IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA13/21
Reportable: YES/NO
Circulate to Judges: YES/NO
Circulate to Magistrates: YES/ NO
Circulate to Regional Magistrates: YES/ NO

In the matter between:

I [....] K [....]	**APPELLANT**
AND	
THE STATE	**RESPONDENT**
DATE OF HEARING	: **04 NOVEMBER 2022**
DATE OF JUDGMENT	: **31 JANUARY 2023**
CORAM	: **PETERSEN J & REDDY AJ**

ORDER

(i) The appeal against the sentence is dismissed.

(ii) The sentence of life imprisonment is confirmed.

(iii) The order declaring the appellant unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

ReddyAJ

Introduction

[1] The appellant was charged with murder read with section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977 as amended ("the CLAA") in the Regional Court. The appellant duly represented by counsel pleaded not guilty and made a comprehensive statement in terms of section 115(1) of the Criminal Procedure Act 51 of 1977 ("the CPA"). Having crystalized the issues in the plea statement, the appellant denied that he possessed the requisite *mens rea,* and that the crime of murder was premeditated. The appellant was convicted of premeditated murder as charged, on 14 November 2020.

[2] The appellant was sentenced to life imprisonment on 4 March 2021 and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 and further declared unsuitable to work with children in terms of section 120(4) of the Children's Act 38 of 2007.

[3] The appeal lies only against the sentence of life imprisonment, consequent to the right to an automatic appeal in terms of section 309(1) of the CPA.

Summary of evidence

[4] Whilst fully alive to the fact that the appeal lies only against sentence, it is apposite to set out the evidence presented at trial in some detail inclusive of the collateral and main factual findings made by the court a *quo.* The rationale for this approach will become clear in the judgment.

[5] Notwithstanding the appellant attempting to suppress material evidence as is apparent from his lengthy plea explanation and admissions contained therein, the detail of how the deceased was murdered is best recanted by the direct evidence presented at trial.

[6] The appellant and the deceased were married. The marriage suffered an irretrievable breakdown, due to the alleged infidelity of the deceased. Irrespective of all the attempts by the appellant to restore the marriage to a normal functioning marriage the deceased verbalised on a number of occasions that she had no interest in the appellant. In fact, on the morning of her death she emphasized the

same when the appellant contacted her on her cell phone. I now turn to relevant facts inherent in the events of the fateful day.

[7] On the events that transpired on 30 April 2016, the State led direct evidence of L [....] K [....] (K [....]), the biological son of the appellant and the deceased; T [....] M [....] (M [....]) and N [....] S [....] (S [....]), the deceased's sister. The narrative commences on the morning of 30 April 2016 when the deceased and S [....] were attending the unveiling of a tombstone at ltumeleng. The deceased received a call from the appellant. According to S [....] it was apparent that there was a disagreement between the deceased and the appellant. To this end, S [....] overheard the deceased tell the appellant to stay away from her as she was no longer interested in him, did not love him and would not be returning to Mahikeng. The deceased threw the cell phone to S [....] who continued the conversation with the appellant. The appellant complained of the disrespectful manner the deceased was treating him, and enquired from S [....] when the deceased would be returning to their home in Mahikeng. At that stage the location of the appellant was unknown and the appellant did not disclose his intentions to commute to collect the deceased and L [....].

[8] Later, on the evening of the fateful day, the deceased and S [....] were asleep in different rooms at S [....]'s home. L [....] and M [....] were watching a soccer match between Sundowns and Kaizer Chiefs. The appellant arrived and both witnesses observed that he was in possession of a firearm, strategically positioned at his back. The appellant enquired from K [....] about the whereabouts of his mother, the deceased. K [....] informed the appellant that the deceased was asleep in the bedroom. The appellant proceeded to the bedroom. K [....] followed him. In the meantime, M [....] ran to his mother S [....]'s bedroom and barged in, waking S [....] in the process. M [....] reported to S [....] that the appellant entered the house saying he was looking for the deceased and that he was in possession of a firearm.

[9] The appellant reached the bedroom door where the deceased was sleeping and although unlocked the door was not aligned properly in the doorframe. The

appellant pushed the door open with his shoulder and entered the bedroom with L [....] following suit. At that point, L [....]'s uncle, B [....] M [....] 1 left the bedroom. The appellant proceeded to where the deceased was and woke her up by pulling the blanket off her. The appellant, as earlier that day, wanted to know from the deceased when she would be returning to Mahikeng. The deceased once again retorted that she would not be returning. The appellant proceeded to pull the deceased to stand in close proximity to a rear window of the bedroom. At this point, the appellant shot the deceased on the left shoulder towards the inner breast. The deceased fell to the ground. L [....] helped the deceased to her feet and he remarked to the appellant that they could go to Mahikeng.

