REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

[FUNCTIONING AS THE GAUTENG DIVISION MBOMBELA]

Case number : CC 35/2018

(1) REPORTABLE: **YES** / NO

(2) OF INTEREST TO OTHER JUDGES: **YES**/NO

(3) REVISED : **YES**

SIGNATURE

DATE: 18 /09/ 2018

In the matter between

The State

And

DOCE ARCODANO ACCUSED

[MURDER WATERVAL BOVEN]

JUDGMENT

JANSEN VAN RENSBURG AJ

This is a written confirmation of the reasons for the acceptance by this court of a plea of guilty entered by the accused on 2 May 2018.

It includes the procedural aspects and requirements followed and the reasons for the acceptance of the accused's plea of guilty and the conviction of the accused.

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1.

INTRODUCTION

1.1. The accused was legally represented during the trial by mr Rasivanga.

1.2. The accused was charged with the following counts –

1.2.1. Count 1 : Kidnapping – in that on or about 21 June 2017 and or near Bloubosch Kraal Farm district of Waterval Boven the accused unlawfully and intentionally take and carried away MARIAN SCHOEMAN an adult female and thereby depriving the aforesaid person of her freedom and movement.

1.2.2. Count 2 : Robbery with aggravating circumstances in that on or about 21 June 2017 at or near Bloubosch Kraal in the district of Waterval Boven the accused did unlawfully and intentionally assaulted MARIA SCHOEMAN and did with force and violence taken from het an unknown amount of cash and a cell phone her property or property in

her lawful possession. Aggravating circumstances present being defined in section 1 of the CPA 51 of 1977.

1.2.3. Count 3 : Kidnapping – in that on or about 21 June 2017 at or near Bloubosch Farm in the district of Waterval Boven the accused unlawfully and intentionally took and carried away ANDRIES NICOLAAS SCHOEMAN an adult male person and thereby deprive the aforementioned person of his freedom of movement.

1.2.4. Count 4 : Robbery with aggravating circumstances In that on 21 June 2017, at or near Bloubosch Farm district of Waterval Boven, the accused unlawfully and intentionally assaulted ANDRIES NICOLAAS SCHOEMAN and took with force and violence cash in the amount of R 80 – 00 , aggravating circumstances being present as defined in section 1 of the CPA 51 of 1977.

1.2.5. Count 5 : Murder – in that on or about 21 June 2017, at or near Bloubosch Farm the accused unlawfully and intentionally assaulted ANDRIES NICOLAAS SCHOEMAN an adult male person by hitting him several times on the head with an iron object causing serious injuries as a result whereof the said ANDRIES NICOLAAS SCHOEMAN died on 9 July 2017 in the Witbank Hospital.

1.2.6. Count 6 : Attempted murder – That on or about 21 June 2017 at or near Bloubosch Farm in the district of Waterval Boven, the accused attempted to kill MARIA SCHOEMAN by hitting her with an iron.

1.2.7. Count 7 : Theft – that on or about 21 June 2017, at or near Bloubosch Farm in the district of Waterval Boven, the accused unlawfully and with the intention to steal, took with equipment as described in the indictment to the value of R 100 000 – 00 from ANDRIES NICOLAAS SCHOEMAN and / or MARIA SCHOEMAN.

THE CONSTITUTIONAL RIGHTS OF THE ACCUSED

2.1. The principle of fairness towards an accused find its origine in the right to be informed of the charges, the applicable acts and the information to be used by the state in its case against the accused. This will enable the accused to know what he or she has to answer to as well as to properly prepare for the case to be met. [1]

2.1.1. Should this not be done it will amount to improper actions and would be impermissible as the accused had not been pre-warned of the applicability of the applicable minimum sentence. [2]

2.1.2. In *S v Legoa* [3] Cameron JA (as the learned judge then was) held the following –

> *The Constitutional Court has emphasised that under the new constitutional dispensation the criteria for a just criminal trial is a 'concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force….the Bill of Rights specifies that every accused has the right to a fair trial…one of those specific rights is 'to be informed of the charge with sufficient detail to answer to it…under the common law that the facts*

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[1] See S v Selekwa and andere 1976 (1) SA 675 (T) at 682 H where the court held the following –

> To ensure a fair trial it is advised and desirable highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it ensures that the accused is informed at the outset of the trial, not only of the charges against him, but also of the States intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed'.

See S v Ndlovu (75/2002) [2002] ZASCA 144; 2003 (1) SACR 331 at 337v A-B; S v Makutu 2006 (2) SACR 582 (SCA).

[2] S v Ndlovu (75/2002) [2002] ZASCA 144; 2003 (1) SACR 331 (SCA); S v Legoa (33/2002) [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) per Cameron JA; S v Makatu (245/2005) [2006] ZASCA 72; 2006 (2) SACR 582 (SCA).

[3] (33/2002) [2002] ZASCA 122; 2003 (1) SACR 13 at 22 G – H.

the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet'

2.1.3. In *S v Ndlovu* [4] Mpati JA held –

'The therefore is whether on a vigilant examination of the relevant circumstances it can be said that an accused has a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pretend be brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other from, so that the accused is placed in a position to appreciate properly in good time that charge that he faces as we'll as its possible consequences….it is sufficient to say what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly'.

2.1.4. In *S v Makatu* [5] Lewis JA held the following regarding details of the charge in terms of section 51 (1) of the *CLAA 105 of 1997* against the accused –

'*As a general rule where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitable dictates decisions made by the accused, such as whether to conduct his or her own defences; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of the trial*

[4] [2002] ZASCA 144; 2003 (1) SACR 331 (SCA) at 337 a – c.
[5] 2006 (2) SACR 582 (SCA) at para 7.

the States witnesses wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.'

2.2. The accused was informed about the seriousness of the charges against him and the accused confirmed that he was aware of the seriousness of the charges.

2.3. The accused confirmed that he was informed about the contents of and that he understood the implications of sections 51(1), (2) and (3) of the *Criminal Procedure Amendment Act 105 of 1997 (the CPAA 105 of 1997)* in that the court was duly instructed and bounded by legislation to impose severe sentences on the accused unless substantial and compelling circumstances existed. The accused confirmed the application of section 1, 3 and 55 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (the *CLAA 32 OF 2007*).

2.3.1. The accused confirmed that he understood that the '*onus of proof*' of the alleged offences committed was on the State. Where the accused would plead not guilty, that he doesn't have to enter any plea explanation and exercised his right to remain silent.

2.3.2. The accused confirmed the explanation by the court as to the procedures to be followed during the trial, the accused's rights in terms of section 35(5) of the *Constitution of the Republic of South Africa Act 108 of 1996* which was applicable to the accused and confirmed that these rights and proceedings were understood by the accused before making any well informed choice in this regard.

2.3.3. The accused confirmed that he was able to follow the proceedings in the court should the trail proceed.

2.4. In *S v Makatu* [6] Lewis JA held the following regarding details of the charge in terms of section 51 (1) of the *CLAA 105 of 1997* against the accused –

> *As a general rule where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitable dictates decisions made by the accused, such as whether to conduct his or her own defences; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of the trial the States witnesses wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.*

2.5. In *S v Kolea* [7] the court held the following –

> *In this case the States intention to rely on and evoke the minimum sentencing provisions was made clear from the outset. The charge-sheet expressly recorded that the appellant was charged with the offence of rape read together with the provisions of*
> *s 51(2) of the CPAA. I am accordingly satisfied that the appellant who was legally represented throughout the trial, well knew of the charge he had to meet and the State intended to rely on the minimum sentencing regime created by in the Act.*

2.6. This court took note of the caution expressed in *S v Langa* [8] where the honourable court cautioned against the lack of informing an accused of the right to be properly informed of the contents of the charge sheet –

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6 2006 (2) SACR 582 (SCA) at para 7.
7 2013 (1) SACR 409 (SCA) at para 11.
8 2010 (2) SACR 289 (KZP) at 306 D – G.

