Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE: 27 MAY 2024

SIGNATURE: [redacted]

Case No: A282/23

In the matter between:

CHARLES PETER BARKER **APPELLANT**

and

THE STATE **RESPONDENT**

Cox AJ

Heard on: 13 MAY 2024

Delivered: 27 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 27 May 2024.

ORDER

It is Ordered:

[1] The appeal against both sentences is dismissed

JUDGMENT

COX AJ:

[1] The appellant was convicted in the High Court of Gauteng at Pretoria of one count of premeditated murder and one of attempted murder for which he was sentenced to life- and 18 years imprisonment respectively. In addition, the court *a quo* fixed a non-parole period of 25 years in terms of section 276B(1)(b) of the Criminal Procedure Act[1] (the CPA).

[2] The Supreme Court of Appeal granted him leave to appeal both sentences.

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[1] 51 of 1977

[3] In the morning of 5 March 2018, the appellant inexplicably lost his temper and stabbed both his fiancée and her 21year old daughter several times with a knife. After being stabbed the 21 year old succumbed to her injuries almost immediately.

[4] Subsequent to a trial the appellant was convicted despite pleading not guilty to the two counts. What follows is a summary of the relevant evidence adduced at the trial.

[5] The appellant shared a home with his fiancé, Ms Bettina-Ann Coke and her 21 year old daughter – Adrianne Coke.

The morning of the dreaded incident the appellant had gone to the kitchen to iron a pair of trousers which he intended to wear to work that day. His fiancé went to check on him as he took longer than usual. She found the appellant in the kitchen and asked him why he took so long. He replied that he had some difficulties with ironing the trouser and threatened to tear it up and threatened to burn her with the hot iron. She left him in the kitchen and went to the bedroom as she was also busy preparing for work.

[6] Shortly afterwards the appellant entered the bedroom without the trousers. Ms Coke left the bedroom and went to the kitchen to iron her dress and found the trousers on the ironing board, torn in two. She took it to him in the bedroom, threw it onto their bed and told him that his behaviour was unacceptable whereafter he took the trousers outside and returned to the room without it.

[7] Upon his return he informed Ms Coke that he was going to leave her and started packing his belongings. As he took a certain towel to pack, she said that she would fetch him another as the one that he had taken was not his property. She fetched one from the study and as she gave it to him, he put a belt around her neck. She managed to remove it and went to the bathroom.

He followed her into the bathroom whereafter the deceased also entered and asked the appellant to leave her mother alone. Ms Coke asked him to leave the bathroom and the two succeeded in pushing him out of the bathroom. He however managed to force his way back in.

[8] The deceased stood in front of her mother, shielding her from the appellant. He grabbed the deceased behind her head by her hair and slammed her head against the toilet seat. He pulled her back up and as Ms Coke tried to intervene, she was pushed against the bath. He held the deceased against his body with his arm around her neck from behind. She struggled to breathe and the appellant said that he was going to kill her and dragged her to the kitchen where he took a knife from the kitchen counter and told Ms Coke that he was going to show her who he really is. While the deceased could not say anything and was struggling to breathe her mother begged the appellant to stop what he was doing and to leave the deceased alone.

[9] The deceased was pulled back to the bedroom where she was dragged to the bed and was stabbed twice on her upper body causing her to fall. Ms Coke tried to reach her but the appellant punched her in the face and stabbed her on her chest.

[10] The deceased managed to get up from where she had fallen and begged the accused to stop what he was doing. He asked her whether she was going to send him to prison and she said yes. He took hold of the deceased once again and she fell down and as Ms Coke attempted to assist her the appellant grabbed hold of her, Ms Coke, who fell too.

In an attempt to protect herself from being stabbed again, she grabbed hold of the knife. It cut her hand and during the subsequent struggle he stabbed her on her right arm close to her elbow saying, 'sorry Jesus I am going to do this'. She managed to get up from the floor and begged the appellant to find help for the deceased.

