REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION CASE NO.AR.461/07

In the matter between

WILLIAM MUNTU MBATHA **Appellant**

and

THE STATE **Respondent**

J U D G M E N T

Delivered on 5 March 2009

WALLIS J.

[1] The facts in this case are relatively straightforward. Their consequences for two families are tragic.

[2] On 13 August 2004 at Good's Garage in Estcourt, the appellant, a 46 year-old man, shot and killed Mr Rudolf van Zuydam, a 49 year-old married farmer with three children. The mystery is why he did so. The appellant was until that day a perfectly respectable citizen, himself married with five children, who conducted business cutting timber on farms in the district and selling that timber. This was no hand-to-mouth existence as the appellant owned a tractor and trailer and employed people to assist him. He also owned his own bakkie and appears to have dealt with the farmers in the area as the principal source of his business.

[3] The deceased was one such farmer. He was, according to his attorney, Mr Geldenhuys, a meticulous farmer and over a period of at least a year if not longer prior to this incident arranged for the appellant to cut and remove wattles on his farm and poison stumps. He had told Mr Geldenhuys that he was pleased with the appellant's work, which had proved more satisfactory

than that of a previous contractor. The only blot on the relationship was that in the course of these activities a shed and a gate were damaged by the appellant's employees. The damage was not extensive but also not insignificant. As will become apparent it is possible that a dispute over the obligation to compensate the deceased for this damage may have lain at the root of the incident leading to his death.

[4] The deceased's son, also Rudolf van Zuydam, was employed as an apprentice at Good's Garage. His father was apparently aware that the appellant sometimes called at the garage to have repairs effected to his vehicles. At some stage shortly prior to 13 August 2004 he told his son to contact him telephonically the next time the appellant was at the garage as, according to what the deceased told his son, the appellant owed him some R2000-00 in compensation for the damage caused by his employees and he wished to resolve with him the payment of this amount.

[5] The younger van Zuydam carried out this instruction on 13 August 2004 when the appellant had brought his tractor into the garage for repairs. He telephoned his father who came to Good's Garage and encountered the appellant in the workshop. They spoke to one another and walked out of the garage together, apparently amicably according to Mr Saltmarsh, who was waiting in the reception area for his own vehicle. As they walked out of the workshop Mr van Zuydam senior rang his friend and attorney, Mr Geldenhuys, on his mobile phone and asked him if he was free to come down to the garage to help him with the matter of payment for the damages. Mr Geldenhuys agreed to do so.

[6] From the stage when this phone call was made until the entire shocking incident was over cannot have taken long as Mr Geldenhuys testified that his office is only a little more than a kilometre away from Good's Garage and he came immediately by car. By the time he arrived the incident was over and his friend was dead. At most it does not seem likely that much more than twenty minutes can have passed from the time the phone call was made and it may have been as little as ten minutes.

[7] After Mr van Zuydam senior and the appellant left the workshop they walked through the entrance gate across to that portion of the garage premises where both their motor vehicles were parked, a distance of some 30 paces. At this point they were by the testing centre and out of sight of the younger Mr van Zuydam who had been watching them from the workshop window. He had left the place where he was working to go into the reception area from where he could watch his father and the appellant. Unfortunately he did not say why he did this and he was not asked to explain whether this was merely a matter of idle curiosity or was motivated by a concern that something might be amiss.

[8] Shortly after the appellant and Mr van Zuydam disappeared from view a number of shots were fired and Mr van Zuydam emerged from behind the testing centre running towards the workshop, with the appellant running after him with a gun in his hand. It is common cause that this was the appellant's gun and that all the shots fired that day were fired by him from that gun. The younger Mr van Zuydam ran from the window to the door of the workshop and outside towards his father. As his father ran towards him the appellant fired a further shot that appeared to hit the older van Zuydam. Nonetheless he ran on until he slipped on the metal track on which the automatic gate to the workshop premises ran and fell forward on to his knees and face. The appellant reached him, crouched on his haunches straddling his body, grabbed his collar and shot Mr van Zuydam through the head, killing him. Young Rudolf then tackled the appellant, disarmed him and pummelled him with his fists until restrained. The time that expired from the firing of the first shot until the appellant was tackled by Mr van Zuydam's son was undoubtedly less than 5 minutes and was probably considerably shorter.