> *'I am of therefore of the view for a trial court to apply the sentencing regime of which the accused has not had adequate and timeous knowledge, qualifies, par excellence, as a material misdirection. In my view, therefore, the consequences of a trial court applying the provisions of the Act, in a situation where the requisite knowledge was lacking, amounts to a misdirection warranting the setting-aside of the sentence and fresh adjudication of an appropriate sentence'.*

2.7. This court was satisfied that the accused was fully aware of the contents of the indictment and the effect of section 51 of the *CPAA 105 of 1997* in this proceedings -

2.7.1. That the indictment contained the correct charges relating to section 51(1) or 51(2) of the *CPAA 105 of 1997* -

- Correct and unambiguous description of the charge relating to the correct section of the *CLAA 105 of 1997.* The description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

- Correct references to date, time, place and the commitment of the offence.

- Reference to the prescribed minimum sentence in terms of the *CLAA 105 of 1997.*

2.7.2. That the accused was aware of the charges against him.

2.7.3. That the charges were explained to the accused by its legal representative and the court prior to the accused pleaded guilty on the charges against him.

2.7.4. That the accused was aware of the consequences of the charges and the prescribed sentences in terms of the *CPAA 105 of 1997* to be imposed should the accused be found guilty of the charges.

2.7.5. That the accused had been legally represented during the proceedings before this court.

2.7.6. That the procedures of a trial, should it proceed thereto, has been explained to the accused and the accused confirmed that he understood the procedures and his or her rights to cross-examine the witnesses for the state and any exhibit to be handed in as evidence against the accused.

2.7.7. That there was no objection against the legal representative of the accused at the onset or during the procedures before this court.

2.7.8. That the accused consulted with the legal representative and had time to prepare its defence against the charges against the accused.

2.7.9. That the accused took a conscious decision to proceed with the plea af guilt without any complaints, requests or whatever in this regard.

2.7.10. That the accused was presented with all the evidence which the State intended to use during the trial, should the accused elected not to plead guilty on the charges against him.

2.7.11. That the accused would be afforded an opportunity to consult with and to give instructions to his or her legal representative during the trial.

2.8. This requirement ‘s rational lies within the Constitutional protected right to a fair trial which includes the accused to be informed prior to the trial stage, of the charges and the sentencing regime, should the accused be convicted. It will ensure that the accused know the *‘case to meet and to*

defend'. Where the accused has not properly been informed of the charge and the sentence it would constitute misdirection and a substantially unfair procedure by any trial court.

2.9. As it will show from the record of this proceedings, read with section 35(3) (a) of the Constitution, the court is satisfied on the answers received from the accused in that he / she understood the aspects referred to above.

PLEA BY THE ACCUSED

3.1. After the accused was informed by the court and by his legal representative of his Constitutional rights in terms of section 35(5) of the Constitution, the accused elected to enter a '*plea of guilt'* on all seven counts.

3.2. The accused tendered a typed *'plea of guilt'* on the above seven charges which was read into the record. In the plea the accused explained in detail the events, actions and factors that lead to the committing of the seven counts that the accused stand accused of. The accused confirmed the contents of the plea and signed each page of the typed plea.

The plea is marked Exhibit A1.

3.3. The court verbally enquired from the accused whether he entered the plea freely, voluntarily and without any or undue pressure. The accused confirmed the above.

See paragraph 2 of the typed plea.

3.4. The State accepted the accused's '*plea of guilt'* on the charges in the indictment.

SECTION 220 ADMISSIONS BY THE ACCUSED

4.1. The State presented the following section 220 admissions made by the accused –

4.1.1. **Exhibit A** – Section 220 admissions made by the accused. The contents of the admissions were amended and the accused signed the admissions. The court confirmed with the accused of the knowledge and the meaning of the admissions made by the accused. The accused confirmed the contents and that he signed the section 220 admissions on 7th May 2018 freely and voluntarily.

4.1.2. **Exhibit A1** – Accused's plea of guilty.

4.1.3. **Exhibit B** - The Post mortem report by dr Sharon Zwitwabu Lukhozi was admitted by the accused. The post mortem report refers to multiple external injuries on the head with blunt trauma. The internal examination of the head of the deceased showed more signs of blunt force injuries such as a fractured skull and signs of brain concussion. These injuries were caused by the assault of the deceased by the accused and must have been extremely violent. The contents of the post mortem report read with exhibit D and E speaks for itself.

4.1.4. **Exhibit C** – A photo album and sketch of the crime scene compiled by constable Makwakwa.

4.1.5. **Exhibit D** – Photo album of the post mortem by captain Motswiyane.

4.1.6. **Exhibit E** – The J88 compiled by dr Mophetha at the Waterval Boven Hospital.

THE ANALYSIS OF THE CHARGES AGAINST THE ACCUSED AND THE PLEA OF GUILT

5.1. The court had to deal with the '*plea of guilt*' entered by the accused and the exhibits handed in. With reference to the plea by the accused, that court is satisfied that after the accused has been questioned by the court about the plea, the accused had made a sound choice to enter the plea, well knowing of the consequences of the possible severe sentence to be imposed on the accused. The accused confirmed that the plea of guilty was made freely and voluntarily without any undue influence, intimidation or threats.

See page 2 para 3 of the plea of guilty.

5.2. The accused admitted the offences committed by him of which a short summary is included hereunder –

5.2.1. **Count 1 – Kidnapping**. Depriving MARIANA SCHOEMAN of her freedom of movement.

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven the accused deprived MARIANA SCHOEMAN of her freedom by tying the complainants hands with shoelaces and the accused took the complainant and tied her to a pole whilst inserting cloths into the mouth of the complainant to prevent her from screaming. The accused admitted that his actions were unlawful and punishable by law.

5.2.2. **Count 2 – Robbery with aggravating circumstances read with section 1(1) of the *CPA 51 of 1977.***

On 21 June 2017 the accused assaulted the complainant MARIANA SCHOEMAN and took with force from the complainant an undisclosed amount of money and a cell phone.

5.2.3. **Count 3 – Kidnapping. Depriving the complainant ANDRIES NICOLAAS SCHOEMAN of his freedom of movement.**

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven the accused deprived ANDRIES NICOLAAS SCHOEMAN of his freedom of movement by tying him to a pole. The accused admitted that his actions were unlawful and punishable by law.

5.2.4. **Count 4 – Robbery with aggravating circumstances read section 1(1) of the CPA 51 of 1977.**

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven where the accused assaulted the deceased ANDRIES NICOLAAS SCHOEMEN by throwing an iron at the deceased and hit the deceased on his stomach. The accused unlawfully took R 80-00 from the deceased's purse.

5.2.5. **Count 5 – Murder of ANDRIES NICOLAAS SCHOEMAN.**

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven where the accused assaulted ANDRIES NICOLAAS SCHOEMAN on twice his fore head. The accused foresee that the assault and the injuries could cause the death of the person. The accused acted in anger when he assaulted ANDRIES NICOLAAS SCHOEMAN on 21 July 2017. The deceased passed away on 9 July 2017 as a result of the assault by the accused in causing severe head injuries to the deceased as reflected in the post-mortem report.

5.2.6. Count 6 - Attempted murder of MARIANA SCHOEMAN.

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven where the accused assaulted MARIANA SCHOEMAN once on her fore head. The accused foresee that the assault and the injuries could cause the death of the person. The accused acted in anger when he assaulted MARIANA SCHOEMAN on 21 July 2017 which caused serious injuries to the complainant in this charge.

