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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(FUNCTIONING AS MPUMALANGA DIVISION) MIDDELBURG

CASE NO: CC139-2012

DATE: 2014-03-12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ (NO)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ (NO)
(3) REVISED. ✓
DATE 2017.02.03
SIGNATURE

10 In the matter between

THE STATE

and

E C DE BEER Accused

JUDGMENT

MAKGOKA J: The accused, Mr Edward Charles De Beer stands trial on
20 four counts, namely, robbery with aggravating circumstances, as defined in s 1 of Act 51 of 1977 (CPA), read with the provisions of s 51 (1) of the Criminal Law Amendment Act 105 of 1997 (count 1); murder read with the provisions of s 51(1) of Act 105 of 1997 (count 2); theft (count 3); defeating or obstructing the administration of justice (count 4). In count 1, the State alleges that on 12 February 2012 in Witbank the accused robbed Mr Mpumelelo Peter Mabuza (the deceased) of his motor vehicle, namely a Toyota Tazz with registration number: SJW007GP. It is alleged

that a knife was used in the commission of the offence, and that grievously bodily harm was inflicted, and the vehicle was robbed under those circumstances.

With regard to count 2, it is alleged that the accused murdered the deceased after robbing him of his vehicle. In count 3, it is alleged that on the same day, 12 February 2012 the accused stole certain items belonging to Mr Werner Taute, namely a curtain, a blanket and a DVD player screen. In count 4, it is alleged that the accused disposed of or hid the body of the deceased by throwing it in the bushes in order to frustrate the investigations into the death of the deceased.

The accused pleaded not guilty to counts 1 and 2, that is, robbery and murder, and pleaded guilty to counts 3 and 4. The State accepted the pleas of guilty in counts 3 and 4, and having been satisfied that the accused intended to plead guilty in those counts, and him having admitted all the material elements of the respective crimes, I accordingly find the accused guilty of theft, and defeating the administration of justice.

With regard to count 1 (robbery) the accused's defence is a bare denial. In count 2, murder, the accused pleaded self-defence. The accused also made certain formal admissions, in terms of Section 220, of the CPA. They are contained in EXHIBIT A, and they read as follows:

1. "That the deceased is the person mentioned in count 2 of the indictment, to wit, Mpumelelo Peter Mabuza.
2. That the deceased died on 12 February 2012 as a result of suffocation, and stab wound injuries that he sustained on the same day.

3. That the deceased did not sustained any further injuries from the time he was injured by the accused, up to the time when the post-mortem was conducted on the deceased.

4. That the authenticity and the correctness of the contents of the following documents are not in dispute. The documents are handed in by agreement, as exhibits.

4.1 EXHIBIT B: Notes on the pointing out of a scene pointed out by the accused to Lieutenant Colonel Ekabata Moses Maepa, except paragraph 23 of the notes of pointing out, which I will deal with later.

4.2 EXHIBIT C: Photograph album of the pointing out, compiled by Lieutenant Kernel E S Caiter.

4.3 EXHIBIT D: Admission statement made by the accused, to the Senior Magistrate Witbank, Mr H P Ferreira.

4.4 EXHIBIT E: Photograph album compiled by Warrant Officer T Vermaak, depicting the house where the deceased was killed as well as exhibits that were lifted from the scene.

4.5 EXHIBIT F: Photograph album, compiled by Constable R T M Hlongwane, depicting the scene in Lydenburg where the body of the deceased was found.

5. The accused admits that on 12 February 2012, and at or near Theos Cheas Complex, in the district of Witbank, he did unlawfully and intentionally steal the following items to wit, a DVD player screen, the property of Taute Werner.

6. The accused admits that on 12 February 2012, at or near Potlo Spruit Bridge in the district of Lydenburg, whilst aware that the body of the deceased was wanted, and whereas to the knowledge of the accused, the above mentioned body was to be used as evidence in the criminal investigations, the accused did unlawfully and with the intention to defeat the administration of justice, thereby disposing and or hiding the body of the deceased, by throwing it into the bushes."

10 The section 220 statement was signed by the accused and confirmed by his legal representative. During the cause of the trial, further admissions in terms of section 220 were made. They are contained in EXHIBIT G. And they read as follows:

"I the undersigned Edward Charles De Beer make the following admissions free and voluntarily.

1. I admit that I was arrested on 14 February 2012 at Phalaborwa, whilst in possession of a white Toyota Tazz with registration number: SJW007GP, the property of the deceased.

20 2. I admit that the body depicted in EXHIBIT F is the same body I dumped in the field."

The post-mortem report identified the deceased cause of death as suffocating, after stabbing into left chest. The chief post-mortem findings were recorded as follows:

> "Decomposed body of black adult male. Black adult male with white plastic bag over head and face. Fractures both firms. Stab wound, chest left side through forth rib into left lung, and into heart.

I will later deal with the admissibility of the post-mortem report. The State called four witnesses, and the State also made an application for the admission of the post-mortem report, in terms of Section 3 of the Law Evidence Amendment Act 45 of 1988, which application I granted. I indicated that the reasons for that ruling would form part of this judgment.

Before I deal with that, I go straight the evidence. As indicated the State called four witnesses, namely Mr Werner Taute, Mr Lucas Peters Daniel Coertzer, Ms Lena Nonhlanhla Mnguni and Lieutenant-Colonel Lekabata Moses Maepa. Mr Taute is, or was, the boyfriend of the accused's sister.