[10] The deceased fled from the bedroom to S [....]'s bedroom. At this stage, S [....] who was woken by M [....] had jumped out of bed and the deceased simultaneously came running into S [....]'s bedroom. The deceased was holding her chest uttering the words *"N [....] help me, I [....] has shot me."* S [....] observed blood oozing from the deceased's chest area, but could not say exactly where the injury to the deceased's chest was. The appellant was not present and his precise whereabouts were unknown to S [....]. The deceased cried out for protection and S [....] used her body to keep the bedroom door close.

[11] Meanwhile outside S [....]'s bedroom, K [....] had followed the deceased but could not gain entry into the bedroom, as unknown to him S [....] was applying force to the door to prevent it from opening. K [....] noticed the appellant approaching S [....]'s bedroom door where the appellant started kicking the door unrelentingly. A battle of strengths ensured between the appellant and S [....] with neither giving way. During this struggle, K [....] unsuccessfully attempted to convince the appellant that they should leave for Mahikeng. At times the bedroom door would open slightly indicative of the appellant gaining the advantage and close again, with S [....] gaining a temporary advantage. Ultimately, S [....] let go of the door and the appellant entered S [....]'s bedroom holding a firearm in his right hand, which was pointing down in line with his thigh.

[12] The deceased screamed out *"I [....] let us leave and go home"* but the appellant did not respond. Instead, the appellant simply raised his hand in which he was wielding the firearm and pointed it at the deceased who was, seated on the floor. The deceased raised both her hands to protect her head. K [....] heard S [....] screaming, followed by the sound of the discharge of a firearm. The appellant had in fact discharged the firearm in the direction of the deceased causing her to fall to the ground. Petrified, S [....] jumped over the deceased and fled the scene through a window at the back of the house. K [....] similarly fled and whilst approaching the door to exit the house, he again heard the discharge of a firearm. The appellant then exited the bedroom. K [....] later returned, armed with a knife and knobkerrie. Upon his return, he discovered that the deceased, his mother, had already died.

[13] The admitted report on a medico-legal post-mortem examination performed by Dr Balatseng found that the cause of death were gunshot wounds to the head and chest.

The approach to sentence on appeal

[14] There is a multiplicity of jurisprudential authority re-iterating the trite position that, the imposition of sentence is pre-eminently within the discretion of the trial court. An Appeal Court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying an interference on appeal, has been shown to exist. (See S *v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A).)

[15] The grounds on which a court of appeal may interfere with sentence on appeal are that the sentence is:

(i) disturbingly inappropriate;

(ii) so badly out of proportion to the magnitude of the offence;

(iii) sufficiently disparate;

(iv) vitiated by misdirection showing that the trial court exercised its discretion unreasonably;

(v) is otherwise such that no reasonable court would have imposed it.

(See S *v Giannoulis* 1975 (4) SA 867 (A) at 873G-H; *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j; *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) para [10].)

[16] In *S v Sadler* [2000] SCA 13 at paragraph [6] Marais JA, writing for a unanimous court, had occasion to re-state the afore-said grounds, when he said:

> *"The approach to be adopted in an appeal such* as *this* is *reflected in the following* passage *in the judgment of Nicholas AJA in* S *v Shapiro 1994 (1) SACR 112 9A) at 119j- 120c:-*
>
> > *It may well be that this Court would have imposed on the accused* a *heavier sentence than that imposed by the trial judge. But even that be assumed to be the fact that would not in itself justify interference with the sentence. The principle* is *clear: it* is *encapsulated in the statement by Holmes JA in* S *v Rabie 1975 (4) SA 855 (A) at 875O-F:*
> >
> > > *"1. In every appeal against sentence, whether imposed by* a *magistrate or judge, the Court hearing the appeal-*
> > > *1. should be guided by the principle that punishment* is *'pre-eminently* a *matter for the discretion of the trial Court', and*
> > > 2. *should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion* has *not been judicially and properly exercised'.*
> > > *3. The test under (b)* is *whether the sentence* is *vitiated by irregular or misdirection or* is *disturbing inappropriate."*

[17] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001 (2) SA 1222 where the following was stated, is instructive:

> *"[12] The mental* process *in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent,* a *trial court will consider the particular circumstances of the* case *in the light of the well-known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant*

jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as *if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do* so *would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court* is *of course entitled to consider the question of sentence afresh. In doing* so, *it* assesses *sentence* as *if it were* a *court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be Justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is* so *marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate." It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."*

[18] In *S v Matytyi* 2011 (1) SACR 40 (SCA) at paragraph 23, Ponnan JA stated as follows in respect of serious crimes, such as the present:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Ma/gas, it still is "no longer business as usual". And yet one notices all to frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Ma/gas makes plain courts have a duty, despite any personal

doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms *of the state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague. ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officers personal notion of fairness. Predictable outcomes. not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."* (my emphasis)

[19] The approach to sentencing in cases involving minimum sentences which has mustered constitutional approval in S *v Dodo* 2001 (3) 382 (CC) is succinctly set out in *Malgas* as follows:

"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and it is they who are to judge whether or not the circumstances of a particular case are such as to justify a departure. However, in doing so, *they are to respect and not pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary-*

A Section 51 has limited but not eliminated the court's discretion in imposing sentences in respect of offences referred to in Part 1 of Schedule 2(or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specifies circumstances.

C *Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts*

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses, favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and the marginal differences in the personal circumstances or degrees of participation between co-offenders are to be excluded.

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

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

G *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling') and must be such cumulatively justify a departure from the standardised*

response that the legislature has ordained.

H In applying the statutory provisions it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

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

J In doing so, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."

Grounds of Appeal (Evaluation)

[20] The appellant contends that the court a *quo* misdirected itself on a plethora of grounds. I propose to address the merits or demerits of the grounds of appeal ad seriatim.

(a) Although succinctly aware of the approach that the trial court needed to follow and adopt during a *sentencing process, the trial court misdirected itself on several occasions.*

[21] This ground of appeal is set out in broad terms and does not necessitate further explication.

(b) The trial court failed to strike a balance between the personal circumstances of the Appellant, the interests of the society and the nature of the offence. The trial court patently over-emphasized the nature of the

offence and the interests of the society more than the personal circumstances of the Appellant.

[22] Central to this ground of the appeal against sentence are the personal circumstances of the appellant. The complaint is that the personal circumstances of the appellant were addressed in a cursory manner with undue emphasis having been placed on the crime and the interests of society. The Regional Magistrate's judgment on sentence unquestionably indicates that he was fully aware of the gravity of the duty that lay ahead when the sentencing process had commenced. Parallel to the enormity of the sentencing task, proportionality had to be attained in respect of the triad as advocated in *Zinn* 1969 (2) SA 537 (A). In the interlude to sentencing the Regional Magistrate states as follows:

"We have come to a *very difficult part of this trial that* is *sentencing. Sit down* sir. *Sentencing* is *difficult because at the time of the trial personal circumstances of the accused were not taken into account. The nature and the seriousness of the offence were also not in reality not taken into consideration* as *well* as *the interests of community."*

[23] What is clear is that, the Regional Magistrate was fully appraised of the triad and its application, in conjunction with the theories of punishment. This is evident in the judgment on sentence.

(c) The trial court failed in its duties to enquire into the personal circumstances of the Appellant in a *more judicious manner. It went on capture them in* a *very cursory and perfunctory manner.*

[24] The Regional Magistrate was fully alive to the broad gamut of evidence that was presented in mitigation of sentence by the appellant, inclusive of witnesses, the probation and correctional supervision reports. It is noticeable that the Regional Magistrate had acquainted himself with the reports tendered into evidence by the accused. The latter is re-inforced by the following remarks:

"As *the probation officer's report* was *read it* was *read here also the*

Court has to go through them. And according to the correctional supervision report Mr Plaatjie he said you said to him that you have four sons aged between 25, *24,* 22 *and 4 years respectively."*

[25] To this end the Regional Magistrate dealt with the personal circumstances as part of the triad and re-iterated same, in the determination of the existence of substantial and compelling circumstances, as part of the judgment on sentence. To argue that the personal circumstances of the appellant were glossed over in cursory and perfunctory way, is ill contrived.

(d) The court failed to appreciate that the Appellant is a first-time offender. A fact so obvious that one wonders why it is not mentioned in the court's entire reasons for sentence together with the other factors, for sum of which could not amount to substantial and compelling circumstances.

