Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO
Circulate to Regional Magistrates:	**YES** / NO

HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **CA&R 29/14**

In the matter between:

EMMANUEL SMOUS **Appellant**

v

THE STATE **Respondent**

Heard: **07 August 2017**

Delivered: **15 September 2017**

Coram: Tlaletsi AJP; Williams J et Ndlokovane AJ

FULL BENCH APPEAL JUDGMENT

Tlaletsi AJP

INTRODUCTION

[1] The appellant, Mr Smous, stood trial in this Court (Pakati J) on a charge of murder read with the provisions of s 51 of Act 105 of 1997 as amended. He was convicted of murder with *dolus directus* as the form of intent and sentenced to serve life imprisonment on 15 June 2016. The trial court on 6

July 2016 refused leave to appeal against both his conviction and sentence. However, on petition, the Supreme Court of Appeal on 17 October 2016 granted him leave to appeal to the Full Court of this Court against his sentence only.

FACTUAL BACKGROUND

[2] On 01 January 2014 the appellant met the deceased, his former girlfriend, at a certain tavern in the area of Boichoko, Postmasburg at about 01h00. The deceased was in the company of her friend Ms Tshireletso Gaborone (Ms Gaborone). At the time the deceased was leaving the tavern for her current boyfriend's place. After a short while the appellant left with the deceased and she ended up being with the appellant at his shack. A certain Mr Mahole who lived in the appellant's neighbourhood overheard the deceased screaming for help from the appellant's closed shack. Mr Mahole knew the deceased well and could easily identify her voice because the deceased used to live in the same shack with the appellant.

[3] Later that morning the appellant's parents were called to the shack where they found the deceased lying on the floor in a pool of blood. The parents left the shack in the condition they found it and went to the police station to report. They returned accompanied by police officers.

[4] The police found a blood stained knife on the kitchen unit, a shoelace and a red electric cord hanging from the rafters. The appellant unsuccessfully tried to commit suicide by hanging himself with the two items. The attempt left him with scars and marks around his neck. The concoction of liquid soap and Ratax (Rat poison) that he prepared and drank also failed to kill him. The deceased was certified dead by the paramedics called to the scene.

[5] The post-mortem report revealed the following injuries on the body of the deceased.

a. History of an assault.
b. Swollen left half of the face.

c. Laceration inside of the upper lip.
d. Linear abrasion left arm.
e. 20x2mm incision wound right half of the neck, 150mm from the midline and 146cm from the right heel, its tract ends in the muscles of the neck.
f. 5x2mm incision right half of the neck, 150mm from the midline and 140cm from the right heel, its tract ends in the muscles of the neck.
g. Large hematoma under the skin over the left half of the face, ear and left temporal part of the scalp.
h. Subarachnoid haemorrhage over left cerebral hemisphere.
i. Fractured ribs 8 and 9 right chest.
j. Bruised right and left kidneys and renal vessels.
k. Severe bruising of the muscles of the back.

[6] The Forensic Pathologist concluded that the cause of death was multiple injuries. Some of the injuries were caused by severe blunt force trauma and others were likely caused by a sharp object.

[7] The respondent proved the following previous convictions of the appellant. On 9 June 2005 he was convicted of possession of a firearm and for discharging a firearm at a public place in contravention of Regulation 2 of section 39 of the Arms and Ammunition Act 75 of 1969. He was sentenced in terms of section 279(1)(a)(2) of the Criminal Procedure Act 51 of 1977 and the sentence was postponed for five years. He was also declared unfit to possess a firearm. On 17 September 2009 he was convicted of Assault with intent to cause grievous bodily harm and was sentenced to 12 months imprisonment which was wholly suspended for four years on certain conditions.

[8] The appellant was 27 years old at the time of his sentence. He attended school up to Grade 10. He has three children aged 9 and 6 years respectively and the youngest was 10 months old. All the children were staying with their respective mothers. The appellant was employed at a mine earning R7 400-00 per month plus a housing allowance of R1 200-00.

