IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Case Number: A276/2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

....
DATE SIGNATURE

MATHEMBA ALFRED NOMGANGA Appellant

And

THE STATE Respondent

JUDGMENT

TSHOMBE AJ

INTRODUCTION:

[1] The appellant appeared before the regional court of the Gauteng division held at Tsakane where he was charged with one count of murder as described in paragraph (a), Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentence Act" or "the Act"). At the trial the appellant was represented and with his confirmation, his signed statement containing formal admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977 ("the CPA") was read into the record.

[2] The Minimum Sentences Act provides that upon conviction of the crime of murder, when the murder was *planned or premeditated,*[1] the sentence that must be imposed is subject to a minimum of life imprisonment. The appellant was advised that should he be convicted of the crime he is charged with, he will be facing a sentence of life imprisonment if the court does not find substantial and compelling circumstances. The appellant pleaded self-defense to the charge. He was convicted of murder as envisaged in the Act and sentenced to life imprisonment on 10 April 2019. The appellant approached this court on an automatic right of appeal wherein he appealed against both the conviction and the sentence.

BACKGROUND

[3] On 2 October 2017 the deceased sustained injuries, namely; "*sharp instrument wound on the chest penetrating through 2nd and 3rd rib"*[2]*.* He was later pronounced dead by Dean Francis from the Department of Health Emergency Medical Services who attended at the scene.

THE ISSUES:

[4] It is common cause that the conviction in this case was secured on the evidence of Mr Medupi, Mrs Baloyi, Misses Joyce Phala and Annie Lekala as well as the deceased's grandson, ("Thumelo"). Although the appellant admitted to the killing of the deceased by stabbing him with his sharp iron rod,

[1] Section 51(1) read with Paragraph (a), Part I of Schedule 2
[2] Exhibit H3 Page 22 of Record

he submitted that he did not intend to kill the deceased, but to scare him, making this an act of self-defense against an attack by the deceased and Thumelo. Therefore, the three issues that need to be determined in this matter are:

4.1 whether the appellant's version of events that he did not intend to kill the deceased but to scare him, or that he acted in self-defense can reasonably possibly be true;

4.2 whether the appellant's killing of the deceased was "planned or premeditated" as envisaged in Part I of Schedule 2 of the Minimum Sentences Act; and

4.3 whether the State proved its case beyond a reasonable doubt that the murder was intentional and "planned or premeditated***."***

GROUNDS OF APPEAL - AD CONVICTION:

[5] As grounds of appeal against conviction, the following submissions have been made on behalf of the appellant:

5.1 The court *a quo* erred in not finding that the appellant's version that he acted in self-defense was reasonably possibly true in spite of the evidence that the deceased and his grandson had weapons and attacked the appellant;

5.2 The learned regional magistrate erred in rejecting the appellant's version that when he struck the deceased with his rod, he did not intend to injure or kill him but intended to scare him;

5.3 The learned magistrate erred in accepting the testimony of the witnesses: Joyce Phala and Arnie Lekala in spite of the appellant's submission that they were ganging up against the appellant.

GROUNDS OF APPEAL AD SENTENCE:

[6] Against sentence it is submitted on behalf of the appellant that:

6.1 The court *a quo* erred in not finding that: (i) the appellant's age of 59 years; (ii) the two years spent in prison awaiting trial; (iii) the imposition of a life sentence which induces a sense of shock - constitute substantial and compelling circumstances to justify deviation from imposing the prescribed minimum sentence;

6.2 The court *a quo* did not exercise its discretion judiciously because it over emphasized the seriousness of the offense;

6.3 The court *a quo* over-emphasized the interests of the community when imposing the sentence; and

6.4 the court *a quo* failed to blend the sentence with a measure of mercy.

THE EVIDENCE:

Evidence Ad Background:

[7] In the light of the issue/s that must be determined in this appeal it is necessary to include in the background the relationship between the deceased, the appellant and one Mr Medupi ("Medupi"), who was the first witness for the State as well as the actual evidence of Mr Medupi and the deceased's wife pertaining to events before the incident that led to the death of the deceased.