During December 2011, the accused came to spend time with Mr Taute at his home in Witbank. During February he, Mr Taute, had to go see his parents in Standerton. On the day of the incident, 12 February 2012, he left the deceased at his house, with the understanding that the deceased was later going to depart for his parental home in Phalaborwa.

Before he left he arranged for a taxi cab to ferry the accused to a point where he would catch his transport to Phalaborwa. It is not necessary to relate all his evidence. But the essence thereof is that on his return to his house a few days later he found, in the spare bedroom, a dishwashing soap on top of a bunker bed.

Upon further investigation, he noticed that there were blood spatters in the bedroom, which apparently had been cleaned. But on closer examination, one could see those with a naked eye. He was with his mother, who later also witnessed what he had seen. At some stage he lifted the mattress and noted that there was a big blood stain on the mattress. In the kitchen there was a big knife which had been bent. He also later noticed that his vehicle DVD player was missing. He testified that when the accused visited him, he only had a big bag full of clothes, and nothing more than that. He did not phone the accused when he found the state of affairs at his house like that, because the accused did not have a cell phone.

Mr Lucas Peters Daniel Coertzer is the accused's friend. He lives in Phalaborwa. He testified that at that stage they were good friends with the accused. He had known the accused for about 5 months. On 13 February 2012 while he was at his house, the accused arrived at approximately 03:00 in the morning. He was driving a white Toyota Tazz, which he told him that he had bought for R13 000-00.

The accused spent the night at his place, and when he asked him about the vehicle papers, the accused said to him he did not have he vehicle papers, yet. The accused left at around 04:00 a.m. for his parental house. On 16 February 2012, the accused approached him at his work-place and told him that he had "more than one problem" concerning the Tazz.

He conveyed to him that he did not know what to do, as he had killed a person, and he showed him a knife that was allegedly used. He explained to him that there had been a quarrel between him and the deceased, as a

result of which, there was a fight and he killed he deceased under those circumstances.

He gave him the knife, for safekeeping. But after learning what had happened, he took the knife to the police. He had only kept it for a day. The knife was the folding type, and he noticed either blood or rust on it. As to the disposal of the deceased's body, the accused told him that he hid the body in the boot, wrapped in a blanket and he dumped it between Lydenburg and Orgistad near a bridge in the bush. Around 17 or 18 February he saw the white Tazz that the accused had driven, at the Phalaborwa Police Station. When the accused told him about the dumping of the body, he looked shocked, but he was in his sober senses.

Ms Mnguni testified that the deceased was conducting a business of a maxi cab. On 12 February 2012 she was in the company of Ms Simphiwe Moyo and the deceased. The latter had come to fetch them from Rhino Ridge in Witbank. It was said around 15:30. He was to ferry them to their house in Extension 14. While driving home, the deceased received a telephone call, after which he informed them that there was a client who needed transport from the nearby townhouses. They proceeded to that place, which happened to be Mr Taute's house.

Upon arrival at the house of Mr Taute, the deceased parked the vehicle near the house and hooted. She saw a person (a white male) opening the garage door, and the deceased left them in the vehicle, and went to speak to that person. It is common cause that this person is the accused. She could not hear the content of the conversation between them, but it took about 10 minutes.

After that the deceased returned to the vehicle, and told them that he must hurry up to take them home, so that he could return to fetch the accused. They asked him why he did not just there and there load the accused and make one trip. The deceased indicated to them that the accused had a lot of things to be loaded, and he therefore needed more space. Ms Mnguni also testified that he could not see the accused's face when he opened the garage, because just when he opened the garage door he quickly half-closed it. And the deceased was inside the garage when they had a conversation, and because the garage was half-closed, she could only see the lower parts of their torsos.

Lieutenant-Colonel Maepa testified with regard to the pointing out that the accused had made. Nothing turned on the evidence of Lieutenant Colonel Maepa, except for paragraph 23 of the pointing out notes, in which the accused would have said:

"I murdered the deceased."

I say nothing turns on that evidence, because that distinction is only relevant for legal purposes, as to what in fact the accused would have conveyed, or wanted to convey about the word 'murder.' But as it turned out, there was no suggestion that the word murder was not used - only the context and the meaning to be attached to that word.

After the evidence of Lieutenant-Colonel Maepa, the State conveyed to court and it was common cause, that the doctor who conducted the post-mortem examination had in the meantime died. Therefore the State wished to introduce the post-mortem report, and the defence objected to that.

The State applied for the report to be admitted as I indicated, in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988. I ruled at that stage, after hearing argument, that the post-mortem was admissible. As I indicated I undertook to furnish reasons for that ruling, as part of this judgment. I do so now. Section 3 of the Law Evidence Amendment Act 45 of 1988 reads as follows:

> "[Indistinct] 1 Subject to the provisions of any other law hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:
>
> (a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence, as such proceedings.
>
> (b) The person upon whose credibility, the probative value of such evidence depends, himself testifies at such proceedings or
>
> (c) The court having regard to:
>
> i. The nature of the proceedings.
>
> ii. The nature of the evidence.
>
> iii. The purpose for which the evidence is tendered.
>
> iv. The probative value of the evidence.
>
> v. The reason why the evidence is not given by the person, upon whose

credibility the probative value of such evidence depends.

vi. Any prejudice to a party with the admission of such evidence might entail.

vii. Any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice."

