

SOUTH AFRICA / JUDGMENT

Maneli v S - Appeal Judgment (CA&R 04/2012) [2013] ZAECBHC 5 (27 May 2013)

[2013] ZAECBHC 5

COURT

Eastern Cape High Court, Bhisho

BEFORE

Mageza, JM Roberson, R Griffiths

CASE / FILE NUMBER

CA&R 04/2012

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – BISHO

CASE NO: CA&R 04/2012

Heard: 17 May 2013

Delivered: 27 May 2013

In the matter between:

THULANI ROZA MANELI APPELLANT And THE STATE RESPONDENT

Nature of matter: Appeal judgment; 12 year lapse between date of appellant's sentencing pursuant to conviction; appeal successful

Order: The appeal in respect of the convictions on Counts 3 and 4 is upheld. The convictions and sentences on counts 3 and 4 are set aside.

2. The appeal in respect of the convictions on counts 1, 2 and 15 is dismissed.
3. The appeal in respect of the sentences on counts 1 and 2 is upheld. The sentences of life imprisonment and 15 years' imprisonment respectively are set aside and substituted as follows:

"Count 1: The accused is sentenced to eighteen

(18) years' imprisonment.

Count 2: The accused is sentenced to ten (10) years' imprisonment. The sentences on counts 1, 2 and 15 are to run concurrently."

APPEAL JUDGMENT

MAGEZA AJ

On Friday 17 May 2013, the appeal herein was heard by the Full Bench of this Court and in the interests of justice and for reasons more fully set out hereunder, the Order outlined herein was made.

The Order issued was the following:

“1. The appeal in respect of the convictions on Counts 3 and 4 is upheld. The convictions and sentences on counts 3 and 4 are set aside.

Count 2: The accused is sentenced to ten (10) years’ imprisonment.

The sentences on counts 1, 2 and 15 are to run concurrently.”

4. The sentences are antedated to 5 February 2001.”

Unconscionable delays in the appeal.

- [1] There is a distressing feature in this appeal in that, between the date of appellant’s sentencing pursuant to conviction and the hearing of the appeal, a period of some 12 years has elapsed. Despite appellant having been found guilty and sentenced in February 2001, the application for leave to appeal was only issued out of this Court in March of 2012 and leave to appeal finally granted in this Court on 30 November 2012.
- [2] In his affidavit in support of the consequent application for condonation, appellant details the extensive efforts he embarked on to secure the assistance of the Legal Aid Board since commencing serving his sentence, this from as long ago as February 2001. He had the misfortune of having his first and timeous application misplaced and was advised to complete a second in 2004, but was thereafter informed that he had applied later than 6 months after the date of his sentence. There is a catalogue of names of persons associated with the Board’s offices stretching between East London, Zwelitsha and Port Elizabeth, all of whom presented him thereafter with various ‘reasons’ why he could not be assisted, the often repeated reason being, late lodgement and/or institutional budget constraints.
- [3] In exasperation, appellant took the matter up with the Human Rights Commission who, on 18 April 2006, advised him to contact the National office of the Legal Aid Board. He did so and his application was for once successful and a legal representative was appointed by the Board. The representative informed him that he was awaiting a copy of a transcript of the record but that this would require appellant to pay some R18 000.00 (eighteen thousand rands) for the said transcript. Having communicated his inability to raise this sum, more difficulties arose after which he was once more informed that he had been allocated yet another new legal representative in April 2007. Sadly he never heard anything further from the Board and in November 2008 he approached the Equality Court but in March 2009, his matter was struck-off off the roll on the basis that, that Court had no jurisdiction over the

said matter.

