REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

NORTH EASTERN CIRCUIT LOCAL DIVISION: MTUNZINI

CASE NO. CC 69/2011

In the matter between:

THE STATE

versus

BHEKOKWAKHE EMMANUEL MATHE ACCUSED

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JUDGMENT

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GORVEN J

[1] The accused was ultimately indicted on two counts and pleaded guilty to both. The counts were as follows:

4. The attempted murder of Nkululeko Mzimela at or near KwaDlangezwa on 18 May 2010.
5. The murder of Nomphumelelo Pretty Mbatha at or near the same place on that date.

[2] The accused tendered a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the Act). The statement was accepted by the state and he was found guilty as charged based on that statement.

[3] Mr Ngobese, who represented the accused, then addressed on sentence. At a certain point it became clear that he would submit that a sentence of correctional supervision in terms of s 276(1)(h) of the Act would be appropriate. The matter was adjourned at the instance of the court, supported by both parties, for the purpose of obtaining a probation officer's report and one from the Correctional Services. This was because a presiding officer bears some responsibility to ensure that important information is placed before the court for the purpose of sentence, especially when a particular sentence is prescribed for the crime in question.[1] It was indicated that any evidence in mitigation or aggravation should be led on the adjourned date. A lengthy delay ensued as a result of the difficulty of finding a date suitable to both parties and the court.

[4] It is necessary to summarise part of the statement in terms of s 112(2) and to set out in full part of it. Since 1999 the accused and the deceased were in an intimate relationship. She was at high school and he was employed. He paid some ilobolo along with gifts, called izibizo. A girl child named Fezeka was born to them on 8 August 2005. The deceased attended the University of Zululand and the accused obtained employment at the Department of Correctional Services during January 2007. As part of his training, he attended college and on his return discovered that the deceased was conducting a love affair with a colleague of his named Mabuyakhulu. Because of this affair, the accused did not wish to work at the Correctional Centre which employed Mabuyakhulu but went to another Correctional Centre. During 2008 the accused attended several counselling sessions with a social worker at work. The deceased and her family were involved in some counselling sessions. The accused was emotionally depressed and at some stage thought of committing suicide and of killing Mabuyakhulu. He also consulted a psychologist. During May 2008 the deceased told the accused that she had terminated her love relationship with Mabuyakhulu. The accused

[1] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at para 14.

was then transferred to the Empangeni Correctional Centre during October 2008 when he and the deceased began to plan for their wedding. However, during May 2009 the accused intercepted a text message from Mabuyakhulu on the deceased's cellphone, inviting her to visit him for a weekend. There was an argument between the two of them and the accused sought the intervention of that same social worker as a result. The deceased, however, convinced him that she had terminated her love affair with Mabuyakhulu. He registered for a degree at the University of Zululand so that they could both have academic qualifications. He was, at this time, accommodated at his workplace and the deceased was employed as an educator in the Msinga area but visited him during month ends and holidays.

[5] On 17 May 2010 he was told that the deceased had visited Mabuyakhulu during the weekends of 1 and 2 May and 15 and 16 May 2010. He had unsuccessfully attempted to contact the deceased telephonically during the latter weekend. He immediately phoned the deceased who told him that she wished to terminate her relationship with him. This affected him the whole night and, on 18 May 2010, he left his post two hours early at 04h00. He took public transport to the deceased's place of employment. He requested that she return with him and she asked for, and obtained, permission from the principal of the school where she taught to be excused from work for the day. They took public transport to Greytown, then to Kranskop, then to Stanger and then to Empangeni. En route to Empangeni, he told her that he would have to alight at the KwaDlangezwa crossroads to attend afternoon classes at the University of Zululand. He had noticed, on their way from Stanger, that the deceased was making and receiving text messages on her cellphone and suspected that she was communicating with Mabuyakhulu. He asked to borrow her cellphone on the pretext of wanting to make some calls, but she told him that her cellphone battery was flat. Despite this, she continued to communicate through text messages.

