

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION

CASE NO: A139/2019

(1)	REPORTABLE: Yes / No:
(2)	OF INTEREST TO OTHER JUDGES: Yes / No
(3)	REVISED.
	<u>31 March 2023</u> _____ DATE
	SIGNATURE

In the matter between

**TUMO, ELIAS NONE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**RAMLAL, AJ (DOSIO, J concurring):**

[1] Tumo, Elias None, (hereinafter referred to as the appellant), was tried with two others in the Regional Court in Soweto on the following charges:

Count 1: Murder

Count 2: Malicious injury to property;

Count 3 and 4: Assault with intent to do grievous bodily harm;

Counts 5 and 7: Kidnapping

Count 8, 9 and 10: Rape (appellant only)

Count 11: Unlawful Possession of a firearm (appellant Only) and

Count 12: Unlawful possession of ammunition: (appellant only)

It was alleged that the appellant and his co-accused acted in the furtherance of a common purpose.

[2] The appellant pleaded not guilty to the charges. He was legally represented during the trial.

[3] On 26 July 2012 the appellant was convicted as charged except on count one where he was convicted of a competent verdict (culpable homicide). The appellant was sentenced to life imprisonment.

[4] A Notice of Appeal in respect of both conviction and sentence was filed by the appellant on 7 August 2012.

[5] The appellant appeals the conviction and sentence on the grounds that the court *a quo* misdirected itself by finding that the State proved its case beyond a reasonable doubt in that the court *a quo* disregarded material discrepancies in the State's evidence.

[6] In respect of the sentence, the appellant states that the Magistrate erred by not properly considering the appellant's personal circumstances, more specifically, the age of the appellant, when the sentence of life imprisonment was imposed.

[7] ***Summary of the Evidence:***

### **7.1 Lebohang Meli ('Lebohang')**

This witness identified himself as the brother of the deceased. He testified that he was called by the deceased on 30 October 2010 at around 02h00-02h30. The deceased informed him that he had been injured. The witness then enlisted the assistance of one Lebohang Morase who had a motor vehicle, to take him to the place where the deceased was.

They parked on the side of the park. The witness called out and met the deceased who was injured. The deceased pointed out that someone by the name of 'Nkepe' had assaulted him. The deceased became unconscious before he could identify the other attackers.

The witness further stated that accused three was verbally abusive to him. He also saw accused two in possession of a panga. The appellant was also present. Although it was in the early hours of the morning, he was able to see clearly in the moonlight.

The witness began fleeing from the scene. He ran for about 10 to 20 metres when the car driven by his friend, Morase, stopped at his side. The appellant and accused three were throwing stones at the vehicle.

All three accused then went back to the deceased. The appellant and accused three threw stones at the deceased while accused two assaulted the deceased with a panga. The appellant and the other two accused were approaching the vehicle again, when the witness managed to board the vehicle and they drove away.

The witness received a call from his wife's sister who informed him that the appellant was looking for him. The witness called the appellant who confirmed that the witness's wife was kidnaped by him and that the witness should come to the Mapetla Park. When he arrived at the park, he found that his deceased brother has already been taken to the mortuary.

On the Monday thereafter he was on his way to work when he met the appellant. He tried to apprehend the appellant, but he failed. He went to the police who accompanied him to where the appellant could be found. He searched the shacks with the police, but the appellant could not be

located. As they were about to leave, the witness spotted the appellant who was in possession of a firearm. The appellant pointed the firearm at the witness. The witness managed to fend off the appellant with a broken bottle that he had in his possession. The appellant was arrested by the police officers. The firearm that the appellant dropped on the ground, when the witness threatened him with a broken bottle, was also recovered by the police at the time of the appellant's arrest.

## **7.2 Lebohang Morase**

The second witness testified that he received a call from his friend, Lebohang Meli on 29 October 2010. His friend needed assistance to transport his injured brother (the deceased) to hospital.

He drove his friend to a place in Protea and when the deceased appeared, he was full of blood. The deceased pointed out the people who had caused his injuries. These people are unknown to this witness.

The witness also testified that the visibility at the time was bad as there was only light from the stars. The place was unknown to the deceased so he could not give details of the area where the deceased was found.