[26] Whilst there is no specific mention that the appellant was a first offender in the judgment on sentence, no judgment can be all encompassing. (See *R v Dhlumayo and Another* 1948 (2) SA (A)). The State confirmed prior to the imposition of sentence that the appellant was a first offender. This is confirmed by the SAP 69 form, attached to the appeal record. Conspicuously, the appellant did not testify to be a first offender and the failure to do so is not definitive. Further, the prosecutor and counsel for the appellant drew attention to the appellant being a first offender in address before sentence. Both pre-sentence reports also confirmed the same. To make short shift of the matter, the record is replete with instances confirming, the appellant had no prior brush with the law. The failure by the Regional Magistrate, to specifically refer, to the unblemished record of the appellant is of no moment. It certainly does not mean that it was not considered by the Regional Magistrate as part of the appellant's personal circumstances. It certainly fell under the umbrella of the personal circumstances of the appellant, which was given due consideration repeatedly.

[27] The aforesaid grounds of appeal speak to the trite position set out by

Nugent JA in *S v Vilakazi* 2009 (2) SACR 435 (SCA), that:

> *"In* cases *of serious crime the personal circumstances of the offender, by themselves, will 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 *employed, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Ma/gas said should be avoided." (See also S v Ro and Another 2010 (2) SACR 248 (SCA)*
>
> *(e) The court misdirected itself in its failure to enquire whether the Appellant has a propensity to commit offences, let alone violent offences, and therefore a danger to society which should be protected from him.*

[28] The need for such enquiry was unnecessary. The appellant had a clean slate before the Court, prior to sentencing, by virtue of having no convicted criminal history. The appellant's conviction on a singular count of murder within the purview of section 51(1) of the CLAA eradicated the need for such an enquiry. Any elicited information fundamental to this proposed enquiry in the absence of proof as required through previous convictions would have no evidential weight.

> *(f) The trial court misdirected itself by failing to appreciate the fact that at the time of his sentencing the Appellant* was *gainfully self-employed* as *a mechanic who contributed meaningfully to the society and that a more meaningful enquiry should have done in this regard.*

[29] The fact that the appellant was employed was certainly given due attention . To aver that the appellant was, gainfully employed, as a mechanic who contributed meaningfully to society was incongruous. The appellant did not provide much detail as regards the scope of his self-employment. Intricate details such as his income and expenditure were not ventilated, what the appellant however did aerate was that for the duration of the trial which had spanned six years he had suffered *"financial disturbance".* This probably explains the absence of further interrogation by counsel

for the appellant as well as the Court. There was not an iota of evidence suggesting that the appellant was tellingly contributing to society. The approach by the Regional Magistrate cannot be faulted. The sentiments expressed in *Vilakazi, supra,* are equally apt to this ground of appeal.

> *(g) Whilst acknowledging the fact that the Appellant had started another family where he became the father figure of two minor children, the court failed to appreciate the devastating effect of sentencing him to life imprisonment on the two minor children that he was maintaining and his live-in-lover, and including his son L [....] K [....].*

[30] The appellant was not the primary caregiver of the two minor children. (See *S v M* 2008 (3) SA 232). The ratio in *Vi/akazi* finds equal application. The averment that the appellant was maintaining his biological son L [....] Kgosoane was factually inaccurate. On 18 February 2021, his son, a major testified as follows:

> "....*I realized that my life was getting better, because in the beginning of this year things started to flow positively in my life. As I was able to get employed as an intern and currently I am* a *data capturer in Potchefstroom."*

> *(h) In over-emphasizing the interests of the society, the court failed to appreciate the fact that the very people who were immediately affected by the conduct of the Appellant and who are* a/so *members of the society, Mr L [....] K [....] and M [....] 2 G [....] M [....] 1 had forgiven the Appellant for killing the deceased and actually pleaded for leniency for the Appellant.*

[31] This ground misconstrues the facts. Kgosaoane was rightfully, enraged by the murder of his mother, by the appellant on 30 April 2016. On 19 September 2019, he testified for the prosecution. No olive branch was extended to him. Rather the material aspects of his evidence were disputed. The appellant was convicted on 20 September 2020. On 18 February 2021, Kgosoane testified in mitigation of sentence for the appellant, his father. According to his evidence, his grandmother observed the descending emotional spiral that the death of the deceased at the hand of

appellant had caused him. It was suggested, that in order for him to heal, he had to forgive the appellant. In October 2020, Kgosoane returned to reside with the appellant in Mahikeng in order for the healing process to begin. The fact that Kgosoane and M [....] 2 G [....] M [....] 1, a family member of the deceased had forgiven the appellant and asked the court for leniency on his behalf, does not avail the appellant. The Regional Magistrate was alive to these two witnesses alacrity to forgive the appellant. But, that is just a portion of the full version. The appellant himself conceded, that other members of the deceased family were not as willing and open to dialogue founded on mediation and restorative justice. It was presumptuous of the appellant to suggest that sixty per cent of the deceased family had forgiven him in the absence of a victim impact report. It bears remembering S [....]'s evidence wherein she stated that after the death of the deceased the family were "... *broken seriously broken after the death of our sister."*

