IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG

CASE NO: CAF: 8/22
Reportable: YES/**NO**
Circulate to Judges: YES/**NO**
Circulate to Magistrates:YES/**NO**
Circulate to Regional Magistrates: YES/**NO**

In the matter between:

MOLAUDI JUSTICE MOCHWARE **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM: MFENYANA J, REDDY J & MOREI AJ

HEARD: **08 November 2024**

DELIVERED: **12 December 2024**

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be **11h00 on 12th December 2024.**

ORDER

The appeal against sentence is dismissed.

JUDGMENT

REDDY J (MFENYANA J AND MOREI J CONCURRING)

Introduction

[1] This is an appeal against the sentence of life imprisonment imposed against the appellant pursuant to leave to appeal being granted by the Supreme Court of Appeal to the Full Court of this Division. The appellant was indicted before Gura J**,** ("the court a quo"), on two counts, murder (count 1), and attempted murder (count 2). Count 1, was read with section 51(1) of the Criminal Law Amendment Act, ("the CLAA") 105 of 1997 (as amended), which made the imposition of life imprisonment mandatory in the absence of a finding that substantial and compelling circumstances as evinced in section 51(3) of the CLAA exist**.**

[2] On 30 March 2011, the appellant who enjoined legal representation, pleaded guilty to both counts. *Adv Raikane* prepared a statement within the purview of section 112(2) of the Criminal Procedure, Act 51 of 1977, ("the CPA"). The court a *quo* held reservations regarding the criminal responsibility of the appellant at the time the offences were allegedly committed. Resultantly, the provisions of section 113 of the CPA were applied. The State led the evidence of a single witness, the victim on

count 2. The appellant elected to exercise his right to remain silent as envisaged in section 35(3)(h) of the Constitution.

[3] On 30 March 2011, the appellant was convicted on both counts and sentenced to life imprisonment in respect of count 1 and ten (10) years imprisonment on count 2. No ancillary orders followed.

[4] In the Notice of Appeal, the appellant assails the sentence on the following grounds:

> 1. The Learned Judge misdirected himself in the sentencing stage when he sentenced the appellant in terms of the minimum sentence [Section 51 of the Criminal Law Amendment Act No.105 of 1997] without warning at the commencement of trial proceedings for the possibility thereof.
>
> 2. The Honourable trial Judge failed to individualize the Applicant in that the sentence wasn't composed to fit the offender and the particulars of his crime as closely as possible.
>
> 3. The Honourable trial Judge failed to look at alternative precedents/patterns for sentencing and simply referred to it in sentencing the Applicant.
>
> 4. The Honourable Court failed to take into consideration that the Applicant was not intent on wasting the Court's time, the Applicant admitted his error and knew that there were consequences to his actions.
>
> 5. The applicant respectfully submits that although the sentencing discretion has been regarded as seated within the judicious domain of the court seized with the matter, it is equally true that equal punishment of equal offenses is to be achieved as a standard of constancy and in the light of section 35(3)(N) of the Constitution to the extent that the applicant is entitled to the benefit of at least severe of the prescribed punishment.

6. It is the applicant's respectful submission that in this under consideration, firstly when the Court a quo imposed the sentence the Honourable Judge had not considered the above-mentioned aspects, the state prosecutor has not presented the matter to the court fully and fairly and conduct the case with judicial discretion and sense of responsibility, but in a vindictive spirit and with excessive zeal in trying to get a conviction.

7. It is the Applicant's respectful submission that he has professed genuine remorse and that despite his plea being denied by the Trial Court he did not deny his action or avoid responsibility, it is submitted that these factors may be taken into account and point favorably towards a possibility of his Rehabilitation.

8. It is further the applicant's submission that the sentence imposed did not take into account the element of judicial punishments namely, Rehabilitation and Reclamation not reciprocation and Destruction. Imprisonment is not the only form of punishment, there are other requirements of judicial punishments.

9. In S v Pretorius the following aims of punishment were referred to:

> "…deterrence, retribution, rehabilitation as well as prevention. In a modern criminal justice system the specific aspects of retribution are starting to play a lesser role, more especially so in a constitutional dispensation and democracy such as ours. There is much greater emphasis on prevention and rehabilitation."

10. In the Supreme Court of Appeal matter of Magano v S with similar facts before this Court, it was found that a sentence of Life imprisonment was not necessary, but that a sentence of 20 years imprisonment was appropriate.