The witness gave an account of three people who attacked his friend at the place where his friend alighted the vehicle. He managed to get his friend back into the vehicle and drive away. However, these three people threw bricks at the vehicle that he was driving and the cost to repair the damage to the vehicle was R6700-00.

During cross examination the witness did not see anyone assault the deceased and he also confirmed that he did not see anyone assault Lebohang Meli by throwing stones at him. His further response in cross examination was that he did not see the appellant and the two accused throw bricks at the vehicle that he was driving. He relied on Lebohang Meli who told him that the appellant and the two accused were the persons who caused damage to the vehicle.

### **7.3 Sikheto Lazarus Baloyi**

The third witness (Baloyi) called by the State was Detective Sergeant Baloyi. He testified that at around 15h00 on 1 November 2010 he was approached by Lebohang Meli at the police station about the whereabouts of a suspect in a murder and rape case. He accompanied Lebohang Meli to a place where Lebohang Meli pointed out the appellant.

The appellant drew a firearm and before the appellant shot, Baloyi fired a shot and the appellant began running. Baloyi gave chase and the appellant tripped on a wire and the firearm fell to the ground. Baloyi arrested the appellant and Lebohang Meli picked up the firearm and handed it to Baloyi.

Lebohang Meli and Baloyi then went back to the house where they found that the occupants had barricaded themselves inside. Baloyi called for backup and they succeeded in opening the door and they entered the premises. Accused 3 was positively identified by Meli. The premises were searched and nothing of relevance was found.

The firearm, magazine and bullet were booked into the exhibit register by Baloyi at the Protea Glen police station. This firearm was later sent to the Forensic Sciences Laboratory for the tests to be conducted thereon.

### **7.4 Peter Moloji**

The fourth witness called by the State was Peter Moloji ('Moloji'). He testified that on 29 October 2010 he was with Jemima and another male person at Jemima's place. There was a knock on the door and the person outside called Jemima by name and asked her to open the door. Before Jemima could open the door, the door was kicked open. The appellant and the two accused, as well as three other people entered the room. Moloji knew five of the six people who entered the premises, as they were from the same society. They were looking for Lebohang. Jemima said that she did not know where Lebohang was, but Peter might know. The appellant then came over to Moloji and struck him with the butt of a firearm

three times on his head. It was a small injury, but it was bleeding. The other two accused also assaulted Moloji with traditional sticks. According to Moloji accused three assaulted him on the instructions of accused two. He sustained swollen arms and he had bruises on his back. He did not seek medical attention for these injuries.

Jemina and Moloji walked ahead of the appellant and others for about 15 minutes when Jemina pointed out the house where Lebohang lives. They knocked and asked to see Lebohang. The female person, Puleng, who used to live with Lebohang opened the door and informed them that Lebohang was not there. They instructed Puleng to get dressed and take them to where Lebohang lived. When they got out of the house, Jemina did not accompany Moloji and Puleng as they led the way to where Lebohang lived in Protea.

When they reached a traffic light, they instructed Moloji to turn back. He complied. He walked back to Jemina's house where he spent the night. He returned to his house the next day. The appellant and the two accused as well as the three men then proceeded on their way with Puleng.

During cross examination Moloji explained that he did not report this assault to the police as he was afraid that the appellant and the accused would return and assault him further. Although he went to work on the day after the assault, he was sent home as a result of his injuries. Upon further questioning, Moloji was not able to give a satisfactory reason for his failure to go to the doctor to attend to his alleged injury. In a final attempt to explain his failure to seek medical attention, he stated that he did not have the money to consult a doctor.

It also emerged during cross examination that Jemina volunteered to show the appellant and the others the place where Lebohang lived. She was not acting against her will or on the instructions of the appellant nor the other two accused or the other three men.

## **7.5 Jemina Leswetsa**

This witness gave testimony that she was drunk and did not see Moloji at her home on the night when the appellant and about sixteen others arrived at her place looking for Puleng.

Her evidence is that the appellant had a traditional stick with him as did the other people who came to her house. She took the appellant and the others to where Puleng lived. She then went back to her house with Puleng's 8-year-old child.