[6] The statement continues as follows:[2]

'We reached the Kwa-Dlangezwa crossroads and the taxi stopped as I was alighting. At that stage I was carrying a baby belonging to one of the passengers in the taxi. I then gave the baby to its mother and soon after I had alighted three officers who are my colleagues at work emerged from the nearby trees. It was Bongani Eugen Mtsweni, Frankson Ryan Smith and Mr S.M Mhlongo. They pointed at me with firearms and demanded the service firearm which I had on my person. Whilst I was still trying to figure out what was going on, Mr Bongani Eugen Mtsweni (who is a close friend of Mabuyakhulu) advanced towards me and tried to grab the firearm from my possession. I retreated towards the back of the taxi and he opened fire.

I removed the firearm from my hip and shot back and he together with Mr Frankson Smith directed shots towards me. I also fired shots towards them and upon realising that I was missing them, and that I had already been shot at about two times, I tried to take cover and I noticed that the taxi in which I had been a passenger was beginning to drive off. I climbed on the rear windscreen and fell down. I arose and ran towards the taxi and climbed again. Shots continued to be fired towards me and the driver of the taxi stopped his taxi approximately 50 m from the place where he had initially stopped and came out of the taxi running for cover into the nearby bushes.

I then entered the taxi through the driver's door trying to take further cover and at that stage I was shot on my foot and legs and I realised that I was being killed. At that stage I was severely emotionally overwrought and began to shoot several times at the deceased who was sitting at the back seat of the taxi. I ordered passengers to bend down so that they do not get hurt and I shot at the deceased as I wanted to die with her since I was bleeding and the blood was all over my body so much so that I did not know which parts of my body had been injured.

At the time of shooting at the deceased I also missed her and shot at Nonkululeko Mzimela. The incident was happening very fast as my colleagues were firing shots at me and I then fell down from the taxi and dropped the firearm, raising my hands and ran towards the nearby bush. Mr Eugen Mtsweni gave chase after me still shooting towards me.

I then saw Mr Gumbi, who is also my colleague, who told me to stop running and I stopped and fell down. I regained my consciousness when I was at the Garden Clinic Hospital.

I wish to state that at the time when I was shooting at the deceased I was emotionally disintegrated but I was still able to differentiate or appreciate between right and wrong and I was able to act in accordance with such appreciation.

[2] The paragraph numbers have been omitted and most of the grammar in the quote corrected.

At the time of the shooting I intended to kill the deceased as I did not want to die alone and leave her with Mabuyakhulu.

I wish to state that I knew at the time that my conduct was unlawful and that I had no right to take the life of another person, Nompumelelo Pretty Mbatha.

I wish to state further that at the time when I shot at the deceased I foresaw the possibility that other passengers like Nonkululeko Mzimela, who was sitting, at the time, next to [the deceased] might be shot at and injured and/or killed as a result of my shooting, but I nevertheless continued with my conduct regardless of whether or not she would be shot dead and injured or killed.

I further wish to state that I realised at the time that my aforesaid conduct was unlawful.

When I was still in hospital I sent my mother and my aunts to go to the deceased's family to apologise on my behalf and to state my willingness to take responsibility over the funeral expenses and also to offer a traditional apology goat… but those offers were turned down by the deceased's father even after some follow-up efforts from my side.

I admit that the shots fired by me directed to the deceased person caused the death of the deceased.

I am really sorry for what happened.'

[7] A report from the social worker whom he consulted from time to time was annexed to the statement. It states that she had two sessions with the accused on 23 and 27 January 2008, a session with the deceased on her own on 31 January 2008, a session with the accused and the deceased together on 31 January 2008 and a session with the deceased's family on 27 March 2008. It records the accused saying he was suicidal and that he was also considering shooting Mabuyakhulu. A request was accordingly made to place the accused in a position not requiring the use of a firearm. On 16 May 2008 the accused and the deceased confirmed that everything was back to normal, whereupon the accused was transferred back. The report further records a later communication from the accused requesting the intervention of the social worker because he had had a fight with the deceased. She encouraged the accused to deal with these issues

without involving the social worker and he then reported that he had done so and that he was happy. The file became inactive and was closed on 22 October 2009.

[8] Both of the offences with which the accused was convicted attract sentences prescribed under s 51 read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLA). As regards the attempted murder count, the minimum sentence is five years. On the count of murder, the state accepted that the statement of the accused did not go so far as to show that the murder was planned or premeditated. As such, the minimum number of years' imprisonment prescribed is 15 years.[3] A sentence less than the minimum prescribed can only be imposed if the court finds that substantial and compelling circumstances warrant a lesser sentence in terms of s 51(3) of the CLA.

