FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A259/2009

In the appeal between:

SHADRACK KWENANE MOFOKENG 1st Appellant
NOMONDE EUDIN MAKENGKENG 2nd Appellant

and

THE STATE Respondent

CORAM: H.M. MUSI, JP *et* RAMPAI, J *et* BOONZAAIER, AJ

JUDGEMENT: H.M. MUSI, JP

HEARD ON: 3 MAY 2010

DELIVERED ON: 10 JUNE 2010

INTRODUCTION

[1] This is an appeal from a judgment of a single judge of this court delivered in November 2008. The two appellants appeared at the trial with another person who featured as accused number 2. The first appellant featured at the trial as accused number 1 and the second appellant as accused number 3. Accused number 2 died shortly after the commencement of the trial. I shall henceforth refer to the

appellants as cited in the appeal. The appeal is with leave of the court *a quo* on a limited basis as will appear shortly.

[2] The appellants were arraigned on charges of kidnapping (count 1), robbery with aggravating circumstances (count 2), murder (count 3) and possession respectively of a firearm and ammunition without lawful authority in contravention of the provisions of the Firearms Control Act, 60 of 2000 (counts 4 and 5). The first appellant was convicted on all the charges whereas the second appellant was convicted of counts 1, 2 and 3 and acquitted on counts 4 and 5. Each of the appellants was sentenced to seven years imprisonment on count 1, fifteen years imprisonment on count 2 and life imprisonment on count 3. In addition, the first appellant was sentenced to three years imprisonment and six months imprisonment respectively on counts 4 and 5. I should mention that in pronouncing sentence the court *a quo* confused counts 2 and 3 and said that life imprisonment was imposed in respect of count 2 and fifteen years imprisonment on count 3. But it is clear that this was a mistake, that life imprisonment was imposed in respect of count 3 and fifteen years imprisonment on count 2. The

court *a quo* subsequently corrected itself and the appeal was heard on the basis that the sentence for robbery with aggravating circumstances was fifteen years and that life imprisonment was imposed on the murder conviction.

[3] The first appellant was granted leave to appeal against all the sentences imposed and in respect of conviction he was granted leave to appeal only in respect of counts 4 and 5. The second appellant was granted leave to appeal against the convictions and sentence in respect of all the charges.

FACTUAL BACKGROUND

[4] I deem it necessary for purpose of putting the judgment of the court *a quo* in its proper perspective to give a full outline of the factual background to the matter.

[5] The second appellant is the wife of the deceased in the murder count, Mr Mpelane Gilbert Makengkeng. They lived together as man and wife in a section of Thabong called Las Vegas in Welkom. The evidence reveals that the couple's house was secured with a security fence and the only entrance into the premises was through a steel gate that was

always locked due to the fact that the deceased kept vicious dogs (bulldogs). Anyone wanting to enter the premises had to shout at the gate and someone from inside the premises would lock the dogs away and open the gate with a key. The deceased had two children from a previous marriage, a boy and a girl aged between 16 years and 18 years. They had been staying with their father in his house before he married the second appellant and continued to do so after the marriage. The evidence reveals that the second appellant had a daughter from a previous marriage who also stayed with the couple. At the time of the deceased's death, the deceased's son was at a university in Bloemfontein and only came home during the school holidays. It is not clear where the two girls were at the time and they do not feature as far as the commission of the crimes is concerned. It emerged later in the sentencing process that the second appellant has another child, a boy who is apparently a major. He does seem to have stayed with the couple and does not feature in these proceedings.

[6] The couple had serious marital problems, partly due to the unfair treatment that the second appellant allegedly meted

out to the deceased's children from an earlier marriage, and partly due to the fact that the deceased conducted an extra marital love affair with another woman, a matter that was public knowledge. The situation had deteriorated to the extent that the couple were no longer sharing the same bed and the deceased had instituted a divorce action. There were also complaints that the deceased was not properly providing for his family and there was always a shortage of money and food in the household.