- [4] No doubt in resigned despair, he finally approached one of the now retired Judges of this Division who assisted by galvanising some of this Court's administrative staff to assist, after which the current legal advisor was appointed by the Legal Aid Board.
- [5] This delay is enormously regrettable, singularly unusual and constitutes a disturbing systemic failure of procedural and substantive justice. The definition of Justice must never vary from one individual to another depending on their economic condition. The Legal Aid Board serves to bridge this ever yawning gap in our society and has commendably over the last fifteen years or so, been a sterling success. This instance in my estimation and experience constitutes an undeserved blemish.
- [6] The proverb 'Justice delayed is justice denied' is no mere cliché and our Courts have repeatedly pronounced that the Constitutional obligations of those representing our first-world institutions serving those who are (at all stages) arrested, charged and sentenced must anxiously and diligently exhort punctual compliance. Since 27 April 1994, all criminal trials and appeals are expected to be conducted according to "notions of basic fairness and justice" – Section 35(3) of the Constitution; *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC). Appellant's right to appeal or review to a higher Court is governed by section 35(3)(o) of the Constitution. Regrettably, he was not afforded timely assistance and this has resulted in him not having had the benefit of an earlier adequate re-appraisal of his case. – See *Qhinga and Others v State* 2011 (9) BCLR 980 (CC).

The appeal.

- [7] Appellant was one of five accused (aged between 16 and 18) first arraigned for trial on 23 October 2000 in the Bisho High Court on some 17 counts including 5 counts of murder, 2 counts of attempted murder, 6 counts of robbery with aggravating circumstances, 3 counts of unlawful possession of firearms and 1 count of pointing a firearm. All these offences were alleged in the Indictment to have been committed at NU1 and NU2 in Mdantsane Township at several different taverns over a period of some 20 days between 28 November and 17 December 1998. In all instances bar one, the deceased were shot at shebeens to rob them of firearms.
- [8] The accused pleaded not guilty to all the charges and after conclusion of the State's case, all the accused applied for their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977. Two (accused numbers 1 and 3) were successful in their application and those in respect of three of the accused, inclusive of appellant, were dismissed by the trial Judge. Appellant who was legally represented throughout the trial, elected to thereafter close his case without testifying. He was in due course found guilty by the trial Judge on two counts of murder; two of robbery with aggravating circumstances; and on one count of unlawful possession of a firearm. He was sentenced to life imprisonment on the murder convictions; 15 years on the robbery charges and 2 years in respect of the unlawful possession of a firearm. He now appeals against the convictions and sentences imposed by the trial Court.

- [9] Lightening the appellant's burden somewhat, the Respondent represented by Mrs Tokota before us conceded that the murder and robbery convictions in counts 3 and 4 are not supported by the available evidence and are liable to being set aside. This court agrees.
- [10] The sole witness to implicate appellant directly on counts 1 and 2 was an accomplice and section 204 witness, Mr Buntu George, who testified that he personally handed over the offending firearm on that day to appellant at a shebeen (tavern) named Ma Ellie in NU2 Mdantsane on 28 November 1998 and had thereafter accompanied the appellant to the site where, according to him, appellant had proceeded to shoot and murder the deceased. They then took the deceased's firearm. I will revert to the testimony of Buntu George.
- [11] A summary of counsel for appellant's submissions before us in respect of count 1 and 2 is the following, that:

The court a quo misdirected itself in the following regards:

- a. The court erred in relying on the evidence of the section 204 witness.
- b. The court failed to give reasons why it found the evidence of the witness credible without furnishing reasons for the

conclusion

reached.

- c. The admission of hearsay evidence was fatal to the State's case since hearsay evidence is highly prejudicial where it goes towards proof of guilt and in this case should have been admitted only if there were compelling reasons.
- d. The evidence being hearsay, no reasonable court could have convicted thereon and same could not constitute proof beyond a reasonable doubt. As such, it was not necessary for the appellant to have testified in his defence. An inference of guilt could thus not in the circumstances have been justified.
- e. The conviction in respect of the possession, based on a pointing out, should have been the subject of a trial within a trial.

[12] Buntu George was warned in terms of section 204 of the Criminal Procedure Act 51 of 1977 (the Act) as an accomplice witness. On his own admission, he was implicated in the (Count 1 and 2) murder and robbery charges relating to deceased Mvuyisi Qegu's murder on the evening of 28 November 1998, for which appellant was found guilty by the trial Judge.