[11] The appellant then phoned his mother and told her that he had stabbed the deceased and threatened to stab himself. The deceased got up from where she lay and fell by the dressing table. The appellant then performed CPR on her and he and Ms Coke tried to stop the bleeding with anything that they could find. While the appellant put on another pants Ms Coke ran out of the house to get some help.

While she was outside the accused came from the house, opened the motorgate, got into his vehicle and drove off. She screamed for her

neighbour to call an ambulance and shortly thereafter paramedics and an ambulance arrived. The deceased was declared dead on the scene and Ms Coke was transported to Tambo Memorial hospital.

[12] The J88 form which was completed by Dr Manyoni shows that she sustained five lacerations in the abdominal area, two on the anterior elbow area and one each on her index and middle finger. The latter caused permanent damage to her right hand.

[13] The post mortem report of the deceased indicates that she had sustained four stab wounds to the chest of which two penetrated her right lung hence the cause of death was found to be stab wound to the chest.

[14] The conviction of premeditated murder triggered the provisions of section 51(1) of the Criminal Law Amendment Act[2] (the CLAA) providing for a minimum sentence of life imprisonment unless the court finds substantial and compelling circumstances to exist[3].

[15] In considering a suitable sentence, the trial court correctly accepted that the appellant was the aggressor and neither the deceased nor her mother provoked him. There was no valid reason for the senseless attack on them.

[16] The deceased and her mother have become part of the statistics in the scourge of gender based violence in the country. Gender based violence in domestic relationships has increased at an alarming rate and caused the legislature to recently effect amendments to the CLAA to also provide for minimum sentences in cases of murder involving domestic relationships. The deceased paid the ultimate price for attempting to protect her mother against the appellant

[17] The imposition of sentence lies within the discretion of the trial court. Hence courts of appeal are reluctant to interfere unless the trial court misdirected itself or imposed a sentence that is shockingly inappropriate in the circumstances.

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[2] The Criminal Law Amendment Act 105 of 1997

[3] Section 53(1)(a) of the Criminal Law Amendment Act 105 of 1997

[18] In *Kumalo*[4] Holmes JA stated, "Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

[19] It would have been incorrect to sentence the accused without first establishing who he is and why he committed the offences, his personality, background, criminal capacity, health, expected future behaviour including other relevant aspects.

[20] The trial court had the benefit of various reports providing it with all the relevant information. It set out the appellant's personal circumstances inclusive of his mental health issues. Psychologists diagnosed him with anti-social personality disorder indicating that the possibility of his rehabilitation is compromised.

[21] Importantly the appellant has a previous conviction of assault with the intent to do grievous bodily harm, one for murder and robbery with aggravating circumstances; the latter two convictions stem from one incident. He was released on parole in 2015 and was still on parole when the current offences were committed.

Noteworthy is that in all the offences a knife was his weapon of choice and the victims in all the instances were people near and dear to him.

[22] The trial court considered the main aims of punishment as well as the *Zinn*[5] triad.

[23] Offences referred to in section 51 of the CLAA have been singled out for severe punishment[6]. That was confirmed in *Nkabinde*[7] which stated:

> '. . . the prescribed minimum sentences should not be departed from lightly and for flimsy reasons. The legislature has ruled that these are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes, unless there are truly convincing reasons for a different response.'

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[4] *S v Kumalo*1973 (3) SA 697 (A)
[5] *S v Zinn* 1969 (2) SA 537 (A)
[6] *S v Malgas* 2001 (1) SACR 469 (SCA)
[7] *Nkabinde and Others v S* [2017] ZASCA 75

Similarly, according to *Netshivhodza*[8], '[t]he minimum sentence has been set as a benchmark prescribing the sentence to be ordinarily imposed for specific crimes and should not be departed from for superficial reasons.'

In this case, the odds were heavily stacked against the appellant.

[24] The point of departure for a sentencing court is the minimum sentence. The follow up question is whether substantial and compelling circumstances can be found to exist, which is answered by considering whether the minimum sentence is disproportionate in the circumstances of the case.