[9] Counsel for the accused submitted that an appropriate sentence on both counts, taken together, would be one of correctional supervision in terms of s 276(1)(h) of the Act, coupled with a wholly suspended sentence of imprisonment and a compensation order on the murder count in favour of the family of the deceased. This would, of course, require a finding that substantial and compelling circumstances are present. In support of his submission that such substantial and compelling circumstances exist, counsel for the accused set out the personal circumstances of the accused and mitigating factors. These are as follows. He is a first offender. He is 31 years old. He is unmarried and has not been engaged in any further relationships. He has a child by the deceased to whom he will have to explain the incident. This child is cared for by and stays with the parents of the deceased. He does not contribute to her support but wishes to do so. He has not taken the initiative to do so in the interim, influenced by the

[3] It is important to bear in mind that the prescribed sentences begin with the minimums and extend, in each case, to life imprisonment. A higher sentence than the minimum may be imposed. See *S v Mthembu* 2012 (1) SACR 517 (SCA) para 11 where the following was said: 'It follows that, even were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its sentencing discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just.'

fact that the family of the deceased has sued him for damages, including loss of support. He has not completed his studies because he has become demoralised by the incident. He has shown remorse by pleading guilty and attempting to apologise to the deceased's family, pay for the funeral expenses and offer the traditional token of apology, all of which were rejected. In addition, counsel for the accused submitted that it should be found that, at the time of commission of the offences, the accused had diminished criminal responsibility.

[10] No evidence was led by either the accused or the State on the question of sentence. The two reports were handed in by consent and the contents accepted by both parties. It was recognised that the court is not bound by the reports and the recommendations contained in them.

[11] The reports throw further light on the personal circumstances of the accused. They also contain material concerning the incident itself, some of which was additional to that set out in the statement in terms of s 112(2). I have had no regard to that aspect of the reports. Since the state did not lead evidence and accepted the statement in terms of s 112(2) of the Act, I am bound by those facts.[4] The accused could have given that evidence or included it in the said statement but elected to do neither.

[12] The additional factors mentioned in the reports which are relevant are the following. The accused was departmentally charged and given a final warning and a suspended fine of one month's salary. He wants to provide for the needs of his child and requested that the social worker facilitate this through victim-offender dialogue. He wants to be actively involved in the life of his child. He also wishes to cleanse the family of the victim to show his remorse. He was raised by his mother's family. He supports his father, mother, four siblings and an

[4] *S v Soci* 1986 (2) SA 14 (A)

unrelated member of the community who has no parents. He owns and manages a soccer team, having previously been a striker for the team. He is an active member of the Galilee Zion Church. He completed grade 12 and enrolled for further part time study but discontinued this after the incident. At work and home he is regarded as a quiet, non-violent, respectful person with a warm heart. He gets on well with his colleagues and his supervisor, despite some of his colleagues having shot at and injured him during the incident.

[13] The probation officer is of the opinion that a custodial sentence is not appropriate because the accused is the breadwinner, has a child from the deceased and is a first offender. A fine would be appropriate. She recommends correctional supervision in terms of s 276(1)(h) of the Act. The Correctional Services report indicates that the accused 'meets the physical criteria' for a sentence of correctional supervision and, in addition, recommended that he should pay victim compensation to the family of the deceased of R50 000 by way of a deposit of R10 000 and monthly instalments of R2 500 for three years. Apart from a brief comment on the attitude of the father of the deceased, neither report deals in any focussed way with factors other than the personal circumstances of the accused.

[14] The reports indicate that the father of the deceased is frustrated and feels helpless. The deceased was going to graduate on 20 May 2010, days after she was murdered. He is seeking compensation for her death. He would not support a sentence of correctional supervision.

[15] The first enquiry is whether there are substantial and compelling circumstances, as envisaged in s 51(3) of the CLA, which warrant a lower sentence than the minimum prescribed sentence in each count.