5.2.7. Count 7 – Theft.

On 21 June 2017 the accused was at the Bloubosch Farm next to the N4 road in the district of Waterval Boven where the accused unlawfully removed items lawfully belonging to ANDRIES NICOLAAS SCHOEMN and / or MARIANA SCHOEMAN to the value of R 100 000 – 00 as listed in the indictment and took the items stolen to his residence.

See exhibit A1 in this regard.

CONVICTION

Based on the evidence and the section 220 admissions handed up to the court, the court accepted the accused's plea of guilty in terms of section 112(2) of the *CPA 51 of 1977* and found that the accused is guilty of the following offences –

6.1. **Count 1** : Kidnapping – in that on or about 21 June 2017 and or near Bloubosch Kraal Farm district of Waterval Boven the accused unlawfully and intentionally take and carried away MARIAN SCHOEMAN an adult female and thereby depriving the aforesaid person of her freedom and movement.

6.2. **Count 2** : Robbery with aggravating circumstances in that on or about 21 June 2017 at or near Bloubosch Kraal in the district of Waterval Boven the accused did unlawfully and intentionally assaulted MARIA SCHOEMAN and did with force and violence taken from het an unknown amount of cash and a cell phone her property or property in her lawful possession. Aggravating circumstances present being defined in section 1 of the *CPA 51 of 1977*.

6.3. **Count 3** : Kidnapping – in that on or about 21 June 2017 at or near Bloubosch Farm in the district of Waterval Boven the accused unlawfully and intentionally took and carried away ANDRIES NICOLAAS SCHOEMAN an adult male person and thereby deprive the aforementioned person of his freedom of movement.

6.4. **Count 4** : Robbery with aggravating circumstances In that on 21 June 2017, at or near Bloubosch Farm district of Waterval Boven, the accused unlawfully and intentionally assaulted ANDRIES NICOLAAS SCHOEMAN and took with force and violence cash in the amount of R 80 – 00 , aggravating circumstances being present as defined in section 1 of the *CPA 51 of 1977.*

6.5. **Count 5** : Murder – in that on or about 21 June 2017, at or near Bloubosch Farm the accused unlawfully and intentionally assaulted ANDRIES NICOLAAS SCHOEMAN an adult male person by hitting him several times on the head with an iron object causing serious injuries as a result whereof the said ANDRIES NICOLAAS SCHOEMAN died on 9 July 2017 in the Witbank Hospital.

6.6. **Count 6** : Attempted murder – That on or about 21 June 2017 at or near Bloubosch Farm in the district of Waterval Boven, the accused attempted to kill MARIA SCHOEMAN by hitting her with an iron causing severe injuries.

6.7. **Count 7** : Theft – that on or about 21 June 2017, at or near Bloubosch Farm in the district of Waterval Boven, the accused unlawfully and with the intention to steal, took with equipment as described in the indictment to the value of R 100 000 – 00 from ANDRIES NICOLAAS SCHOEMAN and / or MARIA SCHOEMAN.

The accused was duly convicted of the charges against him as described above.

SENTENCE

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1.

REQUEST FOR PRE-SENTENCING AND REPORTS

1.1. The accused before the court is Swazi speaking and stand accused of seven serious offences of which section 51(1) and (2) of the *Criminal Procedure Amendment Act 105 of 1997 [The CPAA 105 of 1997]* is applicable.

1.2. Section 51 of the *CLAA 105 of 1997* reads as follows –

(1). Notwithstanding any other law but subject subsection) and (6) a regional court or High Court a person it has convicted of an offence in Part I of Schedule 2 to <u>imprisonment for life.</u>

(2). Notwithstanding any other law but subjected to subsection (3) and (6) a regional court or a High Court shall –

(a). if it has convicted a person of an offence referred to in Part II of Schedule 2 sentence a person in the case of –

(i). a first offender to imprisonment of a period not less than <u>15 years</u> ;

(ii). a second offender of any such offence, to imprisonment of a period not less than 20 years; and

(iii). a third or subsequent offender of any such offence to prisonment for a period not less than25 years.

(b). if it has convicted a person of an offence referred to in Part III of Schedule 2 sentence a person in the case of –

(i). a first time offender to imprisonment for a period of not less than 10 years;

(ii). a second offender of any such offences, to imprisonment for a period not less than 15 years; and

(iii). A third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years.

…….

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence : Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

1.3. In terms of section 51(1) of the *CLAA 105 of 1997*, this court is obliged to sentence an accused, if found guilty of offences which would fall under the above categories, accordingly unless substantial and compelling circumstances would render a lesser sentence. Such a

deviation must be recorded and motivated by the trial court based on the submissions made by the defence at the end of the trial, should the accused be convicted.

1.4. Having in mind the seriousness of the offences that the accused was found guilty off, the court then requested '*victim impact reports*' and '*pre-sentencing reports'* to shed some light on the circumstances of the accused and the victims in this matter. The accused stand to be sentenced to life imprisonment and the court is of the view that these reports might be requested in the interest of justice, not only towards the accused but also towards the victims. The defence confirmed that these reports would be in the interest of the administration of justice and fairness towards the accused.

See exhibits G and H (The court will refer to these reports later in this sentence).

1.5. The court is required to adhere to the principle of *'trail fairness'* and taking into consideration pre-sentencing and victim impact reports. The court is mind full of the failure to call for such reports where the accused must be sentenced to life imprisonment, bearing in mind that such reports might disclose compelling and substantial factors which might favour the accused. [9] Both these reports and specifically victim impact reports forms an integral part of criminal proceedings.

1.6. These report forms an important part in arriving at a decision which is fair to the victim, the offender and the public at large. It serves a greater purpose than contributing only to the quantum of punishment. The purpose thereof is as follows –

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[9] Mashigo & another v The State (20108/2014) [2015] ZASCA 65 (14 May 2015) RA [28]; For victim reports see Mhlongo v The State (140/2016) [2106] ZASCA 153 (3 Oct 2016) at [22].

1.6.1. Its contents serve to promote fairness to the offender in the decision to impose a well-balanced and appropriate sentence.

1.6.2. Giving him or her voice and the only opportunity to participate in the last phase of the trial.

1.6.3. These reports give the victim and the accused an opportunity to say in his or her own words how the crime has affected him or her.

1.7. A court should not underestimate the power of a pre-sentencing report which might shed some light on the accused's background and upbringing and on a reason for the committing of the offence that the accused is charged with. Such a report could serve as an indication of remorse and might contain substantial and compelling circumstances which the court did not have at its disposal at the time of arguments regarding an appropriate sentence to be imposed on the accused. The value of such a request would adhere to the purposeful enquire about section 51(3) of the *CLAA 105 of 1997* where a diligent, conscientious and punctilious search for substantial and compelling circumstances must be dealt with which, if not done, might end up in a sentence which is disturbingly inappropriate and would amount to an injustice, unfairness and a serious misdirection by the trial court.

1.8. In terms of section103 of the *Fire Arms Control Act 60 of 2000* the accused might be declared unfit to possess a fire arm.

1.9. These are all aspects that a court must take into consideration when considering a sentence to be imposed.

1.10. The court must also be aware of the prospects of rehabilitation and re-integration of the accused into society after serving a sentence of imprisonment

THE SENTENCING REGIME AND THE REQUIREMENTS THEREOF

2.1. Sentencing is the most difficult aspect in any trial. In this phase of a criminal trial the court has to deal with human beings, each with its own unique personality, requirements and expectations. The main requirement is that any sentence imposed by a trial court should be balanced by virtue of in its reasoning and motivation thereof at the end of the trial.