In the trial court counsel for the state and the defence were in agreement that there were no such circumstances which warranted a departure from the prescribed sentence.

[25] Before us counsel for the respondent was hard pressed to concede that and argued that the court should differentiate between a planned and premeditated murder and therefore there should be a distinction between the sentences imposed for a premeditated murder as opposed to a planned one. The argument was that a lesser sentence should be imposed in cases of premeditated murder.

I cannot agree with the contention. Premeditated murders are more often than not more brutal than planned ones causing more suffering by the victim than planned ones. The legislature thought it well not to make any distinction between the two and is it my view that the argument by counsel is fundamentally flawed.

[26] The trial court was correct when it found that there were no substantial and compelling circumstances which warranted a departure from imposing the minimum sentence of life imprisonment and was it not unjust for the appellant to be sentenced in terms of s 51(1) of the CLAA in respect of the first count.

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[8] *Netshivhodza v S* [2014] ZASCA 145

[27] It is convenient to now deal with the charge of attempted murder. It was contended on behalf of the appellant that the sentence of 18 years imprisonment was shockingly inappropriate.

[28] I pause to mention that sentencing lies within the discretion of the trial court. The law with regard to the limited point of interference was set out as follows in *Hewitt* [9]:

'the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[29] The court *a quo* considered the sentence in line with the principles set out in *Zinn*. The offence committed by the appellant remains serious. These kind of violent crimes should be met with sentences that would deter the appellant and others from committing them. These factors need to be considered in conjunction with the nature and seriousness of the offence, the interests of society and those of the accused person. In this regard, I am of the view that the sentence of 18 years' imprisonment is appropriate in the circumstances.

[30] The state requested the court *a quo* to fix a non- parole period in terms of section 276B of the Criminal Procedure Act[10] (the CPA), and the court obliged by ordering that the appellant is not eligible for parole prior to serving 25 years of his sentence.

[31] The fixing of a non-parole period sparked a hefty argument from the appellant's counsel, arguing that it was unreasonable and that it should be scrapped in its entirety. He added that the court was free to order that the court record and concomitant reports be forwarded to the Department of

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[9] *Hewitt v S* 2017 (1) SACR 309 (SCA)
[10] The Criminal Procedure Act 51 of 1977

Correctional Services for submission to the parole board when the appellant qualifies for parole.

In *Jimmale and Another* [11] the Constitutional Court confirmed that a non-parole order should not be resorted to lightly. Considering section 73(6)(b) of the Correctional Services Act[12] it may appear that the order in terms of section 276B of the CPA was superfluous. The section provides that when a person has been sentenced to life imprisonment the person may not be considered for parole before serving 25 years of the sentence. It is however silent on the remission of sentences by the President of the country, hence it may in exceptional circumstances and on good cause shown be required that a non-parole period be fixed despite a person being sentenced to life imprisonment.

The court *a quo* considered all relevant factors and did not make the order lightly and was there no misdirection when it was so ordered.

[32] There was no error or misdirection on the part of the trial court in sentencing the appellant. There is no reason for this Court to interfere with the sentence.

Accordingly, I propose the following order:

The appeal against both sentences is dismissed.

[redacted]

I COX

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[11] 2016 (2) SACR 691 (CC)
[12] The Correctional Services Act 111 of 1998

I AGREE AND IT IS SO ORDERED

J HOLLAND-MÜTER

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

J MOGOTSI

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	13 MAY 2024
JUDGMENT DELIVERED ON:	27 MAY 2024
COUNSEL FOR THE APPELLANT:	ADV. H J ALBERTS
INSTRUCTED BY:	PRETORIA JUSTICE CENTRE
REFERENCE:	
COUNSEL FOR THE RESPONDENT:	ADV. HARMZEN
INSTRUCTED BY:	DPP, PRETORIA
REFERENCE:	NOT FURNISHED