

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

CASE Number: A248 / 2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED: YES/NO

3 June 2024 [...].

In the matter between:-

W[...] M[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This appeal is against a judgment handed down by the Regional Court, Gauteng Division, on 11 March 2020, where the appellant was convicted on one charge of murder, and sentenced to 10(ten) years imprisonment.
- [2] The appellant instituted his application for leave to appeal as soon as his sentence was pronounced. The Regional Magistrate granted leave to appeal to this Court on both conviction and sentence.
- [3] On appeal, the appellant challenged his conviction on the basis that he should be charged with culpable homicide instead of murder of the deceased, Kate Makgaleme (Makgaleme). In this context, the appellant challenged the manner in which the Regional Magistrate considered the evidence. The appellant argued that the evidence *in casu* was insufficient to establish his guilt beyond a reasonable doubt. The appellant also took issue with the sentence he received. He contended that he was wrongly convicted of murder.

The relevant background

- [4] It is evident that the bulk of the evidence remains undisputed. The principle witness that testified for the State was Nono Lekaota (Lekaota), who was the aunt of Makgaleme. Several important aspects of her evidence was neither challenged under cross examination, nor was a material part of the appellant's version put to her under cross examination substantiated by the appellant when he later testified (this sentence must be rephrased). This has the consequence of Lekaota's version prevailing, on the basis of the following *dictum* in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular

¹ 2000 (1) SA 1 (CC) at para 61.

point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

- [5] The version that remains undisputed was that the appellant and Makgaleme were in a personal relationship. On the afternoon of Saturday 12 September 2015, Makgaleme and Lekaota were walking together in each other's company at the corner of Carpella Avenue and 35th Avenue in Blyvoor, when they were approached by the appellant driving his Hyundai motor vehicle. The appellant stopped the vehicle to have a conversation with Makgaleme.
- [6] When they conversed, Lekaota was a distance away from the vehicle and could not hear what was being said. The appellant testified that when he asked her to accompany him home, she refused and informed him that she was visiting her new boyfriend.
- [7] When Makgaleme refused to accompany the appellant, he drove away. The appellant then decided to drive back to Makgaleme. By this time, Makgaleme was again walking with Lekaota. The appellant again stopped next to Makgaleme and asked her to accompany him home. Lekaota continued walking a short distance away from the vehicle. The appellant testified that when Makgaleme's telephone rang, she informed him it was her new boyfriend. This sparked an argument between them. The appellant became angry, stepped out of his vehicle holding a screwdriver. He then stabbed Makgaleme with the screwdriver several times.

- [8] There is some dispute about the state Makgaleme was in after the stabbing. Lekaota testified that she ran away into a closeby yard, fearful for her life. She however witnessed Makgaleme being stabbed. Makgaleme collapsed after the stabbing. The appellant returned to his vehicle. He however testified that he left her standing next to the vehicle, got into his vehicle and drove away.
- [9] Another point of contention was whether the appellant consumed any liquor. Lekaota was adamant that the appellant had a beer bottle, and he was drinking out of it. The appellant denied this fact. There is in any event no evidence that he was inebriated or under the influence of alcohol.
- [10] The real issue in this case is about what happened after the stabbing incident. The appellant testified that he drove away with Makgaleme standing next to the vehicle. He did not bump her nor did he drive over her. He further testified that he did not know what state she was left in after the attack.
- [11] Lekaota had something completely different to say. According to her, Makgaleme collapsed before the appellant got into his vehicle, and was laying partly on the road and partly on the sidewalk. Lekaota testified that the appellant then proceeded to run over Makgaleme whilst she was lying on the ground. In her view his conduct was intentional. She explained that Makgaleme was caught under the vehicle and dragged under it for a distance.
- [12] There was an investigation of the scene by SAPS investigators. Photographs were taken of the scene and which evidence remains undisputed. These photographs showed that Makgaleme was dragged along the road, leaving a blood trail. Her body lay a fair distance from where she was attacked.
- [13] Dr Julian David Jacobson (Jacobson) testified for the State. He was employed as a Medical Officer in the Division of Forensic Services in the Gauteng Provincial Department of Health. He conducted the autopsy on Makgaleme

and submitted a report. It is clear from his testimony and the report itself that Makgaleme suffered multiple injuries. These included several bone fractures abrasion marks and bruises. Clearly they were not only from the stabbing incident. Jacobson was however unable to say what exactly caused the death of Makgaleme, as a result of all these extensive and multiple injuries.