2.2. Some important aspects to consider is found in the following case law –

2.2.1. In *S v Rabie* [10] Holmes JA held the following -

> *'The main purposes of punishment are deterrent, preventive, reformative and retributive; and Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.*

2.2.2. In *S v Swart* [11] Nugent JA held the following –

> *'What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead, proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'*

[10] 1975 (4) SA 855 (A) at 862 A – B
[11] 2004 (2) SACR 370 (SCA) at 378

2.2.3. Shongwe JA held the following in S v EN [12] –

> *'…sentencing is the most difficult stage of any criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly….Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence'*

2.3. The structure of a sentence should be determined by a requirement for the balancing of the nature and circumstances of the offence, the characteristics and circumstances of the offender and the impact of the crime on the community, its welfare and concern. A court should strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.

2.4. There must be a balance between the interest of society, the victim and the offence and no court should accentuate the interest of one of the parties, especially not that of the victims to a level which would inevitably have the effect where a court have both eyes on the victims and none on the remainder of the role players or factors in the criminal trial.

2.5. Regarding the compulsory minimum sentences to be imposed read with section 51(3) of the *CLAA 105 of 1997* the case of *S v Malgas* [13] held as follows –

> *[T]he sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime the criminal and*

[12] 2014 (1) SACR 198 (SCA) at para 14
[13] [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) at para 25.

the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

2.5.1. The test in *S v Malgas supra* was held to be the following –

'The test is whether the prescribed minimum sentence would be disproportionate to the crime, the criminal and the needs for society'.

2.5.2. In *S v Malgas* [14] Marais JA held –

'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. 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, standardized and consistent response from the courts. 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 the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded'.

2.5.3. It follows in *S v Malgas* [15] where the court held that all factors traditionally taken into account in sentencing continue to play a role. Deviation from the prescribed sentences in the *CPAA 105 of 1997* should not be done for flimsy reasons but only where there are substantial and compelling circumstances present -

[14] 2001 (1) SACR 469 (SCA)

[15] 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (SCA)

'*Specific sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the defender, undue sympathy; a version to imprisoning first time offenders; personal doubts as to the efficacy of the policy*
underlying the legislation and underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excused'.

2.5.4. The importance of sentencing lies in the following aspects –

a) Sentencing is imposed only with regard to the factors and circumstances known at the time of sentencing being done.

b) Courts are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoyed not to depart from them unless they are satisfied that there is weight justification for doing so.

c) The SCA confirmed the stance in *Malgas* [16] that the minimum sentences should be imposed where there is no substantial and compelling circumstances to deviate from the minimum sentence.

d) A sentence should not be disproportionate but proportionate with the offender – not less or more.

e) A sentence should be fair to the offender, society and blend in with mercy according to the circumstances.

f) The personal circumstances of the accused must not be over-emphasised without balancing the seriousness of the crime, the

[16] 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (SCA).

aggravating circumstances of the crime and the consequences of the victims and the interest of society.

g) Sentencing serves not to satisfy the opinion of society but to serve the public's interest.

h) Criminal procedure need to restore the public confidence in the criminal justice system with the public close to the accused, including those distressed by the horror of the crime.

i) A sentence must be tailored to the seriousness of the offence and one expressing the natural indignation of ordinary citizens would compensate for the seriousness of the crime committed.

2.6. As an introduction a trial court should be aware of the consequences of imposing a shockingly and inappropriate sentence. The aggregation of a sentence and the effect of effective punishment [imprisonment] should always be borne in mind of a trial court and where appropriate, ameliorated.

2.7. These factors should be measured against a '*composite yardstick'* which includes substantial and complelling circumstances. It is required that a sentencing court must therefore take into account the cumulative effect of the sentence(s) and the reason for departing from the minimum sentences imposed by the legislature. The value judgment is that of fairness and to bring the administration of justice into disrepute. A court should be alerted to circumstances which would entitle the court to characterise these factors as being substantial and compelling and as to justify the imposition of a lesser sentence. The sentencing court must be proactive to ensure that the court is fully informed of the facts of the case which would have an impact on the convicted person.

2.8. This court is therefore obliged to impose the minimum sentence prescribed by the Legislator unless substantial and compelling circumstances favour the accused to serve a lesser sentence.

3.

THE PRINCIPLES OF IMPOSING A SENTENCE

A sentence is made out of three important aspects -

- The accused.

- The society.

- The offence.

3.1. The accused

The accused before the court is Doce Arcolano and Shona speaking. The defence admitted the Exhibit H - Pre- sentencing report.

The accused gave evidence during the sentencing procedures.

3.1.1. The accused confirmed that he pleaded freely and voluntarily '*guilty*' to the charges against him.

3.1.2. The accused was born on 19 April 1994 and was 23 years of age at the time of the committing of the offences.

3.1.3. The accused did not complete grade 5 at school.

3.1.4. Occupation – the accused was employed by the deceased and mrs Schoeman at the farm Blou Bosch Kraal Waterval Boven. The accused was purportedly to earn R 2000 – 00 per month but was paid R 800 – 00 per month.

3.1.5. The accused is healthy.

3.1.6. The accused's parents passed away at a very young age.

In 2012 the accused decided to relocate to South Africa to make a better living.

The accused was employed by the deceased and mrs Schoeman at the offences being committed. The accused alleges that the deceased and mrs Schoeman did the accused his wages of R 2000 – 00 per month as agreed upon. He was only paid R 800 – 00 per month. The accused did not confront the deceased and mrs Schoeman over the purported outstanding amounts due to the accused. The accused testified that a sentence of life would not be good as imprisonment is a bad thing. The accused was not raised by his parents as his father and mother passed away at the age of 4 years.

The accused requested the court to impose a lesser sentence and indicated that he has remorse about what he has done.

Cross-examination by the State

The accused testified that he did not have a good relationship with the deceased and mrs Schoeman. The reasons for the bad relationship between the accused and his employers was based on being bad food and accommodation as well as the short payment of R 800 – 00 instead of R 2000 – 00 per month.

The accused was employed by the deceased from 2016 until May 2017 when the offences were committed.

The accused confirmed that the deceased and mrs Schoeman provided the accused with food, accommodation and clothes to wear.

The accused did not pay for the accommodation and did not confront his employers prior to the offences committed about the short payment on the monthly wage of R 2000 -00.

It was put to the accused that when he confronted mrs Schoeman for the payment of the outstanding money, that the accused was informed to wait for the deceased to return to enquire whether there was any money available. The accused confirmed that this was indeed the case.

When the accused was asked why did he force mrs Schoeman into her house, he could not give an explanation.

The confirmed that he was still asking questions in his mind as to the reasons for his actions.

The accused confirmed that it was not necessary to have acted the way he did and that nobody forced him to act as he did.

The accused confirmed that he did not ask the deceased any reason for the short payment of money but just attacked the deceased and mrs Schoeman.

The accused explained that the reason to have attacked the deceased and mrs Schoeman was that he was *'stressful due to the money owed by the deceased and mrs Schoeman'* to him.

The accused confirmed that he has put the deceased and mrs Schoeman through a period of torture , took them around and left them for dead where after the accused unlawfully took the items of the deceased and mrs Schoeman's from their house. The value of the stolen goods were approximately R 100 000 – 00.

The accused even phoned for assistance to remove the items from the house with a trailer and lied to his friends in that he received the items from his

employers whilst the deceased and mrs Schoeman was injured and still lying in the bushes.

It was put to the accused that the amount due to him was purportedly R 2000 – 00 but instead he removed items to the value of R 100 000 – 00 ; the accused could not give an explanation hereto.