[9] Thus far the facts. Then comes the unknown. What caused this respectable citizen to lose control so utterly that he killed Mr van Zuydam in this fashion? We do not know because the appellant gave a false explanation in his evidence, claiming to have been assaulted by the deceased by being hit on the head with what he said looked to him like a gun and saying that he himself used his gun from a fallen position purely in self-defence. This explanation

was rightly rejected by the trial court and I need say no more about it save that it leaves us, as it left the trial court, in the dark over the reasons for this crime. All we can say is that something occurred that led to a total loss of control on his part. It would be quite wrong on the evidence we have to attribute whatever occurred to conduct on the part of Mr van Zuydam and equally wrong to say that the appellant acted from some dastardly motive. We simply do not know. This makes the task of determining a proper sentence even more difficult than usual. All that can be concluded from the evidence is that Mr van Zuydam and the appellant were almost certainly having a discussion arising from Mr van Zuydam's claim to be paid R2000 for the damage to his shed, when something occurred in the course of the discussion that resulted in the appellant losing his normal self-control and engaging in the frenzied attack leading to Mr van Zuydam's death.

[10] It was accepted at the trial that this is a murder falling within section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 and accordingly the court was obliged to impose a sentence of imprisonment for a period of not less than fifteen years, in the absence of substantial and compelling circumstances justifying the imposition of a lesser sentence. There was no real attempt to suggest that there were any such circumstances and the trial court moved in the opposite direction and imposed a sentence of twenty years' imprisonment. This appeal is against that sentence.

[11] In determining an appropriate sentence the court must have regard to the well-known triad of the crime, the offender and the interests of society[1]. Whilst there was initially judicial controversy over the minimum sentencing legislation its constitutionality has been affirmed by the Constitutional Court[2] and most of the early concerns about its impact were laid to rest by the judgment of the Supreme Court of Appeal in *S v Malgas*[3], which relaxed the perceived stringency of the legislation by holding that if, when all relevant factors have been taken into account by the trial court, the court's conclusion

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1 S v Zinn 1969(2) SA 537 (A) at 540 F-H, which was applied in S v M (Centre for Child Law Intervening) 2008(3) SA 232 (CC).

2 S v Dodo 2001(3) SA 382 (CC);

3 S v Malgas 2001(2) SA 1222 (SCA);

is that the imposition of the prescribed minimum sentence would be excessive and disproportionate a lesser sentence is justified.

[12] Whilst the question of what constitutes substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum has been the subject of much judicial consideration and learning, there has been no similar consideration of the circumstances in which it is appropriate for a trial court to impose a sentence greater than the prescribed minimum. Does the court simply have a free and unbounded discretion once it concludes that a sentence greater than the statutory minimum is appropriate? What influence does the statutory minimum have in the determination of sentence in such a case? These are the questions that fall to be considered in the present instance.

[13] Before venturing into uncharted territory it is helpful to start with those principles that are already established by way of binding authority. In *Malgas* Marais JA made it clear that the process of sentencing in cases falling within the minimum sentence legislation was no longer to be "business as usual".[4] The effect of that judgment, as affirmed in *S v Kgafela*[5], is that the proper starting point in determining an appropriate sentence in a case falling within the minimum sentencing legislation is the prescribed minimum sentence. It is not correct for the court to make an initial determination of the sentence that it regards as appropriate and then to compare that sentence with the prescribed minimum sentence. The starting point of the enquiry is the prescribed minimum sentence and thereafter the court considers whether the circumstances are such that a departure from that sentence is justified.

[14] I appreciate that the Supreme Court of Appeal laid down this approach in the context of cases concerned with a departure from the statutory minimum sentence by virtue of the presence of substantial and compelling circumstances. I am also alive to the fact that the legislation contains no provision corresponding to section 51(3)(a) when the departure from the

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4 Paras [7] and [8];
5 2003 (5) SA 339 (SCA)

prescribed minimum sentence is upwards rather than downwards. Nonetheless it seems to me that this must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum in the same way as where it is contemplating imposing a lesser sentence. Otherwise the process of determining an appropriate sentence will be bifurcated in a most undesirable way. If the approach is different from that which I have indicated it will lead to the following situation. The court will first determine whether the case is one falling within the minimum sentencing legislation. If it is then it will enquire whether there are substantial and compelling circumstances justifying the imposition of a lesser sentence. If it concludes that there are none, it will then abandon all that has gone before and simply determine in the exercise of its discretion an appropriate sentence, having no regard to the legislation.

