REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A 389/2016

In the matter between:

Thabang Tohlang Majoro — Appellant

And

The State

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

8/4/2018 .....

DATE SIGNATURE

JUDGMENT

Maumela J.

1. This is an appeal against both conviction and sentence. The appellant, Thabang Tohlang Majoro , is entitled to an automatic right to appeal in respect of count 1, (murder). He applied for leave to appeal which application was dismissed by the trial court in respect of counts 2 and 3. With legal representation throughout the trial, he appeared before the Regional Court held in Benoni in the Regional Division of Gauteng, (the court *a quo).* He was charged with the following offences:

1.1. Murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 1997: (Act No: 105 of 1997).
1.2. Possession of a firearm and
1.3. Possession of ammunition.

ALLEGATIONS

2. In Count I, the allegations were that upon or about the 10th of June 2013, and at or near Mayfield in the Regional Division of Gauteng, the accused did unlawfully and intentionally kill David Sibuyi by firing a shot at him as a result of which he died.

3. In Count II, the allegations were that upon or about the 11th of June 2011, at or near Kingsway in the Regional Division of Gauteng, the accused did unlawfully contravene the provisions of section 3, read with sections 1, 103, 117, 120 (1) (A), 121 and 151 and scheduled 4 of the Firearms Control Act, 60 of 2000, further read with section 250 of the criminal procedure Act, 51 of 1977, in that appellant had in his possession a firearm, to wit a 9 mm Star Semi-Automatic Pistol, without holding a license, permit or authorization issued in terms of the Firearms Controls Act 60 of 2000 to possess such firearm.

4. In Count III, the allegations were that upon or about the date and place mentioned in count II, the accused did unlawfully have in his possession ammunition, to wit a live round of 9mm Parabellum caliber round ammunition without being a holder of:
(i). A licence in respect of a firearm capable of discharging that ammunition;
(ii). A permit to possess ammunition;
(iii). A dealer`s license, manufacture`s license,

gunsmith`s license, import, export or in-transit permit or transporter`s permit, issued in terms of Act 60 of 2000; and/or

Without having been authorized in any other way to possess same.

5. Appellant was convicted on all three counts. He was sentenced as follows:
   5.1. On count 1 he was sentenced to undergo life imprisonment.
   5.2. On count 2 he was sentenced to undergo 15 years imprisonment.
   5.3. On count 3 he was sentenced to undergo 3 years imprisonment

6. Before the court *a quo* appellant was favoured with an explanation on the prescribed minimum sentences relevant to the charges put. He told court that he understands the explanation. He pleaded not guilty to all three charges put. In explaining his plea he told court that on the day of the incident he and a friend known as Mthumi went to a local tuck-shop run by the deceased. He left his cell phone there so that it could be charged. They collected the cell phone later. He said that on their way home they realised that the SIM card for the cell is missing. He and his friend returned to the tuck-shop. He remained outside while his friend entered the tuck-shop to engage the shopkeeper about the missing SIM card.

7. He said that he was not privy to the conversation between the deceased and his friend. While he stood outside he heard the sound of gunfire emanating from inside the tuck-shop. This prompted him to flee. While fleeing he heard a second sound of gunfire. He headed home. On the following day he and

Mthumi, together with several others hired a taxi to ferry them to work. Their taxi was stopped by the police who instructed everyone to alight. Upon a search of the taxi a firearm was found. Everyone denied ownership of the firearm that was found.

8. He said that he advised the police to investigate carefully so as to find out who the owner of the firearm is. He said that the police adopted the attitude that he is talking too much. They arrested him. They took him to the police station where they told him that they shall link him to the murder charge. He denied ownership of the firearm, much as he denied having committed the murder.