'The essence of this approach is that courts retain the discretion to determine appropriate sentences in view of the obvious injustice implicit in an obligation to impose only the

prescribed sentences in any given circumstance. However, courts are required to approach sentencing conscious that the legislature has ordained that particular sentences should ordinarily be imposed regarding crimes covered by the legislation…

… As to what factors amount to "substantial and compelling" circumstances within the contemplation of the legislation the court stated that all factors traditionally taken into account by courts were still relevant and that the "cumulative impact of those circumstances may justify a departure"'.[5]

It has also been held, in support of the need to obtain appropriate information which may bear on the issue, that:

'[W]here s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present….'[6]

Although life imprisonment is not the minimum sentence prescribed in the present matter, the above reasoning holds good for any prescribed sentence. The summary in *Malgas* is a handy guide to the basic approach to be taken:

'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.'[7]

[16] It is clear that diminished criminal responsibility is 'not a defence but is relevant to sentence because it reduces culpability'.[8] Counsel for the accused placed strong reliance on cases which held that, where diminished responsibility is found, the deterrent effect of a sentence on the accused or on others who may

[5] *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) para 17 & 18, *S v Malgas* 2001 (1) SACR 469 (SCA).
[6] *Rammoko* at para 13.
[7] *Malgas*, Subpara I of para 25, p 482. This approach was approved by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC) para 40.
[8] Per Cloete JA in the minority judgment in *Venter* at para 47.

find themselves in a similar situation 'is not an important factor'.[9] This approach was not followed by the majority in *Venter*. Even if it is correct, it relies for its force on a need to find as a fact the extent of the diminished criminal responsibility. This is 'diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of that wrongfulness'.[10] It was held in *Venter* that diminished criminal responsibility 'is not a definite condition. It is a state of mind varying in degree that might be brought about by a variety of circumstances'.[11] In each case the question is the extent, or degree, to which the particular circumstances reduced the powers of restraint and self-control of the accused. This means that the facts of each case must be considered on their own merits. This was elegantly summarised in *Mnisi* as follows:

'Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self control.'[12]

[17] I was invited to accept that the *ipse dixit* of the accused was to the effect that his criminal responsibility was diminished. He does not, however, say so in terms. What he says is that he was 'severely emotionally overwrought' and was 'emotionally disintegrated' whatever these phrases may mean. He also significantly said 'I was still able to differentiate or appreciate between right and

[9] *Ibid* at para 61. See also *Mnisi v The State* [2009] 3 All SA 159 (SCA) at para 34.
[10] Per Mlambo JA in *Venter* at para 21.
[11] Per Nugent JA para 65.
[12] Para 5.

wrong and I was able to act in accordance with such appreciation'. I therefore need to evaluate the facts of the case to see whether there was a reduction in the capacity of the accused to appreciate the wrongfulness of his actions and to act in accordance with that appreciation.

[18] Boiled down to their essence, the facts, as related by the accused, are as follows. There was a history of infidelity on the part of his fiancé. She claimed that her affair had ended. He discovered that this was not so. He phoned her as a result and she said that she wanted to terminate her relationship with him. He left duty two hours early, taking his firearm with him. He persuaded her to leave her place of employment and return with him. It is not clear where she was to go since he was to alight at the KwaDlangezwa turnoff. He did not say whether they conversed during the various legs of the journey. She was sending SMS messages during the trip and clearly did not want him to know who the exchanges were with. When he alighted he was confronted by members of the Correctional Services staff who gave him a command to surrender his firearm which he ought not to have taken from his workplace. He refused to do so and the employee who was a close friend of the deceased's lover tried to grab his firearm. When the accused retreated, this person opened fire. The accused drew his firearm and shots were exchanged. The vehicle carrying the deceased started to move off. He jumped onto the back of the vehicle which stopped after about 50 metres and the driver evacuated and ran away. He then entered the vehicle and was shot on the foot or leg whilst doing so. He ordered the passengers to duck and shot at the deceased because he wanted to 'die with her', being 'severely emotionally overwrought'. He did not want to die alone and leave the deceased with her lover. Although he was 'emotionally disintegrated', he appreciated that what he was doing was wrong and could act in accordance with that appreciation.

