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

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 09/2021

In the matter between:

MAPHASANE MOLUSI **APPELLANT**

and

THE STATE **RESPONDENT**

DATE OF HEARING : 02 FEBRUARY 2024
DATE OF JUDGMENT : 22 FEBRUARY 2024

FOR THE APPELLANT : ADV. MODIBA
FOR THE RESPONDENT : ADV. NTSALA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00AM on 22 February 2024.

ORDER

Resultantly, the following order is made:

(i) The appeal against sentence is dismissed.

(ii) The sentence is confirmed.

JUDGMENT

HENDRICKS JP

Introduction

[1] The appellant was convicted on a charge of murder read with the provisions of section 51 (c) (2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (CLAA). He was sentenced to twelve (12) years imprisonment. The appellant appeals the sentence imposed upon him. The facts can be succinctly summarized as follows. During the night of 7th April 2018 the deceased, Mr. Motsameng Matlau, was in the company of Ms. Gabai Kangwe at a tavern where they purchased alcoholic beverages and then left to Gabai's place to indulge in and enjoyed the drinks that they bought. The appellant showed up uninvited at Gabai's place armed with a knobkierie. He enquired from the deceased what the deceased was doing at Gabai's place. The deceased retorted by posing the same question to the appellant. A quarrel ensued between the appellant and the deceased which

evolved into a physical confrontation, with the appellant being the aggressor. At some stage, the appellant grabbed the deceased and pushed him against a table and ultimately through the window pane. At this stage Gabai already temporarily absented herself from the house.

[2] Upon her return, she only found the appellant inside the house, as he had pushed the deceased through the window pane. She did not go outside again to look for the deceased, as she was afraid of the appellant. She went to bed and the appellant also slept next to her. They were awoken by the police, who took the appellant away for questioning. Undisputed evidence is that the body of the deceased was found lying on the ground. It was bloodstained. The trail of blood spots was followed which led to Gabai's house. This lends credence to the evidence of the police official who went to Gabai's place, opened the door and found Gabai and the appellant asleep. The cause of death was determined to be as a result of a cut wound on the right upper arm of the deceased with severe blood loss.

[3] In conclusion of his *ex tempore* judgment, the Learned Regional Magistrate stated:

> *"Therefore in the end when one looks at the totality of all evidence placed before this court it is clear that the accused [appellant] pushed the deceased through the window pane not considering whatever may happened. Accused [appellant] should have foreseen that his*

action might cause the death of the deceased but reconcile with his actions."

A verdict of "guilty of murder read the provisions of section 51 (c) (2) of the Criminal Law Amendment Act 105 of 1997", was then pronounced. No appeal lies against the conviction, but only against sentence.

[4] The sentence is attacked on the basis that it is shockingly excessive and so severe that it induces a sense of shock. Furthermore, that the court a quo "over-emphasized the seriousness of the charge (offence) at the expense of the [appellant's] personal circumstances"; and that the appellant never had direct intention to kill the deceased. These, together with other factors, the submission amounts to an irregularity committed by the Regional Magistrate. It was submitted that an effective term of eight (8) years imprisonment, "would be a fair sentence".

[5] It is trite that an appellate courts' powers to intervene with the exercising of a trial courts' discretion and finding on sentence, are limited. A Court of Appeal will not lightly interfere with the judicial discretion of the trial court on sentence, and will only interfere when a gross irregularity was committed. For example, where the sentence imposed is totally out of proportion with the seriousness of the crime committed, the personal circumstances of the accused [appellant] and the interest of society.

See: **S v Bogaards** 2013 (1) SACR 1 CC

> *"In the case of S v Bogaards 2013 (1) SACR 1 (CC) the court held "ordinarily sentencing is within the discretion of the trial court. Appellant courts power to interfere with the 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 it's decision on sentence is vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."*

[6] Upon a careful perusal of the judgment on sentence by the court *a quo*, no misdirection can be detected. The learned Regional Magistrate took the following facts, factors and features into account at arriving at a suitable sentence:
The appellant was 40 years of age, unmarried but the father of one child. He is a first offender; he attended school up to Grade 10; he was gainfully employed as a bricklayer; and he mentioned his child. He was not suffering from any medical condition.

[7] The sentence for murder in terms of section 51 (2) as prescribed in the CLAA read with the applicable schedule, is fifteen (15) years imprisonment for a first offender of any such offence, unless there are substantial and compelling circumstances that warrants a deviation. Substantial and compelling circumstances were found to be present in this case. The following was found to be both substantial and compelling: The facts which are traditionally considered as mitigating (and aggravating) must be taken into

account. He is a first offender and a breadwinner; the manner in which the incident happened or unfolded. The Regional Magistrate's finding in this regard cannot be faulted.

See: **S v Malgas** 2001 (1) SACR 469 (SCA), the following is stated:

"[15] I consider the dicta in the cases which advocate such an approach to the application of s 51 to be conducive to error. In my view, they constrict unjustifiably the power given to a trial court by s 51 (3) to conclude that a lesser sentence is justified. Any limitations upon that power must be derived from a proper interpretation of the provisions of the Act and not from the assumption a priori that only a process akin to that which a court follows when in appellate mode is intended.

[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty

justification be imposed for the listed crimes in the specified circumstances.

C *Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*

D *The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.*

E *The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.*

F *All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*

G *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.*

H *In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.*

I *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.

J *In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.*

[30] *Liebenberg J gave anxious consideration to the question of sentence and concluded that the circumstances of the case could not be regarded as substantial and compelling in their mitigatory effect and therefore such as to justify the imposition of a lesser sentence than imprisonment for life. He reached that conclusion with regret and said that if it had not been for the fact that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life. He referred to the lack of unanimity in the provincial divisions of the High Court as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in S v Mofokeng which approach had been approved by Jones J in an unreported decision in the Eastern Cape Division. He indicated that he was, in any event, in agreement with that approach. One of the findings made by Stegmann J in Mofokeng's case was that "for substantial and compelling reasons to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified".*

[31] *As I have indicated earlier in this judgment the requirement that the circumstances be "exceptional" does not appear from the legislation*

and, in so far as Liebenberg J approached the question of sentence from that perspective, he erred. In all other respects Liebenberg J approached the question of sentence in a manner consistent with the approach set forth in this judgment. He made reference to the very serious nature of the crime. He pointed to the element of premeditation present and the defenselessness of the deceased. He considered that the motive for the killing was greed. There were appellantly some life insurance policies from which Carol would benefit and the appellant stood to gain from the "lekker lewe" of which Carol had spoken. He adverted to the prevalence of crimes of violence in the country and the community's interest in having the courts deal severely with offenders."

See also: **S v Matyityi** 2011 (1) SACR 40 (SCA), in which the following is stated:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain

specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[8] I am of the view that the sentence imposed by the Regional Magistrate is just, fair and appropriate if regard is had to the facts of this case, the nature and seriousness of the offence, the aforementioned personal circumstances of the appellant, as well as the interest of society. None of the factors to be taken into consideration when imposing a suitable sentence was either over- or under emphasized, but was carefully balanced. Resultantly, the appeal against sentence should fail.

Order

[9] Consequently, the following order is made:

(i) The appeal against sentence is dismissed.
(ii) The sentence is confirmed.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I agree

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG