
SOUTH AFRICA / JUDGMENT

Ngqola v S (CA&R 30/2018) [2019] ZAECHGC 45 (16 April 2019)

[2019] ZAECHGC 45

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan, Bloem

CASE / FILE NUMBER

CA&R 30/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)

Case

No: CA&R 30/2018

Date heard: 06 March 2019

Date delivered: 16 April
2019

In

the matter between:

LELETHU
NIKITHA NGQOLA
Appellant
and
THE
STATE
Respondent

JUDGMENT

RUGUNANAN, AJ

- [1] The appellant appeared in the regional court in Mdantsane on charges of murder and attempted murder. He was acquitted on the count of attempted murder but convicted on the count of murder for which he was sentenced to 18 years' imprisonment. With the leave of the trial court, the appeal to this court is against the conviction and sentence on the count of murder.
- [2] The charge against the appellant was that on 13 July 2013 he unlawfully and intentionally killed Sisanda Maku (hereinafter "the deceased") by shooting her with a gun. The charge incorporated reference to the sentence provisions of the Criminal Law Amendment Act ("the Act").[1]
- [3] At the commencement of the appeal Mr Stamper, who appeared for the appellant, moved an application for an order reinstating the appeal and granting condonation for the appellant's failure to have filed a Notice of Appeal. The appeal was previously struck from the roll of this court on 16 May 2018 because the notice was not included in the record. With good cause being shown and absent opposition to the application by Mr Sinclair, who appeared for the respondent, this

court granted an order reinstating the appeal and condoning the late filing of the Notice of Appeal.

- [4] It is undisputed that the appellant shot and killed the deceased. The central issue is whether the appellant intentionally shot and killed the deceased or whether his firearm accidentally discharged. The appellant's case is that the firearm was accidentally discharged.

Summary of evidence for the state

- [5] At about 9 o'clock of the night in question, Mncebisi Nonambane arrived at his house in Sweetwaters, King Willamstown. He commenced unpacking sound equipment. While inside the house he heard two gunshots fired in the street. He went outside. From a distance of about 12 or 13 metres he saw a male and a female. He did not see anyone else in the street. According to Nonambane the pair, whom it is common cause were the deceased and the appellant, were having an argument outside a white Opel Corsa "bakkie" at the driver's side. He believed that they were arguing because the deceased was not speaking softly. Amidst interruptions from the appellant, he overheard the deceased trying to explain to the appellant about the people that were in her company. The deceased was standing next to the appellant who held a firearm in his right hand.

The firearm was a revolver. Nonambane could see what was happening because there was a street light not too far off. While still giving her explanation, the appellant shot the deceased in the head. Nonambane observed that the firearm was pointed downward at the deceased's head

because she was shorter than the appellant. After the shooting, the appellant looked around as if to ascertain if there were onlookers who might have seen him. Fearing that he could be spotted by the appellant, Nonambane hastened back into his house. From there he saw the appellant placing the deceased into the bakkie and driving off.

[6] Thembani Booï attended a social function in Sweetwaters. He was in the company of several other persons, among them the deceased. As for his state of sobriety he testified that he consumed “mildly”.

At some point in time the deceased announced that her boyfriend (the appellant) was on his way to fetch her and that she needed to walk outside to meet him somewhere in the street. The deceased asked one of her friends, a female named Thobalalisa, to accompany her along the way. According to Booï, Thobalalisa requested her brother Murwena to accompany her and the deceased. The deceased did not agree that Murwena accompanies them because she characterised her boyfriend as a jealous person. Despite this disclosure, Booï accompanied the deceased along with Thobalalisa and another person named Siya. Siya is a male person younger than Murwena. At some stage during the walk, Thobalalisa turned back and so did Siya, leaving Booï and the deceased to continue walking. A motor vehicle with flashing hazard lights approached from the opposite direction. On seeing this the deceased told Booï to turn back. He said he did not do so because Sweetwater is a “mischievous” place and that he also intended asking the appellant to give him a lift. He persisted with this despite the deceased telling him that the bakkie had insufficient space for him. Booï said he observed the appellant lean over to the passenger side of the vehicle as if reaching for something. He saw the appellant extend his arm out of the driver’s side window and fire a gunshot. The appellant exited the vehicle and went behind it. From there he proceeded to its passenger’s side and pointed the firearm in their direction. The deceased reacted by saying “No baby, this is a friend of Thobalalisa” whereupon the appellant fired a second gunshot in their direction approximately 10 meters away. He stated that “the deceased ran to hold” the appellant, that “they scuffled”, and he (Booï) ran away. He heard the deceased screaming at the appellant urging him to stop what he was doing. He also heard a third gunshot being fired. He did not go back to the scene. He returned to the house where the function was held. He learnt a bit later that the deceased was shot.