[7] Early on the 1st of July 2006 the couple were visited by the deceased's sister and her husband, who had been sent by the deceased's father to try and mediate the marital dispute between the deceased and the second appellant but the second appellant refused to see them. On that same day the deceased left in his motor vehicle to visit his relatives in Odendaalsrus. He returned at about 21H30 and visited his girlfriend, Mantwa Nhlapo. The latter testified that the deceased left her place at about 22H30 saying that he was going home as he had to prepare for his early morning shift the next day (5am). She further said that the deceased never slept at her place, that they could spent the night or

evening together but the deceased would always go home to sleep. She described how the deceased was dressed when he left her place. That was the last time that the deceased was seen alive.

[8] The evidence reveals that sometime after parting with his girlfriend, the deceased was kidnapped in his car, driven from Welkom to the eastern Free State, killed and buried in a shallow grave in a forest in Qwa Qwa (more than 300km away). Subsequently and on 8 July 2006, the first appellant emerged in Maseru in Lesotho driving the deceased's motor vehicle and handed it over to a female acquaintant of his, Senatsatsi Safali, to sell it for him. She was found driving the deceased's motor vehicle at Maseru bridge in the company of a friend of hers, Francina Ditabe. Both were arrested and they in turn led the police to the first appellant. The first appellant subsequently led the police to the spot where the deceased had been buried. The evidence relating to how he led the police to the corpse of the deceased and the pointing out was found by the court *a quo* to be admissible following a trial within a trial. The evidence of the first appellant's girlfriend in Maseru, Lesotho, Lipelaetso

Makwala, disclosed that he had concealed a firearm belonging to the deceased in a dustbin at her place which was subsequently retrieved by the police and which also implicated the first appellant in the kidnapping and murder of the deceased.

FIRST APPELLANT'S APPEAL

[9] It is convenient to dispose of the entire appeal of the first appellant at this stage. The first appellant challenged his conviction on the count of possession of a firearm on the ground that the state has not shown that the firearm found to have been in his possession was a firearm as defined in section 1 of the Act. In the South African Criminal Law and Procedure, Volume 3, Statutory Offences, 2nd Edition by Milton and Cowling the following is said at B1, page 3:

> "In essence a firearm is an instrument that is capable of firing (or propelling), a bullet or similar projectile, either by burning propellant or by other means. Such projectile must be capable of being discharged with the muscle energy of more than 8 joules."

In *casu* the state failed to lead any evidence to show that the firearm concerned was in a working condition in the sense that it was capable of firing a bullet or similar projectile. The state simply handed in the firearm as an exhibit and proceeded on the assumption that it is a firearm as defined. No evidence as to its condition was led and it appears that the police who confiscated it did not even test it. The fact that it was shown to be the deceased's licensed firearm was not sufficient to establish the elements of the offence charged.

[10] Likewise, no evidence was led to show that the ammunition involved was a "primer or complete cartridge" as defined in section 1 of the Act. No wonder that the state conceded that the appeal relating to these two charges should succeed.

[11] Regarding the sentences imposed on the first appellant on counts 1, 2 and 3, Mr Pretorius, who appeared on his behalf, was candid that he could not see his way clear to arguing that the sentence imposed in respect of each of the three charges was inappropriate. Nor was there any irregularity or misdirection committed in the sentencing process.

[12] The concession was correctly made. The provisions of the Criminal Law Amendment Act, 105 of 1997 were applicable to the charges of robbery with aggravating circumstances and murder. Unless it was found that there were substantial and compelling circumstances justifying the imposition of a lesser sentence, the minimum sentence of 15 years imprisonment and life imprisonment had to be imposed respectively for count 2 and 3. The court *a quo* fully dealt with the factors that had been put on record for purposes of sentence and came to the conclusion that there were no weighty reasons justifying a departure from the prescribed minimum sentences. It is trite that a court of appeal will only interfere with the sentence imposed by the trial court where there has been a misdirection or irregularity in the sentencing process or if otherwise the sentence is shockingly inappropriate. In *casu* there is no basis whatsoever for interfering with the sentences imposed on the first appellant.