At first, she said that Puleng didn't tell her anything about what happened after she left on that night. She later said that Puleng arrived at her uncle and aunt's place on the Saturday after the incident and told her that the appellant raped her. Puleng also mentioned that after the incident she called Lebohang and he arrived.

In cross examination the witness was steadfast in her version that she did not witness any assault taking place at her house as she was asleep. She also maintained that the appellant asked to see her cousin, Puleng with whom the appellant was in a love relationship. The witness said that she took the appellant to Puleng's residence:

*"Were you forced yourself to go from Phiri to Mapetla where this lady Puleng resides? They did not force me.*

*You were walking wilfully willingly? Nobody forced me I did that willingly.<sup>1</sup>"*

## **7.6 Gansi Puleng Leswetsa**

This witness ('Puleng') testified that at about 03h00 on 29 October 2010 she saw Jemina in the company of about eight or nine male persons. One of them, the appellant, was pointing a firearm at Jemima whilst they were asking her to point out a shack. Jemina caught sight of Puleng and pointed her out to these male persons.

The appellant instructed Puleng to open the security gate. She complied with his request and all these male persons entered her room. They were

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<sup>1</sup>Caselines 003-138 Lines 13-16

looking for Lebohang. The witness informed them that Lebohang was not there but that she was able to take them to his place. They instructed her to dress so she could accompany them. Her evidence is that Moloji was outside of the shack at that time. When the appellant and others wanted to leave with her, she asked Moloji to accompany her. Moloji refused saying that these people have threatened to kill her and if he accompanies her his life would be in danger too.

According to this witness, Moloji and Jemina left together. The appellant, and others then asked her to show them where Lebohang lives. They said they wanted to kill Lebohang's mother so that Lebohang would return. The witness took them to where Lebohang resided. Before they arrived at the house, the appellant said that he wants to show her the corpse of Lebohang's brother, whom he killed.

As they arrived at the park where the corpse was, Lebohang called the appellant on the appellant's phone. The appellant then challenged Lebohang to a fight.

The witness talked to Lebohang over the phone about where she was with the appellant and others. The appellant and the witness went to the witnesses' residence where the appellant had intercourse with her thrice, without her consent. Thereafter the witness went to Jemina's place where she related what the appellant had done to her. The matter was reported to the police and the witness was taken to the doctor for the necessary examination to be conducted.

During cross examination the witness confirmed that Puleng was her cousin. The witness could not explain why she did not enlist the assistance of a man whom she knew to be a colleague of her neighbour when they met with him before she and the appellant entered her room. Her evidence regarding where the appellant had his firearm whilst he was with her in the room changed during cross examination from the appellant having the firearm on his hip to him keeping the firearm under the pillow when he slept on her bed.



## **7.7 Francina Petsana**

Ms Petsana testified that she owns a shebeen and on the 30 October 2019 she was seated with the deceased and his friend, Skolana. The deceased and his friend went outside and when they returned, Skolana informed Ms Petsana that he was leaving as the deceased wanted to fight with him. After Skolana left the witness asked the deceased to leave too, because he was intoxicated.

This witness related that a patron, Nkepe, and the deceased were involved in a physical fight outside of the tavern. The appellant and his co-accused stopped him and reprimanded him.

The appellant and the co-accused were inside the tavern when the deceased and another patron were embroiled in a fight outside the tavern. Nkepe eventually returned and related to the witness, the appellant and the co-accused what had happened outside. He explained that he had assaulted the deceased with a panga while the deceased was trying to run away.

After a while the deceased and his brother Lebohang came to the shebeen. The deceased had blood on his face. He pointed out Nkepe to his brother, as the person who had assaulted him. Lebohang and the deceased then left. When they left, they threw bricks at the shack and nobody could leave. The appellant and his co-accused went out and chased the deceased and his brother away when they stopped throwing bricks at the shack.

The appellant and his co-accused returned. A short while thereafter they left with the two girlfriends who were still at the shebeen.

The witness stated that she noticed that the appellant and others had traditional sticks. She did not notice anyone carrying a firearm.

The witness said she did not see the appellant or any of the co-accused assault the deceased or throw stones at anyone or any car as she was inside for most of the time.