[13] He testified that he grew up with accused number 1 in NU2 Mdantsane. He went to circumcision school with accused number 3. Accused number 5 (appellant) lived at accused number 3's home in NU2. On 28 November 1998 at about 21h00, accused numbers 2 to 5 found him at a shebeen known as Ma Ellie in NU2. He was there with two of his friends Qavi and Thembinkosi. He does not drink liquor and his two friends were seated inside the

shebeen drinking whilst he was “in front of the shebeen” and appellant had come to him and told him he had heard that he had a firearm with him to which he responded by telling appellant that it belonged to his friend, Thembinkosi. Appellant had then approached Thembinkosi inside the house and Thembinkosi thereafter came to him (Buntu) and instructed him to hand the firearm to appellant. Thembinkosi also instructed him to accompany appellant and to bring back the firearm once the ‘job’ was completed. He did not know what this ‘job’ was, but went along nonetheless. He admitted to being aware that whatever ‘job’ this was, it would needless to say entail the undertaking of a criminal act. He accompanied accused 2 to 5 and as they were walking along the street, not far from Ma Ellie, he saw a young man carrying an empty bottle in his hand in the vicinity of the gate of another house also situate close to Ma Ellie. It appeared

that the man was about to enter the gate of the said house. He said appellant cocked the firearm he had handed to him, approached this man, pointed the firearm at him and pulled the trigger. The man fell. Appellant, accused number 3 and himself approached the dying man and accused number 3 removed a gun from the inside pocket of the man’s jacket and they fled the scene. Later appellant handed Thembinkosi’s firearm back to him. The deceased it later turned out, was one Mvuyisi Qegu.

[14] Cross-examined (briefly) first by Miss Ntobe for accused number 3, she put to the witness that accused number 3’s version was that he, the witness, was in fact the one who shot this man, a suggestion he denied. It was further put by Miss Ntobe to the witness that he had arrived at the shebeen in the company of accused number 4 and that when he left, he left with all the accused, they met the deceased outside and the witness had then shot the deceased. This he denied. Miss Ntobe put it to the witness that he is the one who took the deceased’s firearm. This the witness also disputed.

[15] Mr Sigabi for appellant in cross-examination put it to the witness that according to his instructions, he had been drinking contrary to his assertion that he did not drink. The witness disputed this assertion. Mr Sigabi then questioned the witness on a discrepancy between a police statement he had deposed to in which he had said appellant had grabbed the firearm from him. He denied having said so. He admitted to having signed the statement but denied that he said appellant had forcefully taken the same from him. It later emerged that the statement had not been commissioned.

Having testified that Thembinkosi had instructed him to hand over the firearm, Mr Sigabi proceeded to question the witness as follows:

“Mr Sigabi- Sorry, when you said accused NO.5 borrowed the gun you said it belonged to Thembinkosi right? --- Yes.

And after that you approached Thembinkosi for permission to hand over the gun? --- Yes I went to him.

And then you handed over the firearm? --- Yes I gave him the gun.

...

And who else was present when you handed it over to accused No. 5 the firearm? --- Thembinkosi was present Qavi was also present accused No's 2, 3 and 4 were also present.

And you did not know what they were going to do with the firearm? --- No.

Now after handing over the firearm let me put it this way you were never informed what was to be done with this firearm, at no stage were you ever informed as what was going to be done with this firearm? --- Thembinkosi said they were going to do a job around there.

And you said you left with accused No.5 after handing over the firearm? --- Yes.

And later,

"You knew these people were going to commit a crime whatever it was? --- Yes I knew that they were going to do something untoward.

Accused No.5 will come and tell this Court that at all times you were in possession of this firearm he never took possession of it at any stage from you? --- No he is telling lies."

At no stage during this exchange or immediately thereafter did Mr Sigabi object to the exchange between the witness and Thembinkosi as amounting to hearsay. The sole purpose of his cross-examination was to show that the witness's evidence was simply improbable and possibly a fabrication. Aside from the foregoing, the cross-examination was uneventful and from the record, elicited little else to trouble the witness.

[16] Mr Sigabi went on to confirm that Thembinkosi was indeed with the witness on that day when he put this version to the witness:

"My instructions from accused No.5 is that he first met you on that day in the street you in the company of Mhlankosi who is accused No.2 --- And with you there was also Qavi and Thembinkosi --- Yes of course in my company were Qavi and Thembinkosi."

Finally, Mr Sigabi proceeded to put to the witness that it was in fact him who had shot the deceased and that he had thereafter taken the deceased's firearm and handed it to one Mzimazi Zongelwa. This Mzimasi Zongelwa according to appellant's instructions to Mr Sigabi had moved to Cape Town. This last suggestion made by counsel at the trial, appears strange in light of the fact that the deceased's firearm was found by the investigating officer Sergeant Mqomboti in appellant's own possession on 17 December 1998.