THE EVIDENCE IMPLICATING THE SECOND APPELLANT

[13] There can be no doubt that there was overwhelming evidence implicating the first appellant in the commission of the crimes charged and he was correctly convicted. This much was conceded by Mr Pretorius who appeared for him. In relation to the second appellant, it will be noted that there was no direct evidence implicating her in the commission of the crimes. Her conviction was based purely on circumstantial evidence. It is apposite to consider the evidence on the basis of which the inference of guilt was drawn. But before I do so, I need to point out that the first appellant is also a resident of Thabong in Welkom who operated a taxi business there. It is obvious that he knew the deceased as the latter was a traffic officer in the same area.

[14] First, expert evidence was led showing that between 30 June 2006 and 12 July 2006 the second appellant was in constant contact with the first appellant by cellphone. Now, this is from the eve of the deceased's disappearance onward. The first call made by the second appellant to the first appellant was at 20H17 on 30 June 2006, then followed another at 20H20. These two calls went to voice-mail on the

first appellant's cellphone and apparently no discussion took place. The third call followed at 20:33:00:56 and recorded a conversation lasting 43 seconds. About an hour later that same night at about at 21:24:39 the second appellant made another call to the first appellant lasting 158 seconds. On the following day the 1st of July 2006, the second appellant started telephoning the first appellant from about 10 in the morning. Thereafter several calls followed during the day through to the afternoon and into the night up to the early hours of the 2nd of July 2006 (six calls in all). According to the expert evidence the calls made at about 23H30 on the 1st of July and a quarter to one in the early hours of the 2nd of July were all received by the first appellant's cellphone in Thabong, Welkom. This means that at that time the first appellant was still in Welkom. The first recorded call that the first appellant made to the second appellant was on the 6th of July 2006 at 11H52 and it was made from Ficksburg. The first appellant again called the second appellant on the 10th of July, this time from Ladybrand, which is also in the east of the Free State and near Lesotho. The calls made by the second appellant on the 3rd and 12th of July must have

transpired when the first appellant was in the east of the Free State.

[15] The other evidence that has a strong bearing on the case against the second appellant relates to the fact that the deceased was wearing his pyjamas when he was kidnapped and killed. This evidence must be read in conjunction with following evidence:

15.1 that the deceased left his girlfriend's place at 22H30 intending to go home to sleep;

15.2 that the deceased never slept at his girlfriend's place. As a matter of fact the second appellant herself told inspector Mangani, who interviewed her on the 4th of July when she had gone to the police station to report the deceased's disappearance, that the deceased was not in the habit of sleeping out. The evidence of Mangani to this effect was not challenged under cross-examination.

15.3 the evidence of the deceased's son, Ronas Mankenkeng, that the deceased was particular about his dress code and presentability and would never go out of the house in pyjamas. He said that if someone

called at the gate wanting to be let into the premises, the deceased would first change in to normal clothes before going out to open the gate. There is no evidence on record to contradict this evidence and it had to be accepted as indeed the court *a quo* accepted it.

15.4 the evidence of Ronas that the gate to the house of the deceased was always locked due to the presence of the vicious dogs and that either the deceased or the second appellant would open the premises to visitors. There is no evidence that there was any person on the premises on the night of the 30th June to the 1st of July other than the deceased and the second appellant and it follows that one of them would have opened the gate for visitors in that period.

ISSUES RAISED ON APPEAL

[16] Now, Mr Reyneke, who also represented the second appellant at the trial, challenged the second appellant's conviction on the broad ground that there was no direct evidence implicating her in the commission of the crimes and contended that there was insufficient evidence to convict.

He focused on the evidence of cellphone calls and pointed out that the first appellant's evidence regarding the calls made to him by the second appellant was corroborated by his wife. He argued that such evidence should have been accepted and criticised the trial court's rejection thereof. Now the first appellant claimed that the first three successful calls were actually made by the deceased himself using his wife's (second appellant) cellphone and that the discussion was about the money that the deceased wanted to borrow from him. He said that he and the deceased were friends. He acknowledged that the next four calls were made by the second appellant to his cellphone but claimed that all these calls were answered by his wife, Selinah Mofokeng. He called his wife in this regard and the latter confirmed that she answered the calls and said that the second appellant was enquiring about the money the deceased had wanted to borrow from the first appellant.