[19] From all of this it is clear that the trigger for the shooting was his stated belief that he might die. This arose, he says, from being shot on his 'foot and legs' after he resisted a lawful command to surrender his firearm. He does not say why he resisted doing so. He was not entitled to retain it. He hints that it was because one of the people demanding it was a friend of Mabuyakhulu. This is certainly not the only inference to draw. There were other colleagues from Correctional Services present as well. The parts of his statement on which he relies for a finding of diminished responsibility are when he says that he was 'severely emotionally overwrought' and was 'emotionally disintegrated'. What is crucial is that, in the midst of these events and despite his emotion, he says that he was still able to appreciate the wrongfulness of his conduct and to act accordingly. When he realised that he was under attack, he entered the vehicle with the intention to kill the deceased. He was clearly also able to appreciate the danger to others so as to warn them to duck whilst he shot at the deceased.

[20] It is not clear that he believed he would die. Certainly being shot on the foot and legs (and he does not say where these shots landed) would not likely give rise to that belief. The belief, more probably, was that those shooting at him may at some stage land a fatal shot. It is curious that, whilst he says he was attempting to take cover, he ceased defending himself by shooting back at his assailants and decided to kill the deceased. He was clearly motivated by jealousy in deciding that, if he should die, his fiancé must not be left alive to continue her relationship with her lover and the lover should not have what he, the accused, could not have.

[21] Unlike in so many cases involving one lover killing another, there was no history of abuse. The history was of the deceased's infidelity. This took place while they were not yet married, even though part of the ilobola had been paid and a child had resulted from the union. The history was also of the accused's

jealousy and his refusal to accept that the deceased may desire someone other than him. This is what prompted him to leave work early and fetch the deceased. His primary motivation was to prevent the desire of his fiancé to have a relationship of her choice if he should die. He decided to rather kill the deceased (and risk killing the complainant in count 1) than to either simply stay in the vehicle in the hope that his assailants would stop shooting for fear of killing innocent occupants or to shoot back at them. In my view none of this establishes that the accused had 'diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of the wrongfulness'.[13] His *ipse dixit* is to the contrary.

[22] The cases relied upon by counsel for the accused all have different facts. In *Mnisi* the sentence was reduced from eight years to five years on appeal. In that matter, there had also been a history of infidelity which the appellant thought had been resolved. The appellant came across his wife and the deceased embracing in a vehicle and immediately drew his firearm and shot the deceased. At the time he was gripped by emotion. In the present case, the accused had time to reflect on the situation between the previous night and the time of the incident. He even had time to reflect after suspecting that she was communicating with her lover by cellphone in the taxi. He left her on the transport but, while being shot at, re-entered the vehicle and decided that she should not be left alive if he was to die. *Mnisi* lost control of his 'inhibitions' whereas the accused said that he could act in accordance with what was right and was goal directed. *Mnisi* was convicted on the basis of *dolus eventualis* whereas the accused correctly accepted that he had the direct intention to kill the deceased. The accused did not act out of rage, but out of jealousy and frustration that he might die and that his rival might enjoy a relationship that he could not enjoy. There is no doubt that his emotions were

[13] See note 10 *supra*.

running high but his statement does not go so far as to show that his actions 'were the product of emotional stress'.[14]

[23] In *Venter* the appellant had attempted to kill his wife and had killed his two children. He had been accused of rape in Burundi and, after being granted bail in that matter and returning home, felt that his marriage had deteriorated and was suicidal. He had consumed alcohol and had a dispute with his wife. He said that the next thing he knew he was waking up in hospital and being informed of the death of his children. His wife had told him that if he was convicted of the Burundi offence, she would divorce him and take the children with her but had supported him through the Burundi incident and stood by him until the day of the offence. He had sobered up by the time of the incident and had been calm when he shot his son and wife and had taken careful aim at his fleeing daughter. It was held that he was aware of what he was doing. His effective sentence of 10 years' imprisonment, in a matter where the minimum sentence prescribed was 15 years, was increased on appeal to 18 years, although one of the three judges dissented strongly.