- [14] The pieces of the evidentiary puzzle comes together in respect of the conduct of the appellant after the fact. It was undisputed that he reported to the Carletonville police station on 23 September 2015 (a week after the incident). He informed a police officer, Jennifer Motaung (Motaung) that he had 'killed' his wife. Motaung then arrested him. The testimony of Motaung was not challenged under cross examination.

Analysis: The Conviction

- [15] The undisputed evidence portrays that the appellant became angry with Makgaleme and confronted her twice. He could not hold his anger on the second occasion when he attacked her.
- [16] From the expert evidence, it could not be ascertained with certainty that the stab would cause Makgaleme's demise. That is why the events that followed after is so important. The Magistrate was faced with two mutually contradictory versions, one presented by Lekaota and the other by the appellant.
- [17] It was accepted that there were some contradictions between the statement made by Lekaota to SAPS, and the testimony she gave in the Court *a quo*. The first being that the statement made no mention of the appellant first having an argument with Makgaleme, then driving away, and subsequently coming back. According to the statement, when the appellant first stopped to speak to Makgaleme, that is when he attacked her. Lekaota was adamant the statement was not correct, and she persisted with her version under cross-examination in this regard. The second contradiction was that the statement

reflected that that Makgaleme was standing upright after the attack. Lekaota testified that Makgaleme had already collapsed and was lying partly on the road when the appellant deliberately drove over her.

[18] The appellant had pointed out the aforesaid contradictions. Notably, the Magistrate took into consideration these contradictions. He also assessed Lekaota's credibility and concluded that such contradictions should not detract from her testimony.

[19] Appeal courts are loath to interfere with credibility findings of the court *a quo*. In this instance the Magistrate, presiding over the trial, had the benefit of observing the witnesses, their demeanour and the manner in which they presented their evidence in real time. The only basis where interference would be justified is where the evidence, as it appears from the appeal record, shows that the credibility findings of the Magistrate was entirely out of kilter or irreconcilable with such evidence, and / or the evidence was wrongly considered. The principle was enunciated in *Bernert v Absa Bank Ltd*² as follows:

'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses, as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'

² 2011 (3) SA 92 (CC) at para 106.

[20] Recently, in *Director of Public Prosecutions Eastern Cape Makhanda v Coko*³ the court stated:

‘... it is now trite, as has repeatedly been emphasised in innumerable decisions of our courts, that in every appeal against conviction where the factual findings of the trial court are impugned, an appellate court should be guided by the well-settled principle that its powers to interfere with such findings are circumscribed. Thus, it is not at large to interfere unless it is satisfied that the trial court committed material misdirections or a demonstrable blunder in evaluating the evidence.

Therefore, in the ordinary course, an appellate court should proceed on the basis that the factual findings of the trial court are correct. This entails that the appellate court must defer to the trial court as the latter court was steeped in the atmosphere of the trial and had the opportunity of observing the witnesses testify, and drawing inferences from their demeanour. In *Powel and Wife v Streatham Nursing Home* Lord Wright was forthright when he put it thus:

‘Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.’

[21] In this instance there is no justification for interfering with the credibility findings, or the manner in which the magistrate evaluated and applied the evidence. If the testimony of Lekaota is considered as a whole, she was consistent in her evidence and even under cross-examination. When confronted with the contradictions between her testimony and her statement, she did not concede to another version. Furthermore when the appellant’s actual version was put to Lekaota under cross-examination, it corresponded with the version of Lekaota in evidence in Court, of the appellant leaving after

³ 2024 JDR 1664 (SCA) at paras 38 – 39. See also *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 687; *S v Monyane and Others* 2001 (1) SACR 543 (SCA) at para 15; *S v Kebana* 2009 JDR 0916 (SCA) para 12; *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30.

the first argument with Makgaleme, and then subsequently returning to resume the argument, rendering the contradiction in her statement rather nugatory.⁴ The testimony of Lekaota is also consistent with the other evidence relating to Makgaleme's injuries and the fact that she was dragged under the appellant's vehicle. On the totality of the evidence, the manner in which the Magistrate had considered the evidence was proper, including the testimony of Lekaota. But even if Lekaota was open to some criticism concerning her evidence, it cannot mean that her evidence should simply be ignored. As held in *S v Van der Meyden*⁵:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[22] The appellant was also critical of the fact that the Magistrate failed to have proper consideration of the cautionary rule pertaining to Lekaota being a single witness. But this is not an immutable consideration. In *S v Sauls and Others*⁶ the Court held as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of H Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [*R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision

⁴ As said in *S v Kebana* (*supra*) at para 10: '... But against such criticism as may be justified the objective facts are more important ...'.