[8] Medupi testified that he knew both the deceased and the appellant very well. He had known the deceased from Soweto during the late 1980's even before he (Medupi) moved to Tsakane in 1989. Ultimately the deceased and his family also moved to Tsakane between 1992 and 1993. He further testified that he also knows the appellant very well, having at some point even stayed with him (the appellant) at his house for about 2 to 3 years. Medupi further

testified that the appellant and the deceased also had a good relationship and were on good terms before the events leading to the death of the deceased, which unfolded against the background below.

[9] The three of them (Medupi, the appellant and the deceased) were participants as *'runners'* in a Chinese gambling game called *"fafi"*. Without going into much detail about the game, the evidence led indicated that it consists in the runners taking bets from a number of people, say 10, the runner putting the bets into a bag *(isikhwama)* which a 'runner' would take to Medupi, who, in addition to being a runner was also "*the Master"* and held a *pool* bag into which the various bags would be put until the day of the draw. The draw took place at 13h30 on Mondays upon the arrival of a certain Chinese man who would establish which bets have won and what they have won.

[10] From Medupi's evidence it appears that on the Saturday before the draw that was to take place on Monday 2 October 2017, the appellant asked for his bag from Medupi. Medupi, thinking the appellant wanted to add an additional bet, opened the pool bag, whereupon the appellant took, not his bag but the deceased's bag and ran away with it. This effectively meant that deceased's bag would not be in the pool bag from which the Chinese man was going to draw the people's bets. Medupi's further evidence is that the appellant's bag was also not in the pool bag.

[11] The second aspect of Medupi's relationship with the appellant consists in the services the appellant provided to Medupi, the deceased and a number of other people in the area who were tavern owners. Being a tavern owner, Medupi and the others used the services of the appellant to go and buy their stock for them and he provided the same service to the deceased but stocking cooldrinks and not alcohol. Further evidence is to the effect that the appellant was once robbed of the money that had been given to him by Medupi to go buy stock and for that reason, he obtained and sharpened an iron rod which he carried with him for defense when going to buy stock for his clients.

Medupi's evidence re: 2 October 2017:

[12] Medupi testified further that on the fateful Monday, the appellant arrived at his place around 10 or 11am, carrying his iron rod and asking Medupi where the deceased was and, claiming that *"this person must die"/* "*he must die"* - referring to the deceased. As the appellant uttered the words, he was scratching the rod on the floor. Medupi pointed out to him the early hour, reminded him that the draw is only at 13h30. Upon the appellant's departure Medupi went to the deceased's house and warned the deceased not to go to fafi that day because the deceased wants him (the deceased) dead. When he delivered this warning, the deceased was with his wife, Mrs Baloyi. Medupi also requested the deceased's wife to stop him from going to the game that day.

[13] Medupi's testimony is that the appellant came back for a second time, at about 13h00, once again demanding to know where the deceased is. Medupi reminded him again of the time for fafi, dismissed him again and a short while later he (Medupi) was called by a certain lady to go and assist a man that was being killed.

[14] Although Medupi testified that he saw the appellant running away from the scene as he approached, he (Medupi) could not testify as to what happened between the deceased, the appellant and Thumelo (the deceased's grandson) because by the time Medupi arrived, the deceased was already lying on the ground and wounded. Accordingly, Medupi did not see how the deceased sustained the injury that caused him to fall on the ground and resulted in his death.

Evidence by Mrs Margaret Baloyi ("the deceased wife" or "Baloyi")

[15] Baloyi testified that on Monday 2 October 2017, Medupi arrived at their home and advised the deceased that he must not go to the fafi on that day because the appellant said he was going to kill him (the deceased). Medupi further

advised Baloyi to tell the deceased not to go. Upon advising her husband to rather go report the matter to the police, the deceased told her that he will go to the fafi and then go to the police afterwards.

[16] At that point, Thumelo, their grandson entered the room and the deceased there and then asked Thumelo to accompany him to the fafi. The two left and shortly thereafter Thumelo came back running and reported that the deceased had been stabbed by the appellant. By the time Baloyi got to the scene, the deceased could no longer speak and when the paramedics arrived on the scene, they advised that the deceased had died.

[17] Having dealt with the evidence of Mr Medupi and Mrs Baloyi constituting the background above, I now deal with the evidence of the other three key witnesses in the sequence below.

