IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

Signature .....

Date 10/02/2021

Electronically delivered

CASE NO: A378/2019

BULELANI PETRUS CHAZA **APPELLANT**

and

STATE **RESPONDENT**

DATE OF HEARING: This matter was enrolled for hearing on **17 AUGUST 2020**, but was dealt with or determined on the basis of the papers or record and written argument filed on behalf of the parties, without appearance and oral argument.

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be **FEBRUARY 2021**

JUDGMENT

KHUMALO J (SNYMAN AJ concurring)

Introduction

[1] The Appellant, exercising his automatic right of appeal, following his conviction on a premeditated murder charge and sentence to life imprisonment by the Regional Court, Benoni (the court a quo) on August 2016, appeals against both his conviction and sentence. He was simultaneously charged and convicted of illegal possession of a prohibited firearm and also of ammunition for which he was sentenced by the court to a period of 5 years and 12 months imprisonment, respectively. The sentence of twelve months imprisonment was ordered to run concurrently with the sentence of five years imprisonment. He is only proceeding with the automatic appeal.

[2] He was duly represented during the trial and pleaded not guilty to all the charges. On the charge of murder, that he intentionally and unlawfully murdered one Phatheka Portia Cokotho (the deceased) on 25 September 2013 at or near Daveyton, by stabbing the deceased repeatedly with a knife in front of four eye witnesses, he was convicted on the admissions he made in terms of s 220 of the Criminal Procedure Act 51 of 1977 (CPA) relating to the deceased cause of death, which according to the post mortem report were multiple stab wounds, seven in total and the evidence of two of the four eyewitnesses that were present at the scene. Two of the four witnesses have since disappeared and did not testify during the trial.

[3] The salient facts were that on 25 September 2013 in the early evening, the deceased who was in a relationship with the Appellant was attacked whilst walking with her friends from a tavern at Dungeni Street. The deceased was earlier, prior to being attacked seen talking to her boyfriend and seemed to have been quarrelling. The court a quo found the state to have proven the Appellant's guilt beyond reasonable doubt as the person who stabbed the deceased.

[4] Although the Appellant does not deny being in a relationship with the deceased, he persists in his denial that he was the perpetrator that was seen by the eye witnesses, hence the appeal. The contention is therefore on the identity of the perpetrator and the observations that are alleged to have been made by the two witnesses that testified. The Appellant disputes that the witnesses were able to see or had enough time to see the perpetrator to be able to correctly identify him. He alleges that the witnesses were influenced. The Plaintiff also challenges the evidence of the witnesses on the basis that it was inconsistent, improbable and they contradicted each other. He consequently contends that the court a quo erred in finding the testimony of the two eye witnesses credible and rejecting his evidence.

[5] Furthermore the Appellant contends that the sentence of life imprisonment is strikingly inappropriate as to induce a sense of shock and another court, might well impose a lesser sentence. He reckons the court erred in over-emphasizing the seriousness and prevalence of the offence, the interest of society and the deterrent effect of the sentence. It attached too much weight towards retribution.

Evidence

[6] According to Noluthando Phalwa (Noluthando), the first state witness to testify, she met the deceased for the first time on the day of the incident at Dungeni Street. Noluthando had arrived at Dungeni in the company of two other ladies, that is, Mbali and Nomalanga and found the deceased sitting with Ntombana who was known to her and a gentleman that was

unknown to her. The three were drinking alcohol. As they were drinking and chatting the Appellant arrived and stood at the gate, about 5 to 6 meters from where they were sitting. The deceased stood up and went to chat to the Appellant. Although Noluthando could not hear the conversation between the deceased and the Appellant, she could recognise that there was tension between them. After their chat the Appellant left and the deceased came back and joined them. All this happened around 16h00. The deceased said she was breaking up with the Appellant and the Appellant does not want that so they were fighting. The deceased then spoke to Ntombana (who is the deceased's relative), on the side, whilst they continued drinking. At about 18h30 they all left and walked to Ntombana's place at Bhele. Whilst walking they saw the Appellant and his friend standing at the corner of Dungeni and Sibisini. Ntombana pointed at the Appellant saying to the deceased "there is your person by the passage." They also then looked at the Appellant who was with another person. It looked like the two were exchanging clothes, sort of the jackets or hats. The Appellant was putting on a hoodie. The Appellant then followed them when they entered Khakhu Street. Near the passage the Appellant grabbed the deceased from the front and stabbed her several times in front of them without saying anything. The other three ladies then ran away. When the Appellant started stabbing the deceased, the latter was holding onto Noluthando, who therefore could not run away. The deceased then fell on the wired fence, letting go of her hand. People started coming to the scene and the Appellant ran away. It was dark already when all this happened but there were Apollo street lights 10 meters from the incident illuminating the street. Noluthando therefore says she had a proper look at the Appellant when he was standing at the corner of the street. She ran to Ntombana's place to inform the deceased's relatives. She came back with people from Ntombana's place and found the deceased, who was no longer talking, covered with a sheet. She recognised the Appellant as when he arrived at the gate the deceased had told them that she was going to her boyfriend.