11. Erred in not finding substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment.

The sentencing discretion of the trial court

[5] It is trite law that the imposition of sentence falls within the trials court's discretion. The courts are burdened with the task of imposing the sentences, and an appellate court will only interfere if the reasoning of the sentencing court was vitiated by misdirection, or the sentence imposed induces a sense of shock or can be said to be startlingly inappropriate. Even so, a mere misdirection is insufficient to entitle an appellate court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not exercise its sentencing discretion or exercised it improperly or unreasonably. As a court of appeal, this Court must also determine whether the sentence imposed on the appellant was justified. See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G, *Bogaards v S* 2013 (1) SACR 1 CC, S v *Mokela*, 2012 (1) SACR 431 (SCA) at para 9.*S v Malgas* 2001 (1) SACR 469 (SCA) at para 12, *Director of Public Prosecutions v Mngoma* [404/08] 2009 ZASCA 170.

[6] In respect of the court's sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* (117/2000) 2001 ZASCA 30 (19 March 2001) 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 exercising appellate 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 appellate 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.

[7] In *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 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 Malgas, it still is "no longer business as usual". And yet one notices all too 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 Malgas 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 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 officer's 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. '

(emphasis added)

[8] Whilst being fully cognisant that this appeal is against sentence the facts which are germane to the determination of an appropriate sentence for the appellant deserve to be recounted in full context. The primary facts that formed the factual matrix can be elicited from two sources. First, the statement made by the appellant in terms of section 112(2) of the CPA, and second, the evidence of the victim on count 2, Sinah Mpho L[…], ("L[…]").

[9] The statement in terms of section 112(2) of the CPA provides as follows:

> ' …. I, the accused herein, I, Mr Moladi Justice Mochware, the undersigned I do hereby freely, voluntarily and on my free volition plead guilty to the following charges: I plead guilty to the charge of count 1 being murder read with the provisions of section 51(1) and part 1, schedule 2, I admit that on or about 29 October the year of our Lord 2009 and at or near 1[…] J[…] Street in Swartruggens in the district of Rustenburg, I did unlawfully cause the death of J[…] B[…] L[…], and adult female person by firing shots at her with my service pistol and that I also unlawfully injured and attempted to cause the death of S[…] M[…] L[…], an adult female person by firing shots at her.
>
> The deceased was my girlfriend and the mother of my two children, namely K[…] and R[…], one child being biological child with the deceased and another, my stepchild with the deceased. We also shared a residence at Ragile in Koster prior to the incident. At the time of the incident the deceased had successfully obtained a final protection order being that I was forbidden from entering the deceased's place of residence and of work and I was also forbidden from assaulting her.
>
> The complaint in count 2, that of attempted murder, was my girlfriend's younger sister and the aunt to my two children.

On 29 October 2009 I had two children with me in my company and I had taken them out for a meal at Wimpy Restaurant in Swartruggens, the area where the deceased lived. This was with the permission of the deceased whilst the deceased was at home whilst we were away and whilst at Wimpy I had a few drinks and I was inebriated or drunk. The deceased called me to bring the children home. It was approximately 17:15 and I did that. Upon arrival at home I stood outside the house at the gate and started hooting to draw the deceased's attention to the fact that I had arrived.

I could not enter the premises as there was a final protection order in place.

The complainant in count 2 spoke to me after I had left the two children in the car parked outside the yard and I entered into the yard and stood in the kitchen where I spoke to the complainant in count 2 as there was no one responding to my hooting.

Upon entering into the house in the kitchen, I found the complainant in count 2. I wrongly shot at the complainant in count 2 and I proceeded to the bedroom where the deceased was after I had noticed that the complainant in count 2 had fallen down and dropped.

I met with the deceased in the bedroom and I fired several shots at her fatally wounding her.

I shot at her because I was drunk and I could not appreciate the full magnitude of my actions. I was deeply hurt in that my wife had filed divorce papers against me and we were in the process of a divorce. I have two children with my wife aged 7 and 9 I had anger that I was being divorced on the one hand and my girlfriend, the deceased, had also terminated our relationship and we are no more having a relationship.

I stood the chance of losing both my wife and my girlfriend. I had anger and at the time of shooting, my state of mind was that of experiencing rejection, jealousy, psychological effect, trauma and financially I was also devastated. I was frustrated and I could not think properly.

I am remorseful and very sorry.

I further admit that my actions were wrong in that in that in the first place I should have left the service pistol which I used in my vehicle outside the yard.

Secondly, I should have waited outside the yard to allow somebody from the house, either the deceased, her sister or the maid to come and fetch the children.

I admit that my actions were wrongful and unlawful.