Brendan Thumelo Dandi ("Thumelo" or "Thumi")

[18] Thumelo testified that when he got home the deceased asked him to accompany him to play fafi – this apparently because Thumelo's older brother was not at home. Thumelo testified further that he also found two young girls who told him that the appellant has a weapon that he is going to use to kill his grandfather. Thumelo's further testimony is that when they left the house, him and the deceased did not take the issue seriously. Thumelo testified further that they reached a field where the appellant was waiting. The testimony continued that when the appellant saw them, he stood up and approached them. The deceased went in front of Thumelo and without saying anything the appellant stabbed the deceased with an iron rod.

[19] Thumelo's testimony continued that the deceased had a mop stick with him, which fell to the ground when he was stabbed – Thumelo picked up the stick and hit the appellant with the stick on the head a number of times and at this stage Joyce arrived at the scene and disarmed the appellant of the iron rod that he had. The appellant stood up and walked away and Thumelo ran home to tell his grandmother what had happened. As his grandmother went to the

scene, Thumelo called an ambulance and was advised to go and wait for it at Mutibe street. When Thumelo and his friend arrived at the scene they were advised by the paramedics that the deceased had passed.

Ms Joyce Phala ("Joyce"):

[20] At about 1pm on the day in question, Joyce and Annie were walking in an open veld on their way to the clinic. Joyce testified that she saw the appellant seated next to a furrow which separates Medupi's house from a passage that leads to her house. He was about 4-5metres away and she could see him clearly in the broad day light together with the iron rod he had with him. She also saw the deceased walking with Thumelo towards the appellant. The appellant stood up and walked further to stand in front of the deceased. The two were standing about a meter from each other when the appellant drew out the iron rod and stabbed the deceased in the rib cage area and in an above the shoulder movement.

[21] Her testimony was to the effect that at the time of the stabbing the deceased was carrying what looked like a half of a broomstick, which he never used because it fell to the floor after the stabbing. She then ran closer and saw the grandson striking the appellant with the broomstick. At this point the witness testified that she became aware that the appellant was going to stab the grandson and she dispossessed the appellant of the iron rod. Joyce never heard any communication between the appellant and the deceased – all she heard was when the deceased, after being stabbed, asked Thumelo to stop the appellant. At that stage Thumelo picked up the stick that had fallen from the deceased and struck the appellant on the head.

Ms Annie Lekala ("Annie"):

[22] On the day in question Annie was walking to the clinic together with Joyce. She noticed the appellant seated next to the furrow, which they had to walk across. The appellant had with him an iron rod stuck to the ground. The deceased appeared with his grandson and the appellant approached the

deceased and stabbed him. The deceased moved backwards and his grandson took a broomstick and hit the appellant on the head.

[23] The appellant then went for the grandson with the iron rod and it was at this point that Joyce and Annie intervened and disarmed the appellant of the iron rod. This witness did not see any physical fight between the appellant and the deceased, neither did the appellant and the deceased fight over the iron rod or a broom stick. There was also no verbal altercation that this witness heard between the three people, the appellant, the deceased and Thumelo. All that the witness heard was the deceased asking Thumelo to stop the appellant and this was after the deceased had been stabbed. The witness did not see any attack on the appellant by the deceased and Thumelo.

I now turn to deal with the appellant's evidence.

The appellant:

[24] The appellant testified as follows:

24.1 At around past 1pm he was seated next to a furrow waiting for the fafi game to start; (i) deceased appeared and made a turn-around, went back and appellant couldn't see him; (ii) he appeared again, now with someone else whom the appellant quickly identified as his (deceased's) grandson Thumelo;

24.2 As they were coming, he realized they were armed, the deceased with a stick and Thumi with an iron rod, noticing this when the two were some 15-20 meters away;

24.3 When the two were some 4-5meters away, the deceased jumped across the furrow to appellant's side and simultaneously he was telling Thumi to block the appellant;

24.4 Then the deceased hit him with the wooden mop stick, which did not have the cotton part but had the steel that hold the mop head together. The deceased hit him three times without saying anything.