#### **7.8 Buseni Mhlaba**

Warrant Officer Mr Mhlaba testified that he is a warrant officer stationed at the Protea Glen police station. He is the investigating officer of this case.

He confirmed that the arresting officer booked in a firearm with a magazine and one live round of ammunition into the police exhibit register. Warrant Officer Mhlaba took this pistol, magazine and live round of ammunition to the Forensic Science Laboratory (FSL) in Pretoria. He signed the exhibit register when he removed this exhibit. An extract of the exhibit register was shown to him and he confirmed the entry therein.

#### **7.9 Dr Dingi Konsal Nkondo**

This witness testified that as a medical doctor employed at Diepkloof Forensic Pathology Services, his main duties were to conduct post mortem examinations, attend the scene of the incident and testify in court. She confirmed that she conducted a post-mortem examination on the deceased and that she compiled a report of her findings. She determined that three of the five wounds on the body of the deceased were caused by a blunt instrument. She also confirmed that a brick would qualify as a blunt instrument. Her findings were that the wound caused by a sharp instrument was unlikely to have been caused using a panga, instead, it was more consistent with a knife being used. The measurement of the wound in terms of the depth and width thereof is what informed her findings

The doctor also explained that despite the wounds that were inflicted, if the deceased had bled rapidly, this would accelerate his demise. And lastly that alcohol causes the blood vessels to dilate so bleeding may be more severe when a person is intoxicated.

### **7.10 Janie Loubscher Scheepers**

Warrant Officer stationed at the Forensic Science Laboratory (FSL), Ballistics section in Pretoria. Of relevance regarding the evidence of this witness is that the serial number on the firearm that he received on which the requisite forensic testing had to be conducted, differed from the serial number given according by the officer who handed in the firearm for testing. The witness was adamant that the numbers as contained in his statement, *albeit*, that it differed from that given by the officer Mahlangu, was the correct number. Sergeant Baloyi, who testified earlier during the trial was recalled to confirm the serial number of the firearm that he handed in at the FSL. He confirmed that the serial number on the firearm that was tested by Scheepers did not correspond with the number on the firearm that he seized at the crime scene.

### **7.11 The Appellant**

The appellant testified that he was with his girlfriend, at the shebeen of Francina Petsana. The deceased had an altercation with a person called Nkepe. The deceased left the tavern. Nkepe also left a short while later. Nkepe returned a few minutes later, carrying an axe. Nkepe declared that he had found the deceased outside and he fought with him.

Nkepe was sitting at the tavern, having drinks, when Lebohang Meli, the deceased's brother, came in and stabbed Nkepe. Lebohang then left the shack. Immediately thereafter stones and bricks were thrown at and into the shack. He did not see who was throwing these stones as he remained inside the tavern with others while the door was closed.

The appellant denied the version of the witness Lebohang that the appellant and his co accused physically attacked and caused the death of the deceased.

The appellant explained that he went to Jemina's house on his own. Jemina was at home with her father and her children. He asked Jemina to accompany him to his girlfriend, Puleng's place. Jemina agreed and the

two of them walked to Puleng's residence. When they arrived at Puleng's place, Puleng asked Jemina to take Puleng's child with her. The appellant and Puleng remained at Puleng's place. They were in a relationship with each other and they had consensual intercourse with each other.

The appellant denied that he possessed a firearm on the day or at all. He confirmed that he was arrested by Sergeant Baloyi and that Lebohang Meli was present at his arrest.

#### **7.12 Disema Ntsase also known as Mochito (Accused two)**

Accused two testified that he was in the shebeen on the night when the alleged murder and assault took place. He saw Nkepe assault the deceased and he reprimanded Nkepe. Nkepe and the deceased left the shebeen and Nkepe returned a short while later, carrying an axe. Nkepe announced, in general, that he had chopped the deceased. About ten minutes later, Ntsase saw Lebohang Meli at the door with an injured person who pointed out that Nkepe had injured him. Lebohang then stabbed Nkepe with a knife. After a short scuffle Lebohang went outside and bricks were then thrown at the premises. Ntsase remained inside. The owner of the shebeen informed them that she was shutting down the place for the night. He left the place with the appellant and their respective girlfriends. He bears no knowledge of any of the other incidents that occurred that night. Early the next morning, the appellant informed him that he received a call to go to Mapetla.