[17] Sergeant Vusumzi Mqomboti testified that on 17 December 1998 he visited the appellant in prison where he was held in connection with a different matter and there he questioned appellant about the whereabouts of the deceased Mvuyisi Qeku's fire-arm. Appellant voluntarily offered to point out the firearm and informed the investigating officer that the firearm was stored at his home. He booked appellant out of prison and went with him to his home and on arrival there, appellant furnished him explicit and voluntary instructions as to where in the house the firearm was hidden. He found it with ease hidden under some

clothing in a wardrobe. This evidence was not challenged by the defence.

[18] The State closed its case and the trial Court having dismissed his application for a discharge in terms of section 174 of the Act, appellant, still represented by Mr Sigabi, elected to close his case without challenging the evidence of the accomplice witness, and without testifying to the version suggested in cross-examination that it was in fact Buntu George who had shot the deceased and taken his firearm. In this sense the evidence of Buntu George and Sergeant Mqombothi against appellant remained wholly unchallenged. The Court a quo did not have the benefit of hearing appellant testify in his own defence. Despite bold and robust suggestions being put by counsel to Buntu George that he shot the deceased Mvuyisi Qegu and took his firearm as

he lay on the ground, appellant waived the opportunity to share these details with the Court under oath and have the veracity thereof

tested through cross-examination.

[19] The judgment of the Court a quo does not dwell on a full examination of the credibility of Buntu George and this may well have been so in light of the fact that his evidence stood alone and there was little else that the learned Judge could have tested this evidence against. The Court's judgment is detailed in the manner in which the evidence of all the witnesses was restated and covered. Having analysed the available evidence implicating the remaining accused, the Court found that:

"The pattern of analysis of the evidence in the case of Accused No's 3 and 5 is the same as I have done with accused No. 1. I will therefore not make a detailed analysis of their cases as I have done in the case of Accused No.1. Accused No's 3 and 5 were implicated in counts one and two by the accomplice witness. The evidence of the accomplice witness is further corroborated by the finding of the deceased firearm in the possession of Accused No.5. It is clear from the evidence that Accused No's 3 and 5 shared a common purpose in the commission of the offences referred to in counts one and two."

[20] In *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645 e-f, the Court set out the approach, on appeal, to a trial court's findings of fact in the following terms:

"Before considering the submissions it would be as well to recall yet again that there are well – established principles governing the hearing of appeals against findings of facts. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary."

The three complaints: Evidence of Accomplice; Credibility and Hearsay.

Court's approach to evidence of accomplice.

[21] The reasons for caution regarding such evidence was eloquently explained by Holmes JA in *S v HLAPEZULA AND OTHERS* 1965 (4) SA 439 (A) at 440D as follows:-

“First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit”.

Relevant for us in the current matter is what Schreiner JA said in *R v Ncanana* 1948 (4) SA 399 (A) at p 405 - 406:

“The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or if the trier be a jury, that it should be warned of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth... The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.” (my emphasis)

See also

- *S v Zitha and Others* 1965 (1) SA 166 (E) at p.170 - and - *S v Avon Bottle Store (Pty) Ltd and Others* 1963 (2) SA 389 (A) which in the headnote at 390 reads -

“But this so-called 'cautionary rule' requires no more than an appreciation by the trier of fact of the risk of false incrimination of an accused by an accomplice, a risk which will be reduced by the presence of certain features, such as corroboration of the accomplice implicating the accused. Moreover the absence of such features will not by itself invalidate a conviction on accomplice evidence if the trier of fact appreciated the peculiar danger inherent in accomplice evidence, and it is clear that he accepted the evidence of the accomplice and rejected that of the accused because the merits of the former as a witness and the demerits of the latter were beyond question.”