[15] In my view such an approach disregards one of the purposes of the minimum sentencing legislation, which is to provide a measure of uniformity and not simply to limit in one direction the discretion of courts in imposing sentence in particular cases, whilst leaving them entirely at large in the other direction. In para [8] of his judgment in *Malgas*, Marais JA said that the purpose of the legislation was that of:

> "… ensuring a severe, standardised and consistent response from the Courts to the commission of such crimes, unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis must be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it."

[16] Later[6] he set out the general principles to be applied in approaching the issue of sentence in these cases, some of which bear upon the present problem. They are the following:

> "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

[6] In para [25];

> 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 …"

[17] I can see no reason why those remarks are not of equal application in the situation where a court is considering the imposition of a sentence greater than the prescribed minimum. It needs to bear in mind that the emphasis in determining an appropriate sentence in respect of these offences is the objective gravity of that particular crime and the public's need for an effective sanction against it. In the language of the traditional triad Parliament, acting on behalf of society as a whole, has expressed a view on the severity of the offence and indicated what the interests of society require in that situation. In doing so it has sought to limit the extent to which sentence may be dependent upon the personal views of the judge as to the efficacy of imprisonment for a longer or shorter period or any other factor that may vary from judge to judge. The seriousness of particular crimes is reflected in the fact that they should in general attract sentences that are severe, standardised and consistent.

[18] It is true that with the exception of those instances where life imprisonment is the prescribed sentence the legislation lays down periods of imprisonment of "not less than" a term of years. Thus in the present case the prescribed minimum sentence is one of not less than fifteen years' imprisonment. It is not therefore a requirement for imposing a greater sentence than the prescribed minimum that there should be substantial and compelling circumstances justifying the imposition of a greater sentence. To approach the matter on that basis would re-write the statute by introducing something that does not appear there. However that does not necessarily mean that the standardised and consistent response from the court that the legislature intended vanishes whenever a judge is minded to impose a sentence greater than the statutory minimum.

[19] In my view the proper approach is the following. The court's starting point should be the statutory minimum sentence. It must bear in mind that this is the sentence that Parliament has prescribed as appropriate for the crime in question having regard to both the general nature of that crime and the interests of the public. As the statutory approach is a standardised one requiring generally that there be a consistent response to particular crimes the court needs to identify the circumstances that take a particular case out of the ordinary so as to render the prescribed minimum sentence an inadequate response to the particular crime. It must ask itself whether there are factors present in the particular case before it that create a significant and material distinction between that case and other cases involving the same offence. Thus in the case of a murder by a first offender, are there circumstances attendant upon the killing, for example, a deliberate degree of sadism or a motive of personal advantage, such as a desire to inherit under an insurance policy or to prevent disclosure of or apprehension for a crime, that render the offence deserving of greater moral approbation than murder always properly attracts? In many ways the enquiry will be the converse of that undertaken when the court is considering whether there are substantial and compelling circumstances for imposing a lesser sentence, provided it is borne in mind that in the case of an increased sentence the court's discretion is broader and more flexible and is not constrained by that statutory yardstick.

[20] On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary as there is for it in the converses situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated. In doing so the court must also weigh in the balance any factors, such as youth, provocation or past ill-treatment by the deceased, that point in the opposite direction. It is only where the balance is clearly in favour of the imposition of a sentence greater than the prescribed minimum that such a sentence should be imposed.

Otherwise the whole purpose of a reasonably consistent and standardised approach to sentence in the case of the most serious crimes will be defeated as it will be open to those judges who have particularly stern views on sentence and regard Parliament's response to serious crime as inadequate, to impose those views in disregard of the purpose of the legislation.

[21] One further point of importance was stressed in argument before us by Mr Marimuthu, who appeared for the appellant and argued the appeal. It is that the prescribed minimum sentence for any particular offence does not stand in isolation. It must be viewed in the context of legislation as a whole and the minimum sentences that Parliament has prescribed for other offences. Thus where a court is contemplating, as here, imposing a sentence of 20 years imprisonment where the prescribed minimum is 15 years, it should consider the case before it and assess whether it is of such seriousness and whether the moral blameworthiness attaching to the accused is such that it properly deserves comparison with those offences where the prescribed minimum sentence is 20 years. Here the direct comparison is with a person who has been convicted of two murders or two robberies with aggravating circumstances or two counts of drug trafficking where the value of the drugs in question exceeded R50 000[7] or a third offence of rape or a third offence of sexual exploitation of a child or a person who is mentally disabled[8].