> *(i) In over-emphasizing the interests of the society by alluding to the fact that 'the society needed to be protected from the conduct exhibited by the Appellant, the court misdirected itself by arriving at product which does not find any credence in the legal jurisprudence. By sacrificing the Appellant on the altar of deterrence by sentencing him to life imprisonment in order to send a clear deterrent message to would be offenders and to appease the indignation of the society, the court failed dismally to appreciate the fact that the society's interest are not served by the imposition of unjust sentence.*
>
> *And*
>
> *(j) Even if the trial court found that there were no substantial and compelling circumstances in this case, although the opposite is true in this matter, and therefore life imprisonment became mandatory, the court still had* a *judicial duty to enquire whether the imposition of life sentence would be just in the circumstance of this case.*

[32] The sentencing court's approach was that in the absence of substantial and compelling circumstances, there was no basis to deviate from the

mandatory life imprisonment. The core basis for the latter finding was not founded exclusively on the deterrent purpose of punishment.

> *(k) The trial court misdirected itself by simply concluding that there were no substantial and compelling circumstance in this matter without assessing all the factors cumulatively. It's piecemeal approach to the evaluation and assessment of factors which would constitute substantial and compelling circumstance.*

[33] The court *a quo,* did not "simply" conclude that there were no substantial and compelling circumstances. The process of arriving at the sentence of life imprisonment followed an evaluation of the trite sentencing principles, fully conscious of the clear mandate that was set out by the legislature when seized with the sentencing of an offender wherein a minimum sentence has been prescribed. The use of phraseology extracted from *Malgas* such as *"unless there are truly convincing reasons for departing from it...the Court's discretion to impose lesser sentence is not limited though not illuminated (should have read eliminated) but only for specific reasons not for flimsy reasons ..."* conclusively indicates that the imposed sentence was not handed down in a mechanical fashion. To aver as such is erroneous and not echoed by the record.

> *(l) It is unassailable that the event which culminated to the killing of the deceased by the Appellant stem from the fact that the deceased had an extra-marital affair with one Temba Dibai who resided at Oennboom, in Pretoria. Many attempts were made to resolve this situation, but it did not abate. The trial court misdirected itself in not considering this aspect, together with other factors inherent in this case, as constituting substantial and compelling circumstances in favour of the Appellant."*

[34] The alleged infidelity is founded exclusively on the say so of the appellant. S [....], the sister of the deceased denied knowing of this. In any event, before us, counsel for the appellant conceded that the killing of the deceased was not a crime of passion.

Concluding remarks

[35] The Regional Magistrate found that there were no substantial and compelling circumstances present to justify a departure from the prescribed sentence of life imprisonment. Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is directed at three prominent factors, the crime, the offender and the interests of the community. (See *S v Zinn* 1969 (2) SA 537 (A) at 540G-H). In *S v RO and Another* 2000 (2) SACR 248 (SCA) at paragraph [30] Heher JA stated the following in this regard:

> *"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions."*

[36] What is revealing from the evidence presented during the trial and in the sentencing proceedings is that the appellant was not palpably remorseful. The appellant is undoubtedly regretful but definitely not remorseful. The rationale behind the concept of remorse as dealt with in *S v Seegers* 1970 (2) SA 506 (A); *S v D* 1995 (1) SACR 259(A) at 261 a-c; *S v Volkwyn* 1995 (1) SACR 286 (A); *S v Martin* 1996 (2) SACR 378 (W) at 383 g-i; and *S v Mokoena* 2009 (2) SACR 309 (SCA) at paragraph 9 is succinctly encapsulated in *S v Matyityi* 2011 (1) SACR 40 (SCA) at paragraph [13] where Ponnan JA stated 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 of the conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether*

the offender is sincerely remorseful and not simply feeling sorry for himself 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 a valid consideration, the pertinence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to have exist cannot be determined. After all, before a *court can find an accused person to be genuinely remorseful, it needs to have an appreciation of inter alia: what motivated the accused to commit the deed, what* has *since provoked his or her change of heart; and whether he has* a *true appreciation of the consequences of those actions "*