9. The state led evidence, so did the defence. The court *a quo* upheld the version of the state and rejected that of the defence. Appellant was convicted on all three counts. The state and the defence made submissions on sentence. The following sentences were imposed upon the appellant.
   8.1. Count 1: Life imprisonment.
   8.2. Count 2: 15 (fifteen) years imprisonment in terms of section 51 (2) (a) (i) of the Firearms Controls Act 200: (Act No 60 of 2000) and
   8.3. Count 3: 3 (three) years imprisonment in terms of section 51 (2) (a) (i) of the Firearms Controls Act.

   All sentences were ordered to run concurrently. The sentence of imprisonment for life in respect of count 1 is subject to automatic leave to appeal.

EVIDENCE.

10. **Sibongile Thobile Sibiya** was the **first** witness to be called by the state. Under oath she told court that she used to stay with the deceased, David Sibiya who is her brother. Her

brother owned a tuck-shop. She said that on 10th of June 2013 appellant and several of his friends came to the tuck-shop. They left behind a cell phone which she understood to belong to appellant who wanted it to be charged. She already knew appellant because he had brought the same cell phone to the tuck-shop for charging several times before. At around 19h00, appellant, this time with only one of his friends collected the cell phone. She was seeing this friend of the appellant for the first time that day.

11. A few moments after appellant and his friend had left they returned to the tuck-shop and engaged the deceased. A lamp had been lit for illumination. She heard appellant asking the deceased about a SIM card. Her brother told appellant that he does not know anything about a SIM card. She observed that appellant is becoming emotionally charged. He was holding a beer bottle in his hand. She requested appellant to rather leave and to return on the following day because it did not appear to her that the two could resolve their differences. She said that appellant told them that he would leave, but would return a later stage because there is no way he is going to give up his SIM card for the benefit of the deceased.

12. She said that appellant who spoke in South Sotho emphasized that he knows very well that there was a SIM card in his cell phone when he left it behind for charging. She said that appellant did not open his cell phone to see if indeed there is no SIM card in it. He told them that they will be well advised to call the police because when he returns he is going to shoot them. The deceased told him that he is just seeking a lame excuse to shoot them despite their innocence.

13. The witness stated that at about 20h00 in the evening appellant returned with the same friend. He was wearing a long black jacket. He stood before the window through which customers are served. He was near the table where the public phone is kept. Again he demanded his SIM card. His friend stood on the other side of the window. The deceased drew nearer to the window placing his hands on the counter. This was after accused's friend asked him to do so because he could not hear him properly.

14. She said that all of a sudden appellant fired a shot. The deceased put his hands on his chest. It turned out that a bullet penetrated his chest and the gunshot wound was located where he put his hands. While her brother stood with his hands on his chest, she fled into the house. When she and her father immediately ran back to the tuck-shop the deceased had fallen to the floor. They called the police. On arrival the police covered the deceased with some cloth. The ambulance crew arrived. They told them that her brother has passed away. She said that from the day of the incident she did not see appellant again until she saw him at the occasion of an identity parade conducted in relation to this case.

15. **Michael Radebe** was the **second** witness to be called by the state. He told court that he is a constable with three years of experience within the South African Police Services. On the 11th of June 2013, a Tuesday, together with constable Nthlane he was at work. The two of them were, seized with uniformed police duties. They were clad in police issue uniforms. They were prowling in a marked police vehicle. At around 1h00, he received a message as a result of which he trailed and caught up with a maroon Avanza near Lindelani squatter camp. It

was operating as a taxi. It had four male passengers in it.

16. He stated that the report they had received was about murder. An informant had supplied him and his colleagues with information, including information on the manner of cloth and other features of the culprit. He requested the passengers to alight. He searched them one after the other as they alighted from the Avanza. After being searched they would lie on the ground. The culprit they were looking for, who is the appellant, was the last to be searched.

17. He stated that in the process of searching appellant he held the latter by the waist of his trousers. He felt a hard object which turned out to be a firearm. It was tucked on the front of appellant's trousers. It was a silver coloured 9 mm semi-automatic pistol. Its serial number was 1034349. He said that upon demand appellant could not produce a license to possess a firearm. He arrested appellant for unlawful possession of a firearm. He explained to appellant the reason for the arrest. The firearm was booked into the SAP 13 register. The custody number allocated for the appellant was 39/6/2012.