10 As in many instances, the contestation revolved around the prejudice that would be suffered by the accused in the event the statement or the report is admitted without evidence, as the accused would under those circumstances, not have the opportunity to cross-examine the author of the report. But I also take into account the nature of the evidence, from what I have said it is clear why the evidence, why the doctor who performed the post-mortem report, cannot testify. He is dead.

The nature of the evidence is not factual. And to a great extent, the contents of the report is in line with the accused's own version, because the his version is that he stabbed the deceased. The findings of the doctor also *20* confirmed that the deceased was stabbed, albeit on a different part of the body. It should be recalled that the clinical findings, amongst others, indicated that the deceased body was found with a plastic bag wrapped around his head and face.

And as it will later turn out, this is also in line with the accused's own version. As a result I formed a view that there is not much prejudice that

could be suffered by the accused, if the statement was to be admitted. On the other hand the State would have suffered much prejudice, and it would not be in the interests of justice, for the statement not to be admitted under the circumstances.

I am quite aware of the trite principle that a court should hesitate long to admit hearsay evidence, where the hearsay evidence is crucial or key to the guilt, or otherwise of the accused. In the present matter it is my view that this report is not crucial for that purpose. It simply corroborates, to a great extent, the accused own version. It is only as to what weight to be attached, or what emphasis should be placed on the statement. And for those reasons I came to the conclusion that the statement should be admitted. That concluded the state's case.

The accused took the stand in his own defence. He testified that on 12 February 2012 Mr Taute left him at his house, as he was going away for a few days, to spend time with his parents in Standerton. He confirmed Mr Taute's evidence as to how he came to reside at his place for a while.

Mr Taute had indicated to him the previous day, the 11 February 2012, of his intention to spend time in Standerton, and he then intended, that is the accused, to move out and go back to his parental house, in Phalaborwa. On the 12th before Mr Taute left, he requested him to phone a person who owned a taxi to give him lift. It is common cause that that person would be the deceased.

After some time of Mr Taute having left, the deceased arrived at Mr Taute's house. He came into the house and he requested the deceased to convey him to the Middelburg highway, where he would hitchhike for

Phalaborwa. He conveyed to the deceased that he did not have money to pay him, and the deceased indicated to him that it was fine, and he would assist him. This is the first encounter that Ms Mnguni had testified about.

The deceased asked him how much luggage he had. He took him (the deceased) to the room where his luggage was. And the deceased told him that as he had passengers in the vehicle, also with luggage he would rather return, or rather drop the ladies at home, and return to collect him and drop him at the destination he was heading to.

He had a big black suit case and two black bags, and a painting. Later the deceased returned alone, and once he was in the house he asked him, that is the deceased, asked the accused as to whose TV it was which was in the house. He told the deceased that the TV belonged to the owner of the house. The deceased suggested that instead, he should get the TV in lieu of the payment, for conveying him to his destination.

The accused told the deceased that he could not give him the TV, as it was not his. The deceased kept on insisting that he wanted the TV. At some stage the accused left, and went to the spare bedroom, where his luggage was. The deceased followed him into the bedroom, and then an argument ensued about the TV.

The deceased pushed him, and he pushed him back. The deceased took out a knife and charged at him with that knife, and he ducked. He also had a knife with him, and he took out his knife from his back pocket, and stabbed the deceased on the head and the deceased fell. He stood up, but fell again. He left the bedroom and sat in the lounge as he was shocked, and did not know what to do.

When he left the spare bedroom, the deceased was lying motionless on the floor. He sat in the lounge for a while and took out the knife which he had used to stab the deceased, and put it on the table and went back to the bedroom, where he found the deceased still motionless, and he thought he was dead. He was scared, and did not know what to do. There was a pool of blood.

And all what was on his mind was that he was going to jail, and as a result he decided to dispose of everything. He covered the deceased with sheets, and put him on a blanket and dragged him to his vehicle, that is, the deceased vehicle, as he was too heavy. When he reached the vehicle, he struggled for about 15 to 20 minutes to get him into the boot of the vehicle.

The reason he struggled that long, was that he was born with a spasm in his right arm, so he did not have much power or strength in that arm. After he had put him in the vehicle, he went back to the bedroom and started cleaning the blood which was there. He took out everything that could serve as an exhibit in that room and put them in plastic bags. That included the knife that had been produced by the deceased.

After he had finished cleaning, he put everything into three plastic bags. Not knowing what to do he drove to town in Witbank, where he sold the DVD monitor, the property of Mr Taute, to a taxi driver for R300-00. He used that money to fill up fuel in the deceased's vehicle, and drove towards Lydenburg.

On his way, about 8 to 9 kilometres before Lydenburg, at a place called Old Bridge, along the gravel road, he turned into that gravel road and took out the deceased body. There also it took him about 10 to 15 minutes

to get the deceased body out. This was between Ohrigstad and Phalaborwa, along a mountainous area. He also threw away the three bags, containing the cloths and the knife - that which he called 'the exhibits'. He arrived at Phalaborwa at 03:00 in the morning, and went to spend the morning there at Mr Coetzer's house. Mr Coetzer asked him about the vehicle, and he told him that he had bought it. He did not want to reveal to him the truth of what had happened. At about 07:00 in the morning, he went to his parental house, where his parents also asked him where he got the vehicle from.

