REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED. ..... **SIGNATURE**	CASE NUMBER: A93/2018 02.11.18 **DATE**

In the matter between:

MVANA LUVUNO **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

WINDELL, J:

[1] The appellant stood accused in the Protea Regional Court on a charge of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Count 1); unlawful possession of a semi-automatic firearm (Count 2); unlawful possession of ammunition (Count 3) and intimidation (Count 4) .

[2] He was convicted on all counts and the counts were taken together for purposes of sentencing. The appellant was sentenced to life imprisonment.

[3] In terms of section 309(1)(a) of the Criminal Procedure Act, 51 of 1977, the appellant is before this court by way of automatic right of appeal on both conviction and sentence on the murder charge.

[4] It is common cause that Christopher Dlamini ("the deceased") was killed on 30 September 2015 after he was shot with a semi-automatic firearm. The appellant alleged that the deceased was accidentally shot after a struggle for the firearm ensued between himself and the deceased's brother, Mr Mzwandile Dlamini ("Dlamini"). The State alleged that the appellant shot and killed the deceased and that the murder was premeditated.

[5] The State's case is substantially based on circumstantial evidence. It mainly relied on the evidence of Dlamini whose evidence was the following: On 30 September 2015, at around 14h30, Dlamini and the deceased were inside their house when the appellant arrived in a motor vehicle with two men. The appellant was their neighbour. The appellant entered the kitchen and requested to have a word with the deceased in private. The deceased got up and followed the appellant outside. He noticed the other two men were seated outside and were having a drink. Shortly after, the deceased came back to fetch a bench from the kitchen and said to Dlamini that *'he was still having a conversation with the accused outside'*. Dlamini

remained inside the kitchen. After approximately ten minutes he heard the deceased screaming and calling out the appellant's name saying '*Hau Mvana.* A shot was fired. He rushed outside and found the appellant in possession of a firearm, standing next to the deceased. The other two men had also gotten up from where they were seated. The appellant then pointed the firearm to him and said *"You want to die like your brother has just died? Voetsek get back into the house".* He went back inside the house, locked the door and ran to his bedroom. He then noticed the appellant at the window of the bedroom. The appellant was pointing the gun at him. He retreated and the appellant broke the window. He ran to the other bedroom and hid underneath the bed. The appellant came to the window of this bedroom and broke it as well. He feared for his life and in the process wet himself. He stayed hidden underneath the bed until he heard the sound of a motor vehicle starting. He peeped through the window and noticed the appellant leaving with the motor vehicle in the company of the other two men. He went outside and noticed that the deceased had passed away. He also noticed that the deceased was shot in his chest close to his heart. The police was called and photos were taken of the body; two spilled cartridges found near the body; and the broken windows. Warrant Officer Sithole, a forensic ballistic expert was asked to investigate the two fired cartridge cases as both Dlamini and appellant only recalled one shot being fired. She was unable to determine if the cartridge cases were indeed fired from the same firearm.

[6] The appellant testified that on the day of the incident he was seated outside the deceased's house drinking alcohol with the deceased, who was his friend. Dlamini approached them and asked why he was allowing his brother to drink alcohol. He told Dlamini that his brother was old enough to make his own decisions after which

Dlamini took out a firearm from his waist. He managed to grab hold of the firearm and a struggle for the firearm ensued. A shot was fired and it hit the deceased. Dlamini let go of the firearm and it remained in the appellant's possession. Dlamini then ran away. He dropped the firearm and went to his room. He did not phone an ambulance or contact the police to report the incident. He testified that he had no problem with the deceased and denied that he called him on the day of the incident to have a private word with him. He also denied breaking the window and said it was broken long before this incident.

[7] The court *a quo* took into consideration that Dlamini was a single witness. It is trite that the evidence of a single witness should always be treated with caution. A conviction will normally follow only if the evidence is substantially satisfactorily in every material respect or if there is corroboration. A court is tasked to consider all the particular facts of the case to determine whether the single witness is credible.

[8] The magistrate stated in his judgment that he had the opportunity to observe Dlamini during his testimony. He therefore noticed that he was visibly shocked when it was put to him that there was a scuffle between him and the appellant. He also avoided eye contact with the appellant when he testified. The magistrate found that Dlamini's evidence was not challenged on several material aspects. He also found that the appellant was unable to explain why Dlamini, on the appellant's version, would have had an issue with the fact that the deceased was drinking with the

appellant as they had drank together on numerous occasions before. The exercise of caution must however not be allowed to displace the exercise of common sense[1].