[7] Nomawethu Mdleleni and Zamuxolo Nqwelo testified on behalf of the state. Mdleleni is also a resident of Sweetwaters and while at home on the night in question she heard gunshots. Upon going outside to investigate she observed several people and learnt that a person had been shot. She testified that she observed a male person unknown to her, carrying a female person and placing her inside a bakkie. This vehicle was then driven straight up the road and after a short while

it came back and passed the scene of the shooting. She stated that she got into her own vehicle and followed the bakkie but at some stage lost it when it headed into Zwelitsha. She then decided to go to the police station to make a report.

- [8] Nqwelo testified that he was travelling to Sweetwaters in a motor vehicle driven by his female companion when they encountered a male person dragging a female person alongside a white bakkie. Upon approaching to offer assistance, the male person shouted that they move on. On being cross-examined, he could not clarify what he meant by dragging. He also stated that he did not observe any other people at the scene. Commenting further he stated that visibility at the scene was not clear. It was dark and whatever he observed was through the headlights of the vehicle he had been travelling in.
- [9] A further witness for the state was Dr Dominique John, a medical practitioner employed as a forensic pathologist in the Department of Health since 1992. His professional qualifications and experience were not disputed, nor were the contents of his report on the findings of the post-mortem examination conducted on the deceased on 15 July 2013. This report was handed in by agreement between the parties. It is relevant only to mention (i) that Dr John concluded that the cause of the deceased's death was a "gunshot injury to head", and (ii) the mechanism of the injury involved a "near contact" gunshot wound approximating 5 to 8 centimetres away from the deceased's head. Dr John opined that the projectile tracked from the top region of the left side of the deceased's head to the right side inclining slightly downwards which meant that the firearm was pointed from the top left side of the deceased's head. On the issue concerning the mechanism of the injury it might as well be mentioned that Lieutenant Olivier, who has expertise in wound ballistics and distance determination (*infra*), expressed the opinion that the deceased sustained a hard contact wound where the barrel of the appellant's firearm was either pressed against the deceased's head or was held sufficiently close to her head along similar distance parameters mentioned by Dr John.
- [10] During the trial the appellant conceded that the mechanism of the injury was a hard contact wound. This concession was premised on his version (to which I revert below) that the firearm did not discharge when it made physical contact with the deceased's head but discharged accidentally in single action mode when his elbow struck the doorframe of his motor vehicle after the deceased forcefully hugged him.
- [11] When cross-examined, it was put to Dr John that the firearm held by the appellant, who was taller than the deceased, discharged accidentally upon the appellant's elbow striking the doorframe of the bakkie when the deceased hugged him in circumstances when he was under the impression that she was being pursued by strangers. Dr John conceded that the appellant's version of how the gunshot was discharged was not unlikely.
- [12] Gideon Olivier, a Lieutenant in the South African Police Service, testified on behalf of the state. His qualifications, expertise and training in the mechanical functioning and handling of firearms, wound ballistics and distance determination were not disputed either. He examined the appellant's confiscated firearm and identified it as a Rossi 38 Special revolver. It has an ammunition load capacity of 5 rounds.