18. **Manatsile Lipson Nthlane** was the **third** witness to be called by the state. Under oath he told court that he is a constable within the South African police services. He corroborated the evidence by Michael Radebe, the second state witness. He stated that on the 10th of June 2013 Radebe told him that an informer called who shed light about a murder. The informer revealed that the culprit is taking flight from the area to evade arrest. On the strength of that information he and Radebe set out in a marked police van to trail an Avanza vehicle operating as a taxi. They stopped one Avanza vehicle. Radebe

approached the driver and requested to conduct a search. Radebe searched the passengers, one after the other. From the last passenger who was seated at the back, the search yielded an unlicensed firearm. It was tucked in that passenger's waist, at the front of the inside of his trousers. This passenger was the appellant.

19. He said that upon request by Radebe, appellant failed to produce a license to possess a firearm. Radebe arrested the appellant who started crying. He asked appellant where he was going, telling him that he is not supposed to carry a firearm around. Appellant told him that he carries a firearm around for protection. He said that the informer had alerted them that appellant is clad in a T/Shirt with brown stripes. They were also told that appellant has a bad skin. He entered information about the appellant's arrest and details of appellant's description into his official pocket book although he did not note every single detail in the pocket book.

20. **Moswarisheng Makofane** was the **fourth** witness to be called by the state. Under oath he told court that he has 9 years of experience as a constable, working for the South African Police Services. He is stationed at Klipfontein. On the 10th of June 2013 he was on standby. Upon receiving a report he attended a scene of crime at 7165 Extension 8, Mayfield. There, he found an African male inside a tuck-shop who had been shot dead. Constable Thobejane who was in attendance at that scene showed him a spent cartridge outside the tuck-shop. He confirmed photos shown to him which depict among others a cone placed on the ground.

21. He said that the cone was placed at the spot where the spent cartridge was found. He entered the tuck-shop which

comprised of two rooms. Inside the first room is where he found the black male lying on the floor with a gunshot wound on the chest. There was another spent cartridge inside the first room. Inside the other room he found groceries. When he stepped outside he found the deceased's sister making a statement to Constable Thobejane. The deceased's sister implicated an African male for the shooting. She said that the culprit, whom she can recognize by sight is a regular customer at the tuck-shop but she did not know his name.

22. He said that constable Malema took photographs of the scene using cones as beacons. The deceased's sister revealed that the two culprits are Sotho speaking and that one of them was wearing a blanket. He became aware of the arrest of the culprits in this case on the following day. He participated in arranging an identity parade for purposes of this case. The witness denied that he told appellant that he would only be released if the correct culprit is arrested.

23. **Maryna Venter** was the **fifth** witness to be called by the state. Under oath she told court that she is a member of the South African Police Services with four years of experience. She is stationed at Pitfontein. She is assigned to the Detective Section. On the 9th of July 2013 she was in charge of an identity parade as indicated in the SAP229 form. The parade started 8 o'clock in the morning. Eight people participated as part of the lineup. She was aware that there is only one suspect in the case. He disputed that anyone asked after Thabang before the identity parade started.

24. According to this witness, numbers were allocated to the participants in the lineup. The numbers were matched with names of the participants. He said that one constable Malowsi

played the role of leading the witness to the parade room. Over all the time he did not leave the parade room. He disputed accusations that at some stage he corrected the witness telling her to point at suspect number 6. Beyond explaining the procedure for the parade he never spoke to the witness about anything else. He said that the witness pointed out the appellant. The state closed its case.

25. The appellant, **Thabang Tohlang** testified under oath in defence. He told court that on the 10th of June 2013 he went to the tuck-shop at the Squatter Camp. He was in the company of Mtumi. The two of them were to fetch Mtumi's phone which he took there earlier for charging. The witness said that Mtumi fired a shot while he, the witness, stood near the gate. He was arrested in relation to that incident. At the occasion when he was arrested, he and others were travelling in a vehicle. Shortly after leaving a filling station the police stopped them. The police ordered them to alight. He said that Mtumi was the last to alight from the taxi. However before alighting, Mthumi first took out a firearm hidden in his body and placed it on the floor of the taxi.

