Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**YES**
Circulate to Regional Magistrates:	**YES**

IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 15/2022

In the matter between:

GAOREKWE GODFREY MOLEME **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen ADJP, Mongale AJ

Heard: 27 October 2023

Handed down: 14 November 2023

The judgment was handed down electronically by circulating to the parties' representatives via email. The date and time for hand down is deemed to be 14 November 2023.

Summary: Criminal Appeal against sentence imposed in the Regional Court – misdirection by Regional Court - period in detention prior to being released on bail before subsequent conviction not considered. Appeal against sentence upheld – sentence set aside and considered afresh – substantial and compelling circumstances found – twelve years imprisonment imposed with automatic declaration of unfitness to possess a firearm remaining.

ORDER

On appeal from: Regional Court, Taung, North West Regional Division, (Regional Magistrate Matolong sitting as court of first instance):

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against sentence is upheld.

(iii) The sentence of fifteen (15) years imprisonment is set aside and replaced with the following sentence:

"*The accused is sentenced to:*

1. Twelve (12) years imprisonment.

2. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused shall remain unfit to possess a firearm."

(iv) The sentence is antedated to 03 August 2021.

JUDGMENT

PETERSEN ADJP

Introduction

[1] The appellant was arrested on **21 December 2017** on a charge of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), which crime was committed on **16**

December 2017. He appeared in the Regional Court, Taung on **22 December 2017**. When bail was refused at some stage, the appellant was remanded in custody from time to time until **08 April 2021**, when bail was fixed in an amount of R1000.00 (one thousand rand), pursuant to section 49G of the Criminal Procedure Act 51 of 1977.

[2] The trial commenced on **10 December 2019**. The appellant pleaded not guilty and following a protracted trial, he was duly convicted as charged on **20 July 2021**. On **03 August 2021** the appellant was sentenced to Fifteen (15) years imprisonment.

[3] On **10 August 2021** the appellant lodged an appeal against both conviction and sentence but was only granted leave on sentence. The present appeal is therefore only against the sentence imposed.

Condonation

[4] The appellant failed to prosecute his appeal timeously and seeks condonation for the late filing of the appeal.

[5] The authorities on an application for condonation are trite. The factors ordinarily considered by the court include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

[6] The main reason advanced for the delay in prosecuting the appeal is attributed to a delay in securing the transcribed record which task the appellant left to his attorneys of record, Legal Aid South Africa. The appellant contends that the delay in prosecuting the appeal is ameliorated by prospects of success on appeal against the sentence imposed on the basis that the court *a quo* allegedly failed to consider the pre-trial incarceration period of three years and three months, before the appellant was released on bail.

[7] The respondent does not oppose the application for condonation and this Court is satisfied that good cause has been shown to grant the application for condonation.

The single ground of appeal

[8] The appellant assails the sentence imposed on a single ground of appeal. The court *a quo* is said, during sentencing, to have

misdirected itself by failing to consider the period of three years and three months the appellant was incarcerated as an awaiting trial detainee before being released on bail on **08 April 2021**, pending finalization of the trial. The appellant contends that the court *a quo* erred by not exercising its sentencing discretion reasonably or properly, in imposing the prescribed minimum sentence of fifteen years imprisonment, which renders the sentence disproportionate to the crime, the criminal and interests of society.

Conviction

[9] The appeal against sentence cannot be considered without having regard to the facts which underscore the conviction. In brief, the evidence accepted by the court *a quo* is that on **16 December 2017**, which is celebrated as Reconciliation Day in South Africa, there was a gathering for *a braai*: a South African custom where attendees were required to contribute R70.00. Amongst the attendees was, *inter alia*, Tshegofatso Grace Shuping, the niece of the appellant, her friend Maserane and others. The appellant was present at the time, and he was in fact braaiing the meat.

[10] At around 14h00pm, the deceased Lebogang and his friend Tiro passed by the venue of the braai. In their possession they had a

case or crate of beer. Maserane invited Tiro and the deceased to place their beers in a basin which was filled with ice. The appellant, however, refused to allow them to place their beers in the basin, laying claim to the ice. Tiro and the deceased nonetheless placed the beer in the basin and left for the deceased's home. They returned a few minutes later and kept to themselves, not engaging with the other attendees as they did not want to contribute the requisite R70.00.

[11] The appellant confronted Tiro and the deceased about their presence at the gathering and became embroiled in an argument with the deceased. The appellant instructed them to leave with a crude remark related to what they should do to each other with their nether regions. They, however, did not accede to his instruction. The appellant left for his home which was not far away, threatening the deceased that he would be returning and upon his return he would show the deceased, once again with a crude reference to the deceased's mother.