[37] The appellant from the inception of the trial was not sincere and had not taken the trial court into his confidence. His conduct patently displayed that, notwithstanding the gravity of the offence and the overwhelming evidence, weighed against him *inter a/ia* by his son and sister in-law, he embarked on a deliberate process of self-preservation. At the plea stage the appellant disputed the requisite intent for a premeditated murder, as was his enshrined right. However, in the face of damning evidence, he firmly staved off the evidence, that he entered his sister in law's residence on the night in question with a firearm strategically concealed, but visible to the naked eye of two witnesses inclusive of his son by suggesting to both witnesses, that upon entering, he was only in possession of a Red Bull energy drink and keys.

[38] The appellant during the course of his evidence at trial continued with his machinations. In respect of the first shot that was fired the appellant maintained that he had been provoked by the deceased. In order to scare her, he remembered he had a firearm, recounting that the first shot discharged was accidental, consequent to the safety mechanism of the firearm not being activated. He then followed the deceased in a disoriented state to see if the deceased had been injured. Using a clenched hand he tapped the bedroom door where the deceased entered and it opened. Trying to aid the deceased to raise, the firearm was positioned on his side

together with the keys and another shot was discharged. He then fled. In the car he made a failed attempt to commit suicide.

[39] The appellant testified in mitigation of sentence and again failed to take the court completely into his confidence. This is a thread which runs through every facet of evidence sought to be presented in mitigation of sentence. Demonstrative of this is the finding of Probation Officer, Ms Moatshe, that the appellant was dishonest in his disclosure of the material facts surrounding the commission of the evidence for which he had been convicted. It is, further echoed in the Correctional Supervision report drafted by Mr Plaatjie, in which the appellant persisted with an untruthful account of the events of the day when the deceased was shot.

[40] The interests of society must be afforded due consideration. The role of society should not however be elevated or over-emphasized in this process of proportionality. When the interests of society are being considered, it is not what the society demands that should determine the sentence, but what the informed reasonable member of that community believes to be a sentence that would be just. *(S v Mh/akaza and Another* 1997 (1) SACR 515 (SCA) at 518). A sentence would accordingly, not necessarily represent what the majority in the community demands, but what serves the public interest and not the wrath of primitive society. (S *v Makwanyane* 1995 (2) SACR 1 (CC) at paragraph [87]-[89]). There is no underscoring the current proliferation in the high levels of crime, with particular reference to violent crimes committed against women. The sentiments expressed in *S v Van Staden* (KS21/2016) [2017] ZANCHC 21 at paragraph [14] are apposite:

> *"[14] Murder committed by a man on a woman should not be treated lightly. It becomes worse, where the perpetrator, as in this instance was the deceased's partner, who had the duty and the responsibility to protect her and not harm her. It is killings like this one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the*

commission of such crimes.'

(My underlining)

[41] The appellant was convicted of murder in circumstances where it was planned or premeditated. The deceased was asleep in what she believed was the safety and sanctity of her sister's home. This proved to be a fallacy. The facts underscoring this have been set out in detail above. The murder of the deceased was callous. The degree of violence inflicted in the presence of her loved ones was egregious, none more so than for their biological son, L [....] . The deceased must have died a gruesome death. Throughout the trial the appellant placed much store on how he wished to restore his marriage and yearned for the return of his family to Mahikeng. Remarkably, after shooting the deceased, the appellant did not summon or seek the intervention of medical assistance.

[42] The Regional Magistrate was correct in finding, that there were no substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. Jointly considered the globular effect of all the evidence presented by the appellant does not divulge anything substantial and compelling to have warranted a departure from the imposition of life imprisonment.

Order

[43] In the premises, the following order is made:

(iv) The appeal against the sentence is dismissed.

(ii) The sentence of life imprisonment is confirmed.

A REDDY
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

I **agree**

A H PETERSEN
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Appellant:	**Adv M Mpshe**
Instructed by:	**KK Sebolai Attorneys** **c/o Lehabe Attorneys** **2240 AB Mothusi Street** **Libra House** **Unit 8** **MMABATHO**
For the Respondent:	**Adv BT Chulu**
Instructed by:	**Director of Public Prosecutions** **Megacity Building East Gallery** **3139 Sekame Street** **MMABATHO**