24.5 Before the third blow, Thumi threw the first stone at him, which he ducked. The second stone hit his knee and as he was falling, the deceased hit him for the third time with the mop stick. The appellant testified that he tried to run away but Thumi blocked his way and as he was turning, Thumi hit him on the side of his face with an iron steel and the deceased was also hitting him;

24.6 The appellant testified that one of the other two witnesses (Joyce) called out the deceased name and asked as to what they were doing;

24.7 The appellant testified that he once again tried to run away and Thumi blocked his way and hit him with the iron rod and at this stage the appellant testified that he then took out his weapon and in trying to defend himself that is how the deceased got stabbed;

24.8 After the deceased got stabbed, he grabbed the appellant and they fell together, with the deceased on top and appellant fighting to get on top;

24.9 At that time, while the appellant was trying to get separated from the deceased, Thumi was busy still hitting the appellant on the head with the iron rod that he had;

24.10 As appellant managed to slip, he saw his rod that stabbed the deceased, took it and gave it to Joyce;

24.11 Appellant left, went home, decided to sleep, planning to wake up and go to the police but was woken up by his landlady (“Fikile”);

24.12 Fikile advised him of the passing of the deceased and he then got up to go hand himself over to the police because he had killed someone unintentionally;

24.13 On the way he stopped a taxi and as he was about to get in, members of the community pulled him out of the taxi and at the same time the metro police arrived and after being identified by the community members, the metro police office ordered him to get into the police car;

24.14 In his testimony, the appellant denied seeing Medupi on the day in question, denied that he said the deceased must die. Although he went to Medupi's place, he didn't find anyone there and decided to go and sit next to the furrow so he could see the arrival of the fafi man;

24.15 The appellant denied the version of the witnesses, Joyce and Annie that the appellant was stalking the deceased and that Joyce had to dispossess the appellant of his iron rod, this in contrast with the appellant's version that he handed the iron rod to Joyce;

24.16 The appellant testified further that although on the day before the fafi game there was a problem between him and the deceased about the running of the pool bag for fafi, he denied declaring that he was going to kill the deceased when he meets him;

24.17 The appellant testified that he does not know why Medupi went to court and told lies about him and he did not have an intention to fight with or kill the deceased;

24.18 The appellant further testified that if the deceased had not attacked him, the incident would not have occurred at all;

24.19 During cross examination the appellant alluded for the first time to there being bad blood between him and Medupi arising from an occasion when the

appellant came back late from stocking up liquor for Medupi and since that there was bad blood between the two of them;

24.20 He (the appellant) even testified that about 2 years before the incident in court, Medupi and his brother ganged up against him and injured him;

24.21 In spite of not having made a note in his statement that there was bad blood between him and Medupi, in spite of not having told his attorney about the existence of such bad blood and in spite of Medupi having denied the existence of any bad blood between the two of them when Medupi was testifying, the appellant submitted in court that he was aggrieved because he was not given an opportunity to state that Medupi's testimony is as a result of bad blood between the two of them.[3]

THE LEGAL PRINCIPLES - *Ad Conviction*

[25] Appeal court powers re*:* credibility findings

25.1 With reference to the appeal on conviction, there are three legal principles that are applicable to this matter, the first being that a court of appeal should only interfere with the findings of the trial court where there is a material misdirection on the facts and credibility findings of the witnesses.[4] In the case of S v Monyane[5], Ponnan JA referred with approval to the case of S v Hadebe and Others[6] and held that the

[3] Record Pages 229 - 231

[4] R v Dlumayo and Another 1948 (2) SA 677(A) and S v Francis 1991(1) SACR 198(A) at 198j-199a "The power 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 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".

[5][5] S v Monyane and Others 2008 SACR 543 (SCA) Paragraph [15

[6] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f the court held:
".....in the absence of demonstrable and material misdirection by the trial court . its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. The learned Judge of Appeal pronounced further that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

25.2 Similarly to the Monyane case *(supra)*, *in casu,* a thorough reading of the record does not indicate any doubt as to the correctness of the findings of the trial court. The witnesses for the State corroborated one another's evidence in all material respects and they all came across credibly well during cross examination. There were no indications of fabrication of evidence and all the witnesses testified to what they saw and/or heard and indicated very clearly all the events that each did not see or hear. Further, the appellant did not adduce any demonstrable evidence that could have supported a different finding by the court *a quo* with respect to the evidence led by any of the State's witnesses.