[22] I conceive that this approach is consistent with the obligation that rests on all courts in interpreting legislation to do so in accordance with the spirit, purport and objects of the Bill of Rights. It is consistent with the constitutional prohibition on cruel, inhuman and degrading punishment[9] and ensures a measure of equality of treatment of those who commit serious crimes, whilst ensuring that where the crime provokes a greater degree of moral outrage it will attract a more severe sentence.

[23] Against that background I turn to consider the approach to sentence of the court *a quo* and the reasons that actuated it to impose a sentence of 20 years

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7 Section 51 (2)(a)(ii) of Act 105 of 1997
8 Section 51 (2)(b)(iii) of Act 105 of 1997
9 Section 12(1)(e) of the Constitution

imprisonment. Unfortunately the judgment on sentence is extremely brief. It records that the court had taken account of the appellant's personal circumstances and the sentencing triad. The court indicated that it was aware of *Malgas'* case. The judgment then proceeds as follows:

> "The Minimum Sentences Act, when it was passed, it was passed for a specific purpose. It was passed so that there was some uniformity in sentencing. It was also passed because of the prevalence of certain offences. I have taken into account the accused's circumstances and I have heard the submission of counsel for the defence in what we loosely termed on the merits. I find myself in agreement with counsel for the State that the accused has shown no remorse. He had a golden opportunity when he went to the box, to speak the truth. As I have stated before, he lied and lied and lied. He has certainly shown no remorse. I find as an aggravating circumstance – and we have accepted that after he had already shot the deceased, he went up to the deceased and shot him again. This was done – and this is further aggravating circumstances – this was done in full view of his son. We can only speculate as to what enraged the accused so much, that he had to draw his firearm and shoot the deceased. But no amount of provocation should have led to what he did. It is especially upsetting in view of the fact that the accused is a mature man. Further aggravating is prior to this, the accused and the deceased had a mutually beneficial relationship and they were on good terms. The accused gave evidence in the box there was some altercation prior to this, referring to his van keys, but this was never ever put to any of the witnesses. So the court accepts that prior to this there was not any bad blood between them. As I have said before, this incident has robbed not only one family of a father but another one as well.
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> Taking into account all the circumstances of the accused, and the terrible crime that was committed, I find that the appropriate sentence is one of TWENTY (20) YEARS' IMPRISONMENT."

[24] A disquieting feature of this case that must be mentioned at this stage is that until the concluding sentence of the judgment on sentence there had been no indication to the appellant's legal representative from the judge that he had in mind the possibility of imposing a sentence greater than the statutory minimum. Mr Govender who represented the appellant at the trial, was invited[10] to address the court "on mitigation". Once he had done so the presiding judge pointed out

[10] Record 253, line5

to him that the case fell under the provisions of the minimum sentencing legislation and counsel for the State intervened to point out that there was a minimum sentence of fifteen years' imprisonment but that the court was not precluded from imposing a higher sentence. The record then reads as follows:

> "BADAL AJ : I just want to hear argument from you. The Act provides that the minimum sentence should be 15 years. The Act further provides, I think, that unless there are substantial and compelling circumstances, the court must impose a sentence of not less than 15 years minimum. *Can you advance any reasons why the Court should not impose a sentence in terms of the Minimum Sentences Act?*"

When Mr Govender pointed out that the crime was not planned by the accused the court's response was to say that a premeditated killing was dealt with under another category in the Act. The record then reads as follows:

> "BADAL AJ **:** Yes, it calls for a minimum sentence of 15 years – a minimum sentence of 15 years. Do you follow? So the Court can go over 15 years. *So now I am asking you, can you advance any reason why the sentence should be less than the 15 years?*
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> MR GOVENDER : There are no further substantial and compelling circumstances, m'Lord."