The accused twice confirmed that his actions were planned and orchestrated to -

- Act as he did and to have achieved the results of his planned actions whilst the deceased and mrs Schoeman was injured and lying in the bushes.

- To have removed the furniture from the house of the deceased and mrs Schoeman.

The accused confirmed that he would have kept the stolen items for himself.

The accused indicated that the court must have mercy with him in the sentence to be imposed.

Re-examination
None

Witnesses by the State in Aggravation.
None.

Only victim-impact report is available and admitted by the defence.

See exhibit G (I will come back hereto later in the sentence).

The courts assessment of the Pre-sentencing report compiled on behalf of the Accused

This report was compiled to enable the court to get more information on the accused and to read with it the requirements of substantial and compelling circumstances, if available, to deviate from the minimum prescribed sentences to be imposed in terms of the *CPAA 105 of 1997*.

It has been reflected above that the court has the duty to enquire from the accused and to have to its disposal all means possible to ensure that the court will come to a balanced sentence which will serve the accused, society and the offences committed by the accused.

The court has perused the pre-sentencing report compiled on behalf of the accused and the following are recorded –

1. In 2012 the offender originated from Mozambique to find better employment.

2. The offender was employed by the deceased and mrs Schoeman near Waterval Boven.

3. The offender attended the Twelve Apostolic church at Machado Dorp.

4. The offender became extremely angry at the time that he committed the offences and that he did not intend to have killed the deceased.

5. This is the first time that the offender has committed an offence.

6. The offender enquired from mrs Schoeman about his money, then forcefully removed mrs Schoeman from her house, tied her up, put a cloth in her mount and tied her to a tree in the yard. After the deceased arrived, the offender attacked the deceased but did not intend to kill the deceased.

7. The offender worked for the deceased and mrs Schoeman in a trust relationship and was assisted with accommodation and remuneration.

8. Not only did the offender assault the deceased and mrs Schoeman, but he then proceeded with greed to steal furniture and belongings of the deceased and mrs Schoeman from their home.

The recommendation by the official who compiled the report is that the offender should be sentenced to imprisonment.

See exhibit H

3.2. The society –

3.2.1. The attitude of society is one of the pillars of sentencing. Society expects the courts to impose a sentence which will serve to protect the society against offender. The pendulum of punishment swing from a harsh sentence which would remove the convicted person for good from society, to a more lenient sentence which would be a balancing of the three pillars of a sentence to a total disregard of the principles of sentence which would result in a failure by the court to upheld the Legislator, the *CPAA 105 of 1997*, the proper administration of justice and the other factors to be taken into account prior to and during the sentencing of a convicted person.

3.2.2. The courts have indicated the following aspects regarding the values and expectation of society in *S v Banda* [17] –

> *'The courts operate in society and its decisions have an impact on individuals in ordinary circumstances of daily life. It covers all possible grounds. The court must by its decisions and imposing of sentence promote the respectful law and in doing so must reflect the seriousness of the offence and provide just punishment for the offender well taking into account the personal circumstances of the offender. The feelings and the requirements of the community the protection of society*

[17] 1991 (2) SACR at 325 B.

against the accused and the other potential offenders must be considered as well as the maintenance of peace and tranquillity in the land needs to be taken into account'.

3.2.3. The attitude of society plays a role in sentencing. The courts must look at the interest and outrage of society in any criminal activity and criminal trial by imposing the appropriate and if necessary harsh sentence.

3.2.4. The frequency of a specific crime and the repugnance of the society have continuously expressed in this regard calls for the interest of the accused to be yielded to the interest of society which includes the deterrence component.

3.2.5. The seriousness of the offence and the interest of society would therefore be more important so that a would-be offender would be deterred from committing the same offence.

3.2.6. When the court impose a sentence the court must impose a sentence which is balanced, sensible and motivated by sound reasons and which will therefore meet the approval of the majority of law abiding citizens of the country.

3.2.7. Failure of the above will result in the failure of the administration of justice which will lead to the loss of confidence of society in the judiciary. Courts are always urged to strive for a proper balance that has due regard to all the objects of sentencing.

3.2.8. In *S v Karg* [18] the court held as follows –

It is wrong that the natural indignation of interested persons and to the community at large should receive some recognition in the sentence that

[18] 1961 (1) SA 231 (A) at 236 B – C.

courts impose, and it is not irrelevant to bear in mind that <u>if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and persons may incline to take the law into their own hands.</u>

3.3. The offence or misconduct read with a sentence

3.3.1. In *S v Malyityi* [19] the following passage is found –

> *…the crime pandemic that engulfs our country has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that ill-defined*
> *concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to for the particular sentencing officer's personal notion of fairness ought to be eschewed'.*

3.3.2. The sentence must include mercy to the extent that it warrants. It might require a trial court to impose a sentence which demand a stern and decisive sanction but not so harsh to destroy the convicted person. A sentence should be balanced and appropriate read with the evidence and the *'type of offence'* committed by the accused. Punishment should be aimed at the accused and at society's outrage at such a conduct.

3.3.3. It is required that a balance be struck between the three pillars of sentencing; the one not to be emphasised unnecessarily over the other without reason or motivation.

3.4. The severity of sentence will be tempered by mercy.

3.4.1. When dealing with multiple offences, the court must to the totality of the offences and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so , while punishment and deterrence indeed come to the fore when imposing sentences for

[19] 2011 (1) SACR 40 (SCA) at 53 c – g.

armed robbery it must be remembered as Holmes JA pointed out that mercy, and not a sledgehammer is the concomitant of justice. The judicial officer should not hesitate to be firm when necessary and the offence should not be sacrificed on the '*altar of deterrence'*.

3.4.2. The court is also mindful of the so-called '*Metusalem sentences'* where the convicted person is locked up and the keys are thrown away; that is not the purpose of a sentence. Reference is made to the so-called '*Metusalem sentences'* in *S v Nkosi* [20] –

> *'[97] Thus, under the law as it presently stands, when what on may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one-half of the sentence. Such a sentence will amount to the cruel, inhuman and degrading punishment which is prescribed by s 12(1) (e) of the Constitution of the Republic of South Africa Act 108 of 1996...'*

4.

ARGUMENTS ON SENTENCE

4.1. **DEFENCE** –

The court heard extensive arguments by the defence on the applicable legislation and the *CLAA 105 of 1997* with regard to minimum sentences and the applicability thereof.

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20 2003 (1) SACR 91 at 95

a) The court heard arguments not to impose the minimum sentences prescribed in the *CLAA 105 of 1997* –

i). The accused is a first time offender.

ii). The accused was 23 years of age at the time of the committing of the offences.

iii). That the accused pleaded guilty and did not waste the courts time.

iv). That the accused did not grow up with a father.

v). That the accused was supposed to have earn R 2000 – 00 per month being employed by the deceased and mrs Schoeman.

vi). That the accused was in prison for one year and 3 months to date of this sentence being handed down.

vii). The accused is unmarried and has no dependants.

b) The court took note on the one side of humanity towards the accused but did not close its eye on society, its requirements, faith in the judiciary and the seriousness and frequency of the offences committed by the accused.

c) The court also reminded itself that punishment must also serve the purpose of deterrence, but that the convicted person must not be placed on the altar and be sacrificed just to make a point.

d) The court must also be mindful of the personal circumstances of the convicted person, the prospects of rehabilitation where

imprisonment is imposed as well as the possibilities of re-integration into society.

e) The court must also be mindful of the huge number of prisoners and the restricted space which results in overcrowding, unhealthy and unfavourable conditions in prisons.

f) However, this is not a reason to tilt the scale of justice in favour of the convicted person; there must be a balance struck between all the factors before the court in its evaluation and motivation of the punishment to be imposed.

g) The court is mindful of the enquiry of substantial and compelling circumstances which might have an impact on the sentences to be imposed as well as the effect of multiple offences and the operation of section 280 of the *CPA 51 of 1977.*

4.2. ARGUMENTS BY THE STATE

The court heard extensive arguments by the state on the applicable legislation and the *CLAA 105 of 1997* with regard to minimum sentences and the applicability thereof.