He conveyed to them the same version that he had conveyed to Mr Coetzer. He thereafter went back to Mr Coetzer's house, but did not find him as he was already at work. On 14 February 2012 he went to Mr Coetzer's workplace and as a close friend of him, he wanted to confide in him has to what has happened, because he trusted him. After speaking to Mr Coetzer, he left for town, still driving in the deceased vehicle. He did not know what to do with the vehicle. He wanted to get rid of the vehicle.

He sat in the vehicle, again not knowing what to do, and two men approached him and it later transpired that they were from Netstar, a tracking company. They informed him that the vehicle had been reported stolen. He left with them, and he was later arrested for theft of the motor vehicle. He spent the night in custody, and released the following day on R2000-00 bail.

He was later arrested for the murder of the deceased, and he has been in custody since then. On the day of his arrest he said nothing about the murder, and later he made a statement to a Magistrate and also did the pointing out. In the statement to the Magistrate he repeated the same

version that he had conveyed to both Mr Coetzer and his parents, that he had bought the vehicle. He was adamant that he had stabbed the deceased on the back of his head. During cross-examination he persisted with that version, but testified that he was not sure where he stabbed the deceased because everything happened in split seconds. He testified that when the deceased charged at him, and tried to stab him with a knife, he ducked by going down, and when he rose he stabbed the deceased. He confirmed that the deceased was much taller than him, and it appears to be common cause that the deceased was approximately 1.8 meters tall.

He confirmed that he produced the knife from his back pocket. It is what he called a *knip* knife, which can fold. He confirmed also that when he stabbed the deceased, they were standing face to face, half a meter apart. As to why he put a plastic bag over the deceased's head, he explained that it was to stop the blood from flowing from the head.

He persisted with his version that up until the time he was arrested, he did not know what to do with the vehicle, and he denied any pre-planning or premeditation to kill the deceased for his vehicle. Asked why he did not flee, after he had ducked the first blow, he testified that he was confused as it was the first time that he had been in that situation. He was unable to explain the presence of the big blood stain that had been observed by Mr Taute, on the mattress.

That briefly is the evidence before court. It is on this evidence that I must determine whether the State has succeeded in discharging the onus which rests on it. That onus is proof beyond reasonable doubt.

The accused has no onus to prove his innocence. All what he has to do, and what is expected of him, is to place a version before court, which, when viewed within the totality of the evidence, is reasonably possibly true. It that is the case, the accused is entitled to be acquitted.

Having said that, the notion that an accused may be acquitted, even if the prosecution's case is completely acceptable and unshaken, developed in cases like *S v Kubeka* 1982 (1) SA 534 (W) and *S v Monyai* 1986 (4) SA 712 (V), was rejected in *S v Van der Meyden* 1999 (1) SACR 447 (W). There, Nugent J observed that:

> "It is wrong to separate the evidence into compartments, and to examine the t defence's case in isolation, and hold that because it is not internally inconsistent and improbable when taken discretely, that the accused is entitled to be acquitted, despite the fact that the State's case has not been rejected."

The conclusion whether to convict or acquit, depends on the totality of the evidence, it must account for all of it. The Supreme Court of Appeal in *S v Van* Aswegen 2001 (2) SACR 97 (SCA) approved of these observations. As explained in *S v Chabalala* 2003 (1) SACR 134, para 15:

> "The correct approach is to weigh up all 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 weigh so heavily in favour of the State, as to exclude any reasonable doubt, about the accused's guilt."

In the present case, most aspects are common cause. The narrow and crisp issue that the court has to decide is which version between that of the State and the accused are accosts more with probabilities. Put differently, which version is supported by the established and objective facts? The state's case against the accused is simply this.

The accused lured the deceased to Mr Taute's place, in order to murder him and rob him of his vehicle. Given the fact that the accused has admitted to stabbing the deceased, he has to explain the circumstances under which that happened. This is not to mean the onus which rests on the state throughout, shifts to the accused.

It simply means that the state has made out a *prima facie* case against the accused, which he must rebut with an explanation. The accused's version was that there was a fight between him and the deceased, during which, in an act of self-defence, he stabbed and killed the deceased. It is this version that I must consider against the probabilities and the objective facts. In this regard the following must be borne in mind:

a. That the deceased was a business man conducting a business as Maxi taxi.

b. The deceased and the accused did not have any relationship, whatsoever. They only had one brief encounter before the incident on

the occasion that the deceased transported the accused. As a result there was no special relationship between the deceased and the accused.

From the above one should ask the following pertinent question, as to why would the deceased, having been informed that the accused did not have money to pay him, agree to take all the trouble to ferry the accused for over 10 kilometres? This is unexplained, and it is improbable. The probability is that had the accused indicated to the deceased that he did not have the money to pay him, the deceased, being a businessman, have said "thank you Sir. You have wasted my time. I have more business to do."