On Monday, the police arrived with Lebohang who pointed him and accused three out as the people who were with the appellant on the night of the incident. The appellant, who was covered in blood, arrived and the police arrested the appellant, Ntsase and accused three.

#### **7.13 Nthabiseng Amelia Mahoa**

This witness confirmed that she knew the appellant and his co-accused. On the day of the incident she was seated at the tavern with the appellant and his co-accused as well as a female whom she did not know well.

The gist of her evidence was that the appellant and his co-accused were seated inside the tavern when the alleged assault on the deceased took place. She also testified that she left the tavern with the appellant and accused two and that they went to their respective residences where they were neighbours. And lastly, that she knew that the appellant received a call and he informed them early in the morning that he was leaving his place in response to the call that he received.

#### **7.14 Ramotsabi Maredi (Accused three)**

The witness testified that he arrived at the tavern at about 17h00 on 30 October 2010. There were many people at the tavern. He was drinking for a long time and he ended up sleeping at the tavern. He was awoken by one Kwitsane, who informed him that there had been a fight and the tavern owner stopped the sale of alcohol. He left the tavern and went home to sleep. He testified that he did not know the deceased, but he knew Nkepe. He did not know why Lebohang was implicating him in the murder of the deceased and in the other charges that were brought against him. He confirmed that he and Lebohang were known to each other and they were on good terms.

On 1 November 2010 he was walking past the premises where the appellant and accused two lived. He asked for a cigarette and the appellant said he was going out to buy cigarettes. After he left, people were shouting and the witness and accused two went to see what was happening. At that point, the appellant was already arrested and Lebohang was with the police. Lebohang pointed him and accused two out to the police as the people whom the police were looking for. All this happened in the yard and not inside the premises as State witnesses had said.

He confirmed that he knew Peter Moloi, but he had not seen him for many years. He denied carrying traditional sticks and he denied having assaulted Peter Moloi.

### ***AD CONVICTION***

[8] The trial court evaluated the evidence and concluded that the State witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See **R v Dhlumayo & another** 1948 (2) SA 677 (A) at 705-706).

[9] It is well established that, where a trial court makes findings on credibility of a witness, the court of appeal will take into account that the trial court had the advantage of seeing the witnesses give their oral evidence, which is not available to the court of appeal. The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence than a court of appeal, and such assessment must take precedence unless there is clear and demonstrable misdirection.

[10] It appears from the judgment of the court *a quo* that:

10.1 The issue of identity that was in dispute in respect of counts 1, 2 and 3 was decided in favour of the complainants. Mr Lebohang Meli testified that it was dark around the scene, but visibility was clear as the shining moon served as a source of light.

The distance between Mr Lebohang Meli and the appellant at the time of the attack, according to Mr Lebohang Meli was about twenty metres. Mr Lebohang Meli was able to give the court an account of the role played by the assailants, including the role played by the appellant. In particular, he said that when accused two was approaching his brother

with a panga, the appellant was taking stones from the ground and hitting his brother<sup>2</sup>.

The evidence of Mr Lebohang Meli on its own identified the appellant as one of the perpetrators at the scene of the crime. He was able to see the appellant when he was involved in the attack of the deceased, as well as when the appellant attacked Mr Lebohang Meli and damaged the vehicle of Morase.

The facts show that the moon was shining, providing a source of light, the attacks happened in close proximity of both Mr Lebohang Meli and Morase and Mr Lebohang Meli had ample opportunity to observe the appellant of whom he had an in-depth prior knowledge.

Consequently, the trial court's finding that the complainant's genuineness and ability to give a detailed version of the events justified it in accepting his version as a trustworthy and reliable account of what had happened. The magistrate evaluated the evidence in respect of count one and found that the evidence supported a conviction on the competent verdict of culpable homicide. I have no reason to disagree with the findings of the trial Magistrate on counts one, two and three.