He was not married. He was however in a relationship with the mother of his 10 month old child. The girlfriend testified in mitigation of sentence and pleaded that he be given a wholly suspended sentence so that he can maintain her child. He was contributing R700-00 and R500-00 per month for the maintenance of his elder children respectively.

[9] The deceased was 20 years old at the time of her death. She was the mother of the appellant's second child and received R500-00 per month for maintenance, as per a court order. The child has been negatively affected by the death of her mother. The deceased's family was also affected by her death and were attending counselling sessions.

[10] Regarding the offence itself, the Forensic Pathologist testified that the injuries were consistent with those inflicted by a person with a high level of anger.

[11] In imposing sentence the trial court concluded thus:

"[19] Having considered the circumstances of this case I am satisfied that the accused's personal circumstances and mitigating factors are by far outweighed by the aggravating factors. I am also satisfied that there are no substantial and compelling circumstances justifying a departure from the imposition of the prescribed sentence. I consider the fact that the deceased was a defenceless woman, who posed no danger to the accused who was viciously assaulted and stabbed with a knife by the accused. The fact that the accused did not call for help but remained in the shack trying to commit suicide and later locked his shack and left for his parental home with his brother suggests that he did not want the deceased to get assistance. His previous convictions also show that this is a type of man who would not think twice to violate a woman. This was clear from the evidence of Ms Mabilo, the deceased's friend, that the deceased used to show her marks on her body that were the results of the physical abuse by the accused.

In my view the following sentence is an appropriate sentence:

The accused, Emmanuel Smous, is sentenced to life imprisonment. *"*

PARTIES' SUBMISSIONS

[12] Counsel for the appellant contended that a sentence of life imprisonment in the circumstances of this case is inappropriate and induces a sense of shock. He submitted that a sentence of 15 years imprisonment would have been an appropriate sentence for the appellant especially that the trial court did not find that the murder was premeditated.

[13] Counsel for the respondent submitted that the question to be determined is whether it was competent to impose the sentence of life imprisonment in the absence of premeditation or preplanning, despite the prescribed minimum of 15 years imprisonment being applicable as per the provisions of the Act. Counsel contended that the trial court was not precluded from imposing a heavier sentence than the prescribed minimum sentence. She referred us to **S v Radebe** 2011JDR 0926 (FB) as authority for her submission.

ANALYSIS

[14] The applicable penal provision in the type and circumstances of the murder charge for which the appellant was convicted is Part II of Schedule 2 to the Act. The schedule refers to murder in circumstances other than those referred to in Part 1 of Schedule 2. The prescribed minimum sentence is 15 years imprisonment for a first offender. This fact appears to have been common course between the appellant and the respondent in the court *a quo.*

[15] It is notable that the indictment did not provide the specific part of Schedule 2 that the murder charge should be read with. The indictment only referred in general terms to murder read with the provisions of Act 105 of 1997. Put differently, the indictment did not specify whether the murder charge falls within the ambit of Part 1 of Schedule 2 prescribing life imprisonment on conviction or Part II of Schedule 2 prescribing the minimum sentence of not less than 15 years imprisonment for first offenders, should there be a finding that there are no substantial and compelling circumstances justifying a departure from the prescribed sentence.

[16] It is clear from the reasons for sentence that the trial court, having found that there were no substantial and compelling circumstances in the case of the appellant elected to impose the prescribed minimum sentence. The court a quo, therefore, imposed life imprisonment on the mistaken belief that it is the sentence that was prescribed by the Act. The sentence of life imprisonment was not imposed on the basis that the prescribed minimum 15 years imprisonment was inappropriate in the circumstances of the case and that life imprisonment would be an appropriate sentence. Had this been the case the trial court would have gone further to pronounce why life imprisonment is an appropriate sentence. In this regard, the trial court misdirected itself.[1]

[17] The decision of the Full Bench of the Free State High Court in S v Radebe (supra) is distinguishable from the circumstances of this case. Although that court embarked on an exercise to determine whether the murder charge for which the appellant was convicted of was planned in the circumstances where the trial did not make that determination, it nevertheless concluded that the murder was not planned or premeditated. In my view such an exercise was not necessary because the appellate court did not have the jurisdiction to review the findings of the trial court. That Court, and this Court, is confined to the conviction of the appellant as determined by the trial court when considering the appeal on sentence.