26. He said that one of the police officers spotted the firearm on the floor inside the taxi. He said that the police then imputed ownership of the firearm to him. He was arrested and placed inside a police van. Under cross examination he denied complicity for the fatal shooting of the deceased. Appellant closed his case. The court *a quo* evaluated the evidence tendered. It took into consideration the evidence regarding the identity parade conducted where appellant was pointed out by the witness as the culprit. It took into consideration evidence by the deceased's sister who testified under oath about appellant visiting the tuck-shop on a number of occasions on

the day the deceased was fatally shot.

27. The court *a quo* held that the evidence on the identity parade is admissible. It found the evidence by the sister of the deceased to be reliable. It upheld the version of the state and rejected that of the defense. Appellant was convicted on all of the three counts. Appellant appeals against the convictions. The court is to determine whether or not the appeal succeeds. In order to do that the court has to assess the evidence at hand.

EVALUATION.

28. Sibongile Thobile Sibiya, the sister of the deceased witnessed his shooting with her own eyes. Appellant having been a regular customer at her brother's tuck-shop, she was not seeing him for the first time on the day of the shooting. On that she did not see him once. She had opportunity to see appellant two times before the instance where a quarrel. Took place, culminating in the shooting. The instance where appellant and his friend came and an argument culminated in the fatal shooting of the deceased was third on one and the same day. She could easily recognize the appellant despite the change of clothes he had. There was illumination both from inside the tuck-shop and from the street lights outside.

29. Before the day of the incident the deceased's sister already knew appellant who was already in the of patronising her brother's spaza-shop from time to time. In S v Dladla[1] the court stated: *"If the witness knows the person well or has seen him frequently before, the probability that his*

[1]. 1962 (1) SA 307 (A).

identification will be accurate is substantially increased."

30. The identity of the culprit is therefore not shrouded in doubt. Thobile told court that she saw it when appellant fired a shot at the deceased in keeping with the threat he made earlier on. There is no evidence suggesting that there were other people around. Even if there were other people, evidence shows that appellant is the only one who took issues with the deceased at that exact time. The quarrel was about a SIM card which appellant claimed to have been inside the cell phone he had brought for charging. Appellant was heard threatening to return, insinuating that he shall not be in a friendly mood when he returns. He even advised Thobile and her brother, the deceased, to summon the police in anticipation of trouble he would cause upon return. No one else other than appellant could have had any motive to kill the deceased.

31. It is also trite that while the state bears the duty to prove its case beyond a reasonable doubt, an accused who faces a criminal charge bears the duty to counter the state's evidence by advancing a version which is reasonably and probably true. In the case of S v Thebus and Another[2], the court stated the following: *"The State bears the onus of proving every element of an offence without the assistance of the accused. It is clear from the Constitution that the presumption of innocence implies that an accused person may only be convicted if it is established beyond a reasonable doubt that he or she is guilty of the offence. That, in turn, requires the proof of each element of the offence. However, our Constitution does not stipulate that only the State's evidence may be used in determining whether the*

---

[2]. 2003(2) SACR 319 (CC), at page 356, paragraph 84.

accused person has been proved guilty. Indeed our law has always recognised that the question of whether the accused has been proven guilty or not is one to be determined on a conspectus of all the admissible evidence, whatever is provenance."

32. In his testimony appellant creates the impression that he was engaging the deceased from some distance concerning the missing SIM card when gunshot rang. He states that his friend Mtumi was nearer to the deceased. Without being direct, he insinuates that it could have been his friend who fired the fatal shot. He goes on to state that at the ringing of the shot he immediately took flight. As he fled he heard the sound of a second shot ringing. The court has to assess whether the appellant's version is reasonably and probably.