⁵ 1999 (2) SA 79 (W) at 82C – E. See also *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) 34; *S v Appels* 2007 JDR 1234 (SCA) at para 7, and the how the court dealt with the criticisms dispensed by the appellant concerning the testimony of a witness at para 8, which is comparable to the case *in casu*.

⁶ 1981 (3) SA 172 (A) at 180E – G.

but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded.'

[23] It is however never just about the evidence by the witnesses for the State, but also about a proper consideration of the testimony of the appellant himself. In *S v Van der Meyden*⁷ the Court had the following to say:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond 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 evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond 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.'

The *dictum* in *Van Der Meyden supra* was referred to with approval in *S v Chabalala*⁸, with the Court coming to the following conclusion:

'... The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

⁷ 1997 (2) SA 79 (WLD) at 80H – 81B.

⁸ [2003 \(1\) SACR 134 \(SCA\)](#) at para 15. See also *S v Syster* 2014 JDR 2544 (SCA) at para 17.

[24] The aforesaid means that the appellant's testimony must be considered, so as to ascertain whether he is able to offer a feasible explanation that would create reasonable doubt. His testimony in answer to the allegation of him driving over Makgaleme was simple. He testified that he knew nothing about it. The following exchange took place between the appellant and his counsel when he gave evidence:

MS NEL: So as the witness said you had bumped her while she was in front of your case, is that true?

ACCUSED: No, I know nothing about that.

MS NEL: Is it possible that you had driven over her sir?

ACCUSED: I do not think I bumped her with my car because I just pulled off Your Worship. I drove straight. I never reversed.'

[25] But under cross examination, the following was put to Lekaota as to what the appellant's case and evidence would be:

MS NEL: Yes. The accused will say, he got into his vehicle, the deceased was there at his vehicle at the passenger door, upright, trying to open the door.

MS LEKAOTA: He is lying.

MS NEL: In this motion of her opening, trying to open the door, he drove off and he says that he did not initially realize that she had fallen under the car and then when he realized he stopped.

MS LEKAOTA: Kate never went to stand close to the accused's car at all.'

[26] The aforesaid is a material contradiction on the part of the appellant, where it comes to his case. At some point the appellant conceded that he drove over Makgaleme, but it was suggested that it was an accident because she was trying to open the door and was dragged under the vehicle. When the appellant realised this happened, he immediately stopped. But when the time came for the appellant to testify, he effectively disavowed this entire version,

and stated that he left Makgaleme standing, never drove over her. He simply continued to drive away from the scene.

- [27] The Magistrate noted this contradiction. He further noted that this version was not put to Lekaota when he testified. He also referred to the fact that the appellant was unable to account for the injuries that Makgaleme had suffered. He held that for the appellant's version to be sustained, she had to jump or crawl under the vehicle. He held this was simply not in line with the probabilities. This is undoubtedly a justified conclusion.
- [28] This contradiction in the appellant's case discussed above is in my view problematic for the appellant. It is exacerbated by the fact that when she was asked about Makgaleme being run over under cross examination, Lekaota testified that Makgaleme was driven over by the entire motor vehicle, trapping her underneath and dragging her a considerable distance before she become free. No alternative version was put to her about Makgaleme not being so trapped and dragged. The shock expressed by Lekaota in witnessing this event, even on the transcript, seems genuine and real. Moreover, the forensic evidence leaves no doubt that Makgaleme was dragged along under the vehicle, causing extensive injuries.
- [29] The case of the appellant, in my view, is highly improbable to the extent that it must be false. In *S v Munyai*⁹ the court held: '*... A court must investigate the defense case with the view of discerning whether it is demonstrable false or inherently so improbable as to be rejected as false ...*'. There are a number of reasons for my view in this regard. First, on the version that Makgaleme was trying to open the door, it is difficult in understanding why anyone in the position of Makgaleme would try and get into his vehicle. It is highly improbable. Secondly, if Makgaleme was accidentally dragged under the vehicle and upon realising this he stopped. It is highly improbable as he should have inspected the car and the surroundings. Thirdly, it is impossible for a person like Makgaleme to become stuck under the vehicle and be