[24] In *S v Ferreira & Others*[15] the appellant was an abused woman who had come to the conclusion, supported by expert evidence concerning the responses which such ongoing abuse brought about, that the only way to preserve her bodily integrity was to kill the deceased, her husband. She contracted people to kill him and they had done so. They all pleaded guilty. The trial court held that there were no substantial and compelling circumstances which should cause it to reduce the prescribed sentence of life imprisonment. On appeal it was held that a six year sentence, wholly suspended, was appropriate due to diminished responsibility but that, since she had already served part of the sentence, she was

[14] *Mnisi* at para 6.
[15] 2004 (2) SACR 454 (SCA).

sentenced to six years' imprisonment of which any portion which had not been served was suspended for three years on certain conditions. The court held that the criterion for assessing moral blameworthiness where diminished responsibility existed was subjective.[16] A court 'must look solely at what an accused believed and intended when deciding for purposes of sentence whether moral blameworthiness has been reduced'.[17]

[25] In *S v Marx*,[18] the 41 year old appellant had been married to his wife, the deceased, for 19 years. The deceased's feelings for the appellant had deteriorated markedly. She abused him verbally, was aggressive towards him and engaged in his public humiliation, calling him a 'kruppel gat'. He had injured his hip in a motor vehicle accident which left him with a permanent limp. She initiated a divorce action. Allegations in the community surfaced of the deceased's infidelity but he did not wish to believe them. These allegations were not groundless. The appellant wished to save the marriage but the deceased was implacable and the health of the appellant declined. The deceased taunted the appellant with her wonderful relationship with one Basson, saying that he had given her the best sex of her life. As a result of a confrontation to this effect, the appellant broke down, cried and begged the deceased to return to him and save the marriage. Her response was to tell him to get on with committing suicide by either shooting himself or taking poison. He went and fetched poison, which he ingested but when the deceased realised that he had done so, she phoned a neighbour who came to the assistance of the appellant. Thereafter a drowsy appellant retreated to his bedroom but decided to stay awake to see whether the deceased would leave him during the night. He went to the spare room to talk to the deceased who swore at him. He returned to her room on three more occasions but was rebuffed. He noticed his revolver lying on his bed and wanted to commit

[16] At para 44.
[17] *Ferreira* at para 44.
[18] 2009 (2) SACR 562 (ECG).

suicide. He returned to the deceased's bedroom with the revolver, knelt at the end of her bed and the deceased encouraged him to shoot himself. He had the feeling that the revolver was being pulled from his head and his next memory was of seeing a flash from the gun and hearing a shot. A psychologist testified that it was probable that the appellant's judgment was impaired and his ability to act in accordance with his knowledge of right and wrong was diminished to a significant extent. This was accepted by the appeal court. On appeal his sentence of 10 years' imprisonment was set aside and the matter was remitted to the trial court for the imposition of a sentence of correctional supervision under s 276(1)(h) of the Act.

[26] In the light of all the facts and the legal principles, I find that, whilst the accused was clearly emotional about the infidelity of the deceased and clearly found repugnant the thought that the deceased and Mabuyakhulu might be free to pursue a love relationship, no diminished criminal responsibility has been established. This, therefore, distinguishes this matter from those dealt with above and does not, in itself, give rise to substantial and compelling circumstances. To assess whether they are present, along with his emotional state, other aspects relevant to sentence must be evaluated. These are 'the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.'[19]

[27] The fact that he pleaded guilty is of little moment in the circumstances. He was caught red handed with a number of eye witnesses present, although it counts for something that he did not unduly burden the state with the need to prove the charges. He did express remorse and attempted to make some recompense. To that must be added the significant character evidence emerging

[19] Per Friedman J in *S v Banda* 1991 (2) SA 352 (B) at 355A-C, as approved in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 10. For the more traditional formulation, see *S v Zinn* 1969 (2) SA 537 (A) at 540G.

from the two reports and the personal circumstances mentioned above. He has clearly been a stable, productive member of the community and engaged in uplifting actions over a long period of time. He has supported family and community members and wishes to support his child from the deceased and to take an active role in her life. He is a first offender and does not seem to display a propensity to violence. It seems clear that the accused is a candidate for rehabilitation. Of course, the emotional struggle of dealing with the infidelity and lack of honesty of the deceased must also be taken into account.

[28] An aggravating factor, however, is that, whilst he was able to control his actions, the accused treated a defenceless woman as a chattel who existed purely for his benefit. He did not accord her the dignity of choice concerning her life. She had clearly told him that she wished to terminate their relationship. She had accompanied him when he requested it but we do not know why she did so and whether or not this may have been under duress. He did not accept that she was entitled to send text messages to anyone whom she chose without being answerable to the accused. He regarded it as his right to know who she was communicating with and to bar her from communicating with her lover.