10.2 The magistrate readily accepted the evidence of Peter Moloji regarding his allegation of being kidnapped and assaulted without having regard to the contradictory evidence tendered by the State witness, Jemina Leswetsa to the effect that Peter Moloji was not at her house at the time when he claims to have been assaulted<sup>3</sup>;

10.3 The magistrate failed to consider that no medical evidence was tendered for the alleged serious injuries that Peter Moloji suffered. According to him, he had been assaulted three times with a firearm on his head. He was assaulted with traditional sticks until he felt his arms

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<sup>2</sup>Transcribed record page 74 lines 6-7

<sup>3</sup>Transcribed record page 185

were broken and his back was green. Despite the serious nature of his injuries emanating from the assault that the appellant and the co-accused inflicted on him; he did not see the need to seek medical assistance;

- 10.4 Despite Jemina Leswetsa having clearly stated that she went willingly to show the appellant where her cousin Puleng lived, the magistrate failed to give this evidence the necessary consideration in determining whether the appellant and his co-accused had committed an act of kidnapping against her;
- 10.5 The magistrate accepted the evidence of Gansi Leswetsa despite her being a single witness. The evidence of her cousin, Jemina, established that the appellant and Gansi had a love relationship with each other, even though Mr Lebohang Meli was also in a relationship with Gansi. Gansi denied this relationship. Her evidence regarding the time that she went to her room and her account of disregarding the people who were nearby her room raises questions about the veracity and reliability of her evidence. The appellant's version that he was in a love relationship with Gansi is probable as he had no reason to admit having intercourse with her since there was no other evidence linking him to this occurrence.
- 10.6 The discrepancy in the evidence regarding the firearm that was registered in the police exhibit register (SAP13) and the firearm on which the ballistic testing was done was not given the due consideration by the court *a quo*. The difference in the serial numbers was overlooked by the magistrate. The State failed to prove that the firearm that was booked into the SAP13 register is the same firearm for which the ballistic report was prepared in this case.
- [11] As for the evidence of the appellant, *"in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the*



*observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."* (S v Shackell 2001 (4) SA 1 (SCA) para 30).

[12] For the reasons stated above, the court *a quo* clearly misdirected itself by finding that the State proved its case beyond a reasonable doubt in that the court disregarded material discrepancies in the State's evidence relevant for the determination of the appellant's guilt in respect of counts 4 to count 12.

### **AD SENTENCE**

[13] In an appeal against sentence we must determine whether the trial court exercised its discretion properly, and not whether another sentence should have been imposed (S v Farmer [2002] 1 All SA 427 (SCA) par 12).

[14] The discretion to impose a sentence is that of the trial court. A court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court (S v Anderson 1964 (3) SA 494 (A) 495; S v Whitehead 1970 (4) SA 424 (A) 435; S v Giannoulis 1975 (4) SA 867 (A) 868; S v M 1976 (3) SA 644 (A) 648 et seq; S v Pillay 1977 (4) SA 531 (A); S v Rabie 1975 (4) SA 855 (A) ).

[15] Unless the court of first instance is clearly wrong, a court of appeal will not readily differ from a trial court's assessment of the factors to be regarded or the value to be attached to them.<sup>4</sup>

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<sup>4</sup> S v Berliner 1967 (2) SA 193 (A) at 200D.

[16] In the matter before the court, there is no indication on the record as to what factors were considered or how the aggravating and mitigatory circumstances were evaluated in arriving at the sentence of life imprisonment that was imposed. The pronouncement of the sentence was “All counts are taken as one for sentence and you are sentenced to one life”<sup>5</sup> Before a sentence of life imprisonment is imposed; a court must consider whether substantial and compelling circumstances exist to warrant a deviation from such prescribed sentence<sup>6</sup> No such exercise was conducted by the trial court.

[17] A court misdirects itself if the dictates of justice require that it should have regarded certain factors when considering a proper sentence and failed to do so or that it ought to have assessed the value of these factors differently from the manner that it did. A shockingly inappropriate sentence, in many instances, results from an excessive reliance on one or more of the factors considered in the triad when sentencing. When this happens, the appeal court can consider the sentence afresh.<sup>7</sup>

[18] It is trite law, that sentencing is about striking the correct balance between the crime, the offender and the interests of the community commonly referred to as the triad.<sup>8</sup> A court should, when determining sentence, strive to accomplish and arrive at a judicious counterpoise between these elements in order to ensure that one element is not unduly emphasised at the expense of and to the exclusion of the others. *S v Banda*.<sup>9</sup>

[19] This court must consider an appropriate sentence to be imposed on the appellant for one count of culpable homicide, one count of malicious injury to property and one count of assault with intent to do grievous bodily harm.