1. The state argued in favour of the minimum sentences to be imposed based on the trust of society, the accused and the offences committed.

2. The State argues that the victims of the crimes committed by the accused were elderly and living on a farm in the Waterval Boven area. The victims were harmless against the crimes committed by the accused. Not only were the victims tied to a pole but also assaulted with an iron which resulted in the death of ANDRIES NICOLAAS SCHOEMAN.

3. It was argued that the accused took the law into his own hands and thereby *inter alia* caused the death of ANDRIES NICOLAAS SCHOEMAN.

4. The state argued against any deviation of the minimum sentences as indicated by the *CLAA 105 of 1997*. The State argued that the offences committed by the accused was pre-planned and executed in a cruel way.

5. The state referred to the occurrence of the offences and the effect on society.

6. The state argued that the court must uphold the interest of society and the faith of society in the judiciary and the criminal justice system. Any deviation of the minimum sentences would be detrimental to the interest of society and the administration of justice.

7. The state argued that the basic rights of the victims which are protected by the Bill of Rights were seriously violated. It was arrogant and callous offences that were committed.

   (a). The charges relates to two counts of kidnapping which is contrary to section 21 of the *Constitution Act 108 of 1996* which ensure the freedom of every person.

   (b). The accused was charged with robbery with aggravating circumstances which is contrary to section 25 of the *Constitution Act 108 of 1996.*

   (c). The accused was charged with murder which the right to life is protected by section 11 of the *Constitution Act 108 of 1996*.

(d). The accused was charged with attempted murder which has to be read with section 11 of the *Constitution Act 108 of 1996.*

('e). The accused was charged with theft which has to be read with section 25 of the *Constitution Act 108 of 1996*. In reading the *Constitution Act 108 of 1996* it is clear that the accused has transgressed the Constitutional protected rights of the complainants in every offence he committed. The *Constitution Act 108 of 1996* is the cornerstone of our democracy and should be respected by every citizen of this country.

8. That the convicted person pre-planned the offences using threats, assaulting victims and causing the death of ANDRIES NICOLAAS SCHOEMAN read with the attempted murder on MARIANA SCHOEMAN.

9. The state referred to the frequency of the occurrence offences which occur on such a frequent scale, that these offences have become the '*order of the day'*.

10. The state argued that the society has the right to be protected against any form of criminal activity, the present offences form part of the requirements of the society to put a stop there to or any sentence to serve as deterrent to would be criminals.

ANALYSIS OF THE ARGUMENTS BY THE STATE AND THE DEFENCE IN IMPOSING AN APPROPRIATE SENTENCE

5.1. The court gave weight to the arguments by both the defence and the State in its valuation of an appropriate sentence and the manner in which it should be served.

5.2. The court took note on the one side of humanity towards the accused but did not close its eye on society, its requirements, faith in the judiciary and the seriousness and frequency of the offences.

5.3. The court also reminded itself that punishment must also serve the purpose of deterrence, but that the convicted person must not be placed on the altar and be sacrificed just to make a point.

5.4. The court must also be mindful of the personal circumstances of the convicted person, the prospects of rehabilitation where imprisonment is imposed as well as the possibilities of re-integration into society.

5.5. The court must also be mindful of the huge number of prisoners and the restricted space which results in overcrowding, unhealthy and unfavourable conditions in prisons.

5.6. However, this is not a reason to tilt the scale of justice in favour of the convicted person; there must be a balance struck between all the factors before the court in its evaluation and motivation of the punishment to be imposed.

5.7. Society expects the court to impose a proper sentence and should it be necessary, such a sentence should be *'harsh'* notwithstanding the person before the court is a human being.

5.8. The Legislator clearly indicated that any deviation from the prescribed sentences must be done carefully, diligently and with responsibility and should not be deviated just for the sake thereof, for flimsy reasons or not out of sympathy for the convicted person.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES – SEC 51(3) OF THE *CLAA 105 OF 1997*

6.1. In terms of section 51(3) of the *CLAA 105 of 1977* the court is obliged to enquire regarding the existence and the possibility of substantial and compelling circumstances. Failure to consider and evaluate the contents of this section would render the trial unfair and the judgment and sentence to be set aside. The court has dealt with the judgment of *Malgas supra.*

6.2. There is a number of case law referring to in terms of substantial and compelling circumstances such as *S v Mofokeng* [21] where the honourable Stegman J held the following –

> *'For substantial and compelling circumstances to be found that facts of the [particular case must be present some circumstances that is so exceptional in nature and that so obvious exposes the injustice of [indistinct] prescribed sentence in the particular case that it could rightly be described substantial and compelling. The conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified'.*

6.3. Substantial and compelling circumstances need not be exceptional but must provide truly convincing reasons or weighty justifiable or for flimsy reasons to deviating from the prescribed minimum sentence.

[My underlining]

6.4. The value of the Accused's personal factors as substantial and compelling circumstances -

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[21] 1999 (1) SACR 502 (T).

6.4.1. First offender does not constitute a sufficient basis for finding that he is a good candidate for rehabilitation. [22]

6.4.2. The accused's personal circumstances do not constitute special or outstanding qualities where this court is satisfied to deviate from the prescribed minimum sentence, should it be applicable.

6.4.3. The fact that an accused is married or single, with or without children, employed or not, it is largely immaterial to what the period should be as this is flimsy aspects for an attempt to reduce the time of imprisonment.

6.5. Read with the requirements of section 51(3) of the *CPAA 105 of 1977* this court is of the view that there are no substantial and compelling circumstances by which this court could deviate from the minimum sentences to be imposed and contained in the *CPAA 105 of 1997*.

7.

AGGRAVATING FACTOR REGARDING THE DETERMINATION OF A SUITABLE SENTENCE

7.1. There was no objection by the accused to the victim impact report being handed up.

See exhibit G

The following aggravating factors were present in this matter –

7.1.1. In the evaluation of the evidence contained in the accused's '*plea of guilt'* the court is of the view that the actions by the accused were

[22] Dube v The State (89/2016) [2016] ZASCA 123 (22 Sept 2016) at para [12].

serious and pre-planned actions which consisted of the unlawful restriction of the freedom of movement of the victims, theft of the property of the victims and even causing the death of one of the victims.

7.2.2. The frequency with which the type of crime occurs and its repugnance that society has continuously expressed call for the interest of the accused to yield to the interest of society which includes the deterrence component. The court must be sensitive to the number of murders and robberies committed where aggravating circumstances are present. It seems as if there is no end to these offences and that society is constantly subjected to these serious offences. However the court is mindful not to be subjectively influenced by the statistics [23] published but the court has a duty towards society to protect it at all costs.

7.2.3. Sentences must reflect mercy but also reflect the seriousness of the crime were its execution demand stern and decisive sanction which is not so harsh as to destroy the accused. Sentencing of offenders must be done taking into account offences related to the same time and place, where possible.

7.4. It is clear that the accused had taken the law into his own hands when he confronted ANDRIES NICOLAAS SCHOEMEN and MARIANA SCHOEMAN on the day in question. Nobody is allowed to act outside the law for any reason whatsoever.