[9] The appellant testified that he did not threaten Dlamini after the incident or that he broke any windows. In his judgment, the magistrate specifically made mention of the photos that were taken immediately after the incident that showed that the windows were broken. In my view, credence can be found in the photos in favour of Dlamini's version and is an indication that he did not fabricate his version later in an attempt to shift the blame to the appellant.

[10] The appellant fled the scene of the murder and was only arrested 17 months later. He left the firearm on the scene and it is common cause that the firearm was never found. The appellant was unable to explain why, if he was innocent, he had not reported the shooting to the police or why he did not hand in the firearm for safekeeping. This was after all, on his version, his friend that was shot and killed. This is not the behaviour of a person that has nothing to hide.

[11] The State has to prove beyond reasonable doubt that it was the appellant who committed the crime. A court may only reject the evidence of an accused if it is satisfied that in the light of all the evidence that their version is so untrue and improbable that there is no reasonable possibility of it being true. The court *a quo*,

[1] *S v Snyman* 1968 2 SA 582(A).

with reference to *S v Sauls*,[2] found that Dlamini was a credible and honest witness and rejected the appellant's version as improbable. I can find no reason to interfere with this finding.

[12] In analyzing the judgment and the evidence I am satisfied that the magistrate had not misdirected himself and consequently I am not at liberty to interfere with the court a quo's finding. The appellant's appeal against the conviction is dismissed.

[13] The court *a quo* found that the murder was premeditated. In his reasoning the magistrate held that it was pre-meditated because (1) the appellant did not assist the deceased after he was shot; (2) he ran away to Tembisa; and (3) he threatened Dlamini the following day. None of these reasons justifies a finding of premeditated murder. The State clearly stated at the start of the trial that it will prove premeditated murder based on the fact that the appellant arranged the firearm and thereafter proceeded to the deceased's house to commit the offence. No such evidence was led. The court *a quo* misdirected itself in finding that the murder was premeditated.

SENTENCE

[14] As stated the court *a quo* misdirected itself in finding that the murder was premeditated and the sentence of life imprisonment must be set aside. The Minimum Sentences Act[3] provides for a minimum sentence of 15 years for murder.

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[2] 1981 (3) SA 172 (A)
[3] Act 105 of 1997

[15] A court is compelled to impose the minimum sentence unless substantial and compelling circumstances exist justifying a lesser sentence. The legislature had deliberately left it to the courts to determine whether any circumstances specific to a particular case are substantial and compelling enough to warrant a departure from the prescribed sentences. The court *a quo* did not find any substantial or compelling circumstances present and counsel for the appellant was unable to point us to any.

[16] In the consideration of an appropriate sentence a court is enjoined to carefully and dispassionately consider and balance the gravity of the offenses, the personal circumstances of the accused and the interests of society. On the other hand the interests of the victims are equally relevant and should not be overlooked. The appellant is a first offender, is unmarried and has three children. He was employed at the time of the incident and earned approximately R 2000 per month. The court *a quo* found that the appellant killed the deceased in cold blood without any apparent reason, and that he showed no remorse. The family of the deceased and the complainant have been left traumatized by the senseless murder.

[17] It is trite that the minimum sentence should not be deviated from for flimsy reasons.[4] In *S v Dodo*[5] it was however held that to justify any period of imprisonment without enquiring into the proportionality of the offence and period of imprisonment, would be to offend human dignity.Having weighed the mitigating and the aggravating

[4] *S v Malgas* 2001 (1) SACR 25,
[5] 2001 (1) SACR 594 (CC

factors, I am of the view that the appellant's personal circumstances in light of the specific circumstances of this case do not on their own, or cumulatively amount to compelling and substantial circumstances which justifies a deviation from the prescribed sentence. Taking into consideration the specific facts present in this matter, I find that the imposition of the prescribed minimum sentence is not disproportionate to the offence.

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

[18.1] The appeal against the conviction on the murder charge is dismissed.

[18.2] The appeal against sentence is upheld.

[18.3] The sentence of life imprisonment is set aside and replaced with the following order:

[18.3.1] The charges are taken together for purposes of sentencing.

[18.3.2] The appellant is sentenced to fifteen (15) years imprisonment.

[18.3.3] The sentence is antedated to 16 November 2017.

L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

A. P. BEZUIDENHOUT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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