[12] The appellant indeed returned with what was described as a half of a sheep shear "scissor", which was about 30cm long. The appellant proceeded straight to the deceased, with the attendees reprimanding him and one Ithumeleng remonstrating with him not to injure the deceased. The appellant, however, ignored the

attendees and the remonstration from Ithumeleng. The deceased, upon seeing the appellant, stood up from where he was seated. The appellant without further ado stabbed the unarmed deceased on the right side of his face. When the deceased fell, the appellant trampled his head and picked up an empty crate and strike him with it.

[13] At this time blood was seen oozing from the open wound inflicted upon the deceased. Transportation was arranged and the deceased was ferried to Pampierstad Clinic accompanied by, *inter alia*, another person named Lebogang and Tsegofatso Shuping. The state witnesses who testified learnt about the demise of the deceased a few days later.

[14] The version of the appellant that he acted in self-defence against an attack by the deceased was correctly rejected as false by the court *a quo* and merits no further consideration.

The test on appeal against sentence

[15] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. The position is succinctly set out in *S v Malgas* 2001 (2) SA 1222 (SCA) as follows:

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the

difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(emphasis added)

[16] The sentence imposed is assailed on the basis that it is disproportionate to the crime, the criminal, and interests of society, on the sole basis that the court *a quo* failed to consider the incarceration of the appellant prior to his release on bail. On a reading of the judgment on sentence the court *a quo* indeed omits to deal with the incarceration of the appellant for three years and three months until his release on bail, and his subsequent conviction. This engages the question whether the omission by the court *a quo* to consider the incarceration of the appellant constitutes a material misdirection which should trigger interference with the sentence by this Court. This question was answered in the affirmative by the Supreme Court of Appeal in *Vumani Oscar Ntuli v S* (1025/2022) [2023] ZASCA 150 (10 November 2023), where the following was said:

"[9] **The failure of the magistrate to take into account the time spent by the appellant in custody while awaiting trial thus amounted to a misdirection on the part of the learned magistrate. In my view, had the magistrate engaged in that exercise, this could have had a bearing on the sentences imposed. This omission is apparent from the record and conceded by the respondent**. As such there

are reasonable prospects that the appellant could be successful on appeal against sentence. The high court erred in failing to grant the appellant that leave.

(emphasis added)

The period of incarceration prior to conviction

[17] The leading authority on the issue of the period spent by an accused in detention while awaiting trial, conviction and sentence is *Radebe and Another v S* (726/12) [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) (27 March 2013) by Lewis JA (Leach JA and Erasmus AJA concurring). The appellate jurisdiction of the Supreme Court of Appeal (SCA) was engaged because leave to appeal was granted by Southwood J in the High Court on the basis that it had not taken into account the period (some two years and four months) into account that the appellants had spent in prison while awaiting trial when it altered the sentences imposed by the Regional Court, on appeal. The issue which accordingly engaged the SCA as formulated by Southwood J was stated thus to be that:

"It is arguable that a period of two years in detention awaiting trial constitute substantial and compelling circumstances warranting a lighter sentence than the prescribed minimum, but it seems clear that that period of detention should have been taken into account by the court *a quo* when imposing sentence for the other charges."

[18] After considering the facts inherent in the robbery and its consequences, the SCA noted that the Regional Court had in fact referred to the incarceration of the appellants for some time due to their own doing, which is distinguishable from the position in the present appeal where the court *a quo* failed to do so. The SCA then, after considering differing approaches by the High Courts to the issue, formulated a pragmatic approach to the issue as follows:

> "[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in *S v Dlamini* 2012 (2) SACR 1 (SCA) para 41.)
>
> [14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that **should** be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of

robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), **the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one**.

[15] That general principle was expressed, first, in relation to the way to assess whether substantial and compelling circumstances exist where a minimum sentence has been prescribed by the Criminal Law Amendment Act, in *S v Malgas* 2001 (2) SA 1222; 2001 (1) SACR 469 (SCA) where Marais JA said (para 25):

> '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.'

That approach was endorsed by the Constitutional Court in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382; 2001 (1) SACR 594 (CC). More recently, in *S v Vilakazi* 2012 (6) SA 353; 2009 (1) SACR 552 (SCA) this court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Nugent JA said (para 15):

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'"

(emphasis added)

[19] It is clear from *Radebe* that the period in detention is one of the factors that **should** be considered in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. The court *a quo* failed to consider the period in detention. Whilst same was addressed in mitigation of sentence, the legal aid practitioner for the appellant, notwithstanding *Radebe* sought to rely on *S v Stephen and another* 1994 (2) SACR 163 (W), which the SCA did not endorse in *Radebe.*

[20] The appeal against sentence is accordingly upheld. That leaves this Court at large to consider the question of sentence afresh.