I did not have the necessary authority or the right to have acted in the manner in which I did. I concede that I also overreacted out of jealousy, rage and anger.

I thus plead guilty to the charges."

M'LORD, I beg leave to hand in this as an exhibit?

COURT: Yes.

ACCUSED: I confirm the contents of the statement and signature.

COURT: This statement then is received and marked as EXHIBIT A. Does the accused confirm the explanation as contained in EXHIBIT A?

ACCUSED: I confirm, M'Lord.'

[10] As mentioned the evidence of L[…] was presented as the only evidence in the State's case. L[…]'s evidence can best be retold as follows. On the date in question, at approximately 17h00 the appellant arrived. He collected the children and proceeded to the stores with them. He was the father of one child, the other was being taken care of by the deceased, which the appellant accepted into his care. An extant interdict which was in place prohibited the appellant from entering this premises. On noticing that the appellant was entering through the gate, L[…] instructed the deceased to enter the bedroom, while L[…] intended to close the kitchen door. Before same could be achieved, L[…] met the appellant in the middle of the kitchen. The appellant produced a firearm and uttered, 'I told you.' This comment was in reference to two prior threats that the appellant had issued. Before the protection order was granted the appellant indicated that he would kill L[…] and the deceased by shooting them. After the protection order was granted, he indicated 'that piece of paper cannot protect us.' The appellant then discharged the firearm. L[…] felt a burning sensation on her right upper arm. The entry wound was on the front part of the upper arm with the exit wound at the back of the same upper arm. Contemplating whether to flee to the dining room, L[…] then fell to the floor pretending to be dead.

[11] Whilst on the floor, L[…] had her eyes closed. Given the tiled floor, she was able to hear the footsteps of the appellant and track his movements The appellant moved toward the bedroom which he opened. The deceased then screamed. The appellant then started to discharge his firearm several times. Whilst this was occurring L[…] exited the house seeking assistance from the occupants of a nearby scrap yard. It was reported that the appellant had shot her and the deceased. Furthermore, L[…] requested that the South African Police, ("the SAPS") be summoned. On arrival of the SAPS, L[…] entered the house in the company of the SAPS. The deceased was found face down on the bed. Two children were found inside the bedroom. What stood out was that bedroom emitted a distinct smell of petrol. The two children were removed.

[12] Significantly, L[…] contended that the appellant was "normal" when commenting on the state of sobriety of the appellant. More tellingly, L[…] disclosed that the need to have secured a protection order by the deceased against the appellant was that the appellant was continually "pestering" the deceased. He would confront her at her abode, place of employment and at retail places seeking to convince her to reconcile their prior romance.

[13] I propose to deal with the grounds of appeal in two tranches. The first of which is a procedural one, that which in the view of the appellant constituted an unfair sentence process. In this regard the appellant contends that the court a *quo* had not appropriately cautioned him as to the existence of the mandatory **life sentence** which found application in respect of count 1, in the absence of substantial and compelling circumstances.

[14] The principles in this regard are commonplace in our law. The rub of the matter is simply whether on a vigilant examination of the proceedings, can it be found that the appellant was subjected to an unfair trial. In my view, the assertion of the appellant in this regard did not surpass this minimum threshold.

[15] The law is settled on this point. It does not warrant an in-depth exposition and a regurgitation of established legal principles. The Supreme Court of Appeal has

decisively pronounced on provisions of s 51 of CLAA. It has been decided that the question of whether the accused's constitutional right to a fair trial has been breached at the sentencing phase, can only be answered after 'a vigilant examination of the relevant circumstances'. See *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

[16] In this regard in *Legoa* at para 21, the following was asserted:

> "The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and maybe insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."

[17] A distinction must be drawn between matters where an accused has exercised his/her right to have a legal representative and instances where an accused has by choice made an informed election to proceed in person.

[18] In *Director of Public Prosecutions, KwaZulu-Natal v Pillay* (706/2022) [2023] ZASCA 105 (23 June 2023), this distinction in our law was exploited to good effect where the following was held:

> "[32] Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person's constitutional rights are protected. But that general obligation is to be

carried out in the light of the accused having exercised the right to legal representation. Section 25(3)(f) of the Constitution confers upon an accused person the right to choose and be represented by a legal practitioner. In S v Mpongoshe this Court held that section 73(2) of the CPA confers upon an accused the wider right to be represented. In that case it was held that the right to legal representation encompassed the right to have a plea tendered vicariously by the legal representative.