- [13] He testified that the firearm has a dual mode of operation: The first is what he described as “single action”. It entails pulling back the hammer.[2] This causes the ammunition cylinder to rotate and align an ammunition cartridge with the barrel. The trigger moves back and is rendered “light”. In the words of the witness the expression means “I rotate my finger and just push it, and it will go off.” He stated that “single action is usually used with a revolver if you are ready to fire and you know there is a threat”. In this mode, accidental discharge is possible.
- [14] The second mode of operation was described as “double action”. This mode is activated after a shot is fired in single action. There is no pulling back of the hammer but a greater amount of force is required to pull the trigger. The finger encircling the trigger must physically close so that the trigger is pulled through with positive pressure. On doing so, the hammer moves backwards and the ammunition cylinder rotates bringing an unfired round of ammunition into line with the barrel of the firearm. Accidental discharge is not possible in this mode.
- [15] Lieutenant Olivier, in addition, testified that the firearm has a built-in safety mechanism called a “rebound slide”. The safety mechanism cannot be manually enabled or disabled and is active in either mode of operation. It will not cause the firearm to discharge unless “positive pressure” is applied to the trigger. In the words of the witness: “that means pressure being kept on the trigger until the shot has been fired.”
- [16] It is of note to mention that the evidence by Lieutenant Olivier relating to accidental discharge and positive pressure was given prior to him being cross-examined on the appellant’s version as to how the fatal gunshot came to be fired.
- [17] Under cross-examination, it was asked of Lieutenant Olivier to comment on whether the accidental discharge of a firearm was dependant on the type of finger pulling the trigger. It was put to him that the appellant handled his firearm using the middle finger of his right hand to pull the trigger. Lieutenant Olivier stated that the handler of a firearm typically uses their index finger to pull the trigger but despite the awkwardness of a middle finger, the mechanical operation of a firearm (such as the appellant’s) is unaffected by the type of finger because the discharge of a gunshot is dependent on the degree of pressure applied to the trigger.
- [18] The version of the appellant as put to Lieutenant Olivier, essentially, is that he is taller than the deceased and the third gunshot was accidentally discharged in single action mode when his elbow struck the doorframe of his motor vehicle after she forcefully hugged him. To contextualise this version and for the purpose of eliciting comment from Lieutenant Olivier, the trial court adjourned for inspection of a motor vehicle similar to the one the appellant was driving on the night of the incident and to enable the appellant to demonstrate how the third gunshot came to be fired.
- [19] The magistrate’s summary of the factual findings of the inspection and demonstration is repeated as follows:

“At the inspection in loco, we went to the accused’s own vehicle, which is also now a black Corsa bakkie, the accused indicated that the difference between this present bakkie and the one that he used at the time of the alleged offence is that the suspension of this one is lower, so the body of the vehicle is slightly lower than the original one. In any event, the accused then demonstrated how this incident would have taken place, for the benefit now of the witness, and all the other parties in order to answer the question put to him. The passenger door was opened by the accused, and then he moved into the area between the open door and where you would actually get into the car, facing towards the outside of the vehicle. He demonstrated how the deceased then came into this space, between the door and the body of the vehicle and hugged him. Now as he demonstrated I got the impression that this hug was carried out with quite a bit of force, it’s almost like a, a scrum action that you would find in rugby. He, indicated that she had her head lowered and moved into his body, and he demonstrated how this action of the deceased actually drove him back towards the body of the vehicle, and caused his elbow the right elbow to bump against the pillar of the door frame, that’s

the pillar that basically joins the roof and the bonnet of the vehicle, and frames the windscreen, how that would have bumped his

elbow, and he demonstrated then that his finger was on the trigger of this revolver, which was on a single action at that stage and then the firearm discharge[d]. The important thing is that he demonstrated how during this hug he was actually forced back into the vehicle, and that caused the bump.”

[20] Neither the state nor the defence attempted to pare or supplement these facts.

[21] The last witness who testified for the state was Warrant Officer Luzuko Naka who compiled an album of photographs. He confirmed that photographs were taken at the scene of the shooting incident shortly after his arrival at about 23h00. By that time he learnt that the appellant had already departed for Grey Hospital with the deceased in

his vehicle. All that was visible to him at the scene was a blood stain on the tarmac in the middle of the road. He also confirmed

having taken photographs of blood stains inside the appellant’s vehicle when it was parked later that night at Grey Hospital.