[20] The court is obliged to consider various factors in arriving at a suitable sentence, including the seriousness of the offence, the personal circumstances of the appellant and the interests of the community. See **S v**

<sup>5</sup>Transcribed record page 402 lines 5-6

<sup>6</sup>Section 51(3) Criminal Law Amendment Act 105 of 1997

<sup>7</sup> *S v Fazzie and Others* 1964 (4) SA 673 (A)

<sup>8</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G-H)

<sup>9</sup> *S v Banda* 1991 (2) SA 352 (BG) at 355A

**Zinn 1969 (2) SA 537 (A)** and **S v Quandu En Andere 1989 (1) SA 517 (AD)**. In its consideration of an appropriate sentence, the court is mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.

[21] The court must, nevertheless, neither over-emphasise nor under-emphasise any of these principles. It was succinctly expressed as follows in **S v Rabie 1975 (4) SA 855 (AD)** at 862 G: 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'

[22] The personal circumstances of the appellant that were placed before the court are scant: he is twenty-nine years old. He is married and he has two children aged 7 and 4 years. Both these children live with their mother who is dependent on casual labour to earn a living. Before his arrest, the appellant was employed as a security officer who earned R500-00 per week. He has one previous conviction for possession of an unlicensed firearm and ammunition for which he was sentenced in 2006, to a wholly suspended sentence.

[23] The seriousness of the crimes for which the appellant must be sentenced cannot be downplayed, they are serious, and they bear a high degree of violence.

[24] Members of society depend upon the courts to protect them against the infringement of their right to safety and the security of their property as a symbol of an orderly society.

[25] The sentence the court imposes must be one that will not only rehabilitate the accused but it should also serve as a deterrent to other like minded individuals. Members of society must know that the courts will protect their rights. The remarks of Legodi J in **S v WV 2013 SACR GNP** are appropriate, when he said:

“ it is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would be offenders. In our constitutional order every person is entitled to expect and insist upon the full protection of the law.”

[26] In addition to imposing a sentence on the appellant, Section 103 of the Firearms Control Act provides as follows:

“(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;”

[27] As these provisions were ignored, we are of the view that it should be addressed here, and that we should make the order that the court *a quo* should have made.

### **ORDER**

The following order is made:

1. The appeal against the convictions on counts 1, 2, and 3, is dismissed;
2. The appeal in respect of the convictions on counts 4, 5, 6, 7, 8, 9, 10, 11 and 12 is upheld and the convictions are set aside;
3. The sentence of life imprisonment imposed on the appellant is set aside and substituted with the following:

- 3.1 Count 1: Culpable Homicide: Fifteen (15) years imprisonment;
- 3.2 Count 2: Malicious injury to property: Five (5) years imprisonment;
- 3.3 Count 3: Assault with intent to do grievous bodily harm: Five (5) years imprisonment
- 3.4 In terms of section 280 of the Criminal Procedure Act, the sentence imposed on counts 2 and 3 are to be served concurrently with the sentence imposed on count 1. The appellant is to serve an effective term of fifteen (15) years imprisonment
- 3.5 The court makes no determination in terms of section 103 (1)(g) of the Firearms Control Act, 60 of 2000 in respect of the appellant.

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AK RAMLAL  
**ACTING JUDGE OF THE HIGH COURT**

I agree and it is so ordered

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D DOSIO  
**JUDGE OF THE HIGH COURT**

*This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to*

*SAFLII. The date and time for hand- down is deemed to be 10h00 on 31 March 2023.*

Date of hearing: 29 August 2022

Date of Judgment: 31 March 2023

**Appearances:**

On behalf of the appellant: Adv Y Britz

Instructed by: Johannesburg Justice Centre

On behalf of the respondent: Adv E.N Makua

Instructed by: National Prosecuting Authority Innes  
Chambers