**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. CC26/2018

In the matter between:

**THE STATE**

**VS**

**ODWA SQANDULO SONGCA**

---

**JUDGMENT ON SENTENCE**

---

**JOLWANA J**

[1] The accused has been convicted of the offences of unlawful possession of a firearm and ammunition in contravention of various provisions of the Firearms Control Act 60 of 2000. He has also been convicted of the murder of sergeant Phumzile Michael Ntando. When the accused was indicted the State invoked the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). The provisions of this section and its implications were explained to the accused at the commencement of the trial. In invoking this section, the State raised two grounds. The first one is that the deceased was a law enforcement officer. The second ground is that the murder was planned or premeditated. It is common cause that the deceased was a police officer stationed in Mount Frere. This is the very town in which he was shot and killed by the accused while sitting in his vehicle.

[2] The brazenness of this attack on a law enforcement officer in the middle of the town is shocking. The State witnesses testified that the deceased parked his car near a car wash in which liquor was consumed and sat in his vehicle. It is common cause that

there were many other vehicles there where the deceased arrived and parked his vehicle.

[3] The deceased must have assumed that he was safe there precisely because of the other vehicles that were there. After all he was very well known in the small town of Mt Frere because that is the very community he served. It is common cause that the people who were in Bongani's vehicle just a few vehicles behind the deceased's vehicle, including Simthandazile and other State witnesses knew the deceased very well. He parked his vehicle in an area in which he had every reason to take for granted that he was safe. It appears from the evidence led before this Court that the accused had a long standing grudge against the deceased. There was evidence by State witnesses that the accused did not hide his dislike for the police officer. On the night on which he murdered him by shooting him several times on his upper body, State witnesses testified that when he saw the deceased parking his vehicle he said, "here is this dog". This utterance and other circumstantial evidence clearly indicates that the murder was not only that of a law enforcement officer but also premediated. On either of these bases the sentence prescribed in terms of section 51(1) of the Act is life imprisonment.

[4] However, this Court has a discretion to depart from imposing the prescribed sentence of life imprisonment if this Court finds that there are substantial and compelling circumstances for it to do so. Section 51(3) of the Act provides in part as follows:

> "If any court referred to in subsections (1) and (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence …"

[5] Mr Ntikinca who appeared for the accused made a number of submissions on the basis of which he sought to persuade this Court to exercise its judicial discretion and impose a lesser sentence by departing from the prescribed minimum sentence. One of the most ironical of the accused's personal circumstances is the fact that he is a first offender as the State did not prove any previous conviction against him. The irony is that the evidence of warrant officer Maliwa was that the deceased was going to testify in two cases against him, the first one being possession of a suspected stolen property, which was an engine of a motor vehicle. The second case was vehicle hijacking. Whether or not the accused would have been convicted of these offences is unknown. What the evidence of warrant officer Maliwa indicates is that the deceased was murdered not only because he was a police officer but mainly because he was one of the investigating officers in those two cases in which the accused had been charged.

[6] It is common cause that on the very day on which he murdered sergeant Ntando the accused had been to Mount Frere police station and signed as one of his bail conditions in respect of a case on which he had been released on bail. The firearm and ammunition he used to shoot and kill the deceased were unlicenced and therefore the accused was in contravention of the law even in possessing that firearm and ammunition. He clearly demonstrated his disrespect for the law and his disregard for the justice system by using the freedom of being granted bail to murder a police officer who was investigating him with an unlicenced firearm. There was even evidence that the firearm he used to murder sergeant Ntando was stolen from one of his colleagues who spent time and drank alcohol with the accused. However, it is so that he is a first offender in this case as he has not been previously convicted of any criminal offence.

[7] The other personal circumstances of the accused are the fact that he is unmarried and has two minor children. It was submitted that before his arrest for this case he looked after the two minor children. It was further submitted that he is relatively young at 27 years of age. Mr Ntikinca submitted that while he accepted that this Court has a discretion on what an appropriate sentence should be, he urged this Court not to sentence the accused heavily because of its indignation with the serious offences for which he has been convicted especially the murder of a law enforcement officer. He further submitted that even the convictions of the community of Mount Frere and the society in general should not lead to the court not showing leniency to the accused in light of his personal circumstances.