As I indicated they had no friendship, nor any special relationship. It is highly improbable that the deceased would have agreed to spend his petrol to ferry Ms Mnguni and her friend, to their home, return to the house of Mr Taute to fetch the accused, and drive him about 10 kilometres, to where he would have hitchhiked to Phalaborwa. He would not have done that for nothing. I also bear in mind that the accused, on his own version, did not have money to travel to Phalaborwa. He had to make a plan.

And that plan it all appears to have been to get some money somehow, to arrive to Phalaborwa. Because even if I accept his version that the deceased was going to drop him at the Middelburg highway where he would have hitchhiked, how was he going to pay whoever was going to ferry him to Phalaborwa?

I accept the evidence of Ms Mnguni that when they arrived at Mr Taute's place, the accused's conduct suggested that he did not want to be

seen, in that the garage door was only half-opened. And that was once the accused noticed that the deceased was in the company of other people. Another improbable feature of the accused's version is how he would have stabbed the deceased at the back of his head. He had considerable difficulty in explaining, and demonstrating, during cross-examination, how he physically could achieve that. As indicated, the deceased was 1.8 meters tall and the accused is much shorter than that, from the court's own observation. It should also be borne in mind that, and it is common cause, that the accused placed a plastic bag around the head of the deceased.

His explanation was that he wanted to stop the blood flowing from the head. There are two difficulties with this explanation. First, the post-mortem report does not indicate any injury to the deceased's head - only a stab wound to the chest. Second one does not stop the blood by using a plastic bag. At his disposal, were a number of things that were suitable for that purpose, and on his own version, there were a number of cloths around the house.

So he could have used anyone of those to stop the blood. The only conclusion from the conduct of the accused on this aspect is that he wanted to make sure that the deceased was dead. Furthermore the conduct of the accused after he had stabbed the deceased must be scrutinized. He loaded the deceased's body in the vehicle, and drove to town to sell Mr Taute's DVD monitor to get money for petrol.

Along the way to Phalaborwa, he disposed of what he called exhibits - the body and three plastic bags contained the deceased's alleged knife

and blood-stained cloths. But he did not dispose of the vehicle and the knife which he had used to stab the deceased.

And the questions is, why dispose of a knife that was not used at all, and keep the one that was used if he had in mind to dispose of the exhibits? The real exhibit would have been the knife that was used to kill, to stab the deceased. I also agree with the State advocate's contention that he had all the opportunity to dispose of the vehicle. If his version is to be accepted, that he did not know what to do with the vehicle, amongst others, I agree with Mr *Moeatesi,* that it was one of those easiest things to dispose of. He could have left it during the night and went to Mr Coetzer's house without alerting him of the vehicle, or on the days that followed his arrival in Phalaborwa.

He could have left it anywhere. On the day he was arrested he was still driving the vehicle. He could have left it at a parking lot at the shopping mall. He persisted with a false version, both to Mr Coetzer and to his parents and later to the Magistrate, that he had bought the vehicle. And the circumstances under which the vehicle was found, are also important. It is not because of his benevolence that the vehicle was found.

It was because the vehicle had been fitted with a tracking device and he was caught literally, red-handed. It is very probable, and I agree with the State advocate, that the probabilities are that had he not been caught on that day he would have continued to use the deceased vehicle.

As to the accused as a witness, he did not impress me as an honest witness. He struggled to answer simple and straight-forward questions in

cross-examination. Either he could not remember pertinent details, or adjusted his evidence.

I have already pointed out some of the inherent improbabilities in his evidence. I also had a closer and careful look at the accused in the witness box during cross-examination, and I observed a marked deterioration in his demeanour, during which he became irritable and unnecessarily defensive. Lastly the accused's version is not supported by the objective facts, in particular the finding of the post-mortem report. His version that he has stabbed the deceased on the head, is not borne out by that report. The report, on the contrary, supports the state's version that the accused deliberately killed the deceased. I indicated also the in this regard the placing of the plastic bag around the deceased's head.

The motive is clear for killing the deceased. I have already alluded to that part, as been the desire to rob the deceased of his vehicle. In my view therefore, the state's case, viewed against the accused's version, especially the conduct of the accused after stabbing the deceased, excludes any other reasonable inference other than the guilt on the part of the accused.

The inference accords with all proved and all common cause facts, and the evidence against the accused is strong and it is my view that the state has established the guilt of the accused beyond reasonable doubt. The sum total of all this is that the accused version cannot be reasonably possibly true, and it stands to be rejected as been false.

In particular I find that there was no fight between the deceased and the accused as he testified. He lured him to Mr Taute's house in order to kill

him and rob him of his vehicle. Given this finding, it is not necessary, and indeed procedurally untenable, to consider whether the accused had acted in self-defence. The above findings inherently exclude such a possibility.

It follows that the State has succeeded in proving the guilt of the accused beyond reasonable doubt. The nature of this onus on the state is explained in *S v Ntshele* 1998 (2) SACR 178 (SCA), where the Supreme Court of Appeal, per Eksteen J A said the following:

> "Die bewyslas wat in 'n strafsaak op die Staat rus, is om die skuld van die aangeklaagde bo redelike twyfel te bewys, nie bo elke sweempie van twyfel nie." *In Miller v of Minister of Pensions* [1947 (2) ALL ER 372 or 373 H stel Denning R soos hy toe was, soos volg:
>
> "It need not read certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean prove beyond a shadow of 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

dismissed with a sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt. In *R v De Villiers* 1944 (AD) 493 at 508 to 509, the following was said:

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one to be taken. It must carefully weigh the cumulative effect of all of them together.