[33] In Beyers v Director of Public Prosecutions, Western Cape, it was held that:

'The idea of being represented by a legal adviser cannot simply mean having somebody next to you to speak on your behalf. Representation entails that the legal adviser will act in your best interests, will represent you, will say everything that need be said in your favour, and will call such evidence as is justified by the circumstances in order to put the best case possible before the court in your defence. S v Mpongoshe 1980 (4) SA 593 (A) at 603B-C.

[34] 'Representation' in this sense is not confined to the conduct of the trial. A legal representative, who is engaged to represent an accused, is obliged to act in the best interests of their client. That means, inter alia, to act according to the highest standards of professional ethics; to advise the client of their rights fully and properly; and to guide and advise the client in exercising of those rights. The legal representative must prepare thoroughly and properly on all aspects of the case. This includes advising the client about s 93 ter (1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors.

[35] A presiding officer must, in the first instance, respect an accused person's choice of legal representative and must defer to the legal representative's conduct of the matter. These are general principles which are well established. They inform our adversarial system of trial adjudication. It is against this backdrop that the duties of a trial magistrate must be viewed. Where an accused is represented, it must be established that the

representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s 93ter(1). As indicated in Gayiya, the presiding officer must take the lead in doing so at a stage before any evidence is led. See R v Matonsi 1958 (2) SA 450 (A) at 456; R v Baartman and Others 1960 (3) SA 535 at 538; S v Mkhize; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 (A) at 874E; S v Louw 1990 (3) SA 116 (A) at 124B-125E.

[36] The approach regarding the intended reliance upon prescribed minimum sentences as provided by s 51 of Act 105 of 1997, is instructive. In S v Legoa, it was held that the concept of substantive fairness under the Constitution requires that an accused be informed of facts, which the State intends to prove to bring him within the increased sentencing jurisdiction provided by that Act. The court declined to lay down a general rule regarding the form of notice. It held that: 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired will therefore depend upon a vigilant examination of the relevant circumstances.

[37] In S v Kolea, this Court reaffirmed the principle in Legoa. It also endorsed the approach set out by Ponnan JA in a minority judgment in S v Mashinini and Another, where the learned judge stated that the fair trial enquiry is first and foremost a fact-based enquiry. The court in Kolea held that the conclusion to which the majority had come was wrong.

[38] Although we are not here dealing with a fair trial enquiry, compliance with s 93ter (1) of the MCA is no less a fact-based enquiry. In light of this, it is equally undesirable to lay down a general rule regarding what must be done to establish compliance with the section. The set of guidelines proffered in Langalitshoni, strays into this terrain. The requirements are at odds with the notion of a right to legal representation. They are also premised upon a misconception of the nature of the right conferred by s 93ter (1) and the application of principles of waive.' (footnotes omitted)

[19] A vigilant examination of the record provides that the appellant duly represented pleaded guilty, to murder read with the provisions of section 51(1) of the CLAA. Moreover, after the statement in terms of section 112(2) of the CPA was read into the record, the appellant confirmed the content and the correctness thereof. This statement refers to section 51(1) of the CLAA with specificity. In mitigation of sentence, *Adv Raikane* implored the court a *quo* to consider the appellant's personal circumstances as substantial and compelling. This implicitly demonstrates that *Adv Raikane,* and the appellant were completely *au fait* with the prescribed minimum sentence of life imprisonment that found application. To conclude, the complaint that the appellant was exposed to an unfair trial is countenanced by the record.

[20] The court *a quo* 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, namely 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 para 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. "

[21] I now shift focus to address the governing principles that formed the triad.

[22] At the time of sentencing the appellant presented the following personal circumstances. He was forty-one (41) years old, and a first offender. The appellant was previously employed as a Principal Provincial Officer at Department of Transport North West Province, for a period of twenty-one (21) years. The appellant was married and had two (2) children with his wife aged seven (7) and nine (9) years old

respectively. The appellant and his wife were in the process of divorcing. To this end, the appellant was the sole breadwinner and carried the financial commitments due to his wife being unemployed. He was in a relationship with the deceased, with whom he had one child. This relationship had run its course

[23] 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. See *S v Mhlakaza 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. See *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC) at paras 87- 89. There is no underscoring the current proliferation in the high levels of crime, with reference to violent crimes committed against women. The sentiments expressed in *S v Van Staden* (KS21/2016) [2017] ZANCHC 21 at para 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.

[24] The facts in this matter are common cause and have been set out in some detail *supra*. There is an enduring line of cases that deal with gender-based violence and femicide.

