisonment was imposed. As pointed out by Mr *Mkhumbuzi* the facts in *Magano* above were similar to the facts of this matter.

I may add that although the sentences imposed in those cases serve as a guide, each case must be decided on the basis of its own facts.

CCTV footage

[22] In aggravation of sentence the State showed the CCTV footage, exhibit "1" depicting the shooting incident and the manner in which the deceased met her untimely death. It depicts the accused driving into the workplace of the deceased, not entering through the normal entrance, but using a side entrance. One notices the deceased exit her workplace approximately 23 minutes after the accused arrived and descend the steel fire escape stairs making her way to her vehicle. On reaching her vehicle, the accused is seen alighting from his motor vehicle, walking toward her.

She is then observed running up the stairs. He approaches and fires at her from underneath the stairs. She falls in a freefalling position. He is then seen dropping the firearm and running toward his motor vehicle. He is then observed driving away using the same route that he entered. A witness, a fellow employee, is seen exiting on the fire escape and observing the deceased, and the accused driving away from the scene. The footage corroborates Dr Hina's findings that the gunshot wounds were distant entry wounds and also appears to be consistent with the facts as contained in the accused's s 112(2) plea.

The medical evidence

[23] Dr Ziphozethu Balbalwa Hina, a state pathologist, confirmed that she completed the post-mortem report in respect of the deceased on 30 November 2016. Her chief post-mortem findings are contained in exhibit "C" and record the cause of death as being perforating gunshot wound to the head. She testified that there were several wounds to the head with skull fractures, base of skull fractures, subarachnoid haemorrhaging and brain lacerations. There was also blood aspirated in the deceased's lungs which meant that the deceased survived for approximately ten minutes after the incident. An aggravating feature of the fall from the steel stairs of the fire escape was that she struck her head with such force as she fell that she sustained a hinge type fracture of the skull.

The relationship between the deceased and the accused

[24] The deceased's sister Chrisantha Pillay testified that the deceased was five years older than her and that she was employed at Bridgeport Shipping for approximately two years as a customer service controller. She did not approve of the relationship with the accused and indicated that the accused was very abusive and derogatory of her sister. She indicated that the deceased expressed no desire to marry the accused and because they were very close, the deceased would have certainly mentioned it to her. She further indicated that the relationship between the deceased and the accused ended when the deceased backed away from him around about 31 March 2016 shortly after her birthday.

[25] She confirmed that on the day she died the deceased was in communication with her and an exchange of Whatsapp messages took place. She confirmed that in

these Whatsapp messages her sister indicated that she was scared of the accused and that the accused had called Tracker and concocted a story to establish her whereabouts after he had been unsuccessful in contacting her at her place of employment. She confirmed that despite the problems she alluded to and the nature of the accused's behaviour, her sister chose to stay with him for ten years.

[26] She also testified about the qualities of the deceased and the impact the deceased's death had on their family especially her parents.

[27] Mr *Singh* submitted that in respect of count 1 there are no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. He acknowledged however that this was a crime of passion although to a limited extent. He indicated that whilst he must concede that the accused displayed some diminished responsibility, he behaved like someone who was determined to end the life of the deceased shortly before her death. He conceded however that since his arrest the accused indicated he wanted to plead guilty.

[28] Although the accused has shown some remorse, he submitted that this is not genuine remorse and referred to the decision in *S v Matyityi* above para 13 when Ponnann JA said 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 gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for 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.' (Footnotes omitted)

[29] Having regard to the various annexures being "E" and "F", he indicated that the last communication between the accused and the deceased via cell phone was 2

November 2016. Thereafter, the records indicate the next time he contacted her was some 27 days later on 29 November 2016.

