IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no.A 282/15

In the matter between:

MAVELWANO TAFENI Appellant

And

THE STATE Respondent

JUDGMENT DATED 16 OCTOBER 2015

BINNS-WARD J:

[1] The appellant was duly convicted in September 2010 of murdering Noliswa Mdekwana by stabbing her multiple times with an okapi knife. He had pleaded guilty and the factual particulars were set out in his statement in terms of s 112 of the Criminal Procedure Act 51 of 1977. The trial court found that there were no substantial and compelling reasons to depart from the prescribed minimum sentence and accordingly sentenced him on 22 September 2010 to a term of fifteen years' imprisonment. An application for leave to appeal against the sentence, brought well out of time, was refused by the trial court in November 2014. The appeal is before us with leave granted by this court (per Erasmus and Yekiso JJ) on petition in May 2015.

[2] The appellant's counsel submitted, as he had to if the appeal were to enjoy any prospect of success, that the trial court had erred in its finding that there were no substantial and compelling reasons justifying the imposition of a lesser sentence than the prescribed minimum sentence. Counsel for the state, on the other hand, submitted that this court would be entitled to interfere with the sentence imposed only if it were able to find a material misdirection on the part of the sentencing magistrate.

[3] While the approach propounded in the argument for the state is generally correct in regard to appeals against sentence, it would be counterintuitive to apply it when the initial question is not whether the sentence itself was vitiated by some or other material misdirection by the sentencing court, but whether the court was right or

wrong to have determined on the facts of the case that there were no substantial or compelling circumstances justifying a departure from the prescribed minimum sentence. It is clear that the determination of an appropriate sentence entails the exercise of judicial discretion in the narrow or strict sense of the word (sometimes termed 'true discretion'). It is for that reason that an appellate court's powers to interfere are circumscribed. In determining an appropriate sentence, a trial court exercises a power that allows it to choose from a wide range of equally permissible options. It cannot be found to be wrong simply because the appeal court might, had it been the first instance decision maker, have selected a different one.

[4] However, the exercise of a narrow discretion is not involved in the making by a sentencing court of a finding in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997 that it is, or is not, satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsections (1) and (2). While the range of relevant circumstances falling to be taken into account in making the finding in the given cases will in the nature of such matters necessarily be disparate and incommensurable, there is not a range of equally permissible options available to the decision maker. The court is either properly satisfied as to the existence of substantial and compelling circumstances, or it is not.

[5] The position is analogous to that which obtains in regard to a court's discretion in respect of the grant of interdictory relief. In *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A), which concerned an appeal against the refusal by the court below of an interim interdict, the Appellate Division found, for the reasons explained at pp. 360-362 of the judgment, that the matter involved the exercise by the court a quo of its discretion in the wide sense and that the appeal court thus was less constrained in its ability to interfere than it would have been had the discretion involved been one in the true sense. It was therefore at liberty to decide whether the interdict had been correctly refused applying its own view of the proper outcome.

[6] The distinction between discretion in the strict and wide senses (or the true and loose senses) is well recognised in our jurisprudence. The distinction is made for the very purpose of determining the extent of an appellate court's power to substitute

its own determination for that of the court a quo where the decision in point is accepted to have involved the exercise of 'a discretion'. The nature of the distinction was most recently discussed in the Constitutional Court's judgment in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC), where it was applied in determining the extent of the court's powers to interfere on judicial review with a discretionary administrative decision. Khampepe J rehearsed the relevant principles as follows at para 83 - 88:

> [83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.
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> [84] In *Media Workers Association* [*Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A)] the court defined a discretion in the true sense:
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> > 'The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.'
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> [85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.
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> [86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox* [*Knox D'Arcy Ltd and Others v Jamieson and Others* supra], a discretion in the loose sense —
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> > 'mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'.
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> [87] This court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as

> the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.
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> [88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —
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> > 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'. [Footnote omitted.]
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> An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.
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> [Footnotes omitted.]