7.5. A clear transgression of the complainants Constitutional protected rights which was argued by the State.

7.6. Personal experiences and information regarding mrs Schoeman as contained in the victim impact report –

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[23] http://africacheck.org - who published the statistics for 2016/2017 as 52,1 murders per day and 386,2 robberies with aggravating circumstances per day.

7.6.1. Mrs Schoeman was 68 years of age at the time of the offences being committed.

7.6.2. The deceased was 70 years of age when the offences was committed.

7.6.3. Mrs Schoeman suffered psychological and physical injuries for which she received treatment for two weeks at the Witbank Provincial Hospital.

7.6.4. The brain injuries caused to mrs Schoeman as a result of the assault by the accused on her, she is no longer in a position to eat the food that she used to eat. In the process she lost some 18 kg in weight.

7.6.5. Another result of the assault by the accused is that she is forgetful and her sensor organs have been affected.

7.6.6. Mrs Schoeman suffer from severe psychological trauma or distress, nightmares, hear strange noises and footsteps and that she cannot sleep without taking sleeping pills. There are signs that she had a personality change.

7.6.7. Mrs Schoeman has received medical treatment and counselling but this seems not to be effective for the trauma she suffered together with the death of her husband.

7.6.8. As a result of the ordeal mrs Schoeman does not trust anybody anymore.

7.6.9. Mrs Schoeman experience financial difficulty since the death of her husband. She cannot assist her grandchildren anymore and she had to relocate to Waterval Boven as a result of the actions by the accused before the court. She lost all furniture and the farm.

7.6.10. As a result of the actions by the accused, mrs Schoeman's future financial obligations is uncertain as she has to attend counselling sessions, hospitals for check-ups and treatment.

7.6.11. The criminal actions by the accused had a negative impact on mrs Schoeman's emotional and psychological state, trauma, her wellbeing, ill-health, and change in personality, having nightmares and economical loss.

8.

MOTIVATION OF THE SENTENCE IMPOSED BY THE COURT ON THE ACCUSED

8.1. It is required for a trial court to motivate the sentence it stands to impose on the accused person. For this reason it is important to read the above mentioned aspects herewith as it would complement the motivation of the trial court in its decision to impose a specific sentence on an accused.

8.2. In *S v Abrahams* [24] Cameron JA held the following regarding minimum sentences –

> *'Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as 'ordinarily appropriate' is a consideration*
> *that the courts are 'to respect, and not merely pay lip service to'. When a sentence is ultimately imposed, due regard must, therefore, be paid to what the Legislature has set as the 'benchmark'.*

8.3. In *S v Immelman* [25] Corbett JA held the following –

[24] 2002 (1) SACR 116 (SCA)
[25] 1978 (3) SA 726 (A) at 728 - 729

'In my view, difficulty can also be caused by an appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.'

8.4. In *S v de Kock* [26] Van der Merwe J held –

'By vonnisoplegging is dit die vonnisoplegger wat met alle moontlike ervaring en wysheid in pag vir die eerste en laaste keer met 'n besondere individu werk. Daarom moet alles wat 'n invloed op die pleging van die misdrywe gehad het oorweeg word ten einde 'n korrekte besluit te kan neem oor die toekoms van daardie besondere individu.'

8.5. In *S v Dodo* [27] Ackermann J held –

'[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.'

8.6. *S v Holder* [28] Rumpff CJ held the following –

'Die konstatering van die feit dat die Republiek se gevangenisse oorvol is, en dit 'n ekonomiese las op die Staat plaas, is feite wat niks te doen het met die

[26] 1997 (2) SACR 171 (TPA)
[27] 2001 (1) SACR 594 (CC)
[28] 1979 (2) SA 70 (AA)

vraag wat 'n gepaste vonnis in 'n besondere geval is nie. Die oorvol gevangenisse mag te wyte wees, oa, aan die groei van stedelike bevolking met meegaande vermeerdering in ernstige misdade en 'n versuim om voldoende gevangenisse te bou. Dit is 'n ernstige mistasting in die meerderheidsuitspraak om in 'n besondere geval op hierdie feite staat te maak.'

8.7. In *S v Lister* [29] Nienaber JA at 232 held the following –

'Prison, one knows, is not a congenial place and the conditions may well be less than ideal for psychotherapy. But then, a prison is primarily an institution of punishment, not cure. As the Court a quo was at pains to point out, the approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.'

8.8. In *S v Johaar* [30] Griesel AJA held –

'Waar 'n veelvuldigheid van misdade bestraf moet word, moet die hof ag slaan op die totaliteit van die betrokke misdadige optrede en sigself afvra wat die gepaste vonnis is vir al die misdade gesamentlik. Waar die vonnis ten opsigte van aanklag dus moontlik gekritiseer mag word dat dit te swaar is, is die vonnisse op ander aanklagte (bv die aanklagte van roof met verswarende omstandighede), aan die ander kant, op die oog af aan die ligte kant.'

In this regard the court refer to the so-called '*Metusalem sentences'* which is unjust and not in the interest of fairness towards an accused.

[29] 1993 (2) SACR 228 (A)

[30] 2010 (1) SACR 23 (SCA) at para 14.

8.9. In *S v Rabie* [31] Holmes JA held the following –

> *'Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognizing that fair punishment may*
> *sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society.'*

8.10. Imposing a sentence must also serve as deterrence to anyone who would consider engaging in any offence. Goldstone JA in *S v Dlomo & others* [32] held the following –

> *'Offenders must be made aware that except in exceptional cases, courts will impose severe sentences on them'.*

Factors to be taken into account when considering a sentence is the following –

- Significant Callousness acts by accused.
- Serious category of the offence.
- Disregard of rights of the victims.
- Feelings of the victims and family.
- Welfare of the victims.
- Impact of actions on complainant or victims.

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[31] 1975 (4) SA 855 (A) at page 861.
[32] [1991] ZASCA 94; 1991 (2) SACR 473 (A) at 477 h – 478b.

- No remorse by the accused.

- Comfort, protection, confidence of the victims.

- Planning and deviousness of the offender in committing the crimes.

- Psychological, emotional and physical stress on the victims.

- Financial loss by the victims as a result of the actions by the offender.

- Personality changes by the victims as a result of the actions by the offender.

- Physical damages, injuries, lifelong inabilities of the victims as a result of the actions by the offender.

- Future medical treatment of the victims as a result of the actions by the offender.

Section 51(3) of the *CLAA 105 of 1997* order a court to investigate whether there is a possibility of any factors which might influence the court to deviate from imposing the prescribed minimum sentence in cases like the present one before the court.

This court is of the view that the aggravating circumstances outweigh the accused's factors by far.

The court is of the view that there are no substantial and compelling circumstances in this regard which favours the accused before the court.

REMORSE AS A FACTOR

9.1. The defence argued that the accused had shown remorse for the offence he committed. However remorse is a gnawing pain of conscience for the plight of another.

9.2. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. In order for the remorse to be a valid consideration the penitence must be sincere and the accused must take the court into his or her confidence. [33]

9.3. In *S v Matyiti* [34] the court held as follows –

> *'There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of the. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless this happens, the genuineness of the contrition alleged to exist cannot be determined'.*

This court not convinced that the accused showed genuine remorse for the offences that he committed but merely convey this sentiment in that this court would consider imposing a lesser sentence on the accused.

IN SUMMARY

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[33] S v Volkwyn [1994] ZASCA 175; 1995 (1) SACR 286 (A) at 289h
[34] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) at para 13.

10.1. The accused before the court is charged with seven counts of misconduct of which murder and robbery with aggravating circumstances fall squarely within the ambit of section 51(1) of the *CLAA 105 of 1977*. The reliance on section 51(1) of the *CLAA 105 of 1977* is based on the pre-meditated or planned murder of ANDRIES NICOLAAS SCHOEMAN by the accused. From the admissions by the accused whilst giving evidence he conceded that he planned the murder of the deceased. This court cannot find any other reason why this murder would not be included in section 51(1) of the *CLAA 105 of 1997*.