[30] He submitted that the offence was premeditated or planned for the following reasons:

- (a) The relationship between the deceased and the accused had terminated. The accused went to the deceased's workplace under false pretences. He submitted that this is evident from the Whatsapp exchange between the deceased and her sister and the fact that he had to concoct a story with Tracker to obtain her whereabouts. If he wanted to see her, Mr *Singh* submitted, he could simply have gone inside the workplace and not waited for her to exit. This he submitted was a deliberate act indicating that this was thought through and not a spur of the moment decision he made.
- (b) In addition, he indicated that from the CCTV footage it is evident that the accused waited for approximately 23 minutes outside the deceased's workplace. This he indicated gave him enough time to reconcile himself to the fact that he intended to kill her and went there for that purpose. He had time to resile from his pre-planned decision. In addition, given the timeline of the shooting and the fact that it happened so quickly, is indicative he submitted, of the fact that he went there to kill her. The fact that he did not use the normal entrance and entered and exited through the unattended side entrance where there is no security was indicative of this and that it was a carefully thought out plan.
- (c) He further submitted that if one looks at the cell phone records, these indicate the deceased and the accused's last telephone contact occurred on 2 November. The accused had 27 days to plan the offence.

[31] He submitted that given the circumstances of this offence the prescribed minimum sentence was appropriate. Society demanded such sentences be imposed given the incidences of femicide and domestic violence.

Interests of society

[32] Society demands that offenders be punished for their crimes. Given the nature of the offences which have become endemic in our society, the legislature

saw it fit to enact the CLAA. I am aware of the huge public presence both in the lower court and when this matter commenced. Despite this, however, a court must not overemphasise one factor and ultimately a balance must be struck. In *S v Kruger*⁶ the court remarked '[p]unishing a convicted person should not be likened to taking revenge'. In my view every sentence that must be imposed must be tempered with a degree of mercy no matter the crime.

[33] A sentencing court must not over-emphasise the public interest and general deterrence. The Supreme Court of Appeal in *S v Scott-Crossley*⁷ para 35 said the following:

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

The judgment further states at para 35:

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

[34] As our courts have often said the object of sentencing is to serve the public interest and not satisfy public opinion. In *S v Mhlakaza & another*⁸ at 518f-g Harms JA held the following:

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

Referring to Chaskalson P in *S v Makwanyane & another*⁹ paras 87-89 in which the court said the following:

'... public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public... "righteous anger should not becloud judgment".'

⁶ *S v Kruger* 2012 (1) SACR 369 (SCA) para 11.

⁷ *S v Scott-Crossley* 2008 (1) SACR 223 (SCA).

⁸ *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA).

⁹ *S v Makwanyane & another* 1995 (2) SACR 1 (CC).

[35] Of relevance to the determination of an appropriate sentence is whether the offence in count 1 was planned or premeditated. In *S v Raath*¹⁰ para 16 the court dealt with this:

'Planning and premeditation have long been recognised as aggravating factors in the case of murder. See *S v Khiba* 1993 (2) SACR 1 (A) at 4 and *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) at para 34. As Terblanche *Guide to Sentencing in South Africa* 2 ed states at 6.2.2, planned criminality is more reprehensible than unplanned, impulsive acts. However, there must be evidence that the murder was indeed premeditated or planned. See for example *S v Makatu* 2006 (2) SACR 582 (SCA) at paras 12-14. The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The *Concise Oxford English Dictionary* 10 ed, revised, gives the meaning of premeditated as to "think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time". Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".'

Circumstances of the offence

[36] The facts on which the accused was convicted were dealt with extensively in his s 112 plea. The accused indicates that he had been in an intimate relationship with the deceased from 4 November 2006 and they had agreed that they would marry at the end of 2017. In early November 2016 he received information of a clandestine relationship which the deceased was involved in with a third party.

¹⁰ *S v Raath* 2009 (2) SACR 46 (C).

[37] The accused indicates that he contacted the deceased on several occasions to establish the truth of what had been reported to him but the deceased avoided contact with him. As a consequence he was of the view that what he had been told had a ring of truth to it and knew that he was losing the deceased. He attempted to get hold of her on the morning of 29 November 2016. After several failed attempts to contact the deceased at work or on her cellphone, and her family, the accused contacted the tracker company Netstar and was informed that the deceased's vehicle was somewhere in the Bluff. He then drove to her workplace and parked not far from the offices waiting for her.