And it is only after it had done so, that the accused is entitled to the benefit of any reasonable doubt, which it may have, as to whether the inference of guilt is the only inference which can reasonably been drawn.

To put the matter in another way, the crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt, inconsistent with such innocence."

The court also referred to the remarks, in amongst others, *S versus Clegg* 1973 (1) SA 34 (A) at 38 that:

> "In considering the effect of evidence, one need not be concerned with remote and fantastic possibilities. And that it is not incumbent upon the State to eliminate every considerable possibility that may depend on 'pure speculation.'"

To sum up. The killing of the deceased was premeditated. The accused is also guilty of robbery with aggravating circumstances.

In the result, the verdict against you, Mr Edward Charles de Beer is:

Count 1: Robbery with aggravating circumstances, you are found guilty.

Count 2: Murder of Mr Mpumelelo Peter Mabuza you are found guilty.

Count 3: Theft, you are found guilty as per your plea of guilty.

Count 4: Defeating or obstructing the cause of justice, you are found guilty as per your plea of guilty.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA (Functioning as MPUMALANGA DIVISION) MIDDELBURG

CASE NO: CC139-2012

DATE: 2014-06-27

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(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ (NO)
(3) REVISED. ✓
DATE 2017·02·03.
SIGNATURE

10 In the matter between

THE STATE

and

E C DE BEER Accused

SENTENCE

MAKGOKA J: The accused Mr Edward Charles de Beer has been 20 convicted of 4 counts, namely, robbery with aggravating circumstances (count 1); murder (count 2); theft (count 3); and defeating or obstructing the administration of justice (count 4).

It is now up to the court to determine the appropriate sentence for the accused. In considering sentence, the traditional triad of factors must be taken into consideration, namely the nature of the offences, the personal circumstances of the accused and the interests of the society. See in this regard *S v Zinn* 1969 (2) SA 537 (SA). With regard to the

nature of the offences, all are very serious indeed, especially robbery and murder.

The interests of society dictate that those convicted of serious crimes are adequately punished. As to the personal circumstances of the accused, those are contained in a pre-sentencing report prepared by a probation officer, which was handed in by agreement.

From the report the following personal circumstances of the accused can be gleaned. The accused was born on 5 September 1992. He was therefore 19 years old when the offences were committed on 12 February 2012. He is the last of the four children in his family.

His childhood was characterized by constant relocation from one place to another, due to his father's employment. This had a negative impact on the accused's schooling as he was not able to adapt to changing circumstances and environments. He was born with a partially paralysed right side.

He dropped out of school in Grade 6, reportedly due to, amongst others, bullying. He is not married, although he was in an intimate relationship before he was arrested. He was not employed at the time of his arrest, save for odd jobs. He has no children.

The circumstances of the robbery and the murder bring the sentence within the purview of s 51 (1) of the Criminal Law Amendment Act 105 of 1997, in terms of which 15 years' imprisonment and life imprisonment are prescribed for the offences, respectively. At the commencement of the trial, despite that the accused is legally represented, I drew the attention of the accused to these prescribed

sentences. These are, of course, prescribed sentences and not mandatory sentences, in that the court is entitled to deviate from them, and impose lesser sentences if it finds to exist, substantial and compelling circumstances. Counsel for the accused, Ms *Frazer* urged me to find substantial and compelling circumstances in the cumulative effect of the following factors:

(a) the youthfulness of he accused;

(b) the accused poor socio-economic background;

(c) the conduct of the accused after his arrest;

(d) the prospects of rehabilitation;

I will deal in turn with each of these factors to make a determination as to whether substantial and compelling circumstances exist, for this court to deviate from the prescribed sentences.

Regarding the age of the accused, this is perhaps one factor that deserves attention in some detail. There can be no question that at the best of times, the sentencing of a youthful offender is never an easy task. It is far more complex than sentencing an adult offender. See in this regard *S v Ruiters en 'n Ander; S v Beyers en Andere; S v Louw en 'n Ander* 1975 (3) SA 526 (C) at 531 E – F; *Director of Public Prosecutions (KZD) v* P 2006 (1) SACR 243 (SCA) para 12; Terblanche *The Guide To Sentencing in South Africa*, 2nd ed, p 315. As explained by the Supreme Court of Appeal in *S v Matyityi* 2011 (1) SACR 40 SCA para 14:

> "A teenager is *prima facie* to be regarded as immature, and in that the youthfulness of an offender will

invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds, rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general the court will not punish an immature young person, as severely as it would an adult.

10 It is well established that the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity, and therefore moral blameworthiness. The question in the final analysis is whether the offender's immaturity, lack of

20 experience, indiscretion and such ability to be influenced by others, reduces his blameworthiness."

(Footnotes have been omitted.)

With regards to the sentencing of youthful offenders, in the context of the prescribed sentences and in particular whether substantial and compelling circumstances are present, it was pointed out in *S v Mabuza* 2009 (2) SACR 417 (SCA) at para 23 that the legislator had clearly intended that youthfulness is no longer to be regarded as *per se*, a mitigating factor.