The Court a quo was correct in convicting on the evidence of Buntu George. From the record, his cross-examination yielded little that caused the trial Judge discomfort. To a large degree the witness was only called upon to repeat what he had already testified to. The uncommissioned police statement contained little else in dispute other than what is referred to herein. Appellant freely and voluntarily offered on the available and accepted evidence to point out the deceased's firearm to the investigating officer. No objection was raised by the defence when the investigating officer tendered the evidence of the pointing out. There was no dispute that the firearm had belonged to the deceased. Appellant must have been alive to the devastating consequences of such a pointing out. To compound his problems appellant, perilously as it turned out, decided not to testify in his own defence. These attendant factors reduced the risk of a wrong conviction.

The credibility findings.

[22] The second ground of appeal is that the learned Judge failed to give reasons why he found the evidence of the witness credible without furnishing reasons for the conclusion reached. The judgment of the Court a quo spans some eighteen pages and covers an evaluation of the evidence of each of the thirteen or so witnesses called by the State.

Only the accomplice and investigating officer's testimony was relevant in respect of the charges that led to appellant's

conviction. The learned Judge traversed the evidence of these two witnesses. He admittedly made no overt pronouncement on the credibility of the section 204 witness. He may well have found it unnecessary to do so in light of the corroboration and the fact of there being no evidence to gainsay the evidence of the witness. Save for the one contradiction pointed out in cross-examination between his evidence and that portion contained in his police statement, there was little else yielded by and revealing from the

cross-examination of the witness by Mr Singaphi. The trial Judge certainly traversed the available evidence and did consider the

probabilities in light of what he had before him. Indeed - "an assessment of evidence on the basis of demeanour ... without regard to the probabilities, (would) constitute a misdirection". – See *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005(5) SA 339 (SCA) at para 14.

The hearsay complaint.

[23] It is the duty of a trial Judge to keep inadmissible evidence out, and not to listen passively as the record is turned into a papery sump of 'evidence'. – *S v Ramavhale* 1996 (1) SACR 639 (A).

The present matter is however not such a case. As outlined above, the defence cross-examined the witness at some length on his evidence concerning what Thembinkosi instructed him to do. Thembinkosi instructed him to accompany the appellant and to ensure that he brought the firearm back once the 'job' (as he put it) was completed. Needless to say these statements are material only in so far as to how the firearm came to be in the possession of the appellant. The crucial and direct evidence implicating the appellant in the death of the deceased emanates solely from Buntu George who was available and cross-examined by appellant's counsel. The witness testified that he himself is the person who handed over the firearm to appellant. He saw and was with appellant when, he says, appellant shot the deceased. The fact that the firearm belonged to Thembinkosi and that he was instructed by him to hand over the firearm is secondary and, in my view, is a matter of little probative value and depends primarily on the credibility of the witness Buntu George and less so on Thembinkosi. The exchange relating to this testimony is set out herein and Mr Singaphi cross-examined the witness thereon. There was also no formal objection to the introduction thereof during the trial. This appears

to me to accord with the view that this piece of evidence was not viewed in any way as introducing prejudicial hearsay material that needed to be tested by calling Thembinkosi.

Appellant's failure to testify.

[24] The position with regard to a failure to rebut prima facie evidence before a court has been extensively dealt with by our courts for some time. The accused is a competent but not compellable witness. He or she can refuse to testify and this right is now entrenched in terms of section 35(1) of the Constitution. The decision in *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) affirms this right to silence. However, if a witness has given evidence directly implicating the accused -

"... the accused can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject credible evidence which the accused himself has chosen not to deny..." See The South African Law of Evidence – 2nd Edition, Zeffert and Paizes at page 134 (Chapter 5).

[25] Moseneke J remarked as follows in *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC) para 56:

"The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the Court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will, of course, depend on the quality of the evidence and the weight given to that evidence by the Court."

Sentence

[26] The Indictment made no reference to the applicable minimum sentences set out in section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997. The trial Judge passed a sentence of life imprisonment in respect of the murder (section 51(1) read with Part 1 of Schedule) and 15 years imprisonment in respect of the robbery (section 51(2) read with Part 2 of Schedule), aggravating circumstances being present. Although this is a material misdirection, the matter is one of substance and not form. In *S v Legoa* 2003 (1) SACR 13 (SCA) ([2002] 4 All SA

373) paras 20 and 21, Cameron JA stated:

"Under the common-law it was (therefore) desirable that the charge sheet should set out the facts the state intended to prove in order to bring the accused within the sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force. The Bill of Rights specifies that every accused has a right to a fair trial... But under the constitutional dispensation it can certainly be no less desirable than under the common-law that the facts the state intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet. 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.”