Appellant’s version

[22] The appellant testified that on the evening of 13 July 2013 the deceased called him. She required a lift from Sweetwaters where she was attending a function. When the appellant received this call he was in Middledrift with a male friend. They left Middledrift at about 19h00 and after the appellant was dropped off at his home in Westbank by this friend, he then took his own vehicle (a white Opel Corsa bakkie) to go and fetch the deceased. Because Sweetwaters is an area unfamiliar to him, he called the deceased and requested directions. He arrived in Sweetwaters but failed to locate her exact destination. He called her and suggested that she meets him in a street where his vehicle would be identified by its hazard lights flashing.

[23] While in a street unknown to him the appellant observed a person running towards his vehicle. He realised that it was the deceased and that she was being pursued by two men. He thought that she was under attack. He retrieved his firearm from the cubby hole and cocked it (in single action mode). He exited the vehicle and fired a warning shot up into the air. On noticing that the men did not retreat, he fired a second warning shot upwards in “double action” mode while running to the passenger’s side of the vehicle. He opened the passenger’s door for the deceased so that she could “quickly get inside the vehicle”. While opening the door he simultaneously cocked the firearm, activating the single action mode. He did this because he believed the area was unsafe. At that moment the deceased approached the vehicle. She was running. In her endeavour to hug him she “collided” with him.

[24] The appellant said that he did not foresee that she would hug him while she was at the same time running away from strangers. The momentum of the hug drove him backwards and his right elbow struck the pillar of the doorframe of the bakkie causing the firearm held in his right hand, with (middle) finger on the trigger, to discharge a bullet at the deceased’s head. Due to the circumstances that confronted him, he could not recall if the deceased had spoken to him

before being shot. Intending to get her to hospital, he placed her into his vehicle. While doing so he recollected seeing occupants in a passing vehicle. He did not pay attention to them or to what they might have said to him, nor does he have any recollection as to what he might have said to them. He drove away from the scene but turned around and passed it a second time. This happened because of his unfamiliarity with the area so he thought it prudent to navigate his way out of Sweetwaters through the same route that he entered it. Before arriving at the hospital, he stopped at the deceased’s home where he informed her father that she had been shot. He testified that the firearm he used was licensed in his name. Before acquiring it, he was a member of the South African National Defence Force where he received training in the use and handling of firearms. He testified that despite a previous injury to the index finger of his right hand, he was still able to handle the firearm with his middle finger as he did on the night in question, albeit that the middle finger was not as resilient as his index finger prior to its injury.

[25] When cross-examined as to Nomambane’s testimony that before the third gunshot was fired, the appellant argued with the deceased, the appellant denied such argument. He further explained that when the deceased sank into his arms after she was shot this could mistakenly have led one of the state witnesses for thinking that she was being

dragged. The appellant maintained that he was sober when the incident occurred.

The approach with regard to appeals

[26] *S v Hadebe and Others*[3] summarised the principles applicable to appeals against findings of fact. To the extent that these principles find application to the present matter, the court commented as follows:

“... there are well-established principles governing the hearing of appeals against findings of fact. 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 approach which commended itself in *Moshephi and Others v R* (1980-1984) LAC 57 at 59 F-H seems appropriate in the particular circumstances of the matter:

‘The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to take a step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’ ”

[27] In a case such as the present, it is necessary to re-iterate the test to be applied when assessing an explanation given by an accused. In *S v V* [4] the court had the following to say:

“It is trite that there is no obligation on an accused person, where the State bears the onus, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. ... the test is whether there is a reasonable possibility that the accused’s evidence may be true.”