[25] In my view the effect of the questions posed by Badal AJ in the passages I have italicised, was to direct Mr Govender's attention to the question of whether there were any substantial and compelling circumstances that would have warranted the imposition of a sentence of less than fifteen years' imprisonment and away from any other question. Although it was clear that this was a minimum sentence there was no indication that the judge was contemplating imposing a higher sentence and the manner in which he put questions to Mr Govender was in my view misleading. Instead of asking him about substantial and compelling circumstances for reducing the sentence below the statutory minimum he should have alerted him to the fact that he was thinking of imposing a sentence in excess of the minimum. The situation is aggravated by the fact that, when at the end of her reply counsel for State made the submission that the court could "increase the sentence as prescribed by the Minimum

Sentences Act to a period of between 15 and 20 years", the court did not invite Mr Govender to deal with that statement and indicate that it was indeed contemplating a sentence greater than the statutory minimum. This is particularly important because from the manner in which the prosecutor couched this statement it appears to be a reflection of the proviso to section 51(2) of Act No.105 of 1997, which is concerned with the jurisdiction of a Regional Court and not the jurisdiction of the High Court, rather than a submission as to the sentence that should be imposed. In those circumstances it is hardly surprising that Mr Govender did not respond to an irrelevant statement.

[26] Consistent with what I have already said about the proper approach to sentence when the court contemplates a sentence greater than the statutory minimum and consistent also with those cases that have held that if the State intends to rely upon the minimum sentencing legislation the accused must be forewarned of that fact, preferably in the indictment, I think that that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings. What makes that defect of greater significance is that the way in which Badal AJ put his questions to Mr Govender meant that the latter may have been misled. In my view there was a substantial risk of him having been lulled into a sense of false security in the belief that the court was only concerned with the question whether there were substantial and compelling circumstances justifying the imposition of a sentence less than the minimum and was not entertaining the possibility of a sentence greater than that. That is particularly so in a case such as the present where the fact that the appellant chose to advance a dishonest defence, which had been correctly rejected by the court, and did not then give evidence, meant that there was little point in advancing a submission that substantial and compelling circumstances were present justifying the imposition of a sentence of less than fifteen years' imprisonment. In my view the court contemplating the imposition of a sentence greater than the statutory minimum should make it apparent to the accused and his or her legal representative as that may well alter their entire approach to sentence.

[27] I think that this was on its own an irregularity warranting this court's interference. Had Mr Govender been forewarned of the learned acting judge's disposition on sentence he could have asked for time to try and persuade his client, hitherto obdurate, to enter the witness box, or at least make a statement from the dock, concerning the events that triggered his murderous attack on Mr Van Zuydam. As he was not afforded that opportunity and was misled by the judge we can only speculate on whether this would have had any effect. However it is one thing for an accused person to refuse to give evidence in mitigation – perhaps in the misguided belief that there are still prospects of succeeding in an appeal against conviction – knowing that they are risking a minimum sentence of 15 years imprisonment and another entirely different thing for them to do so when they are confronted with a possibility that the sentence may be substantially greater than that. That risk may also galvanise counsel in his or her efforts to advise their client as to the best course of action. I appreciate that we cannot say what would have occurred in the present case had the judge forewarned Mr Govender of his inclinations in regard to sentence, but the point is that the judge's approach foreclosed any such possibility. In simple, but constitutional, terms it meant that the appellant did not have a fair trial on the question of sentence insofar as the sentence imposed on him exceeded the statutory minimum. For us to endorse that sentence now on the basis that it is a proper sentence on the material at present before the court would merely compound the irregularity in the proceedings before the court *a quo*.

[28] In the ordinary course the only way in which this irregularity could be addressed would be for us to set aside the sentence of the court *a quo* and remit the matter for a proper consideration of the question of sentence. I have however considered whether the justice of the case will be met by setting aside the sentence of 20 years imprisonment and replacing it with one of 15 years imprisonment. This is because it is in my view clear on any basis and leaving this irregularity aside for the moment that the court *a quo* misdirected itself in material respects in regard to sentence and that on the evidence before it there were no sufficient grounds for imposing a sentence greater than the minimum sentence of 15 years imprisonment, There can be no question about the

appellant having been afforded a proper opportunity to lead evidence and advance argument in support of a lesser sentence but the submissions on his behalf fell well short of making a proper case for that.

[29] The respects in which I think the court below fell into error are the following. Firstly, as I read the judgment on sentence and the exchanges between the judge and the respective legal representatives, whilst the judge was manifestly aware of the terms of the legislation and generally aware of *Malgas'* case, there is no indication that he viewed the statutory minimum sentence as being the proper starting point for his analysis with a need to identify clearly those circumstances of an aggravating nature that justified the imposition of a higher sentence. The approach reflected in the judgment is consistent with a view that provided the court did not go below fifteen years' imprisonment it was otherwise at large to impose sentence in accordance with its own unfettered discretion. For the reasons set out above I do not think that is correct.