[7] In *Knox D'Arcy* supra, at 362D-E, Grosskopf JA illustrated the court's conclusion that the court's discretion in respect of interdictory relief was of the wide or loose type as follows: '*Finally, in regard to the so-called discretionary nature of an interdict: if a Court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice .... I doubt whether such a conclusion could be supported on the grounds of principle or policy.*' It seems to me that that observation must apply equally to the determination of the existence of substantial and compelling circumstances within the meaning of s 51(3) of the Criminal Law Amendment Act. Neither principle nor policy could support one court holding that such circumstances existed and another concluding on identical facts that they did not, and a court of appeal not being able to interfere with either's choice.

[8] For these reasons, and mindful that we must pay due heed to the discretionary nature of the decision by the lower court, even if in the wide sense of the concept, I do not accept that we may interfere only if we are able to identify a material misdirection, or a failure of the exercise of discretion. Although expressed differently, this conclusion finds support, I think, in the remarks of Bosielo JA in *S v PB* 2013 (2) SACR 533 (SCA) at para 20, where the learned judge of appeal stated:

> What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.

See also the judgment of the Full Court (per Rogers J, Gamble J concurring, Matthee AJ dissenting) in *S v GK* 2013 (2) SACR 505 (WCC), at para 5-7, approving the pertinent dicta of Cloete J (Robinson AJ concurring) in *S v Homareda* 1999 (2) SACR 319 (W) ([1999] 4 All SA 549), at 326c-d (SACR): '*The decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment; but a Court on appeal is entitled to substitute its own judgment on this issue if it is of the view that the lower court erred in its conclusion: cf Wijker v Wijker 1993 (4) SA 720 (A) at at 727E-728B*'. We were not referred to any of these authorities in counsel's heads of argument. I came across them only when I looked in the law reports to find support for the conclusion at which I had arrived independently. While coming to the same conclusion that I have done, none of the judgments, however, seems to have expressly identified the nature of the discretion entailed in the determination of the existence of substantial and compelling circumstances in prescribed sentence cases as the basis for distinguishing an appellate court's power to intervene from that which it has in respect of sentence generally. (Cloete J did so by inference in *Homareda*, by referring to the passage in *Wijker*, which in turn cited the relevant passages in *Media Workers Association*.)

[9] I turn now to consider whether the court a quo was right to have found that there were no substantial and compelling circumstances in the case that justified a lesser sentence than the minimum prescribed in terms of the Act. It has been authoritatively acknowledged that the words 'substantial and compelling circumstances' in the relevant context denote a composite term that defies precise definition. The existence of such circumstances will generally be present when the case is one in which the sentencing court should feel a sense of unease amounting to a conviction that '*the prescribed sentence* [would be] *unjust or, as some might prefer to*

put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence'; *S v Malgas* 2001 (1) SACR 469 (SCA), 2001 (2) SA 1222, [2001] 3 All SA 220, at para 22.[1] See also *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396); especially at para 13-20, and the recent rehearsal of the principles by this court in *S v Fortune* 2014 (2) SACR 178 (WCC) in the context of a request by the court a quo in that matter for '*some guidance with regard to how* [this court] *sees the question of substantial and compelling circumstances*'.

[10] The appellant was involved in an extra-marital affair with the deceased. It would appear that he was not the only man in her life because he was attacked by another of her boyfriends and his friends. He fled from his assailants to the deceased's house, where he expected to find refuge and support. The deceased was not there when he arrived. She arrived shortly afterwards with a beer can in her hand and visibly under the influence of alcohol. She showed no sympathy for the appellant and told him that it would have been better if her boyfriend had stabbed him. This taunt caused him to lose his temper, draw out the knife from his pocket and stab her repeatedly. The stabbing took place in the presence of the deceased's young daughter, who must surely have been deeply traumatised by the experience. The appellant left the house and returned home where he told his wife what had happened. He had been drinking and was intoxicated, but admitted that he had been able to appreciate what he was doing. As mentioned, he pleaded guilty at the trial and showed every sign of genuine remorse. He was 43 years of age at the time of the trial. He is married with four children and has no previous convictions. A correctional officer's report indicated that his family background was stable and supportive. After he had lost his employment in the context of the effects of industrial action in 2004, his wife had been the principal breadwinner, although he applied himself in running a