25.3 The appellant's allegations that there was bad blood between him and Medupi during cross examination was correctly rejected by the court as he had ample time and the opportunity to have raised it during Medupi's testimony especially because the specific question regarding any bad blood between the two was asked of Medupi during his testimony and Medupi denied the existence of any bad blood. Similarly, the appellant's allegation that Joyce and Annie were ganging up against him because Joyce had seen the attack on him (the appellant) was baseless given that Joyce has testified in his (appellant's) presence as to what she saw, which is the stabbing of the deceased by the appellant without any preceding exchange of words, fight or any kind of altercation. The appellant was hit by Thumelo only after the stabbing of his (Thumelo's) grandfather by the appellant, even then with a mop stick as opposed to the iron rod which the appellant used to stab the deceased. There was therefore no evidence led by the

appellant which could have supported a different finding by the court *a quo.*

[26] The standard of proof:

26.1 The second principle is that the state bears the onus to prove its case beyond a reasonable doubt. The accused bears no onus and if his version is reasonably possibly true he is entitled to receive the benefit of the doubt and be discharged.[7] It is also trite law that proof beyond a reasonable doubt does not mean proof beyond all doubt. In *Monageng v S*[8] the court described proof beyond a reasonable doubt as:

". . . evidence with such high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot be reasonably true."

26.2 The above establishes a tension between proof beyond a reasonable doubt and the reasonable possibility that the accused may be innocent. In order to resolve the tension that exists between the two seemingly separate but in essence the same test, the court must look at all the evidence in its totality. In other words, the court must not look at the evidence exculpating the accused in isolation and neither must it look at the evidence implicating the accused in isolation. This therefore means that a court does not base its conclusion, either way, on only part of the evidence. The conclusion of the court must account for all the evidence. In S v Van der Meyden[9] Nugent J stated as follows:

"In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable: each being the logical corollary of the other. In whichever ***form the test is expressed, it must be satisfied upon a consideration of all the***

[7] S v Van Der Meyden 1999(1) SACR 447; S v Shackell 2002(2) SACR 185 at para [30]
[8] [2009] 1 All SA 237 (SCA).
[9] 1999 (1) SACR 447 W at 448 F – G

evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true*"* (emphasis added).

26.3 The classic decision by Malan JA came in the midst of a popular argument that was to the effect that proof beyond a reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed is consistent with his innocence. Malan JA rejected this approach and preferred to adhere to an earlier approach which is now preferred by the courts.[10] In other words, the court must be morally certain of the guilt of the accused.

26.4 Before the Minimum Sentencing legislation, planning and pre-meditation of an offence has always been recognized as an aggravating factor. In terms of the Minimum Sentence legislation, this factor has now become one of the elements that must be proved beyond a reasonable doubt in order to convict and impose a sentence in terms of the said legislation. This stems from the provisions of Section 51(1), which reads:

"notwithstanding any other law but subject to subsections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

In terms of Part I of Schedule 2, the above provisions apply when the murder is "*planned or pre-meditated".* Therefore, the question of

[10] R v Mlambo 1957(4) SA 727 at 738 A-C *"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged…* ***An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case…The evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty.*** *That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice."* (Emphasis provided)

whether murder was planned or pre-meditated is a crucial consideration in the context of the application of the Minimum Sentences Legislation when adjudicating and imposing sentence in a murder trial.

26.5 The phrase has not been authoritatively explained either in statute or case law but what it really means is that the court needs to strike a difference between 'spur of the moment' action and that which has been planned and decided upon. In Raath v S[11] the court spent some time providing some detail to the issue of premeditation.[12] The court came to the conclusion that an answer to the question requires an examination of all the circumstances surrounding a particular murder, during which evaluation the amount of time it takes the offender between forming the intent and carrying out his intention is of cardinal importance.

26.6 While in the Raath case the appeal court did not find that the appellant conceived an intention or plan to kill the deceased either before or on the night in question, *in casu* by at least Monday morning the appellant had taken the decision to kill the deceased. Not only had he taken the decision, he was brash and brazen enough to go looking for the deceased, carrying his deadly weapon and to actually communicate his intention to the deceased's friend and neighbour, Medupi.