[8] As far as the minor children are concerned, no evidence was placed before this Court on the actual role the accused personally played in raising his children. The submission ended with a mere bald submission that he looked after the minor children. This is even more important in light of the fact that his own evidence was that he had a number of taxi cabs through which he ran a business ferrying passengers in Mount Frere. It was also submitted that the minor children are now being looked after by his twin sister. An accused person must, in my view, do more than merely submitting, through his legal representative, that he has minor children that he looks after. There must be clarity on the role he played through evidence so that the State can verify that and the court is placed in a better position to decide how best to deal with that issue. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 574 c-f, the Supreme Court of Appeal stated the legal position as follows:

> "[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period

> of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character."

[9] In aggravation of sentence the State called the wife of the deceased. She testified that she and the deceased have two minor children. The deceased was a loving husband to her and a loving father to his children. He was very close to his first born of the two minor children who, to date, continues to ask difficult questions concerning her father. The deceased's mother who is now 88 years old has been badly affected by the killing of her son and has been struggling with his untimely death since 2018. It was heart rending to also hear that in addition to the loss of a loved one the widow and her children, more than three years later, have not yet been given any form of financial support by sergeant Ntando's employer, the South African Police Service in line with their policies and regulations.

[10] As if the death of her husband and father to her children was not bad enough, Mrs Ntando testified that not only have they not been given any form of financial support that would have been due to them following sergeant Ntando's untimely death, they have not even been given professional counselling by his former employer. This must mean that nobody really knows the true impact of the trauma of the death of their father on the two minor children. The only counselling they received was, according to Mrs Ntando, from her sisters in law who have been very supportive. This is like the wounded bandaging each other's wounds with the little emotional strength they have

as the Ntando family all of whom lost a son, husband, father, brother, or even uncle etc.

[11] The murder of a police officer whose job is to protect the community even at the risk of his own life is a very serious offence. Mr Baliwe described this as tantamount to challenging the authority of the State. For this reason and many other aggravating factors he urged this Court not to depart from the prescribed minimum sentence of life imprisonment. He referred to some of the evidence of Mrs Ntando in which she testified that she did not see anything suggestive of remorse for murdering her husband on the part of the accused. It is indeed so that the accused showed no remorse whatsoever.

[12] In *S v Jansen* 2020 (1) SACR 413 (ECG) at para 25 after looking at previous authorities the court once again explained the approach to the prescribed minimum sentences as follows:

> "In *S v Matyityi* the Supreme Court of Appeal, with reference to *Malgas*, emphasized that the courts are obliged to impose the prescribed sentences despite any personal doubts about the efficacy of the policy underlying the Act or the presence of a personal aversion to the minimum sentencing regime. In *Dodo* the Constitutional Court found that the *Malgas* approach to sentencing constituted "an appropriate path which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes while at the same time promoting the spirit, purport and objects of the Bill of Rights." The proper approach, according to *Matyityi* is that the point of departure of the sentencing court must be that the prescribed sentences are generally appropriate for the kind of offences specified, unless there are substantial and compelling factors justifying a departure therefrom. This is consistent with what Cameron J in *Center for Child Law v Minister of Justice* said are the two operative effects of the minimum sentencing legislation:
>
> > "First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent 'truly convincing reasons' for departure, the scheduled

> offences are 'required to elicit a severe, standardized and consistent response from the courts through imposition of the ordained sentences. Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighing effect leading to the imposition of consistency."

[13] I have carefully considered all the circumstances of this case in particular the personal circumstances of the accused in light of the very difficult balancing task the law places on the sentencing courts in deciding an appropriate sentence. I am not persuaded that the personal circumstances of the accused considered individually and cumulatively, in the circumstances of this case, amount to the substantial and compelling circumstances envisaged in our law, for the purposes a departure from the prescribed minimum sentence of life imprisonment.

[14] In the result the accused is sentenced as follows:

1. Count 4, possession of an unlicensed ammunition the accused is sentenced to two years imprisonment.
2. Count 3, unlawful possession of a firearm, the accused is sentenced to five years imprisonment.
3. Count 2, murder, the accused is sentenced to life imprisonment.

_____

**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

Appearances:

Counsel for the State: M. BALIWE

Instructed by: NPA

MTHATHA

Counsel for the Accused: L.F. NTIKINCA

Instructed by: Legal Aid South Africa

MTHATHA

Date head : 11 November 2021

Delivered on : 12 November 2021