[17] Now the trial court found the first appellant to be a lying witness and rejected his entire version as false. The court *a quo* was clearly correct in so rejecting such evidence and Mr Reyneke did not make any submission to the contrary.

However, Mr Reyneke suggested that we should take into account the fact that the first appellant, not only did not incriminate the second appellant but also that he sought to exonerate her. Mr Reyneke submitted that it is improbable that the first appellant would have risked being convicted alone if his co-accused was indeed complicit in the crimes. The answer to this is that it is not uncommon in our practise for co-accused to shield one another. The point, however, is that if the first appellant's explanation regarding the cellphone calls exchange between himself and the second appellant was found to be false that does not help the second appellant's case at all, for the rejection of such explanation necessarily means that in the absence of any other credible evidence there is no explanation at all.

[18] It is trite that a court of appeal will interfere with the credibility and factual findings of the trial court only where such findings are clearly wrong. I am not persuaded that the court *a quo* was wrong in rejecting the evidence of the first appellant's wife. On the contrary, I think that the court *a quo* was justified in thus rejecting it. Her evidence was predicated upon the premise that the deceased had wanted

to borrow money from the first appellant and his wife called the first appellant in order to enquire about the loan. But it should be noted that it was the first appellant's evidence that the deceased had told him not to disclose the loan to his wife (decead's). Why would the second appellant now enquire about the loan she was not supposed to know about? And why would she on each occasion discuss the matter with the first appellant's wife instead of the "lender" himself? And what a coincidence that on four different occasions would it be the wife to answer the first appellant's cellphone, even in the middle of the night? In all probability the first appellant had told his wife what to tell the court in order to save his skin and that of his co-accused.

[19] Mr. Reyneke also contended that the court *a quo* should not have accepted the evidence of the deceased's son, Ronas, on the basis that he held a grudge against the second appellant due to the fact that the second appellant allegedly illtreated him and his sister. I do not agree with this submission. The relevance and importance of the evidence of Ronas relate to the existence of a marital conflict between the deceased and his wife, as well as the physical security

arrangement around their home. In this regard, Ronas is fully corroborated by the deceased's brother-in-law, William Matoba, and to some extent by the deceased's younger brother, Aaron Makengkeng. The deceased's girlfriend also corroborated them on the issue of the marital dispute and the pending divorce. Such evidence stands uncontradicted by any other evidence and had to be accepted. The evidence also dispelled any notion that there could have been friendship between the deceased and the first appellant, since all these witnesses would have known about it had it existed.

FAILURE TO TESTIFY

[20] It is to be noted that the second appellant chose not to testify. Now it is trite that the onus is on the State to prove the guilt of an accused beyond reasonable doubt and the accused has a right to remain silent and not to testify during the proceedings. But it is also trite that failure to testify is a factor that, depending on the circumstances of the case, may count against an accused. See **REX v ISMAIL** 1952 (1) SA 204 (AD) at 210; **S v LETSOKO AND OTHERS** 1964 (4)

SA 768 (AD) at 776 B – D; **S v MTHETWA** 1972 (3) SA 766 (AD) at 769.

[21] It is apposite to refer to what Langa DP (as he then was) said in **S v BOESAK** 2001 (1) SA 912 (CC) at 923 E – F:

> "The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused."

The learned judge went on to quote with approval what Madala J said in **OSMAN AND ANOTHER v ATTORNEY-GENERAL, TRANSVAAL** 1998 (4) SA 1224 (CC) para [22]. There it was made clear that once the prosecution has established a *prima facie* case against an accused and he/she does not give evidence to rebut the *prima facie* case, the court may find that the *prima facie* evidence is sufficient to convict.