[25] In *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) Mohammed CJ said:

"*The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives*."

[26] In *S v Kekana* 2014 JDR 2139 (SCA); (629/2013) [2014] ZASCA 158, para 20 the court held the following:

"*Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."*

[27] In *S v Sejake* (28/2022) [2022] ZAFSHC 266 (16 September 2022) at para 21 the following was posited :

"*The accused gained nothing of worth for the perpetrating and inflicting of this terrible and horrific suffering on the deceased and her family. Gender Based violence, threatens every woman and particularly poor and vulnerable in our society. In our country, it occurs far too frequently that women are violated or murdered at the hands of their partners. The time has come to send a clear message that anyone that perpetrates these crimes against the most vulnerable in our society, does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish perpetrators severely. Communities are outraged and if we fail to take account of that outrage, we risk encouraging the breakdown of law and order and communities taking the law into their own hands."*

"*It is thus important and the duty of the Courts to contribute in our role as the justice system to impose appropriate sentences, particularly where women*

are murdered in the context of their marriages, their relationships and homes. Whilst it is so that you, as the accused, cannot be sacrificed at the altar of deterrence for other would-be offenders, nor can it impose punishment in anger, the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly. If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined. Serious crimes of this nature therefore compel that the objectives of retribution and deterrence weigh more than the objectives of rehabilitation of the offender and accordingly the interests of the accused would recede to the background. S v Rohde (CC43/2017) [2019] ZAWCHC 18 (27 February 2019)."

[28] The deceased was previously in a relationship with the appellant. She then made an election not to continue with same. Notwithstanding her decision, the appellant continued to beleaguer her. Given the unrequited approaches of the appellant, the deceased obtained a protection order. The preamble to the Domestic Violence Act 116 of 1998 reads in part thus:

"*Domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective*."

[29] The material terms of this order were that the appellant was proscribed from entering the deceased's residence and place of employment. Furthermore, the appellant was proscribed from assaulting her. He had threatened L[…] and the deceased prior to the application for the protection order and after. This order did not have any effect on the appellant. The appellant shot the deceased eleven (11) times within the safety of her home. Unsurprisingly, the deceased succumbed to multiple gunshot wounds and passed on the same day. The heinous and callous nature of

this murder cannot be underscored. The consequences are irreversible and will have a detrimental effect on all those affected by the horrendous nature of this crime.

[30] The appellant contended in his section 112(2) statement that he "stood the chance of losing both my wife and my girlfriend. I had a lot of anger and at the time of shooting, my state of mind was that of experiencing rejection, jealousy psychological effect, trauma and financially I was also devasted." Additionally, the appellant contended that prior to the murder of the deceased he consumed 'a few drinks and I was inebriated or drunk.' What can be gleaned from these statements is that preceding the shooting, he acted with diminished criminal capacity. Diminished criminal capacity must be distinguished from diminished criminal responsibility.

[31] It is a trite principle that diminished criminal responsibility is not a defence but squarely relevant to sentencing. *S v Campher,* 1987 (1) SA 940 (A) at 964 C-H and 976 D-E*. S v Laubscher*; 1988 (1) SA 163 (A) at 173 F-G. *S v Smith*; 1990 (1) SACR 130 (A) at 135 B-E. *S v Shapiro*; 1994 (1) SACR 112 (A) at 123C-F. and *S v Ingram*. 1995 (1) SACR 1 (A) at 8D-I.

[32] In of *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) the Supreme Court of Appeal held that:

> '…diminished criminal responsibility is recognised in our law, particularly its relevance to sentence. Properly understood, this state of mind can be stated to be the diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of that wrongfulness.'

[33] In *S v Mnisi*, the Supreme Court of Appeal expounded on *Director of Public Prosecutions, Transvaal v Venter* as follows:

> "[4] The appellant does not seek to rely upon the defence of temporary non-pathological criminal incapacity (See *S v Laubscher* 1988 (1) SA 163 (A); S v Calitz 1990 (1) SACR 119 (A); S v Wiide 1990 (1) SACR 561 (A); S v Kalogoropoulos 1993 (1) SACR 12 (A); S v Potgieter 1994 (1) SACR 61 (A); S

v Kensley 1995 (1) SACR 646 (A); S v Di Blasi 1996 (1) SACR 1 (A); S v Cunningham 1996 (1) SACR 631 (A); S v Henry 1999 (1) SACR 13 (SCA); S v Francis 1999 (1) SACR 650 (SCA); S v Kok 2001 (2) SACR 106 (SCA)) but rather upon diminished responsibility which is not a defence but is relevant to the question of sentence. The former relates to a lack of criminal capacity arising from a non-pathological cause which is of a temporary nature whereas the latter pre-supposes criminal capacity but reduces culpability. The following cases are examples in this court where the fact that the accused was found to have acted with diminished responsibility warranted the imposition of a less severe punishment: *S v Campher, S v Laubscher*; *S v Smith*; *S v Shapiro*; and *S v Ingram*.