[29] A 2012 study by the Medical Research Council showed that, of every two women who are murdered, one is killed by her partner. This means that the proprietary attitude of men towards women has reached extremely serious proportions in our society. This attitude makes a mockery of the right to life accorded by the Constitution to all within our borders.[20] If a person kills another, this is the ultimate negation of the right to life. This set of attitudes also fundamentally undermines, during life, many of the other rights of women, including the right to equality, the right to human dignity, the right to freedom and security of their persons, the right not to be subjected to servitude, the right

[20] The Constitution of the Republic of South Africa, 1996.

to privacy and the right to freedom of association contained in the Bill of Rights.[21] This proprietary attitude is inimical to a democratic society based on values of human dignity, equality and freedom.[22] It is clear that, in addition to depriving the deceased of her right to life, the accused infringed at least some of these other rights afforded to the deceased by our Constitution. It is my view that the nature of the offence and the interests of society demand that the crimes committed by the accused be severely punished.

[30] In *Mudau v S*[23] the Supreme Court of Appeal recently held as follows:

'Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. 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* 1997 (3) SA 341 (SCA) at 345A-B when this Court said the following:

"Women in this country have a legitimate claim 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 diminishes the quality and enjoyment of their lives."'

This says clearly what I have attempted to highlight above.

[31] The question arises as to the deterrent effect of any sentence, both on the accused and in respect of others who may find themselves with similar urges. Since the accused could appreciate the consequences of his actions, deterrence is an appropriate factor to take into account. The accused has given no indication that he has come to realise that his attitude to the deceased was inappropriate. He

[21] Sections 9, 10, 12, 13, 14 and 18 of the Constitution.
[22] Section 7(1) of the Constitution.
[23] (547/13) [2014] ZASCA 43 (31 March 2014) para 6. See also *S v Baloyi* 2000 (1) SACR 81(CC) at para 11.

may well constitute a danger to future fiancés or lovers. In addition, men within society in general can benefit from the deterrent effect of a sentence passed on the accused if they encounter situations where they are consumed by jealousy or cannot accept their rejection by a woman they claim to love.

[32] In considering an appropriate sentence it is necessary to bear in mind that, in providing for correctional supervision and a range of non-custodial sentences, the legislature has distinguished between offenders who ought to be removed from society and those who, although deserving of punishment, do not.[24] The first duty of a sentencing court is to decide into which category the accused falls. Having anxiously considered all of the above factors, including the reports from the authorities and the submissions of counsel for the accused, it is my view that, despite the recommendation of the probation officer, the accused falls into the category of those who must be removed from society.

[33] The aggravating features of the crimes of which the accused has been convicted, the need for deterrence and retribution and the interests of society that women should be able to make free and unfettered choices without fearing reprisal must be weighed with the mitigating factors arising from the 'emotional disintegration' and other personal circumstances of the accused. In addition, since the accused is a candidate for rehabilitation, it is in the interests of society that he be allowed to once more become a productive member of society after having served a sentence of imprisonment and being given the incentive to do just that. In the light of all of these, I am of the view that, if I were to impose the minimum prescribed sentence of 15 years' imprisonment, an injustice would result. I therefore find that there are substantial and compelling circumstances as envisaged by s 51(3) of the CLA.

[24] *S v R* 1993 (1) SACR 209 (A) 221*h*; *S v Bergh* 2006 (2) SACR 225 (N) 235*e*.

[34] Taking into account all the circumstances of the case, I consider a sentence of three years' imprisonment appropriate for count four and one of 10 years as appropriate for count five. It is appropriate that the sentence for count four is made to run concurrently with that imposed for count five as being part of the same unfolding tableau on the day in question.

[35] In the result, the accused is sentenced as follows:

1. On count 4 the accused is sentenced to 3 years' imprisonment.
2. On count 5 the accused is sentenced to 10 years' imprisonment.
3. The whole of the sentence on count 4 is ordered to run concurrently with that imposed in respect of count 5.

DATE OF HEARING: 14 and 16 August 2012 and 23 April 2014.

DATE OF JUDGMENT: 24 April 2014.

FOR THE STATE: Adv Khathi of the NDPP.

FOR THE ACCUSED: Mr Ngobese, attorney of Ngobese and Company.