26.7 After establishing that the deceased was not at Medupi's place, the appellant actually seated himself in a spot where he knew without any measure of doubt that the deceased was going to pass though on his

[11] 2009(2) SACR 46 (C)

[12] Clearly the concept suggests a deliberate weighing up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of the all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated." In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated" at Paragraph 16

way to the game. While sitting there, he had his deadly weapon, which he had no reason to carry on that day at that time except to use to kill the deceased. When the deceased finally showed up with a young grandchild, the independent evidence of the two ladies Joyce and Annie is to the effect that the appellant had no words, no issue to resolve with the deceased except to kill him. There doesn't seem to be any doubt that the appellant planned the execution of the killing of the deceased.

[27] The requirements of the defense of self-defense

27.1 In his grounds of appeal the appellant has submitted that he acted in self-defense. In other words, he had no intention to kill deceased. In Nene v S[13], Henriques J referred to the definition of Private defense and quoted as follows:

"a person acts in private defense, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack"[14]

27.2 In the same case the court articulated the requirements for the defense of private defense and I quote:

"(a) it must be directed against the attacker;
(b) the defensive act must be necessary. Here one considers whether there is a duty to flee and the defensive act must be the only way in which the attacked party can avert the threat to his/her rights or interest;

(c) There must be a reasonable relationship between the attack and the defensive act. Here it is not necessary that there be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired;

(d) the attacked person must be aware of the fact he/she is acting in private defense."[15]

[13] [2018] ZAKZPHC 46 (4 May 2018)
[14] CR Snyman Criminal law 6 ed (2014)
[15] At Paragraph 11

27.3 In order to succeed with this defense, the appellant needs to show that there was an unlawful and violent attack on him. This means that there must have been the use of force or the threat of force against the appellant. The defense must be necessary and appropriate. *In casu,* it is clearly evident that the appellant was not facing any danger from an old man carrying a wooden mop stick and his grandson who had no weapon with him. Once again from the independent evidence of the ladies who had no cause for bias in the incident, there was no attack on the appellant by either the deceased or his grandson, who merely started hitting the appellant with the mop stick after the fatal wound had been inflicted.

THE LEGAL PRINCIPLES - *Ad Sentencing*

[28] Before the enactment of the Minimum Sentence legislation, common law had developed to a point where courts were, for sentencing purposes obliged to have regard to three basic elements, which came to be known as the triad of Zinn, as these were espoused the case of S v Zinn[16] and remain relevant, to the exercise of the court's discretion when sentencing. The first element, that is *'the crime'* is considered the most important and influential element on the nature and extent of the sentence. The proportionality requirement, which drew constitutional support for the minimum sentence legislation, reflects the importance of tailoring the sentence to the seriousness of the crime.

[29] The second element to be considered by a sentencing court in terms of the triad of Zinn is *'the criminal',* and because of the nature of the analytic factors involved in considering the criminal, this element has been referred to as the *'individualisation'* of the offender. Although this kind of investigation is often not done, it is nonetheless an important aspect as it enables the sentencing officer to get to know the offender, his/her character and motives. The necessary information in this regard includes age, marital status, the presence of dependents, level of education, employment and health. Owing to the

[16] S v Zinn 1969(2) SA 537 (A)

shortcomings of this process and the lack of exposure time between the sentencing officer and the offender, this aspect of the elements needs a system of rigorous pre-sentence reporting which would assist the presiding officer to have a better understanding of the offender, personal circumstances, character, motives and why the crime was committed.

[30] The third leg of the triad of Zinn is '*the interests of society'.* In the face of some difficulty in expressing what is actually meant by this phrase, it has been suggested that this leg be interpreted to mean *'serving the interests of society'.* It has been cautioned that this leg must not be interpreted to mean the *satisfaction of public opinion*,[17] instead its value must be in the deterrent and retribution effects of a sentence, the protection of the society and the reformation or rehabilitation of the offender.

[31] The Minimum Sentence legislation was passed in order to curb violent crime in South Africa. The legislature identified certain crimes that fit into this category. The legislation requires trial courts to impose various minimum sentences for crimes that fit the legislative description of what it considered violent crimes. In order to meet the requirements of fairness, humanity and constitutionality the legislature put exceptions to the imposition of minimum sentences in accordance with this legislation, the effect of which is that where there are substantial and compelling circumstances identified by the sentencing court, a sentence lesser than the prescribed minimum sentence may be imposed. There are challenges in the identification of crimes that fit in the category so well that there can be no room for finding the existence of compelling and substantial circumstances.

