REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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DATE 28/02/2019 SIGNATURE: .....

**CASE NO: AA 05 / 2018**

In the matter between:

**SILAS SILENCE MULAUDZI** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**JUDGMENT**

**SIKHWARI, AJ**

[1] The appellant was arraigned in the Circuit Court of the Limpopo Division of the High Court sitting at Lephalale before Nair AJ.

Appellant was convicted on count 1, being the murder of Nkele Meriam Sedie ("the deceased") read with the provisions of section 51(1) of Criminal Law Amendment Act 105 of 1997, count 2 of malicious injury to property and count 3 of assault. He was sentenced to life imprisonment in count 1. Counts 2 and 3 were taken as one for purposes of sentence and appellant was sentenced to 12 months imprisonment. Appellant is approaching this court, with leave of the court *a quo* on appeal against the sentence only.

[2] The evidence of the State regarding the murder of the deceased in count 1 is that on 23 April 2017 the body of the deceased was discovered by Matlakala Mita Sedie ("Matlakala"), the deceased's sister, at the premises of the appellant. Matlakala became suspicious of the deceased's whereabouts when the deceased was not at home in the morning of 23 April 2017. She searched for the deceased all over but could not find her. Matlakala went to the house of the appellant because she knew that the appellant had a love relationship with the deceased. On arrival, Matlakala discovered the deceased's body lying on the floor in a pool of blood.

[3] The version of the appellant on the murder charge is that the deceased found him with another woman, his girlfriend, named is Eva. The deceased started to fight the other woman and went to an extent of stabbing the appellant behind his head with an unknown object. The two women started fighting and he ran away and left the deceased fighting with Eva. He denied having killed or

threatened to kill the deceased at some stage. The appellant's version was correctly rejected by the court *a quo* and he was accordingly found guilty of murder.

[4] The conviction on counts 2 and 3 arise from an incident on 22 April 2017 wherein the appellant smashed and damaged the motor vehicle windscreen of one Mr Philemon Sithole whom he also assaulted in the process. This as when the appellant found the deceased in Mr Sithole's motor vehicle and apparently suspected the two of being in love. The next day, on 23 April 2017 Mr Sithole, a police officer, learnt that the appellant was arrested and charged for the murder of the deceased.

[5] There is no evidence relating to the manner and circumstances under which the deceased went to the house of the appellant. Evidence of Matlakala who testified for the State is that the relationship between the deceased and the appellant was already terminated, however the appellant would usually fight the deceased if he saw her at the taverns. There is no evidence as to why on 22 April 2017 the deceased went to the house of the appellant. More importantly, there is no evidence as to what had triggered the fight or what were the circumstances which led to the murder when they were in the house of the appellant.

[6] It is the duty of the State to prove the guilt of the accused person beyond reasonable doubt. In the circumstances, there is no basis to make a finding that the murder of the deceased was premediated or pre-planned. The presented circumstantial evidence is not enough to sustain the conclusion in favour of the State regarding the pre-planning of the murder of the deceased.

[7] According to the cardinal rules stated in ***R v Blom 1939 AD 202,*** the enquiry should be whether the *court a quo*, on the evidence before it, could reasonably have concluded that the murder was indeed premeditated. This enquiry involves the determination of the two cardinal rules of logic; being: *Firstly*, the inference must be consistent with all proven facts. If it is not, that inference cannot be drawn. *Secondly*, the proved facts should be such that they exclude every reasonable inference except that it was the appellant who was the perpetrator.

[8] In the present case, the proven facts do not indicate premeditation of the murder of the deceased. Consequently, this court is entitled to interfere with the sentence of life imprisonment in respect of count 1 of murder. The appellant must be sentenced in terms of Section 51(2) read with 51(3) of Act 105 of 1997

[9] The provisions of Section 51(3)*(a)* of the Criminal Law Amendment Act 105 of 1997 are that:

*"(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exists which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence."*

[10] A proper reading of this section does not preclude the sentencing court from imposing a heavier sentence than the prescribed minimum as long as the sentencing court can record its basis for doing so in going above the prescribed minimum sentence.

[11] In the case of ***Mathebula & Another v State 2012 (1) SACR 374 (SCA)***, at para [11], Bosielo JA stated that:

"the proper approach to be adopted by a sentencing court which contemplates to impose sentences higher than the prescribed minimum sentence seems to me to be the one adumbrated by Wallis J in *S v Mbatha* **2009 (2) SACR 623** (KZP) para 20 where he stated:

'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 converse situation to identify those substantial and compelling circumstances that warrant the imposition of

a lesser sentence than the prescribed minimum and explain why they render a 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'."

[12] This approach was followed by Makgoka JA in the case of ***Kekana v State (37/2018) [2018] ZASCA 148 (31 October 2018)*** at para [11] where he stated that:

"... the appellant's main complaint was that the trial court had misdirected itself by, without giving reasons therefor, imposing a sentence of 20 years' imprisonment on each murder count, instead of the prescribed 15 years. This, he argued, was at odds with what this court held in ***S v Mathebula & Another*** *[2011] ZASCA 165; 2012 (1) SACR 374 (SCA) para 11*. There, this court held that a sentencing court should identify the circumstances that impel it to impose a sentence higher than the prescribed minimum sentence, and explain why a departure from the prescribed sentence is justified."