[30] Secondly and in any event, it does not seem to me that the circumstances referred to in the judgment on sentence as aggravating could in all instances be correctly characterised as such. In the first instance it was said that the appellant had shown a lack of remorse as evidenced by his having advanced a dishonest version in his defence and not having come forward to tell the truth after his conviction. Whilst it is correct that the level of remorse of an accused is recognised as one of many factors to be considered by a sentencing court, it is a regrettable fact of life that in the vast majority of defended criminal cases the accused either keeps silent in the hope that the prosecution will fail to prove its case or tells a false story that is rejected by the court. The latter is what the appellant did. I accept that this does not demonstrate the type of contrition that would be inferred from a full and frank description of events and acceptance of responsibility for the crime, but that is an instance where remorse is a mitigating feature. However, it is a far cry from those cases[11], where the accused's absence of remorse is demonstrated by their past criminality, punishment and

[11] Such as S v B 1985 (2) SA 120 (A) or S v N (Centre for Child Law as *amicus curiae*) 2008 (3) 232 (CC), para 115.

recidivism[12]. It is equally far from those cases where the brutish nature of the offence and the conduct of the accused in the immediate aftermath of the killing demonstrate a level of callousness and absence of remorse[13]. Even where the accused followed the same path as the appellant in this case and denied all involvement in a murder in the course of robbery it has been held that this did not preclude the court from finding on the basis of the youth of the accused that substantial and compelling circumstances existed warranting the court imposing less than the statutory minimum sentence[14].

[31] I am also mindful of the fact that the right to remain silent and to require the State to prove the case against one is a right that is constitutionally protected. There seem to me to be substantial dangers in inferring an absence of remorse from the exercise of a constitutional right and treating that as an aggravating factor. Equally the Constitution protects the right of an accused person to advance his or her defence. To infer from the fact that the accused has advanced a defence found to be dishonest that this reflects a lack of remorse and therefore justifies the imposition of a more substantial sentence, comes perilously close to holding that the accused is being sentenced not only for the crime that they have committed but also for their failure to confess that crime. All this seems to me inconsistent with the constitutional protection afforded to the accused person to remain silent or put forward a defence to a charge. No doubt it is for that reason that remorse usually comes into the scale in mitigation of sentence, rather than in aggravation of it, and where its absence is treated as aggravating that is inferred from factors other than the accused's conduct of his or her defence. In the present case I do not think that the fact that the accused put forward a false defence is a seriously aggravating feature.

[32] The second aggravating feature relied upon by the court below was the fact that the appellant, having already shot the deceased in the course of pursuing him, then caught up with him and shot him again. The fact that the fatal shot was fired in the presence of the deceased's son was also treated as an aggravating

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12 S v N (Centre for Child Law as *amicus curiae*) 2008 (3) 232 (CC), para 115

13 S v Salzwedel and others 2000 (1) SA 786 (SCA) at para 17.

14 S v Ndhlovu 2002 (6) SA 305 (SCA)

circumstance. As to the first of these it suggests a separation in time and space between the firing of the initial shots and the firing of the final fatal shot that is simply inconsistent with the evidence. In effect it is premised on the notion that there was an opportunity for thought and reflection – a *spatium deliberandi* - between the firing of the initial shots and the firing of the final one. That is not what occurred. As the court correctly held, the accused became enraged for a reason that has not been disclosed. The entire incident was over in a matter of moments, with little more than a minute or two, if that, passing from the firing of the first shot to the firing of the fatal bullet . The statement that "after he had already shot the deceased, he went up to the deceased and shot him again" suggests time and reflection, rather than an enraged chase during which shots were fired until the pursuer caught up with the pursued and fired a last fatal shot. Like the then Lord Chief Justice[15], Lord Phillips of Worth Matravers, I ask rhetorically how much is added to the crime of deliberate killing of another human being by the feature that the final bullet is fired in the gratuitous execution of a victim already rendered vulnerable by a prior bullet, when the entire criminal enterprise was over in a matter of seconds?[16] The answer is surely very little because it is what commenced the criminal enterprise that is important not an impractical belief that when a person is enraged they behave rationally. As regards the fact that the fatal shot was fired in full view of Mr van Zuydam's son I do not see how the appellant is burdened with a greater degree of moral responsibility for his crime by virtue of that chance fact. It is not even suggested in the evidence that he was aware of the presence of Mr van Zuydam's son and it is certainly not the case that he had any intention to harm the latter, as well as his father.