[7] Noluthando's testimony under cross examination was that at Dungeni she sat with her back against the gate and did not see the face of the person the deceased went to talk to at the gate or take notice of the clothes that person was wearing. She assumed that it must be the same person. She could make out that the deceased and the Appellant were quarrelling as the deceased was throwing her hands in the air with an angry facial expression whilst talking to the Appellant. She was not drinking. When they first saw the Appellant and his friend at the corner they were about 10 to 12 meters away. Appellant was putting on a hoodie and whatever else he exchanged with the other person which is a lumber jacket with long sleeves. **At the time the Appellant was facing them.** The Appellant then walked behind them when she and the others were walking up Dungane Street and about to turn into Khakhu Street. The Appellant then stabbed the deceased who broke into a scream.

[8] Subsequent to the incident, the Appellant told them to change their statements to say that they did not see him. He also from Modderbee prison sent one lady who stays in the same street as her, to ask her and the others to withdraw the case. He was reprimanded for that. The same lady once accosted and asked her if she can send the Appellant 'a please call me' so that the Appellant can speak to her directly. She refused. With regard to the stabbing, she said the other four ran away when the Appellant started stabbing the deceased. They saw the initial stabbing not the entire stabbing. It was put to her that the Appellant's version was that the deceased had many boyfriends. The Appellant and the deceased occasionally met at drinking places and then got together. In that way they were not boyfriend and girlfriend.

[9] The second witness, Mbali Mkhalali (Mbali) testified in camera due to the threats she received a month before the trial. According to Mbali she grew up with Ntombana and had just got to know the deceased two months before the incident. She had heard from Ntombana that the Appellant was the deceased's boyfriend two weeks before the incident. On the day of the incident she arrived at Dungani Street, with Nomalanga and Noluthando and found Ntombana, Sipho and the deceased there drinking wine. After the three had finished the wine they left the place and walked to Ntombana's place in Bhele. The deceased, Noluthando and Ntombana were walking ahead of them and she was following behind with Nomalanga. They were walking approximately two (2) meters apart. They left Sipho at Dungeni. The Appellant emerged from nowhere and walked passed them to the deceased. She then heard the deceased scream calling Ntombana's name. She ran to the passage to see what was going on and found that the deceased has fallen. She turned around and ran back to Ntombana's place to call Ntombana's mother. She however also said when she heard the deceased scream she did not look at her she just ran away because the deceased fell on her side. She also said when she turned to look at the passage she saw the Appellant pressing the deceased against the wall. The Appellant had walked past them to get to the deceased. Their route to Ntombana's place was going to pass through the passage. The Appellant came from Zibisini Street. She also explained that when they were at Dungani Street, the deceased and the Appellant seem to have been fighting. At some stage she had left the place where they were drinking to go to the shops when she came back the Appellant and the deceased were standing at the gate. She does not know what started the argument or fight but there was a lot of noise. Ntombana looked scared and informed her that the deceased and the Appellant were fighting. The Appellant was alone when he stabbed the deceased. Ntombana was said to be in Johannesburg now.