⁹ 1988 (4) SA 712 (V) at 915G.

dragged for a considerable distance without the appellant becoming aware thereof. And finally, why would he report to SAPS that he had killed Makgaleme? This is why the Magistrate expressed '*hunting with foxes and running with rabbits*'. The appellant was approbating and reprobating. On the one hand, he testified he never drove over Makgaleme with his vehicle, whilst on the other hand he conceded that he had driven over her but did not have the intention to do so. Such versions cannot be presented in the alternative. It is either the one or the other. It has to follow that any version proffered by the appellant contrary to the testimony of Lekaola had to be rejected.

[30] There are further probabilities that work against the appellant. Considering the photographs of the scene, it simply not possible that Makgaleme could have ended up under the appellant's vehicle and he would not know about it, and such contention must be rejected. As held in *S v Heslop*¹⁰: '*... logic dictates that where the evidence of a witness is irreconcilable with an unassailable fact, such evidence falls to be rejected ...*'. The appellant, at the time, was angry at Makgaleme for refusing to accompany him home and the fact that she had another boyfriend. As the evidence reveals, he came back a second time to press the issue, stabbed Makgaleme with a screwdriver, and then drove over her whilst still angry.

[31] It is evident that the appellant seeks to disavow the fact that he drove over Makgaleme by relying on the report and testimony of Jacobson. This was noted from the argument presented by the appellant at the end of the trial, and also in his written submissions in this Court. Jacobson testified that he was unable to say what injuries caused the death of Makgaleme. This included whether any stabbing injuries caused her death. The appellant's justification could be that if it could not be pinned on him that he stabbed Makgaleme to death, and he did not drive over her, then he would escape the murder charge. However, the simple answer to this has to be that the stabbing of Makgaleme and then driving over her with his vehicle was, in the end, one and the same attack. The attack was intentional, and led directly to

¹⁰ 2007 (4) SA 38 (SCA) at para 11.

the death of Makgaleme by way of multiple serious injuries. It can hardly be better said than to refer to the following *dictum* in *S v Phallo*¹¹:

'In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned judge deals, at 737 F - H, with an argument (popular at the Bar then) that proof beyond 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, preferring to adhere to the approach which ". . . at one time found almost universal favour and which has served the purpose so successfully for generations" (at 738 A). This approach was then formulated by the learned judge as follows (at 738 A - B):

"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 an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

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 approach of our law as represented by *R v Mlambo*, *supra*, corresponds with that of the English courts. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) it was said at 373 H by Denning J:

". . . 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 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. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be

¹¹ 1999 (2) SACR 558 (SCA) at paras 10 – 11.

dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

[32] The appellant was thus rightly convicted of murder in the Court *a quo*. It can safely be concluded that whilst it may be said that it could be possible that the appellant accidentally ran over Makgaleme with his vehicle, such a possibility, and with all the evidence properly considered, is not in the least probable. That places the matter beyond reasonable doubt, and the State successfully proved the murder charge against the appellant. The appeal against the conviction falls to be dismissed.

Analysis: The Sentence

[33] With the appellant rightfully being convicted of murder, the main contention that the sentence is too harsh, has no merit. This is because the core argument raised by the appellant is that he should have been convicted of a lesser offence, such as culpable homicide, which carries a lesser sentence. Once this argument fails, the appeal against the sentence must fail.

[34] In *S v Bogaards*¹² the Court held:

'Ordinary, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another ...'

[35] In *S v Hewitt*¹³ the Court reiterated the aforesaid principle:

¹² 2012 (12) BCLR 1261 (CC) at para 41.

¹³ 2017 (1) SACR 309 (SCA) at para 8. See also *S v De Jager* 1965 (2) SA 616 (A) at 629A-B.

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows 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.'

[36] In my view, the Magistrate's reasoning on the sentence of 10(ten) years imprisonment was not unreasonable. He properly applied his mind to all of the facts, and paid particular attention to the pre-sentence report submitted by Anette Vergeer, a specialist social worker. There is no irregularity in the sentencing that can be said to constitute failure of justice, nor is there any misdirection that would significantly impact on the sentence, for the reasons to follow.