[5] Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence, and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self control."

[34] In *Van der Westhuizen v S* the Supreme Court of Appeal again in the context of diminished criminal responsibility remarked that:

'[31] … The effect of the admissions is that the appellant acknowledged criminal responsibility because the admissions are inconsistent with a defence of criminal incapacity, whether non-pathological or caused by mental illness or mental defect ─ although the admissions are not inconsistent with diminished

responsibility, which is relevant to mitigation of sentence. The distinction is explained by Prof Snyman[1] in comparing s 78(1)[2] of the Criminal Procedure Act, which excludes criminal responsibility caused by mental illness or mental defect, with s 78(7),[3] which allows a court to take into account diminished responsibility resulting from either cause in sentencing the accused. The learned author, with reference to s 78(7), says:

'This subsection confirms that the borderline between criminal capacity and criminal non-capacity is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation. He will then, of course, not succeed in a defence of mental illness in terms of section 78(1). If it appears that, despite his criminal capacity, he finds it more difficult than a normal person to act in accordance with his appreciation of right and wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.'

The same distinction applies where mental illness is not present, as appears from a number of judgments of this court eg *S v Smith*,[4] *S v Shapiro*,[5] and *S v Ingram*.[6] According to these cases, the fact that the defence of temporary non-pathological criminal incapacity fails, or is not raised, does not have the

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[1] *Criminal Law* 5 ed (2008) para 12 at 176-7.

[2] 'A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable—

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.'

[3] 'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

[4] *S v Smith* 1990 (1) SACR 130 (A) at 135b-e.

[5] *S v Shapiro* 1994 (1) SACR 112 (A) at 123c-f.

[6] *S v Ingram* 1995 (1) SACR 1 (A) at 8d-i.

consequence that the accused must be sentenced as if he/she was acting normally. The contrary is the case. A person who acted with diminished responsibility is guilty, but his/her conduct is morally less reprehensible because the criminal act was performed when the accused did not fully appreciate the wrongfulness of the act or was not fully able to act in accordance with an appreciation of such wrongfulness."

[35] As the authorities postulate the presence of diminished criminal responsibility is determined on the conspectus of the evidence. Whilst it was not obligatory on the appellant to have adduced expert evidence, his mere say so may have been sufficient with the *proviso* that a proper factual substratum is laid, which gives rise to the reasonable possibility that the appellant so acted. When such evidence is found to exist, it must be meticulously analysed and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively.

[36] The State led evidence of L[…] to successfully counter the averment of the appellant that he was inebriated. Notwithstanding same, the factors relevant to the appellant's diminished responsibility were not vehemently contested in the court a *quo. Adv Molefe* for the respondent elected to rely on her written heads before this Court, which failed to pertinently address the legal question of diminished criminal responsibility which is relevant to sentence *in casu.*

[37] In my view, there are no facts to find that the appellant acted with diminished criminal responsibility. It must be underscored that the appellant was convicted of premediated murder which by implication excludes any notion of diminished criminal responsibility. The appellant made his intention manifest prior to the application of a protection order by the deceased that he intended to kill her. Notwithstanding the granting of the protection order, he remained unyielding. Prior to shooting L[…], the appellant boasted about forewarning her. After shooting L[…] and the deceased the appellant departed the scene.

[38] The appellant failed to testify during the trial or in mitigation of sentence. This would have provided an ideal platform to present a factual basis which underscores his belated reliance on diminished criminal responsibility. Mere bald

unsubstantiated assertions are wholly inadequate to sustain diminished criminal responsibility. It cannot be found that the appellant acted with diminished criminal responsibility. The appellant fully appreciated the wrongfulness of his act and was able to act in accordance with an appreciation of such wrongfulness.

[39] On a full conspectus of the mitigating and aggravating features there is nothing substantial nor compelling about the personal circumstances of the appellant to justify a deviation from the mandated sentence.

Order

[40] In the premises I make the following order.

The appeal against sentence is dismissed.

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

I agree

_____

S MFENYANA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG.

I, agree

_____

N MOREI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG.

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