REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No. AR 319/09

SYDNEY QINISELA MAKHAYA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Delivered:
4th May 2010

TSHABALALA JP

[1] The appellant was tried and found guilty in the court *a quo*, of murder, unlawful possession of a firearm and unlawful possession of ammunition. He was sentenced to life imprisonment for the murder and an effective two years imprisonment for the other two charges, by McLaren J. This is an appeal against the sentence of life imprisonment. The application for leave to appeal was granted on 12 July 2007.

[2] Since the appeal is only against sentence, it is not necessary to deal in great detail with the evidence that led to conviction. I will however,

concentrate on those facts that are relevant to the sentence appealed against.

[3] The appellant was employed as a security guard at the Cato Ridge Hotel (hereinafter referred to as 'the hotel'). He was on duty one night towards the end of August 2000 when the hotel was burgled. He was asleep during the burglary and was dismissed, by Mrs Roux and the deceased's wife Mrs Gunter, as a result. He felt that the dismissal was unfair and on 27 September 2000 returned to the hotel to speak to the deceased who was the night manager on duty. On his own version he arrived there to speak to the deceased about either getting his job back or receiving financial compensation for his termination.

[4] In her heads of argument, counsel for the appellant, Miss Anastasio, submitted that the sentence of life imprisonment is shockingly inappropriate in the circumstances of this case, as there is disparity between the prescribed sentence and the sentence which the presiding officer may have regarded as the appropriate sentence.

[5] She submitted further that the cumulative effect of the factors advanced in mitigation of sentence, amounted to substantial and compelling circumstances, and this court is therefore at liberty to ameliorate the sentence. According to her, the mitigating factors are, that the appellant:

1. had reached the age of 24 years without any prior brush with the law.

2. was maintaining his children.
3. was aggrieved by his discharge from his employment.

[6] The respondent's heads of argument submit that the court *a quo* took into account the appellant's personal circumstances and attached proper weight to them. The respondent contends that the court *a quo* was alive to the fact that the appellant subjectively believed that he had been wrongly dismissed.

[7] The respondent submitted further that the court *a quo* had not misdirected itself on the facts in finding that the appellant had acted with pre-meditation, and that the court's power to interfere with sentence on appeal is limited.

[8] It is common cause that s 51 of the Criminal Law Amendment Act 105 of 1997, read with Part 1 of Schedule 2, was applicable in sentencing the appellant on the murder charge. The finding by the court *a quo* that the murder was pre-meditated was not challenged on appeal and I will therefore not deal with this issue any further.

[9] In *S v Malgas* 2001 (1) SACR 469 (SCA) the Supreme Court of Appeal (hereinafter referred to as 'the SCA') set out the 'determinative test' to be applied in matters where the minimum prescribed sentences becomes a factor. The court held at para 25 that:

> 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[10] The fact that the murder charge falls within the ambit of the prescribed minimum sentence does not automatically result in a sentence of life imprisonment being handed down. I align myself with the view of the SCA in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 18:

> 'It is plain from the determinative test laid down by Malgas,[1] consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in Dodo,[2] that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of Malgas and of Dodo is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.'

[11] The court *a quo* found that the factors advanced in mitigation of sentence did not amount to 'substantial and compelling circumstances',

[1] *S v Malgas* 2001 (1) SACR 469 (SCA)
[2] *S v Dodo* 2001 (1) SACR 594 (CC) (2001 (3) SA 382; 2001 (5) BCLR 423)

and therefore did not deviate from the prescribed sentence of life imprisonment. In *Vilakazi* it was held at para 17:

> 'To say that a court must regard the sentence as being proportionate a priori and apply it other than in an exceptional case runs altogether counter to both Malgas and Dodo. Far from saying that the circumstances in which a court may (and should) depart from a prescribed sentence will arise only as an exception, Malgas said:
>
> > "Equally erroneous . . . are dicta which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling." '

[12] It is common cause that at the time of the murder the appellant:

1. was 24 years old;
2. was single, with two children, whom he supported;
3. had been gainfully employed; and
4. was a first offender.

[13] The appellant was aggrieved about his dismissal, which he considered as unfair and unreasonable. On his own version he acknowledged that it was not the deceased who had dismissed him. The deceased was on duty at the hotel, where the appellant had been employed. After the murder the appellant fled the scene.

[14] In *S v Mnisi* 2009 (2) SACR 227 (SCA) it was held at para 8:

> 'So far as individual deterrence is concerned, the evidence does not suggest that the appellant has a propensity for violence or is a danger to society. He is a first offender and given the unusual circumstances of the case is unlikely again to commit such an offence.'

In my view it cannot be under emphasised that the appellant, being a first offender, has shown no propensity to commit violent crime. Given the circumstances of this case, it is unlikely that he would commit such a crime in future. The trial court should have looked at the totality of the appellant's behaviour in arriving at an appropriate sentence. See *S v Mpofu* 1985(4) SA 322 (ZH) at 324 G – J).

[15] In *S v Sangweni* 2010 (1) SACR 419 (KZP) it was held at para 13 that:

> 'A long term of imprisonment should emphasise the seriousness of the offence sufficiently and, at the same time serve the community interest. Such a sentence will also take due account of the need to give the appellant an opportunity and a chance to rehabilitate himself.'

The appellant, in the present case, committed the murder when he was at a relatively young age and he was also a first offender. I am of the view therefore that he is capable of rehabilitation.

[16] In light of the judgments referred to it is evident that the mitigating factors advanced on behalf of the appellant cumulatively amount to substantial

and compelling reasons that would necessitate a deviation from the prescribed sentence.

[17] The appeal against the imposed sentence of life imprisonment is upheld. In the result the following order is made:

The sentence is set aside and substituted with the following sentence:

1. Appellant is sentenced to 20 years imprisonment.
2. The sentence is antedated to 14 September 2001.

_____

TSHABALALA JP

_____

STEYN J

_____

CHILI AJ

Date of Hearing:	28 January 2010
Date of Judgment:	4th May 2010
Counsel for Appellant:	Ms Z. Anastasiou
Instructed by:	Justice Centre
Counsel for Respondent:	Mr. M. Magwanyana
Instructed by:	Director of Public Prosecutions