[13] The manner in which the deceased was killed in cold blood by causing multiple incised penetrating wounds to the neck on no less than 8 times around the neck was very cruel and gruesome. The deceased was harmless and defenceless. The appellant attacked her without any form of provocation. In his own evidence, he was no longer in love with her. He was in love with one Eva but he still persuaded her to come to his house. Appellant acted in violation of a protection order issued by the court to protect the deceased from violent attacks by the appellant. Appellant has tendered no apology

to deceased's family. There is no sign of remorse on the part of the appellant. He abused the trust which the deceased had on him when she agreed to go to his house. These factors, considered cumulatively, justify the imposition of a sentence which is higher than the prescribed minimum sentence of 15 years for murder under Section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[14] A further aspect of the appeal on sentence which is worth considering is the concurrent operation of the sentences imposed by the court *a quo*. There is no hard and fast rule as to whether sentences should be concurrent or consecutive. The sentencing court should be more concerned about the cumulative effect of the sentence. The practical objective should be to impose an overall sentence which is proportionate to the offence, offender and community. The sentencing court should have regard to the nature of the offences where there is a close connection in time, place and intention with regard to the offences involved; and then the counts be taken as one for purposes of sentencing or the sentences be ordered to run concurrently.

[15] In ***Moswathupa v State 2012 (1) SACR 259 (SCA)*** at para 8, Theron JA (as she then was) stated that:

"... It is trite that punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy. In

*S v V 1972 (3) SA 611 (A) at 615D-E*, Holmes JA emphasised that 'the element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked'. Holmes JA added that mercy was an element of justice and referred with approval to *S v Harrison 1970 (3) SA 684 (A)* at 686A, where the learned judge has said that, '[j]ustice must be done; but mercy, not a sledge-hammer, is its concomitant'. Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe."

[16] There is a close connection with regard to the three counts on which the appellant was convicted. The circumstances which led to the murder of the deceased seem to have flown from the rage which the appellant had when he saw the deceased in Sithole's motor vehicle. He attacked Sithole, damaged the windscreen of Sithole's motor vehicle, and later the deceased was found murdered in an apparent crime of passion. The appellant is a man who could not contain his jealousy or could not come to terms with his break-up with the deceased. Consequently, it is our view that the sentence(s) in counts 2 and 3 should run concurrently with the sentence in count 1 of murder.

[17] The court of appeal's powers to interfere with the sentence imposed by the trial court are limited unless the sentence is disturbingly inappropriate or vitiated by irregularities or misdirection. In the case of ***S v Rabie 1975 (4) SA 855(A) at page 857D-F***, Holmes JA stated that:

"1. In every appeal against sentence, whether imposed by a magistrate or judge, the court hearing the appeal:-

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court";

and

(b) should be careful not to erode such discretion: hence the further principle that sentence should only be altered if the discretion has not been "judicially or properly exercised".

"2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate."

[18] Sentencing falls within the discretion of the trial court. In sentencing the appellant herein for count 1 of murder, the court *a quo* correctly found that there were no substantial and compelling circumstances to persuade it to deviate from the prescribed minimum sentences in terms of the relevant provisions of Section 51(3) of Act 105 of 1997, as amended.

[19] In the case of ***S v Malgas 2001 (1) SACR 469 (SCA) at 481J–482A***, the Supreme Court of Appeal stated that:

"the specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts are to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded". In the *Malgas* matter the SCA set aside the sentence of life imprisonment and replaced it with 25 years imprisonment

[20] In the premises, I propose to make the following order:

1. That the appeal against sentence in count 1 of murder is upheld and the sentence of life imprisonment is set aside and replaced with the following:

   "The accused is sentenced to 20 years imprisonment."

2. That the appeal against sentence(s) in count 2 of malicious injury to property and count 3 of assault is dismissed.

3. That the sentences in counts 2 and 3 shall run concurrently with the sentence in count 1.

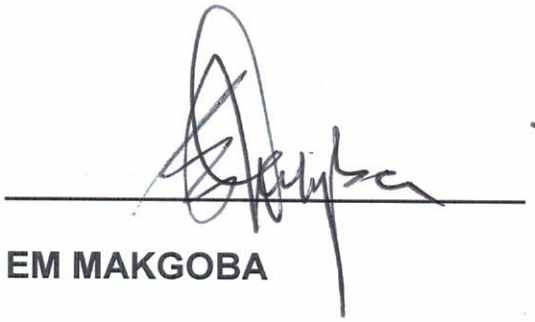
4. That the sentences so imposed are antedated to 2 August 2018, being the date on which the appellant was sentenced by the court *a quo*.

**MS SIKHWARI**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE**

I agree.

**MG PHATUDI**
**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE**

I agree, and it is so ordered.



**EM MAKGOBA**

**JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES:**

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| **APPELLANT'S COUNSEL:** | **Mr DJ Nonyane** |
| **INSTRUCTED BY:** | **Justice Centre, Polokwane** |
| **RESPONDENT'S COUNSEL:** | **Adv JJ Kotze** |
| **INSTRUCTED BY:** | **National Prosecuting Authority, Polokwane** |
| **DATE OF HEARING:** | **15 February 2019** |
| **DATE OF JUDGMENT:** | **28 February 2019** |