[10] Mbali's testimony under cross examination was that the Appellant came from behind walking fast, wearing a black jacket with pockets that had a brownish colour and a brown beanie. She did see the Appellant's face when he was holding the deceased against the wall. The Appellant and the deceased had their backs against them, facing away from her, but she knows him as she had seen him before at Ezidudleni, standing with other boys by the corner. The next time she saw him was at the gate at Edumeni. She confirmed that when going to Ntombana's place the deceased and Noluthando were walking ahead of them holding hands and about to enter into the passage. She and Nomalanga were still walking behind when Ntombana and the deceased were almost into the passage. That is when she heard the deceased screaming calling Noluthando's name. She then saw the deceased falling on her side. She did not get into the passage she turned back and ran away down Khakhu Street and used the other passage to get to Ntombana's place. The Appellant took out a knife and stabbed the deceased and thereafter ran into the passage getting away. She saw the Appellant stab the deceased once on the chest and she then ran away. She said when she ran to call Ntombana's family, Noluthando was standing on the side. When she came back with Ntombana's mother and sister, a lot of people had gathered there and the deceased was covered with a white cloth. Noluthando was not there, she had gone home. They got into the car that was hired to take the deceased to the clinic. The deceased was still alive and got silent at the clinic. She saw the wounds on the deceased's chest, head and ribs when they were at the clinic. They thereafter went to the police to make statements. She only saw Noluthando the next day. She said what made her certain that it was the Appellant that stabbed the

deceased was because the Appellant and the deceased were in a relationship. It was put to her that the Appellant's version was that the deceased had many boyfriends.

[11] In response to the court's question she confirmed that she left Edumeni to go to the shops and encountered the deceased and the Appellant at the gate when she came back.

[12] Further evidence that was led was in regard to the two other charges, the conviction and sentence of which is not contested by the Appellant. The state closed its case on the murder charge.

[13] Appellant's version was that he had a four-year relationship with the deceased. She knew the first witness Noluthando as she stays near his aunt's place. He has also seen Noluthando with the deceased at a drinking place prior to the incident. Noluthando was therefore lying when she said she saw or met the deceased for the first time on the day of the incident. He however has never spoken to Noluthando before. He also knew Mbali, the second witness through the deceased from seeing both of them drinking at the tavern. He only met once and spoke to Mbali after the deceased has passed on. Prior to that they have never spoken. He got to know about the incident as somebody called Pontsho who happened to stay near the home of the deceased's relative called him the next day and informed him that the deceased has passed away. Pontsho has since passed away. He did nothing as in their four-year relationship they never really had a committed relationship. The deceased was a type of girl who would go home with anybody that buys her alcohol. On the day of the incident he was at the square where he operates his business as a hawker. It is all lies that he killed the deceased. Both witnesses have lied. The two witnesses were influenced by Ntombana who told them what to do and say. He knew that because Ntombana once paid him a visit in prison. The two state witnesses heard of the incident from Ntombana.

[14] The Appellant further testified under cross examination that his four years relationship with the deceased was a secret and all that time he was aware that the deceased was also involved with other people. Amongst the deceased's friends he was more familiar with Ntombana, who is the deceased's relative. He knew the two state witnesses as they stay at Maxhoseni where his aunt stays. He would sometimes see them when he is at his aunt's place but has never had a conversation with them. He did not know if Noluthando and the deceased knew each other prior to her death and he also could not dispute that Noluthando was seeing the deceased for the first time that day. With regard to Mbali, besides seeing her near his aunt's place he once saw her at Basotwini section. He greeted Mbali and had a chat with the deceased. This happened a long time ago before Portia passed away.

[15] He argued that Noluthando said she did not see the face of the person at the gate but heard from Ntombana that the deceased has gone to see her boyfriend. She however took the person to be the deceased's boyfriend. He alleged that what made Mbali not to look at him when she was testifying is because she was shameful of her lies. Ntombana visited him when he was in prison to apologise and these were Ntombana's friends that were lying. Appellant also argued that Mbali and Noluthando testified about the same incident but contradicted each other as to whether he had company at the time when they saw him at the corner. He denied killing the deceased. He said on the day in question he was at the Square and left around 17h00 to go home. He heard of the deceased's death the next day. The last time he saw the deceased was on a holiday, the 24th of September 2013, a day before she was murdered. The deceased was with Ntombana and some other males drinking at a tavern.

He did not talk to the deceased but they greeted each other because they were in a secret relationship and she was with other people. Their secret relationship meant she can go with him home after she has bought her a few beers. If she is with somebody, he will not bother her and she will also not bother him if he is with his partner. Similarly, Ntombana will approach him when he has money and he will give Ntombana money to do her hair or to buy takkies and when he feels that he wants to partake in any sexual activity he will call Ntombana and they will do it. Ntombana did not appreciate it when he stopped giving her money, so they ended up not being in good terms. Ntombana once told him that one day he will be sorry for that. He thought what she meant was that one day when he has nobody to go home with, she will turn him down. Ntombana also visited him at Modderbee prison where she specifically reminded him of what she said and what she meant by it that she will one day lend him in trouble. He said the deceased was involved with many people around the location with whom she had sex, he therefore never followed up on the information he got that the deceased had passed away as he did not care.