33. Upon his arrest on the 11th of June 2011 appellant was found in possession of a firearm on which has ballistic linkage to cartridges recovered from the murder scene was established. The explanation he gives concerning this is far from plausible. He attempts to sow confusion about possession of the firearm at the time it was found in the taxi. The police officer spotted the firearm on the floor inside the taxi. He prompted the police officer to probe all passengers, creating the impression that nothing links him to the firearm and that someone else among the passengers could be the owner of the firearm. This was an attempt on his part to cast aspersions on all passengers so that the police cannot pin anyone down for its possession.

34. At the same time appellant admits to having been to the deceased's tuck-shop on the day of the shooting. He admits that altercations took place between him and the deceased

regarding a SIM card which he claimed to have been inside his cell phone at the time he brought it for charging. There is no evidence "showing that the deceased quarreled with anyone else on that day, especially before, during and after the shooting. It is clear that the shooting of the deceased can only have been as a result of the quarrel over the SIM card.

35. If appellant's version were to be true, it begs the question why he did not bother to find out the effect of the gunshots that rang. Instead he was apprehended in a taxi that was leaving the area. He does not take the court into his confidence to reveal the sort of conversation he had with his friend concerning the shots that rang when the two met and arranged transport with which to leave the area.

36. The incident of the shooting happened over a very short period of time. No lengthy period of time elapsed after the shooting before the police engaged the deceased's sister. Had she aimed to falsely implicate the appellant, she would not have chosen to tell a long story about a culprit whose name she does not know. She would have implicated appellant directly instead of telling a story about appellant coming and going to and from the tuck-shop several times. She was honest and unambiguous in relating what took place. She placed into perspective the time preceding, during and after the deceased was shot. It is the reason why the court *a quo* believed her version. The version of the appellant around the timing at which the first shot was fired does sound to be reasonably and probably true.

37. At the same time appellant admits to having visited the deceased's tuck-shop on the day of the shooting. He admits that altercations took place between him and the deceased

regarding a SIM card which he claimed to have been inside his cell phone at the time he brought it to the deceased's tuck-shop for charging. There is no evidence showing that the deceased quarreled with anyone else on that day, especially before, during and after the shooting. Appellant tells about hearing gunshots. But it is he who was caught in possession of a firearm with ballistic linkage to cartridges recovered from the murder scene. It is clear that the shooting of the deceased can only have been as a result of the quarrel over the SIM card. Appellant seeks for this court to interfere with the findings of the court *a quo* on the basis that the latter court misdirected itself in upholding the version of the state.

38. It is trite that appellate courts do not have a free hand with which to interfere with findings of trial courts without a lawful basis. In the case of S v Hadebe and Others[3], the court stated the following: *"It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."*

39. In the case of S v Francis[4], the court stated the following: *"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the*

---

[3].1997 (2) SACR 641 (SCA), at page 642.
[4]. 1991 (1) SACR 198.

trial Court was wrong in accepting the witness' evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

40. Nothing in this case suggests that the court *a quo* misdirected itself in making the findings it did. It carefully considered the version of the state as against that of the defence. There is no basis for this court find that the court *a quo* misdirected itself. Evidence shows that upon request appellant failed to produce a lawful license to possess a firearm or ammunition. The cause of deceased's death is gunshot wound. Should appellant be convicted for murder, it follows that he is also guilty of unlawful possession of a firearm and ammunition. For the above reasons the appeal against conviction on all counts stands to be dismissed.

RE: SENTENCE.

41. In count 1 appellant was charged with murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 1997: (Act No: 105 of 1997). Before the court *a quo* he understood the essence of section 51 (1) of the Criminal Law Amendment Act read with the charge. Life imprisonment stands prescribed as the minimum sentence to be imposed. Our courts have promoted the view that courts be inclined to impose sentences in accordance with the prescribed minimum sentence legislation and that they should avoid allowing flimsy reasons to dissuade them from doing so.