[18] Having found that the trial court misdirected itself this Court is enjoined to consider afresh whether there are substantial and compelling circumstances present to justify a sentence lesser that the 15 years imprisonment prescribed in Part II of Schedule 2 of the Act. That is the inquiry inter alia, that should have been embarked upon by the trial court.

[19] Regarding the appellant's personal circumstances the following remarks in **S v Vilakazi**[2] are to be kept in mind:

---

[1] **S v Malgas** 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220; R v S 1958 (3) SA 102 (A) at 104.
[2] **S v Vilakazi** 2009 (1) SACR 552 (SCA); Vilakazi v S [2008] 4 ALL SA 396 (SCA) para 58.

"[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character."

[20] I now turn to the offence itself. The deceased was a defenceless woman who posed no danger to the appellant. She was derailed from her way to her boyfriend by the appellant who took her to his shack where she met her ultimately death. There is however no evidence to suggest that she was not willing or was forced by the appellant to accompany him. The attack with a knife was vicious. Her loud screams did not deter the appellant from further attacking her. It would not be unreasonable to infer from the facts that the appellant may have out of jealousy decided that if he could not have her as his girlfriend no one should. This inference is bolstered by the fact that the appellant made a serious attempt to take his own life as well and escape accounting for his deeds. The suicide attempt could only have taken place after the deceased was dead already.

[21] The appellant's parents must be commended for their swift action of ensuring that they brought the police to the scene for justice to be attained. They did not consider covering up for their son's evil deeds. The parents

and appellant's brother also testified as state witnesses on the events of that morning. I have no doubt that the offence itself has adversely affected the appellant's family and that it will always be in their mind that their child has killed a person who is a mother of their grandchild.

[22] There is not much information on record about the deceased other than that she used to be the appellant's girlfriend and mother of his second child. The state did not present any report on the impact this offence had on the deceased's family for purpose of sentence. Be that as it may, her death must have had a negative impact on her child, family, friends and the community at large. Her children have lost their mother.

[23] Violence in our society, particularly by men against women is prevalent. The interests of society dictate that a strong message to the public that violence will not be tolerated should be sent. Failure to do so would feed into the unjustifiable trend of the society taking the law into their own hands by punishing, without due process, alleged suspects of crime. Respect for the law must be guaranteed. A sentence should be fair to the society, the offence, the offender and be blended with a measure of mercy.

[24] I am satisfied that the aggravating features of this case outweigh the mitigating circumstances. There are no substantial and compelling circumstances justifying a lesser sentence than the prescribed sentence. However, the prescribed minimum sentence of 15 years imprisonment would, in my view, not adequately cater for the gravity of the offence and its prevalence, the interests of society and shall not be fair to the appellant for what he has done. That is a judicial balance that a sentencing court should strive to achieve. A sentence in excess of the prescribed minimum of 15 years in the circumstances of this case justified.

[25] In the result the following order is made.

1) The appeal against sentence is upheld.

2) The Order of the trial court with regard to the life term of imprisonment is set aside and substituted with the following:

"a) The accused is sentenced to a term of imprisonment for 18 years.

b) The sentence is antedated to 06 July 2016."

L. P TLALETSI
ACTING JUDGE PRESIDENT
Northern Cape High Court, Kimberley

I concur.

C.C WILLIAMS
JUDGE
Northern Cape High Court, Kimberley

I concur.

N. NDLOKOVANE
ACTING JUDGE
Northern Cape High Court, Kimberley

Counsel:

For the Applicant: Instructed by:	**J.J Schreuder** Advocate's Chambers, Kimberley
For the Respondent: Instructed by:	**K.F. Ilanga** Director of Public Prosecutions, Northern Cape