[32] The above is particularly so because the sentencing regime still requires the sentencing court to consider all the factors or circumstances traditionally considered by sentencing officers. In other words, the elements established in the triad of Zinn, aggravating circumstances, mitigating circumstances, measure of mercy and all other factors relevant for consideration by a sentencing court when it imposes sentence

[17] S v Mhlakaza 1997(1) SACR 515 (SCA)

[33] The concept of substantial and compelling circumstances comes from the exception contained in Section 51(3)(a) of the Minimum Sentencing legislation. It reads as follows:

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

[34] The fact that before applying the exception the court must be 'satisfied' requires some attention as to what being *satisfied* means. This has been considered in a number of cases even before the minimum sentence legislation given that the word 'satisfied' is often used in the CPA as well. Having looked at a number of cases, which do not provide consistency, this standard of proof, that is, 'being satisfied' is preferred by the courts and academics justified by its flexibility and the fact that it is commonly used by the legislature as a standard in connection with sentencing. This is because a court may proceed on the basis of being *'satisfied'* as it relates to the appropriate sentence because some considerations involve more than just facts but other factors such as considerations of the future and the making of a value judgment with reference to which there can be no onus of proof.

[35] From a constitutional perspective, the Constitutional Court endorsed proportionality as a requirement in the sentencing regime in the case of S v Dodo[18], The Constitutional Court explained that,

> *"proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhumane or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."*[19]

The court referred to section 12(1)(a) of the Constitution, which provides that a person *"not be deprived of freedom arbitrarily or without just cause"* and

[18] 2001 (1) SACR 594 (CC)
[19] At paragraph 37

found that when a person commits a crime the crime provides the just cause to deprive the offender of freedom.

[36] [In *S v Homareda*[20] Cloete J and Robinson AJ proposed what they referred to as the correct approach in exercising the discretion conferred on the court in section 51 of the Amendment Act and it is that:

- The starting point is that a prescribed minimum sentence must be imposed;
- Only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence may it do so;
- In deciding whether substantial and compelling circumstances exist each case must be decided on its own facts and the court is required to look at all factors and consider them cumulatively;
- If the court concludes in a particular case that a minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate it is entitled to impose a lesser sentence.

[37] The above jurisprudential approach is the essence of the reasoning of the Supreme Court of Appeal in S v Malgas[21], which is recognized as the seminal judgment on how courts should deal with substantial and compelling circumstances. The approach adopted by the court in Homareda blends with the view expressed by the Supreme Court of Appeal that, in the prescribed minimum sentences regime it is no longer *"business as usual"*[22]*,* meaning that the sentencing court does not start the sentencing process from a clean slate, but must start by imposing the prescribed minimum sentence. The Supreme Court of Appeal further held that Section 51 has limited, but not eliminated the court's discretion in imposing sentence.

[38] The above becomes endorsed by the proviso in section 51(3) of the Act, which requires the sentencing court to consider and be *"satisfied that substantial and compelling circumstances exist…"* in order to depart from the minimum

[20] 1999(2) SACR 319 (W)
[21] 2001 (1) SACR 469 (SCA)
[22] At Paragraph 7

sentence prescribed. This indicates that the sentencing court is vested with not just the power but the obligation to consider whether the particular circumstances of the case require a different sentence to be imposed. Further, in deciding whether substantial and compelling circumstances exist, the court is to consider all factors relevant to sentence, both aggravating and mitigating circumstances **cumulatively** and the circumstances do not have to be exceptional in order for the court to depart from the prescribed minimum sentence.

[39] In the above exercise, the court is required to consider the seriousness of the crime, after-effects of the crime, planning or pre-meditation, previous convictions, motive, lack of remorse, vulnerable victims, prevalence of crime, the need for deterrence and retribution, the protection of society, punishment to fit the crime, rehabilitation etc.) In other words, the sentencing court is called upon to **individualise** the offender.