[16] The Defendant closed its case.

[17] On the evaluation of the evidence the court a quo found that Noluthando's testimony was presented logically and in a satisfactory manner and had no inherent improbabilities or contradictions. She was also honest on what she heard and observed happening between the deceased and the person who was said to be her boyfriend at the gate, including not being able to confirm certain things, but circumstantially. The court concluded that in view of what happened prior to the stabbing and how the stabbing took place it cannot be said that Noluthando was not able to identify the perpetrator. The Appellant was pointed out to her in the street to be the boyfriend of the deceased's person when there was sufficient light and time to look at him. The Appellant then right in front of her, stabbed the deceased whose hand Noluthando was holding at the time.

[18] The court a quo took note of the second witness Mbali's vulnerability when testifying, however found her evidence to have been given in an understandable manner and that she earnestly answered all questions put to her although sometimes not with sufficient detail. Mainly Mbali saw the Appellant at the gate with the deceased, therefore not questionable that Appellant was the boyfriend that was standing at the gate having a quarrel with the deceased, even though he disputes having seen the deceased or any of them that day. The court looked at the fact that Mbali also saw the Appellant when he suddenly appeared and walked past them and when she looked at the screaming deceased who was being stabbed by the Appellant. The court understood that she did not see the other person who was observed by Noluthando as she was walking a few meters behind Noluthando Ntombana and the deceased, and seemingly less aware of what was happening at that corner. The court a quo accepted that contradictions on such instances do happen however did not render the evidence unreliable. According to it, it only shows that due to their positions the witnesses can observe things differently and at different stages. Proving that the testimony was un adulterated and authentic. It referred to the discrepancy about what the Appellant was wearing and their reporting to Ntombana's relatives, pointing out that each might have observed same scene at different times.

[19] The court compared the version of the state witnesses with Appellant's bare denial that he was there that day and his attempt to trivialise the relationship he had with the

deceased. His allegations of being framed and the strange reason he gave why he would be framed by a person who herself did not attend court and was probably not aware of the proceedings was found to be baseless. The matter was to have proceeded 3 years ago but the Appellant was on the run from then until 2016 when he was arrested on a different case. The witness was always available during the court appearances in 2013 and was reported not found in 2016 even though Noluthando indicated where she can be found. The court a quo also found that the Appellant was not truthful to the court about when he last saw the deceased. His version that he last saw her a day before the incident, when he has also said he saw her about a week before the incident accompanied by Noluthando or seen her with Mbali were found to be untruthful. He also could not rule out that Noluthando and the deceased met for the first time on the day of the incident.

[20] Mbali's evidence that the Appellant was seen earlier on at the tavern having an argument with the deceased confirms that the Appellant had a tiff with the deceased prior to her being stabbed. The evidence therefore rebuffs the attempt by the Appellant to pretend that he was not aware of the incident and had a secret relationship with the deceased. They also indicated that to have become aware of a person following them after they left the tavern. He was wearing a hoodie whilst Mbali was of the opinion that it was a beanie. The fact remains that the Appellant was wearing something that covered his head. They were able to see clearly his face when he started stabbing the deceased as there were street lights 10 meters from where the incident occurred.

[21] The court a quo took an account of all that evidence together with all the other evidence available in this matter and found the state to have discharged its onus to prove its case beyond reasonable doubt. The Appellant's version, a bare denial who was the only one to testify on his behalf was rejected as false and not reasonably possibly true.

[22] In an appeal, the approach as explained by Jones J in *S v Leve* 2011 (1) 87 (ECG) at 90 is that:

> "The trial court's findings to facts and credibility are presumed correct, because the trial court and not the court of appeal has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See well known cases of *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705 and the passages which follow *S v Hadebe and Others* SACR 641 SCA at 641 at 645 and *S v Francis* 1991 (1) SACR 198 (A) at 204Cc-f. This principle is no less applicable to cases that involve the application of the cautionary rule. If the trial judge does not misdirect himself on the facts in relation to the application of the cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.

[23] Indeed, the Appeal Court's power to interfere with the discretion of the trial court is circumscribed, as confirmed in *S v Mabena* 2012 (2) SACR 287 (GNP) that:

> The power of an appeal court to interfere on fact with the findings of the court below is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case...."