Discussion

[21] Before turning to consider the question of sentence afresh, an observation must be made about premeditation in respect of the murder, which was dealt with by the Regional Magistrate for the

first time in the judgment on sentence. The Regional Magistrate said the following:

"…It is clear that you have planned this incident to happen, because you left for your home to go and fetch a sharp instrument and attacked the deceased with it and that can also be said that it is premeditated.

Premeditated should not be something that has been planned for a long time. Even a few minutes are enough to carry out a premeditated offence. In this case it is clear that you decided to go fetch a weapon at your place which is described as a sheep shear that you used to stab the deceased."

(emphasis added)

[22] In compliance with the salutary injunction in *Ndlovu v S* (CCT174/16) [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paragraphs [53] – [58], the Regional Magistrate should have addressed the question of premeditation and the applicability of section 51(1) and Part I of Schedule 2 of the CLAA, at the earliest during the case for the prosecution and not in sentence for the first time. The prosecutor should similarly have been alive to the applicability of section 51(1) of the CLAA, which in all probability would have manifested at the earliest, in the statements of witnesses, and at the latest in consultation, before drafting the charge. If the charge was correctly formulated by the prosecutor from the outset and secondary thereto if the Regional Magistrate complied with his duty to correct

this anomaly, the appellant would have been faced with a sentence of life imprisonment. In that case the sentencing process would have implicated the further epithets espoused in *Malgas* which was confirmed by the Constitutional Court in *Dodo* on proportionality of the sentence of life imprisonment. Any deviation from the sentence of life imprisonment by the Regional Court would have implicated a sentence which could have extended to 30 years imprisonment.

[23] Khampepe J said the following in this regard in *Ndlovu* in the context of a rape matter, which is equally apt in the present appeal:

> *"The responsibilities of prosecutors and the courts*
>
> [53] Mr Ndlovu's crime is just one instance of one of the most harrowing and malignant crimes confronting South Africa today – rape. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa.
>
> [54] Despite my finding in this matter, there is nothing before me to indicate that Mr Ndlovu's blameworthiness for this deplorable crime is in any way diminished. This is a case where the state's remissness has failed the complainant and society.

[55] Section 165 of the Constitution vests judicial authority in the courts and nowhere else. They are the gate-keepers of justice. The evidence of the injuries sustained by the complainant should have alerted the Magistrate that the appropriate charge should have been rape read with section 51(1) of the Minimum Sentencing Act: rape involving the infliction of grievous bodily harm. Furthermore, the acceptance of the evidence relating to the infliction of grievous bodily harm should have made it clear to the Magistrate that the crime fell squarely within the ambit of section 51(1) of the Minimum Sentencing Act.

[56] **In this case, the Magistrate could have and should have taken steps to ensure that Mr Ndlovu was prosecuted or convicted in terms of the correct provision of the Minimum Sentencing Act. Courts are expressly empowered in terms of section 86 of the Criminal Procedure Act to order that a charge be amended. Upon realising that the charge did not accurately reflect the evidence led, it was open to the Court *at any time before judgment* to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment. This the Magistrate failed to do. It was only after conviction, at sentencing, that she sought to invoke the correct provision. This failure is directly implicated in the finding made in this judgment**.

[57] Furthermore, section 179 of the Constitution provides for a "single national prosecuting authority … structured in terms of an Act of Parliament". The National Prosecuting Authority Act gives effect to section 179 of the Constitution. Section 2 of the NPA Act provides for a "single national prosecuting authority established in terms of section

179 of the Constitution" and section 20(1)(a) provides that the power to prosecute is vested in the National Prosecuting Authority (NPA); a power exercised on behalf of the people of South Africa.

[58] When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. **It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu**.

The prosecutor was from the outset in possession of the J88 form in which the injuries sustained by the complainant were fully described. It boggles the mind why the proper charge of rape read with the provisions of section 51(1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter."

(emphasis added)

[24] I turn to the question of imposing sentence afresh. The appellant was 31 years old at the time he was sentenced on 03 August 2021. He was unmarried with one son aged 8 years at the time. His son lived with his, the child's mother, who was unemployed and received a state grant. The appellant was unemployed at the time of his arrest and maintained by his family. He advanced as far

as Grade 8 at school, in 2003. The State proved no previous convictions against him, and he was therefore a first offender. The appellant from the date of his arrest on **16 December 2017** remained in custody as an awaiting trial detainee for three years and three months before he was released on bail pursuant to the provisions of section 49G of the CPA on **08 April 2021**.