[37] The record shows that the Magistrate had regard to the fact that the appellant wanted to continue with the relationship with Makgaleme, however she was not '*keen*' to do that. He considered the manner in which Makgaleme was killed and considered inputs from the family. He considered what he called the '*mercy aspect*' and that the events were not premeditated. He made detailed reference to the post-sentence report, which in itself concluded that a direct prison sentence was appropriate. The Magistrate exercised his discretion accordingly.

[38] What must also be considered in this case is the apparent lack of real remorse on the part of the appellant for what he did. Even when testifying in the Court *a quo*, he never expressed real remorse or regret for what he did. Whilst he did acknowledge that what he had done was wrong, when asked how he felt about Makgaleme passing on, he said ‘... *I am so hurt Your Worship because this is someone I loved ...*’. This is hardly an expression that he appreciated what he had done and had genuine regret for doing it. Also in his testimony, he said that he was scared once he appreciated what he had done. This fear equally does not translate into remorse, Instead, it is a fear of consequence, and what would happen to him. He simply showed no genuine contrition. In *S v Matyityi*¹⁴ the Court had the following to say:

‘There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’

[39] In my view, the appellant fails on the *Matyityi* approach. He took more than a week to even report what he always knew was wrongdoing to SAPS. And even then, he continued to disavow that he was responsible for Makgaleme’s death by driving over her with his vehicle. He persisted with this view in the Court *a quo*. He never showed any remorse. He failed to take the Court a

¹⁴ 2011 (1) SACR 40 (SCA) at para 13.

quo into his confidence and explain his anger and why it caused him to act as he did. The fact that he came back a second time to continue the altercation required explanation. The appellant does not have a true appreciation of his wrongdoing.

[40] As to the personal circumstances of the appellant as set out in the presentencing report in some detail, this would be insufficient to come to the appellant's assistance where it comes to successfully challenging the sentence that has been imposed on him. In *S v Vilakazi*¹⁵ the Court held as follows:

'... 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 employed, are in themselves largely immaterial to what that period should be ...'

[41] In conclusion, the judgment in *S v Kebana*¹⁶ is apposite to the case *in casu*.¹⁷ In that case, the appellant was sentenced to ten years imprisonment for conduct quite comparable to what is before this Court in the current case. It was contended on appeal that the sentence was shockingly inappropriate, considering the appellant's age, long and unblemished work record with a single employer, and that he supported four minor children. In *Kebana*, as *in casu*, the Magistrate weighed all the facts and also considered that the attack was planned¹⁸, and that it was carried out in a cruel and cowardly manner. He was sentenced for a long period and it was considered to be the appropriate punishment and fitting for the deed. The Court also considered the fact that the appellant did not express his remorse. The Court ultimately concluded: '*... the role of mercy must to a large extent give way to just retribution. The*

¹⁵ 2012 (6) SA 353 (SCA) at para 58. See also *S v Ro and Another* 2010 (2) SACR 248 (SCA) para 30, where it was said: '*... to elevate the personal circumstances of the accused above that of society in general and the victims, in particular, would not serve the well-established aims of sentencing, including deterrence and retribution.*'

¹⁶ 2009 JDR 0916 (SCA).

¹⁷ See para 13 of the judgment.

¹⁸ In the current matter, it was accepted by the Magistrate that the attack was not pre-planned, but did consider that the appellant left and returned to continue the altercation.

sentence, while heavy, induces no disquiet in me ...'. A similar outcome must follow in the current proceedings.

[42] As a result, the appellant has failed to make out a proper case of the kind of failure in sentencing that would justify it being interfered with on appeal. The Magistrate exercised his discretion by having regard to all the facts placed before him. The appeal against the sentence therefore equally falls to be dismissed.

[43] In conclusion therefore, there is no basis, whether in fact or in law, to interfere with the judgment of the Regional Magistrate in the Court *a quo*. It is therefore upheld on appeal.

[44] In all the circumstances as set out above, the following order is made:

Order

1. The appellant's appeal is dismissed.

[...]

SNYMAN AJ
Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

I agree.

KOOVERJIE J
Judge of the High Court of South Africa

Appearances:

Heard on:	22 May 2024
For the Appellant:	Adv MB Kgagara
Instructed by:	Legal-Aid South Africa
For the Respondent:	Adv V Tshabalala
Instructed by:	Director of Public Prosecutions
Date of Judgment:	4 June 2024