Similarly in *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12, Mpati JA commented:

“The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the state intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it brought to the attention of the accused before the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given notice of the state’s intention to enable him to conduct his defence properly.”

Finally in *S v Makatu* 2006

(2) SACR 582 (SCA) para 7, Lewis JA affirmed that:

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

[27] The sentence handed down does not take into account the substantial and compelling circumstances evident from a perusal of the record and the pre-sentence report admitted into evidence. Mrs Tokota for the Respondent agreed with this view and conceded the excessiveness thereof. The appellant was a first offender at the time of his conviction. He was only 18 years of age when the offences were committed. He spent two years in prison awaiting trial from December 1998 to February 2001 when his trial was concluded. The pre-sentence report states that his parents were not married and his paternal family looked after him only between 1982 and 1988. He dropped out of school in standard five, months before these offences were committed. He is described as an extrovert who is easily influenced by his peers. Although he takes general responsibility for the offences he does not overtly take ownership and responsibility for the same. He smoked dagga frequently and this could be related to his strange behavioural patterns. We are also informed, and we accept this, that appellant has since his incarceration completed a Diploma in law with Oxbridge College whilst in prison.

[28] Navsa JA commented in *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* 2009 (2) SACR 361 (SCA) at para 22. That:

“Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter

sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation. Pre and post Malgas the essential question is whether the sentence imposed is in all the circumstances, just.”

[29] Courts will always take into account that the foundations of proper sentencing continue to require the traditional cautions be observed. - See *S v Khumalo* 1973 (3) SA 697 (A); *S v Zinn* 1969 (2) SA 537 (A); *S v Qamata* 1997 (1) SACR 479 (E).

In addition what is also paramount is the importance of the individualisation of sentence. – See *S v Blank* 1995 (1) SACR 62 (A) at 70f-71c.

[30] In a recent unreported decision of the Supreme Court of Appeal, the value of sentences cumulatively in excess of 25 years imposed by trial Courts was again considered. - *Zondo v S* (627/12) [2012] ZASCA 51 (28 March 2013). Citing *Harms JA* in *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519 the Court commented that the learned Judge in dealing with the element of deterrence, noted that although it remained, according to judicial precedent, an important consideration when imposing sentence, its effectiveness in deterring others from committing the same offences was unclear. It further considered that ‘as far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length’ before going on to state that a lengthy term of imprisonment would serve none of the purposes of punishment and would simply serve to appease public opinion. He pointed out that sentences of imprisonment ought to be realistic and should not be open to interpretation that they are designed for public consumption. See also: *S v Skenjana* 1985 (3) SA (A) at 55 C; *S v Silaule* 1999 (2) SACR 102 (SCA) at 106g; *S v Chavulla* 2001 (2) SACR 681 (SCA) para 22 and *S v Matlala* 2003 (1) SACR 80 (SCA).

[31] It is, in my view important to take into account that whilst the offences for which appellant was convicted are most serious and were carried out in a shockingly callous manner, these took place in a short period between commission and arrest. The evidence on record is that the investigating officer Sergeant Mqombothi approached him in prison and on enquiry as to the whereabouts of deceased’s firearm, the appellant co-operated fully and accompanied Sergeant Mqombothi to his own home where he took him directly to where he had concealed the weapon. He admitted that it was that of the deceased, thereby bringing his own involvement to a close. There is no prior history of criminal disposition and he was too young to be regarded as a hardened criminal but possessed instead, a character lending itself to influence by his peers. He does have a family to go back to and with a Diploma in law (no doubt spurred by an effort to make sense of his existential predicament) all

indications are that he is bright, full of warm promise, and could with inspiration achieve more and be a model citizen and role model to others in the community from

within which he emanates.

[32] Taking all the foregoing into account, the above order was made on 17 May 2013.

ACTING JUDGE OF THE HIGH COURT

I AGREE

JM ROBERSON

JUDGE OF THE HIGH COURT

R GRIFFITHS

JUDGE OF THE COURT

FOR APPELLANT: MR STAMPER FOR THE STATE: MRS TOKOTA

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/maneli-v-s-unknown-topic-aecbhc-2013>

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