[25] The appellant verbalised no remorse for his actions and maintained his innocence after conviction. Whilst there was a failure of justice brought about by the prosecution failing to charge the appellant correctly in respect of section 51(1) of the CLAA, the evidence accepted in convicting the appellant cannot be overlooked. The appellant, after engaging in a verbal altercation with the deceased, threatened the infliction of harm upon the deceased. The appellant left for his home, only to return with half of a sheep shears. He without further ado stabbed the unarmed deceased, kicked him against the head as he was laying injured on the ground, and finally struck him with a crate. These sequences of events aggravate the imposition of sentence. It speaks volumes of the moral blameworthiness of the appellant. The loss of life over a mere difference of opinion, was unwarranted.

[26] There is an abiding reality; that murder in whatever form or guise is a serious crime, a fact rightfully conceded by the appellant's

legal representative in address in mitigation of sentence. Section 11 of the Constitution of the Republic of South Africa, 1996 enshrines that: "*Everyone has the right to life".* The right to life and the sanctity thereof, was visited very early on in our nascent democracy by the Constitutional Court, in *S v Makwanyane* 1995 (3) SA 391 (CC) where Justice O'Regan said:

"... The right to life was included in the Constitution not simply to enshrine the right to existence..., but...to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values...The right to life is the most primordial right which humans have. If there is not life there is no human dignity."

[27] The interest of society and more importantly the family of the deceased also merit consideration in the sentencing process. In *S v Matytyi* 2011 (1) SACR 40 (SCA), Ponnan JA said the following in this regard at paragraph 16:

"*An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred… As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity. It enables us as well to*

vindicate our collective sense of humanity and humanness. The Charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and in future is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim…"

[28] The prosecutor failed to adduce any evidence on the impact of the murder of the deceased, on his family. Even if not by way of a victim impact statement, prosecutors should be acutely aware of the rights of the family as "the victim" of the appellant's conduct. Prosecutors should strive to ensure that victims are given a voice, to enable the sentencing judicial officer to fully appreciate the impact of the crime on the family. The family of the deceased were clearly present at court when the appellant was sentenced. This is evidenced by the peremptory explanation of section 299A of the CPA by the Regional Magistrate to the family of the deceased, which asserts the rights of the family in any future parole processes. Experience in matters of this nature teaches that a representative of the family often will embrace the opportunity to express the impact of the crime on the family. This should be encouraged, rather than making submissions of a mechanical or general nature by a prosecutor, regarding the interests of society.

[29] There are no substantial and compelling circumstances inherent in the personal circumstances of the appellant, save for noting the single mitigating factor that he is a first offender. This Court, as postulated in *Radebe*, is called upon to consider whether the mandated sentence of 15 years imprisonment is justified or proportionate to the circumstances of the crime committed. And whilst hamstrung on the impact of the crime on the family of the deceased in particular, the interests of society must be factored into the equation. This approach, as *Radebe* makes plain accounts for the conditions affecting the appellant in detention, and any reasons for the prolonged period of detention. It thereby avoids propelling the period in detention as a separate factor to be considered in isolation. The prolonged period of detention to the credit of the appellant was not brought about by any fault on his part. This is demonstrated by the fact that he was eventually released on bail because of the systemic delays in finalizing the matter. In that regard the present matter is distinguishable from *Radebe*.

[30] All the factors considered and applying the test of proportionality, a sentence of Twelve (12) years imprisonment would be both fair and reasonable. The ancillary order in terms of section 103(1) of the Firearms Control Act 60 of 2000, in terms of which the appellant is

automatically declared unfit to possess a firearm is justified by the facts underscoring the conviction.

Order

[31] In the result, the following order is made:

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against sentence is upheld.

(iii) The sentence of fifteen (15) years imprisonment is set aside and replaced with the following sentence:

"*The accused is sentenced to:*

1. *Twelve (12) years imprisonment.*
2. *In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused shall remain unfit to possess a firearm.*"

(iv) The sentence is antedated to 03 August 2021.

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A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

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K MONGALE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Appellant: Mr M V Kekana
Instructed by: Legal Aid South Africa
Mahikeng Justice Centre

For the Respondent: Adv K Phethlu
Instructed by: The Director of Public Prosecutions, Mahikeng