[1] Marais JA added the following significant rider in para 23 of the judgment in *Malgas*:
'*While speaking of injustice, it is necessary to add that the imposition of the prescribed sentence need not amount to a shocking injustice (''n skokkende onreg' as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking.*' The statement of the law in para 22 of *Malgas* was endorsed by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC), 2001 (3) SA 382, 2001 (5) BCLR 423, at para 40

home business. He was considered to be amenable to rehabilitation and a suitable candidate for correctional supervision.

[11] The crime was committed in the heat of the moment at a time when the appellant was emotionally charged and evidently deeply hurt by a callous rebuff from the person to whom he had been looking for sympathy. While this in no way excuses his conduct or renders the needless death of Ms Mdekwana any less tragic and horrific, it does afford a basis for understanding the appellant's behaviour in a way that lessens the blameworthiness attached to it. It was a crime of passion, not one of gratuitous violence. (In *S v Mvamvu* 2005 (1) SACR 54 (SCA), at para 13, Mthiyane JA noted that an essential characteristic of a 'crime of passion' is that it is committed 'without rational reflection whilst the perpetrator [is] influenced by barely controllable emotion'.) Courts have found the commission of murder in such circumstances to found substantial and compelling circumstances even when the accused has subsequently failed to show repentance or remorse, see *S v Dumba* 2011 (2) SACR 5 (NCK), although I would, with respect, regard the finding in that case as exceptional. There are other examples in circumstances generally more comparable to the current case: *S v Mngoma* 2009 (1) SACR 435 (E), in which the sentence imposed by the trial court was found to be inappropriately lenient and increased on appeal, but its finding in the context of a crime of passion that substantial and compelling circumstances existed to justify a departure from the minimum sentence was confirmed; *S v Makatu* 2006 (2) SACR 582 (SCA) at para 15-17 and *S v Engelbrecht* 2005 (2) SACR 163 (W) are amongst them.

[12] Having regard to all the aforementioned features of the case, the magistrate was wrong to have found that substantial and compelling reasons did not exist to depart from the prescribed minimum sentence of 15 years. The imposition of such a sentence was manifestly disproportionate if proper regard were had to the circumstances of the commission of the offence and the personal characteristics of the appellant. In the circumstances it is necessary to set aside the sentence imposed and replace it with one that does justice to the case.

[13] As noted, the crime of murder is of the most serious category of common law offence. The determination of an appropriate sentence must appropriately reflect that. Violence by men towards women is endemic in this country and the opprobrium that

the court attaches to it must also be marked in the sentence. The sentence imposed must moreover bear an appropriate relationship to the benchmark set by the prescribed minimum sentence. I consider that a sentence of 10 years' imprisonment, two years of which being suspended on appropriate conditions, would be fitting.

[14] The following order is made:

1. The appeal against sentence is upheld.
2. The sentence of 15 years' imprisonment imposed by the trial court on 22 September 2010 is set aside and replaced by that set out in paragraphs 3 and 4, below.
3. The appellant is sentenced to 10 years' imprisonment, two years of which are suspended for five years on condition that the accused is not convicted of an offence involving the element of assault committed during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.
4. The substituted sentence is antedated, in terms of s 282 of the Criminal Procedure Act 51 of 1977, to 22 September 2010.

A.G. BINNS-WARD
Judge of the High Court

RILEY AJ:
I concur.

J. RILEY
Acting Judge of the High Court