[33] The last aggravating circumstance is said to be that previously the accused and the deceased had had a mutually beneficial relationship and were on good terms.

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15 Now the senior Law Lord

16 R v Bieber [2009] 1 All ER 295 (CA) para [56]. This case involved the accused who had been detained for being in possession of a stolen motor vehicle suddenly producing a gun and shooting all three policemen who were on the scene and then administering the *coup de grace* to one already wounded and unable to escape. It was on any basis a far worse case than the present one. Not only were the victims policemen but there was no question of the killings being anything other than cold-blooded murder, unlike the present situation where the appellant was for some reason enraged.

I am entirely unable to see how this is aggravating in the present case. Whilst there may be cases of murder where the friendship between the parties or even a blood relationship, has an impact on the moral culpability of the accused, this is not one of them. The probabilities are overwhelming that whatever did occur between the appellant and Mr van Zuydam occurred because of the latter raising with the appellant an alleged indebtedness arising from the damage to Mr van Zuydam's shed. The prior good relationship makes the reason for committing the crime more baffling, but it is not an aggravating circumstance when one comes to sentence.

[34] In my view therefore there were significant misdirections by the court below in regard to the question of aggravating circumstances. A further misdirection was that there was no attempt whatsoever to weigh any of those circumstances against the range of obviously mitigating circumstances that were present in this case. The court accepted that for an unknown reason the appellant became enraged. It accepted that this led to his complete loss of control and the killing of Mr van Zuydam. However the court should have recognised that this was a "moment of madness" entirely out of character with everything that it knew about the appellant. Hitherto he had been a model citizen, a family man, conducting his own business in a respectable and reputable way, without any prior blemishes on his record and lawfully in possession of the firearm that he used. The court should have weighed a lifetime of respectable citizenship against a few moments of enraged madness. Its failure to do so is a further misdirection.

[35] That conclusion would, if the irregularity I have already dealt with is left aside, have left this court at large to impose the sentence that should have been imposed by the court below. In accordance with the principles discussed above the starting point is the statutory minimum of 15 years. Nothing has been advanced that would warrant a finding that there are substantial and compelling circumstances entitling us to impose a lesser sentence. All relevant circumstances must be weighed both aggravating and mitigating. This involves weighing the appellant's hitherto unblemished record and life as a responsible

citizen, together with the fact that this was a short and temporary loss of control, against the circumstances of the crime. The question is whether those circumstances make this crime more morally reprehensible than a case where the minimum of 15 years would be imposed for murder. Higher minimum sentences provided in the same legislation provide a useful benchmark against which to measure his moral culpability. I can see nothing in the facts of this case that makes the appellant's crime as heinous as those of a double murderer or a triple rapist for whom the statutory minimum is 20 years imprisonment. The aggravating circumstances that do exist, such as the abuse of his licence to carry a firearm; the bloody way in which the final shot was fired and the impact of these events in broad daylight in a public place, are in my opinion balanced by the mitigating features I have identified. This should in my view have led the court below to conclude that there were not sufficient grounds on the evidence before it for departing from the statutory minimum sentence.

[36] On reflection, however, I do not think this is the correct course to follow. My colleagues are less persuaded than I that this is a case where only the minimum sentence is appropriate. In addition as my brother van der Reyden has pointed out following this course would still mean that the sentencing process was infected by a grave irregularity. That can only be cured by setting the sentence aside and remitting the case to the trial court for the matter to be considered afresh in the light of this judgment. The evidence that then emerges after a full investigation may cast a very different light on matters and the resultant sentencing process will be fairer to the appellant and ensure that his constitutional right to a fair trial is fully realised. The appellant can then be properly apprised of the risks he runs if he persists in his untruthful version of events or refuses to tell the court why he acted as he did. I accordingly conclude that this is the proper course for us to adopt

[37] In the circumstances the order I propose is that the appeal be upheld and the sentence of twenty years' imprisonment imposed by the trial court be set aside. The case should then be remitted to the trial court to consider sentence afresh,

including if the appellant so desires the hearing of evidence in mitigation, in the light of this judgment.

VAN DER REYDEN J.

NILES-DUNÈR J.

DATE OF HEARING:	30th January 2009
DATE OF JUDGMENT	5 March 2009
COUNSEL FOR THE APPELLANT:	Mr P Marimuthu (Pietermaritzburg Justice Centre)
COUNSEL FOR THE STATE:	Mr I P Cooke