[38] When he saw her exiting the door and proceeding down a steel staircase to her vehicle, he drove his vehicle toward her vehicle and called out her name. When the deceased saw him she ran away to the staircase. Enraged by her conduct, he chased after her with the unlicensed firearm and fired several shots in her direction. He panicked, dropped the firearm and drove to the Chatsworth Police Station accompanied by his cousin. On his arrival at the police station he was told to wait until the next shift. Because he was anxious and shaking he went home to sleep and at about 23h00 the police arrived and arrested him.

[39] There is nothing on the facts as pleaded and accepted by the State to indicate that in the time preceding the shooting, the accused formed an intention or plan to kill the deceased. There is nothing to suggest that he deliberately armed himself with the firearm and went to her workplace with the sole intention to kill her. His actions, although deadly and tragic, cannot change what appears to be the spur of the moment act of a man in an emotional rage, into a planned and premeditated murder.

[40] There is nothing to suggest that this was not a crime of passion at a time when the accused was emotionally riled. It does not detract from the seriousness of the offence but helps one appreciate the accused's behaviour. In *S v Mvamvu*¹¹ Mthiyane JA described an essential characteristic of a crime of passion 'as one committed without rational reflection whilst the perpetrator is influenced by barely controllable emotion'. In such instances the circumstances of such a murder are considered substantial and compelling circumstances.

¹¹ *S v Mvamvu* 2005 (1) SACR 54 (SCA) para 13.

[41] As was held in *S v Mathe*¹² an accused person would be considered to have acted in circumstances with reduced powers of restraint and self-control.

[42] Whilst acknowledging the circumstances under which the deceased met her untimely death, I am of the view that on the facts of the matter, substantial and compelling circumstances exist warranting a deviation from the prescribed minimum sentences. Although the accused's conviction is one which falls within the purview of Part 1 of Schedule 2 to the CLAA, on the objective facts alluded to by Mr *Singh* and on the contents of his plea, I am unable to find that the offence in count one was planned or premeditated. I say this mindful of the interests of society. One has to view these against the facts pleaded and the personal circumstances of the accused.

[43] Mr *Singh* acknowledged that the accused displayed remorse and voiced an intention to plead guilty from the time of arrest. I am of the view that this remorse was genuine. Although he waited for the deceased for 23 minutes and the shooting was relatively quick, there is nothing on the facts pleaded and the evidence presented to indicate he was armed with the firearm with the sole intention of killing her. In addition, Mr *Singh* acknowledged the accused acted with diminished responsibility.

Possession of the firearm

[44] At the hearing of the matter I raised with Mr *Singh* the conviction in respect of this offence. In his s 112 plea the accused pleaded guilty to contravening the provisions of s 3 of the Firearms Control Act read with s 51(2) and Part II of Schedule 2 to the CLAA. In essence he admitted to being in possession of a semi-automatic pistol which had a serial number obliterated without holding a licence therefor. When I indicated to him that strictly speaking this was a contravention of s 4 of the Firearms Control Act, he indicated that although this issue was debated in his office, the plea was accepted on the basis of a contravention of s 3. He submitted in this regard that given the case authority the appropriate sentence in this regard would be no less than seven years in respect of this conviction.

[45] The prescribed minimum sentence in respect of a contravention of s 3 is 15 years' imprisonment. Having regard to the decision in *S v Madikane*¹³ it would

¹² *S v Mathe* 2014 (2) SACR 298 (KZD),

appear that the sentences imposed varied but those imposed are no greater than seven years' imprisonment, depending on the facts of a particular case. It was also pointed out by Mr *Singh* that if one has regard to exhibit "D", which is the ballistics report, the barrel of the pistol was cracked and could not be tested for safety reasons. It would appear that the firearm posed a threat even to the life of the accused.