10.2. The victims have been threatened with violence which was even more aggravating as plain threats of some other kind. ANDRIES NICOLAAS SCHOEMAN died as a result of the assault by the accused being hit with an iron on the head. The post mortem report indicates serious injuries causing the death of ANDRIES NICOLAAS SCHOEMAN.

10.3. Murder and robbery with aggravating circumstances are crimes that are committed on a daily basis in our country. Society therefore demands that harsh sentences be imposed on offenders of this type of offence.

10.4. The sentence imposed on the offender, should reflect the blameworthiness of the offender. Where there is no substantial and compelling circumstance the courts must not hesitate to impose minimum sentences – not to deviate for flimsy reasons, undue sympathy, and personal doubt regarding the effectiveness of the sentence to deflect from executing the task to impose an appropriate sentence. Life imprisonment is the ultimate – a trail court should be placed in possession of all the relevant facts and information to consider an appropriate sentence.

10.5. A factor to consider in imposing a sentence in tis circumstances is the serious interpersonal problems, trauma, emotional and psychological deficiencies that a victim of such offences as in this case might experience. One could ask whether life imprisonment would be as brutal as the murder and the other offences the accused has been charged with and whether it would balance the scale between the experience of the victim and the deceased and that of the offender in prison; then life imprisonment would be appropriate.

10.6. The wave of murder cases has been increasing at an alarming rate and it is a crime that calls for long term imprisonment. It is clear that a trial court has the duty to motivate its sentence based on precedents set and the requirements of informing the accused of the reasons why a certain sentence or sentences have been imposed. Without reasons the accused will not be able to take the matter any further and no other court will be in a position to follow the reasoning of the court in reaching its verdict. Sentences imposed for murder, especially the kind of which was executed in this matter, must reflect the value that society and courts attached to human life, which is protected by the Constitution. It would be argued that people who does not have respect for human life, must be visited with severe punishment so that this punishment would sent a clear message to potential offenders and society that murder would not be tolerated under any circumstances. Life is too precious to just take it away for flimsy reasons and by taking the law into one's own hands.

10.7. Following the offences that the accused has committed, I am of the view that this is precisely the kind of matters that the Legislature had in mind for the imposition of the minimum sentence of life imprisonment on the charge of murder. As case law has indicated, a court must not shrink from their duty to impose, in appropriate cases the prescribed minimum sentences ordained by the Legislature. Societies' legitimate expectation is that an offender will not escape life imprisonment – which has been prescribed for a specific reason – simply because

substantial and compelling circumstances are unwarrantedly held to be present. All persons have the right to life and the other Constitutional rights of the victims in this matter which the accused has transgressed in this matter, is serious. The victims are entitled to expect and insist upon the full protection of the law in this regard.

10.8. This court has provided the reasons for imposing the sentences which is required to meet the aspects and factors to be taken into account in imposing a sentence namely the accused, the offence and the interest of society read with the proper administration of justice. The court has motivated the reasons for the sentences to be imposed on the accused. However from the pre-sentencing report no substantial and compelling circumstances have been disclosed to this court. Plain personal circum- stances of an accused does not constitute substantial and compelling circumstances.

10.9. The period that the accused spent awaiting trial is might be considered as a factor in imposing a sentence of imprisonment. In *S v Mqabhi* [35] the court formulated the following guidelines in determining whether the period spent in custody ought to be considered a substantial and compelling circumstance justifying the imposition of a sentence less than the minimum prescribed sentence -

> *'After considering argument the court formulated the following guidelines:*
> *(a) pre-sentence detention* was a *factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of CLAA;*
> *(b) Such period of detention* was *not to be isolated as a substantial and compelling circumstance but had to* <u>*be weighed as a mitigating factor*</u>; <u>*together with all the other mitigating and aggravating factors*</u>, *in determining whether the effective minimum period of imprisonment to*

[35] 2015 (1) SACR 508 (GJ).

be imposed was *justified in the sense of it being proportionate to the crime committed. If it were not then the want of proportionality constituted the substantial and compelling circumstances required under section 51 (3);*

(c) The reason for the prolonged period of presentence detention was a *factor. If the offender were responsible for unnecessary delays then this might redound to his detriment;*

(d) There was *no mechanical formula or rule of thumb to determine the period by which a sentence* was *to be reduced. The specific circumstances of the offender, which might include the conditions of his detention, were to be assessed in each case when determining the extent to which the proposed sentence should be reduced;*

(e) Where only one serious offence was committed, and assuming that the offender had not been responsible for unduly delaying the trial, then a court might more readily reduce the sentence by the actual period in detention prior to sentencing. "

[My underlining]

10.10. In the light of the above, this court took note of the *'dead time'* spent by the accused awaiting trial. The period since arrest to being sentenced is one year and three months, which in the mind of the court has no effect on the sentences to be imposed on the accused.

11.

SENTENCE

11.1. Having considered and assessed all the factors and information of this case read with the lack of mitigating circumstances of the accused, including the personal factors of the accused, the reports and read in conjunction with the aggravating circumstances, this court has found that the aggravating circumstances outweigh the mitigation factors by

far. The result is that this court is of the view that the prescribed sentences in the *CLAA 105 of 1997* should be applicable and should warrant no deviation from such prescribed sentences.

11.2. Having regard to all the aspects and factors read with the circumstances of the offences committed and the legislator's aim with the *CPAA 105 of 1997*, the court is satisfied that the convicted person before this court should be sentenced as follows –

11.2.1. Count 1 : Kidnapping of MARIANA SCHOEMAN : 5 years imprisonment.

11.2.2. Count 2 : Robbery with aggravating circumstances of MARIANA SCHOEMAN read with section 1 of the *CPA 51 of 1977* and section 51(2) of the *CLAA 105 of 1997* : 15 years imprisonment.

11.2.3. Count 3 : Kidnapping of ANDRIES NICOLAAS SCHOEMAN : 5 years imprisonment.

11.2.4. Count 4 : Robbery with aggravating circumstances of ANDRIES NICOLAAS SCHOEMAN read with section 1of the *CPA 51 of 1977* and section 51(2) of the *CLAA 105 OF 1997* : 15 years imprisonment.

11.2.5. Count 5 : Murder of ANDRIES NICOLAAS SCHOEMAN who died on 9 July 2017 in the Witbank Hospital as a result of the pre-planned assault by the accused on the deceased : Life imprisonment in terms of section 51(1) of the *CLAA 105 of 1997*.

11.2.6. Count 6 : Attempted murder of MARIANA SCHOEMAN : 10 years imprisonment.

11.2.7. Count 7 : The illegal theft of equipment as described in the indictment to the value of R 100 000 – 00 from the lawful owners

thereof being ANDRIES NICOLAAS SCHOEMAN and / or MARIANA SCHOEMAN : 8 years imprisonment.

11.3. Read with the following -

11.3.3. The sentences on count 1,2,3,4,6 and 7 will run concurrently with that of the sentence on count 5 – life imprisonment.

11.3.4. The accused is declared unfit to possess a fire arm in terms of section 103 of the *Fire Arms Control Act 60 of 2000.*

12.

THE ACCUSED'S RIGHT TO APPEAL

In terms of section 306B of the *CPA 51 of 1977* , the accused has the right to apply for leave to appeal in writing within 14 days of the date on which the sentences have been imposed.

H.C.JANSEN VAN RENSBURG
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MBOMBELA DIVISION NELSPRUIT