DRAWING INFERENCES

[22] In a matter based on circumstantial evidence as *in casu*, it is important to keep in mind the principles laid down in **R v BLOM** 1939 AD 188 at 202 – 203. We must determine whether the inference of guilt drawn by the court *a quo* is consistent with all the proved facts and whether the evidence excludes other reasonable inferences. In my view, this is where the failure to testify on the part of an accused becomes critical. Where on the accepted evidence, considered as a whole, a certain inference becomes inescapable, an explanation under oath by an accused could operate to displace it. Absent such explanation the inference could remain the only reasonable inference. I would think that this is what the authorities mean when they say that failure to testify may count against an accused.

[23] Turning to the particular facts of this case, the sustained cellphone communications made by the second appellant to the first appellant within the time span that the deceased was kidnapped, killed and buried, called for an explanation from the second appellant. In the absence of an explanation the only reasonable inference to be drawn is that the second

appellant had discussed the kidnapping and murder of the deceased with the first appellant.

[24] The above conclusion must be read in conjunction with the following:

24.1 On the totality of the evidence the deceased must have been kidnapped from his house whilst asleep. The fact that he kept a firearm but was unable to ward off the attackers shows that he must have been taken by surprise.

24.2 Either the deceased or the second appellant opened the gate for the intruders or otherwise assisted them to get in and the deceased must be ruled out. This is an issue that called for an explanation from the second appellant and in the absence of an explanation the only reasonable inference to be drawn is that she assisted the kidnappers to get into the premises.

24.3 The second appellant had a motive to get rid of the deceased based on the marital strive and the pending divorce, especially the notion that she would loose her husband to another woman. That she rebuffed mediation efforts in the morning of the day before the

deceased was kidnapped is not without significance and so is the evidence that she had said that she will resolve the dispute in her own way.

[25] The above findings cumulatively justify the conclusion that the second appellant conspired with the first appellant and assisted him in the kidnapping, robbery and murder of the deceased. I conclude therefore that the second appellant was correctly convicted.

SENTENCE

[26] The first point to be made is that the provisions of the Criminal Law Amendment Act, 105/1997 as amended (the Act) come into play in respect of the convictions for robbery with aggravating circumstances and murder. Now it is not necessary to deal with the sentence on count 2, for the target of the appeal on sentence was the life imprisonment imposed on the murder conviction. In terms of section 51 of the Act read with part 1 of Schedule 2 thereto, a prescribed minimum sentence of life imprisonment must be imposed for murder committed by a person acting in the furtherance of a common purpose or conspiracy, unless it is found that there

are substantial and compelling circumstances justifying the imposition of a lesser sentence. The cardinal question therefore is whether there are such circumstances in the case of the second appellant. The court *a quo* found that there were none and hence it imposed the prescribed minimum sentence. The question is whether this finding is correct. I now turn to consider the relevant factors.

[27] The appellant did not testify in mitigation of sentence but her personal circumstances were put on record by her legal representative. These are that she was 46 years old at the time, is a trained nurse and has undergone further training as a pharmaceutical assistant as well as a project manager. She was previously married and has two children from such marriage both of whom are majors. She had no children with the deceased. When she married the deceased, she was employed as a nurse but the deceased wanted her to be a housewife so that she could look after the children and so she resigned her post. She had received pension/provident fund benefits from her employment and the money was all used up in the maintenance of the common household. Because the deceased was not

adequately providing for the family, with the result that there was always a shortage of money, the appellant was forced to look for employment and she ultimately joined a chicken breeding venture with other people and earned R2 500,00 per month from the project. She forfeited her interest in the venture when she was arrested in connection with the instant case. She had to leave the common home as a result of the hostility from the deceased's family and neighbours following her arrest. Finally, she has no previous convictions.

[28] The above are noncontroversial, undisputed facts on record. There are, however, other contentious, if not scandalous, allegations opportunistically made on her behalf which are essentially matters that could only be confirmed by evidence under oath. They could not, and should not, be taken into account for purposes of sentence.