The position is therefore that, youthfulness is no longer *per se* a substantial and compelling factor, justifying a departure from the prescribed sentence. However it often will be, particularly when other factors are present. The court cannot therefore lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment. For in doing so, it would deny the youthful offender the human dignity to be considered capable of redemption. It bears repetition that when considering youthfulness as a factor influencing sentence, it is not done in the abstract.

The blameworthiness of the offender is what is at issue. The main question is whether the offender's immaturity, lack of experience and discretion and the likelihood of being influenced by others, reduces his blameworthiness.

See *S v Booi* 1996 (2) SA 580 (A) at 585 A - B. The case of *S v Bosman* 1990 (1) SACR 306 (A) bears some resemblance to the present case. The facts appear at 308 A to C.

> "Op Saterdag 26 September 1987 het hy [die appellant] met die gesteelde geweer in 'n drasak versteek, voetgeslaan na

Saldanha. Langs die pad het Mnr Isack Coetzee hom opgelaai.

Nadat hulle 'n ent gery het, het hy die geweer te voorskyn gebring en Mnr Coetzee gedwing om te draai en met die grondpad na Kersefontein af te draai. Langs die grondpad het hy Coetzee eers uit die motor en toe te voet na die Bergrivier gedwing.

10 Daar het hy hom doodgeskiet, die lyk in die rivier gegooi, en met Coetzee se motor, waarin laasgenoemde sy geld agter gelaat het, na 'n vriend se huis in Belville gery.

Daar het hy die Saterdag en Sondag nag geslaap. Maandag oggend het die vriend se moeder toevalling 'n radio berig oor Mnr Coetzee se verdwyning gehoor. Omdat die beskrywing in die berig van

20 die laasgenoemde se voertuig te vore gekom het waarmee die appelant daar aangekom het, het sy die polisie ontbied en appelant is aangehou.

Aanvanklik het hy 'n leuenagtige verduideliking gehad vir sy besit van

Coetzee se voertuig. Maar later het hy die polisie vertel wat gebeur het en hulle na die lyk in die Bergrivier geneem."

At 309 F to G, the trial court's apposite remarks with regards to the appellant's youthfulness, and its influence on the commission of the crime, was quoted with approval by the Appellate Division:

"Jeugdigheid of onvolwassenheid is 'n faktor wat ons baie deeglik oorweeg het. Maar ons kom tot die gevolgtrekking dat sy jeugdigheid in hierdie geval hoegenaamd geen verband hou met die pleging van hierdie misdryf nie.

Daar was geen druk op hom geplaas, of deur omstandighede of deur ander persone wat vanweë sy jeugdigheid en onervarenheid hom hierdie misdrywe laat pleeg het nie. Hy het op sy eie hieroor besin. Hy het dit gedoen omdat hy geld nodig het. Omdat hy waarskynlik ook 'n motor nodig gehad het om mee rond te ry.

Sy jeugdigheid of onvolwassenheid het in hierdie besluit hom hierdie

misdrywe te pleeg, ten einde te bekom
en ons oordeel geen rol gespeel nie."

Similarly in the present case there was no influence on the accused by any other person. He acted alone. He needed the deceased's vehicle to drive around, and to achieve that, he planned to murder the deceased. And it should be recalled, that in my judgment convicting the accused, I mentioned the meticulous planning on the part of the accused to murder the deceased.

He lured him to Mr Taute's house, and initially when the deceased arrived there on the first occasion with other people, he let him go so that he could return to the house alone. After he murdered the deceased, he dragged his body from the house, bundled it into the deceased's vehicle and drove to town, where he sold a DVD player screen, stolen from Mr Taute's house. That was brazen.

He thereafter drove from Witbank to Phalaborwa. *En route* he dumped the deceased's body at a secluded spot and proceeded to Phalaborwa, where he, until he was arrested, drove around in the deceased's vehicle. He lied to all and sundry about how he came to be in possession of the deceased's vehicle. That was callous. It must also be borne in mind that the accused has maintained his innocence up to now. In paragraph 8 of the pre-sentencing report, the following is stated:

"The offender did not want to share what happened with the Probation Officer, as he only reported that he did not know why and how it happened.

> He reported that he did not mean to murder the deceased.
>
> He further reported that he is not ready to narrate what happened, as he does not want to be reminded of what happened, because it traumatizes him.
>
> He reported that he acted alone, and he takes responsibility and remorseful for what happened."

10 In my view, all of the above, especially the viciousness of the accused deeds, the brazenness and callousness displayed after the murder, and the lack of remorse, all rule out immaturity on the part of the accused. As in the *Bosman's* case above, I conclude that actions of the accused were not related to his youth, and this factor cannot be helpful for him as a mitigating factor. In this regard I can do no better than repeat the apt remarks of Navsa J A in *Director of Public Prosecutions KwaZulu-Natal v Ngcobo* 2009 (2) SACR 361 (SCA) at para 18:

> "The court below took into account the youthfulness of the offenders. None of
20 the respondents demonstrated immaturity. Nor was it evident that anyone of them was subjected to peer or undue pressure, by one or both of the others.

> On the contrary the manner in which entry was gained to the deceased house, the brutal nature of the murder, the brazen manner in which they walked through a residential area and the callousness displayed after the murder, as well as the fact that they each maintained their innocence right up to the end, showed a complete lack of remorse, and are all indicative of a calculated, bloody mindedness belying their relative youthfulness."