42. In the case of S v Malgas[5], the court stated that courts should not avoid the imposition of a minimum sentences prescribed for specified offences for flimsy reasons. On page 479 of this case, the court stated: *"When applying the provisions of section 51, a trial court is not in trial mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is prima facie to be respected. Instead it is faced with a generalized statutory injunction to impose a particular sentence, which injunction rests, not upon all the circumstances of the case, including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which vests the sentencing court with the power, indeed the obligation to consider whether the particular circumstances of the case require a different sentence to be imposed, and a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist, which justify it".*

43. It was submitted on behalf of the appellant that the sentence imposed upon him, particularly that in respect of count 1 is harsh much as it induces a sense of shock. Appellant submits that the sentence be set aside and replaced by a lenient or a fitting sentence. The question is whether or not appellant has made a sufficient case for this court to interfere with the sentence imposed by the court *a quo*.

44. It is trite that appellate courts are justified to interfere with sentences imposed by trial courts, indeed to avoid the imposition of prescribed minimum sentences in the event where substantial and compelling circumstances are

---

[5]. 2001 (1) SACR 469 SCA

attendant to the person of the accused. However our case law has set preconditions to be met before an appellate court may interfere with the discretion of the trial court where sentencing is concerned. In the case of S v Romer[6], the following was stated: *"It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence appealed against is:*

(a) disturbingly inappropriate;
(b) so totally out of proportion to the magnitude of the offence;
(c) sufficiently disparate;
(d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and
(e) is otherwise such that no reasonable court would have imposed it."

See S v Giannoulis[7] S v Kibido[8] and S v Salzwedel and Others[9]."

45. In the case of S v Zinn[10] the court stated as follows: *"in imposing the sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community."*

THE INTERESTS OF THE APPELLANT.

46. Appellant is 25 years of age. He is married with two children aged 2 and 5 respectively. He is a sole bread winner. Before his arrest he relied on doing menial jobs on a part-time basis earning R 550-00 per week. He is a first offender. He studied

---

6. 2011 (2) SACR 153 (SCA), in paragraph [22].
7. 1975 (4) SA 867 (A) at 873G – H.
8. 1998 (2) SACR 213 (SCA) at 216g – j.
9. 1999 (2) SACR 586 (SCA) (2000 (1) SA 786; [2000] 1 All SA 229), at paragraph 10."

10. 1969 (2) SA 537 (A).

up to standard 4, (grade 6). For about 8 months appellant was in pre-trial custody. The personal circumstances of the appellant are not extra-ordinary. They come across as the same with day-to-day circumstances attendant to convicts before our courts. They are not substantial and compelling in nature.

47. It is trite that appellate courts do not have a free hand to interfere with sentences imposed by trial courts. Whenever called upon to consider interference with sentences imposed by trial courts appellate courts have to weigh the sentences imposed by the trial courts up against principles based on the sentencing triad as expressed.

48. Appellant is a first offender In S v Vilakazi[11], the court in determining the appropriateness of the imposition of the minimum sentence prescribed stated the following: " it is clear from the terms which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The constitutional court made it clear that what is meant by the "offence" in that context and that is the sense in which I will use the term throughout this judgement unless the context indicated otherwise".

49. In the light of the seriousness of the offences committed the consideration of sentence to take into consideration expressions in the case of S v Vilakazi[12], where the court

---

[11]. 2009 (1) SACR 552 SCA, at page 560.
[12]. Supra.

stated the following regarding punishment in response to serious crime. *"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 question 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 the period should be".*

THE OFFENCES COMMITTED.

50. The offences committed in this case are very serious. Murder in count 1 involved cruel use of a dangerous weapon against an unarmed victim who was not fighting anyone. In the case of S v Mnguni[13] the court stated that: *"there is aggravation where an accused person inflicts a brutal, cruel, and inhuman attack on a helpless, unarmed harmless victim."* Murder undermines the right of human beings to life. With total finality, it deprives the next of kin of the victim of the latitude to exercise and explore their kinship with the victim as they wish.