[40] The sentencing court must then balance all the factors that come into play in a particular case and upon a **holistic and cumulative consideration,** exercise the sentencing discretion. As difficult as this exercise may be, sentencing courts are required and obliged to take into account what courts call the cumulative effect. In S v Muller[23] the court noted that *"a sentencing court must **have regard** to the totality of the offender's criminal conduct and moral blameworthiness."*[24]

CONCLUSIONS:

[41] In his grounds of appeal and heads of argument the appellant submitted that the trial court did not exercise its discretion judiciously because it over emphasized the crime and did not balance the crime element with his personal circumstances and the interests of society as set out in the *triad of Zinn (supra).* In other words, the appellant's submission is to the effect that the court failed to individualise him. One of by-products of this ground is for

[23] 2012(2) SACR 545 (SCA)
[24] At Paragraph 9; see also S v Mthethwa 2015 (1) SACR 302 (GP) at Paragraph 21

the appellant to be given the opportunity to rehabilitate and blend into society again. This ground does not take account of the fact that the court required a pre-sentence report in addition to the court's observation of the accused during trial.

[42] More importantly, the evidence indicates that the appellant thought about this over a sufficient amount of time as opposed to a spur of the moment thing – he had the weekend to mull over it. He slept over it and thought it out, his starting point being to establish the presence or otherwise of the deceased at Medupi's house until he decided to catch the deceased on his way to the game by waiting for him at a spot where the deceased was sure to pass.

[43] This court believes that this ground of appeal is defeated by a number of realities regarding the appellant: (i) his age is at a mature level where he is expected to have control .; (ii) he spent the weekend thinking about; (iii) pleaded self-defense, in the face of circumstances where there was clearly no danger posed to him by an old man with his very young grandson, carrying pieces of a broom stick, did not display a character that will take responsibility for his actions; even in his application for appeal he is on the one hand pleading self-defense and on the other he says he wanted to scare the deceased off. There is therefore no remorse in him at all for what he has done.

[44] The second ground of appeal is that the appellant submits the existence of substantial and compelling circumstances. One of these is the appellant's age, which has already been characterized as more of an aggravating circumstance (*supra).* Section 51(3)(a), the legislative underpin that gives rise to this concept as a ground of appeal against the imposition of a minimum sentence is not required to be the norm but a departure therefrom requires weighty justification. Case law, building from the seminal judgment of Malgas, has established a sequence to the effect that the prescribed sentence should be the point of departure. The process which follows, that of deciding whether there are substantial and compelling circumstances must be a function of the consideration and weighing of all the traditional sentencing considerations,

that is, mitigating circumstances, aggravating circumstances, proportionality, consideration of mercy etc.

[45] This court does not find any mitigating circumstances. The fact that the appellant is a first offender is, to the extent it could have been in his favour, is totally neutralized by the fact that his age is at that mature stage that he should have respect for life, especially in this case he had a relationship with the family and knew that the deceased was the pillar thereof. The appellant displayed no remorse, there are no indications that he made any advances to the family or Medupi to mediate some kind of apology or peace-making with the wife and the whole family that the deceased was looking after. In the Pre-Sentence report, the appellant is said to have 13 children, and no contact with any of them or their mothers. He is also reported to have insisted that the deceased started the fight and he had to defend himself. Therefore, there can be no prospects of rehabilitation for a personality like that.

[46] This court finds the aggravating circumstances very serious, serious enough to tip the scale against the appellant even if there was any one mitigating factor in his favour. The Victim Impact Report, which identifies the real victims of the appellant's actions is telling. Apart from the trauma to the family and the community (given the high regard in which the community held the deceased) (i) the wife was reduced to a beggar; (ii) deceased's daughter's life thrown financially upside down; (iii) negative psychological effects on the children who felt poorly regarded by friends, lost their associates and became constantly unhappy, this being particularly noticeable to the grandson who witnessed the killing. The fact that the family viewed the appellant as a friend makes it even more difficult for them and worst of all they all carry feelings of guilt that they could have done something to prevent the tragedy.

[47] The above picture shows how negative the effects of that single act committed by the appellant had on the whole family, their lives, self - esteem and human dignity. It speaks squarely to the interests of society element of the triad of Zinn discussed above.

ORDER:

[48] In the circumstances, it is ordered that:

48.1 The appeal against both the conviction and sentence is dismissed;

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NL TSHOMBE

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

_____

R TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for Appellant:	J L Kgokane
Attorney for Appellant:	Legal-Aid South Africa
Counsel for Respondent:	M Marriot
Attorney for Respondent:	State Attorney
Date of hearing:	30 May 2023

Date of Judgment: 4th October 2023