[29] There are two factors that need special mention and consideration and they implicate the probable cause of the appellant's conduct leading to the commission of the offences. The first is the marital strife. It can be accepted

that the appellant endured deep emotional suffering as a result of the conduct of the deceased in publicly conducting a love affair with another woman. This coupled with the fact that the appellant had resigned her job at the instance of the deceased and now faced the real prospect of being left financially stranded by him, must have resulted in a build-up of the kind of hurt and resentment that would explain her conduct.

[30] Mr. Harrington, for the state, argued that it was up to the appellant to have come clean under oath and explained the experiences and emotional impulses that drove her to getting rid of her husband. He submitted that in the absence of such evidence, we should not draw any conclusions about what could have driven her to commit the offences. I disagree. I think that these are matters of ordinary, common human experience that we can take cognisance of and are grounded on the testimony of state witnesses taken together with the undisputed information put on record in mitigation of sentence. Certainly this is not a typical case of a crime of passion where the perpetrator acted on the spur of the moment. Compare **S v MNGOMA** 2009 (1) SACR 435

(ECD). The instant matter probably falls within the category of cases like **S v DI BLASI** 1996 (1) SACR 1 (A). The point, however, is that we are here dealing with a consideration of whether there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. The factors mentioned above are relevant and must be thrown into the matrix of factors relevant to a consideration of the question.

[31] It was held in **S v MALGAS** 2001 (1) SACR 469 (SCA) that ordinary mitigating factors individually considered, may not constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, but that a combination of various such factors may constitute weighty reasons for the imposition of a lesser sentence. In my view, the fact that the appellant was a first offender taken together with the factors mentioned in the immediately preceding paragraphs, cumulatively justify a departure from the prescribed minimum sentence of life imprisonment in respect of count 3. That being so, we are at liberty to consider sentence afresh.

[32] There is no gainsaying the fact that murder is a very serious offence. What compounds matters is that this crime is prevalent throughout the length and breath of our country. And cases where spouses, whether the married or simply living together, conspire with criminals to murder their spouses, are escalating at an alarming rate in this country. As was stated in **MALGAS**, *supra*, even where there is justification for deviating from the prescribed minimum sentence, the courts should keep in mind that the prescribed minimum sentence remains a benchmark.

I note that the appellant declared through her legal representative that she was not remorseful. But this should be considered in the light of her insistence throughout that she did not commit the crimes and especially that she intended to appeal. Not much weight can be attached to this avowed lack of remorse.

[33] There has not been any suggestion that the sentence imposed on counts 1 and 2 are shockingly inappropriate and I see no reason to interfere therewith. In my view, a sentence that would adequately balance the interest of

society, the gravity of the offence of murder and the personal circumstances of the appellant, is 23 (twenty three) years imprisonment.

[34] In the result the following order is made:

1. The appeal of the first appellant against conviction on counts 4 and 5 succeeds and he is acquitted on these counts. For the rest, his appeal fails and the convictions and sentences imposed in respect of counts 1, 2 and 3 are confirmed.
2. The second appellant's appeal against her convictions fails and the convictions are confirmed.
3. The second appellant's appeal against the sentences of 7 (seven) years and 15 (fifteen) years respectively imposed on counts 1 and 2 (kidnapping and robbery with aggravating circumstances respectively) is dismissed and such sentences are confirmed.
4. The sentence of life imprisonment imposed on the second appellant in respect of count 3 (murder) is set aside and for it is substituted a sentence of 23 (twenty three) years imprisonment. All the sentences are to

run concurrently and are antedated to 7 November 2008.

H. M. MUSI, JP

I concur.

M. H. RAMPAI, J

I concur.

A. J. BOONZAAIER, AJ

On behalf of first appellant: Mr. K. Pretorius
Instructed by:

	Bloemfontein Justice Centre Legal Aid SA BLOEMFONTEIN
On behalf of second appellant:	Mr. J. D. Reyneke Instructed by: Bloemfontein Justice Centre Legal Aid SA BLOEMFONTEIN
On behalf of respondent:	Adv. W. J. Harrington Instructed by: Director of Public Prosecutions BLOEMFONTEIN

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