[24] In *S v Pistorius* 2014 (2) SACR 314 (SCA) at [30] Bosielo J for the court articulated the approach as follows:

> "It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong"

See also *S v Artman & Another* 1968 (3) SA 339 (A) at 341C.

[25] It would therefore be in exceptional cases that an appeal court will be entitled to interfere with the trial court's valuation of the oral testimony of witnesses. Therefore in order to succeed, the Appellant will have to convince the Appeal Court that the trial court was wrong in accepting the evidence of the state's witnesses and rejecting his version, in so far as it was in conflict with that of the state, as being reasonably possibly true, hence a reasonable doubt will not suffice to justify interference with such findings; see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15].

[26] Equally it is accepted that incorrect identification is always a dangerous possibility and can result in serious cases of injustice. The courts are therefore implored to approach the evidence of identification with caution to limit unintended outcomes that would result in the failure of justice. In that regard *S v Mthethwa* 1972 (3) SA 766 (A) is instructive, the following approach at 768A being set forth:

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: **the reliability of his observation must also be tested.** This depends on various factors, such as **lighting, visibility**, and eyesight; **the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene;** corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities." (my emphasis)

[27] The court a quo did exactly that, it weighed all the existing factors, one against the other, taking into account the evidence as a whole as already illustrated above. The Respondent in its heads had correctly argued that it is not the duty of this court to re-evaluate the evidence afresh as if sitting as a trial judge, but to decide if patently wrong findings and or misdirection by the magistrate led to a failure of justice. It was further argued that the Appellant's heads of argument failed to explain why the court a quo's findings and evaluations are to be found to have been patently wrong or give a valid reason why this court can or may interfere with the presumption of the correct factual and credibility findings, see Prinsloo & Others

[28] It is therefore clear that honesty, sincerity and subjective assurance are not enough; see *Charzen and Another v S* [2006] 2 All SA 371 (SCA) par [11]. There must in addition, be

certainty beyond reasonable doubt that the identification is reliable. Confidence in the first report of a witness shortly after the observation by the witness carries more weight than the witness' confidence in court, often several months later, after the witness' observations have been confirmed by conversation with other witnesses; see Hiemstra's *Criminal Procedure,* Issue 11, May 1998 on 3-8. The courts are therefore in certain circumstances to guard against time lapse.

[29] In *casu, t*he court a quo was on the lookout for this possibility and carefully weighed the total evidence guided by the precautionary measures identified in *Mthethwa.* It must also be recognized that according to the state witnesses, the first incident at Dungani Street happened at around 4 o'clock and Mbali passed the Appellant and the deceased at the gate, coming back from the shops. The main incident, that is the stabbing of the deceased, took place early in the evening, and there was an Apollo light illuminating the Street 10 meters away. The Appellant stabbed the deceased right in front of the witnesses' eyes. He had also confirmed that the two witnesses were known to him prior the incident and that he was also well known to Ntombana the deceased's relative. There is therefore a miniscular chance of wrong identity.

[30] The issue of whether there was a dissimilar reference to what the Appellant was wearing over his head, a beanie or a hoodie, in the conspectus of the evidence, is not a material aspect. The similar material fact is that Appellant was wearing something over his head. It is likewise probable that Mbali did not see the other person who was standing at the corner with the Appellant as she indicated that she was walking a few meters behind Noluthando, Ntombana and the deceased. It was therefore possible that she did not hear when Ntombana was pointing out the Appellant to the deceased. Therefore did not see the exchange of clothes as well. It also could not be ruled out that they both reported to Ntombana's relatives who did turn out at the incident and found the deceased covered with a sheet. Given the totality of the evidence weighed, and the lengthy assessment conducted by the court a quo, we could not find any misdirection with the factual evaluation. The court a quo sufficiently motivated for its findings in the judgment. The allegations that the court a quo was misdirected therefore has no merit.

[31] The Appellant has also failed to convince the Court that the trial court was wrong in rejecting his version of being framed as being reasonably possibly true. The version did not make any sense, hence a reasonable doubt will not suffice to justify interference with the court a quo's finding. The appeal on the conviction must accordingly fail.

On sentence.

[32] Furthermore the Appellant contends in his heads of argument that the sentence of life imprisonment is shockingly disproportionate to the crime that the Appellant was found guilty of. He further alleges that the court erred in over-emphasizing the seriousness of the offence, the interest of society, the deterrent effect of the sentence attaching too much weight towards retribution and the public opinion regarding sentences in general and prevalence.