[46] In his s 112 plea, the accused admits to being in possession and control of the firearm without a valid licence. In addition it is clear that he admits that the serial number for the firearm was obliterated. The accused appears to have obtained the firearm in August for safety reasons. He thus appears to have been in possession of the firearm for a period of time and kept same with him for work purposes. There is nothing to gainsay that.

[47] Mr *Mkhumbuzi* submitted that in relation to the conviction in respect of count 2, the State in the exercise of its prerogative, charged the accused with a contravention of s 3 and not with a contravention of s 4. The accused has provided an explanation of how he acquired the firearm. He has submitted that whatever sentence is imposed in respect of count 2 the court ought to consider the cumulative effect thereof and order the sentences to run concurrently given the fact that the firearm was used in the commission of the offence in count 1.

[48] Ordinarily where offences occur and they are closely related in time and place to each other, the court in considering the cumulative effect of the sentence, often orders sentences on two counts to run concurrently.

[49] Regrettably this is not one of those cases. It is correct that the firearm was used in the murder of the deceased in count 1. However the accused through his legal representative indicated that he was in possession of the firearm for a considerable period of time prior to the incident. It is clear that after the incident during which he and the driver were robbed and assaulted, he consciously made a decision to purchase an unlicensed firearm and remain in possession thereof. This in my mind indicates that the firearm was purchased for a different purpose and under those circumstances, although used in the commission of the offence in count 1 the

¹³ *S v Madikane* 2011 (2) SACR 11 (ECG).

sentence imposed in respect of this count must take these facts into consideration as well. There is no reason to order the sentences to run concurrently.

Conclusion

[50] In coming to an appropriate sentence in respect of both these counts, the following must be borne in mind, namely:

- (a) Although the accused in respect of count 1 pleaded guilty to murder read with s 51 Part I in Schedule 2 of the CLAA, the State accepted this plea based on the facts submitted in his s 112(2) statement.
- (b) The deceased and the accused were involved in a relationship for approximately ten years.
- (c) Even though her sister Chrisantha Pillay testified that the deceased wanted nothing to do with the accused and according to her the relationship ended at the end of March after the deceased's birthday, it would appear that there was communication between the deceased and the accused at least until the beginning of November 2016.
- (d) Although her sister testified that the relationship between the deceased and the accused was a troubled one and that he was often demanding, abusive and disrespectful toward the deceased, there was no evidence placed on record to indicate that this was an abusive relationship and that the deceased was being stalked by the accused. In fact Ms Pillay confirmed that despite the problems, the deceased was in the relationship with the accused for some ten years.
- (e) Two families have been affected by this tragedy, the family of the deceased but also the family of the accused, their lives irreversibly altered for ever.
- (f) No sentence will ever bring back the deceased. Whilst this may be cold comfort for the family of the deceased, I am reminded of what the court stated in *S v Rabie*¹⁴ that '[p]unishment should fit the criminal as well as the crime, be fair to society, and should be blended with a measure of mercy according to the circumstances'.

¹⁴ *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.

[51] The sentences would give recognition to the justifiable abhorrence invoked by the callousness of the offences whilst not destroying the accused on the altar of general deterrence.

[52] In the result, the sentences I impose are the following:

Count 1: Murder read with s 51(1) and Part I of Schedule 2 of Act 105 of 1997: the accused is sentenced to 20 years' imprisonment

Count 2: Possession of a firearm in contravention of s 3 of the Firearms Control Act read with s 51(2) and Part II of Schedule 2 of Act 105 of 1997: the accused is sentenced to 5 years' imprisonment.

The accused is thus sentenced to an effective 25 years' imprisonment.

The accused is declared unfit to be licensed for a firearm in terms of the provisions of the Firearms Control Act.

HENRIQUES J

Case History

Date of conviction: 24 April 2018

Date of argument on sentence: 25 April 2018

Date of sentence: 7 May 2018

Mr Singh for the State

Mr Mkhumbuzi for the defence