I turn now to the accused socio-economic background. From the pre-sentence report, it is quite clear that the accused has not has a stable environment, growing up. This is reflected amongst others, by his dropping out of school at an early stage. He has no training, no qualification, nor any skills, hence he was without a job, except for an erratic odd job.

Having said that, it was observed in *S v Mathlangu* 2012 (2) SACR 373 (GSG) at 376 H, that there are many people in our society, who have also suffered hardship, deprivation and unfairness and had left school, resulting in lack of training, skills and jobs, yet they do not resort to criminality. See also *Director of Public Prosecutions KwaZulu-Natal v Ngcobo* above, para 17, where the Supreme Court of Appeal cautioned against readily accepting that young people find it difficult to resist the lure

of materialism. With regard to the conduct of the accused after his arrest, it is said that it demonstrates that the accused takes responsibility for his deeds, as he co-operated with the police. He volunteered to point out where the body of the deceased had been dumped, thereby enabling the family to have a proper burial and closure. It is true that the accused co-operated with the police. But that is only *after* he had been arrested. It should be borne in mind that when he was arrested, he was found in possession of the deceased's vehicle, and had no plausible explanation for that.

10 He would have demonstrated responsibility, had he gone to the police before he was arrested. The vehicle was found because it apparently had a tracking device, and not because of his benevolence. Finally I consider the accused's prospects of rehabilitation. In this respect I have nothing to work from. I have no basis to consider this aspect.

The accused elected not to testify in the mitigation of sentence. And all I have is a passing reference in the pre-sentencing report of him being remorseful. That cannot be explored, and what is stated in the pre-sentencing report is at best a neutral fact. The court has no mechanism of verifying that aspect.

20 In this regard, the following was stated by the Supreme Court of Appeal *in S v Matyityi* above, para 13:

> "Remorse was set to be manifested in him pleading guilty and apologising through his Counsel (who did so on his

behalf from the bar) to both Ms KD and Mr Cannon.

It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person, is a neutral factor. The evidence linking the respondent to the crimes, was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings out by him, and his positive identification at an identification parade. 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 contrition alleged to exist cannot be determined."

(Footnotes omitted.)

The proper approach where minimum sentences are applicable, was established by the Supreme Court of Appeal in the path-finding and seminal judgment of *S v Malgas* 2001 (1) SACR 469 SCA; (2001) (2) SA12 22. [2001] 3 All SA 222.

The summary of the approach is conveniently set out in paragraph 25 of the judgment, the effect of which is that prescribed minimum sentences should ordinarily, and in the absence of weighty justification, be imposed.

The approach established in *Malgas*, which has since been followed in a long line of cases, sets out how the minimum sentencing regime should be approached and in particular, how the enquiry into substantial and compelling circumstances is to be conducted by a court.

The approach was endorsed by the Constitutional Court in *S v Dodo* 201 (1) SACR 594 (CC) as being 'undoubtedly correct' and the summary referred to above as having laid down 'a determinative test' as to when the prescribed sentence may be departed from. It is the court's

duty to consider all relevant factors in considering in whether substantial and compelling circumstances are present.

It is important for the sentencing court to properly balance all factors relevant to sentencing against the benchmarks set by the Legislator. See *S v Mvambu* 2005 (1) SACR54 (SCA). Life imprisonment is the heaviest sentence a person can legally oblige to serve. It should therefore not be imposed likely without full and proper consideration of all the relevant facts.

It was remarked in *Rammoko v Director of Public Prosecutions* 2003 SACR 200 (SCA) para 13 that where life sentence is prescribed, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent.

At the same time, the community is entitled to expect that an offender will not escape life imprisonment, which has been prescribed for a very specific reason, simply because such circumstances are, unwarrantedly, held to be present.

In *Matyityi* above, it was pointed out that the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer business as usual. A court no longer has a clean slate to inscribe whatever sentence it thought fit, for the specified crime.

It has to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.

It was also remarked at para 23 in *Matyityi* that there was all too frequently a willingness on the part of courts to deviate from the sentences prescribed by the Legislator, for the flimsiest of reasons.

The upshot of all the above is, that having considered carefully all the relevant factors, I conclude that none of them constitutes substantial and compelling circumstances, taken either severally or cumulatively. I am not unmindful of the period spent by the accused awaiting finalisation of his trial, which is over a year to date. In my view, the totality of the circumstances dictates that the prescribed sentences should be the only
10 appropriate sentences, in spite of that period. With regard to the count of theft, I am of the view that 3 years' imprisonment should be appropriate. On Count 4, that is, defeating or obstructing the administration of justice, 5 years' imprisonment would suffice.

In the result, the accused, Mr Charles de Beer is sentenced as follows.

Count 1: Robbery with aggravating circumstances, you are sentenced to 15 years' imprisonment;

Count 2: Murder, you are sentenced to imprisonment for life;

Count 3: Theft, you are sentenced to 3 years' imprisonment;

20 Count 4: Defeating or obstructing the administration of justice, you are sentenced to 5 years' imprisonment. It is ordered that the sentences imposed in counts 1, 3 and 4 shall run concurrently with the sentence imposed in count 2.

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Thank you. Court adjourns.

COURT ADJOURNS