[33] In sentencing what is pertinent is the application of the broad "Zinn of triad" principle named after the matter of *S v Zinn* 1969 (2) SA 537 at 540, which require that, when making sentencing determinations, three general guides are to be considered: the gravity of the

offence, the personal circumstances of the offender, and public interest which are to be considered equally and not with one heavily relied upon over the others.

[34] It is however trite that sentencing is within the trial court's province as its primary function and the appeal court can only interfere where it is satisfied that the trial court failed to exercise the discretion judicially. The test is an enquiry if the sentence is shockingly inappropriate or of such a nature that no reasonable man ought to have imposed such a sentence or that the sentence is totally out of proportion to the gravity or magnitude of the offence or that the sentence is grossly excessive, taking into consideration the circumstances and hence whether the judicial officer misdirected himself. *S v Blignaut* 2008 (1) SACR 78 (SCA) 82b-d; *S v Malgas* 2002 (1) SA 1222 (SCA); *S v Johaar and Another* 2010 (1) SACR 23 (SCA) at 27; *S v Truyns* 2012 (1) SACR 79 (SCA.

[35] Since the Appellant alleges disproportionality of the sentence to the offence in contesting the sentence imposed, it becomes important to deal with the concept of proportionality and or appropriateness in relation to sentence and the offence. With regard to the offence, the first leg of the triad, there is a constitutional requirement that the punishment imposed, including when it is set by statute, must not be disproportionate to the offence, which is to be ascertained by looking at the applicable aggravating and extenuating circumstances. In *S vs Dodo CCT* 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC) 2001 (5) BCLR 423 (CC) (5 April 2001) Ackermann J held as follows on the Constitutional context of the concept:

> "The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognised in *S v Makwanyane*. Section 12(1)(a) guarantees, amongst others, the right "not to be deprived of freedom ... without just cause". **The "cause" justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.** In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence. (my emphasis).

See also *S v Makwanyane* and Another [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) paras 94, 197 and 352-6, that confirms that one such vital determining factor is the severity of the crime.

[36] The Appellant had a fight with the deceased who was trying to break up with him. He was therefore very incensed, that being evident in the number of times he stabbed the deceased. He had time to think and took calculated moves in killing the deceased. He knew the deceased and her friends were eventually going to leave Edumeni. When they left and were walking, he was seen in preparation to strike changing clothes with another person and wearing a hoodie to try and hide himself. He then followed the deceased and her friends, singled out the defenceless deceased and stabbed her seven times to make sure she dies. His brutal and calculated action being an aspect that the court a quo correctly and extensively dealt with.

[37] The offence *in casu* happened early in the evening in front of several witnesses. The Appellant was so brazen enough not to even care that the deceased is in the company of other people. He showed total disregard of the dignity or respect for the deceased, her friends or the community he lives in. He exhibited a lack of restrain, complete arrogance and contempt; see *S v. Khandulu and Another* 1991 (127/90) [1991] ZASCA 15 at 33. The witnesses were as a result shocked and scared such that they all ran away except for Noluthando, who could not do so as the deceased was holding her hand.

[38] In the circumstances the seriousness of the offence, viciousness in which it was committed, the situation under which it was committed, brazenly in the glare of the public and the deceased's friends against a defenceless victim, the type of the offender that committed the offence (who has a history of violent crimes that is rape and robbery for which he was incarcerated a number of times), his lack of remorse and premeditation, in magnification trumps whatever other personal considerations there might be for the Appellant; see *S v* [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA)

[39] The prevalence of cruel murders committed against defenceless and vulnerable victims validates the protection of society by imposing sentences that would curb the commission of such offences. Indeed, previous short term incarcerations failed to deter or rehabilitate the Appellant as noted by the court a quo. The Appellant has been proven to be a very dangerous person who callously murdered the deceased.

[40] It therefore cannot be said that the sentence was shockingly inappropriate or disproportionate to the offence he committed. The sentence in essence does bear relation to the gravity of the offence. The dignity of both the offender and the deceased equally protected, any sentence less than life imprisonment would be offensive to any sense of justice and disturbingly inappropriate, falling fowl to the warnings that were issued in *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) at [25] that:

> "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 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. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of t policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained."

[41] The Appellant has failed to prove any misdirection by the court a quo in imposing the sentence of life imprisonment for his premediated murder of the deceased.

[42] In the circumstances I therefore make the following order:

1. The Appeal against conviction and sentence is dismissed.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur

FMM SNYMAN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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