THE INTERESTS OF THE COMMUNITY.

51. Incidences of unlawful possession of firearms and ammunition are highly prevalent. Their unlawful use is very rife. Communities are wary of incidences where these offences get repeatedly committed. The legislature has prescribed minimum sentences to punish them. Subject to considerations whether substantial and compelling circumstances obtain or not, courts stand enjoined to impose sentences in compliance with the relevant legislation.

---

[13]. 1994 (SACR) 579 (A), at page 583 paragraph E.

52. It is in the interests of community that crime, especially violent crime, be met with stiff punishment. In the case of S v Makwanyane & Another[14], the court stated: "*The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law. . .*

---

[14]. 1995 (2) SACR 1 (CC), at paragraph 117.

53. Our print, visual and social media is replete with incidences where exasperated communities wrongly take the law into their hands due to perceptions that the criminal justice system is failing to protect citizens because offenders appear to be subjected to either impunity or soft punishment. Some feel strongly that offenders enjoyed by far more human rights than innocent victims and citizens. In the case of R versus Karg[15], The Court stated: *"In assessing an appropriate sentence, the Court must have regard for the feelings of the community and must bear in mind that if sentences for serious crimes are too lenient, the demonstration of justice may fall into disrepute in that persons may be inclined to take the law into their hands."*

54. The above notwithstanding, courts still have to strike a balance in the considerations of interests of the society and those of the accused from time to time. In the case of S v Mhlakaza[16]; the court stated the following: *"the object of sentencing is not to satisfy the public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public. This does not mean that the views of the society are of no consequence to the sentencing of the offender."*

55. Our courts have demonstrated consistency regarding the consideration whether or not minimum prescribed sentences should be imposed in response to particular crimes. In S v

---

15. 1961 (1) SA 231 (A), at page 236 A – B.
16. 1997 (1) SACR 515 (SCA) paragraph 30.

Vilakazi[17], the court in determining the appropriateness of the imposition of the minimum sentence prescribed stated the following: *"It is clear from the terms which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The constitutional court made it clear that what is meant by the "offence" in that context and that is the sense in which I will use the term throughout this judgement unless the context indicated otherwise."*

APPELLATE POWERS.

56. It was submitted on behalf of the appellant that the court *a quo* erred in imposing life imprisonment upon appellant. In the case of S v Rabie[18] the court stated the following: *"In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -*
    (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
    (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

    The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

57. In considering whether or not this court has appellate powers to interfere with the sentence imposed by the court *a quo* the court is not considering its own inclination, preferences and

---

17. Supra.
18. 1974 (4) SA 855 (A).

tastes where it regards sentencing. In the case of the S v Anderson[19] the court stated: *"Moreover, a court of appeal "will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently."*

58. In the case of S v Rabie[20], the court stated as follows: *"The decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to intervene only if the trial court's discretion was not "judicially and properly exercised" which would be the case if the sentence that was imposed is "vitiated by irregularity or misdirection or is disturbingly inappropriate."*

59. It was submitted on behalf of appellant that in imposing sentence the court *a quo* did not pay sufficient regard to the effect that appellant is a first offender; more washers on. In this case the interests of the offender had to be balanced against the nature of the offences. In this case the court *a quo* took into consideration all relevant aspects while considering a fitting sentence to be imposed. The court found no basis upon which to justify interference with the sentences imposed by the court upon the appellant. The appeal against sentence stands to be dismissed.

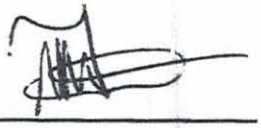
60. Consequently the appeal against conviction and sentence stands to be dismissed and the following order is made:

---

19. 1964 (3) SA 494 (A), at page 495 G.
20. 1974 (4) SA 855 (A).

ORDER.

1. The appeal against conviction and sentence is dismissed.



T. A. Maumela.
Judge of the High Court of South Africa.

I agree.

HMS Msimang AJ
Acting Judge of the High Court of South Africa.