[28] The dictum above does not incorporate two separate and independent tests. It is the expression of the same test viewed from opposite perspectives. A court may only convict if a consideration of all the evidence establishes the guilt of the accused beyond reasonable doubt and may only do so if there is at the same time no reasonable possibility that an innocent explanation put forward by an accused person might be true. The two facets are inseparable, each being the logical corollary of the other.[5]

[29] To summarise, in whichever form the test is expressed, the onus throughout is on the state to prove the accused’s guilt beyond reasonable doubt; and a court must be satisfied upon a consideration

of all the evidence whether it is reasonably possible that the accused's evidence may be true. Evidence implicating the accused is not looked at in isolation in order to determine if there is proof beyond reasonable doubt, nor is the exculpatory evidence

viewed in isolation in order to determine if it is reasonably possible that it might be true.[6]

[30] In the final analysis no onus rests on an accused person to convince the court of the truth of any explanation which he gives. He should be acquitted if there exists a reasonable possibility that his evidence may be true. Whether a court subjectively believes the accused is not the test. A court does not have to reject the state's case in order to acquit an accused. A court is bound to acquit him if there exists a reasonable possibility that his evidence may be true.[7]

Evaluation of the evidence

[31] The evidence on the appellant's version indicates that once the second gunshot was fired, he opened the passenger door of his bakkie to enable the deceased to quickly get inside. He also cocked his firearm and in doing so it was rendered operative in the single action mode with his middle finger being kept on the trigger (as per the magistrate's factual recordial of the demonstration supra).

[32] Under cross-examination the appellant confirmed that his firearm was rendered in single action mode after the second gunshot was fired but he maintained that he did not know if the strangers retreated because his attention was directed at getting the passenger door open for the deceased. On being confronted by the fact that his counsel put it to the witness Nonambane that the strangers retreated after the second gunshot was fired, and that he had opportunity to correct his counsel, he replied that his omission to have done so was an oversight. It was put to the appellant that once the strangers retreated after the second gunshot there was no risk of danger that necessitated recourse to the single action mode. It is at this interval that the appellant's version is not only rendered improbable but that an additional facet of the evidence by Lieutenant Olivier assumes relevance in the overall evaluation of the probabilities. Lieutenant Olivier stated that a trained user of a firearm, on realising the approach of a person not unfamiliar to them, would as a matter of logic and common sense, lift their finger off the trigger, or holster the firearm, or lower it and point it to the ground, or move it away from the direction of the approaching person.

[33] Lieutenant Olivier, in addition, also stated that a trained user, in similar circumstances, "will see that the person gets into the car." On this point, the following excerpts from the magistrate's factual summary (which emanates from the appellant's own version and demonstration of events), become significant:

"The passenger door was opened by the accused, and then he moved into the area between the open door and where you would actually get into the car, facing towards the outside of the vehicle . .

... he demonstrated then that his finger was on the trigger of this revolver, which was on a single action at that stage and then the

firearm discharge[d] ...”.

[34] The excerpts unmistakably convey that the appellant obstructed the area between the open door and the cabin of the bakkie and this would have hindered the deceased’s quick entry. While in this space the appellant’s firearm was in single action mode, and even though the strangers retreated which meant that there was no imminent threat or danger, the appellant kept his middle

finger on the trigger. The magistrate correctly considered this to be a crucial aspect of the appellant’s case that was not

sufficiently explained. As a result, one is left with no conclusion other than that the appellant’s version of how the deceased

came to be shot, is improbable and that it is beyond any reasonable doubt, false.[8] This conclusion is also supported by Lieutenant Olivier’s evidence on the conduct of a trained user when confronted by someone not unknown to them. In this regard the magistrate correctly placed reliance on such evidence. From this perspective of evaluating the evidence, it makes no difference whether the firearm was rendered in single action or double action mode, nor does it matter which finger the appellant used to pull the trigger. The magistrate’s reliance on the trained user evidence displaces Mr Stamper’s criticism that the magistrate did not properly evaluate Lieutenant Olivier’s evidence and that he laid emphasis on a singular aspect to convict the appellant.

[35] During argument, Mr Stamper contended that by singularly laying emphasis on Lieutenant Olivier’s evidence that the appellant’s

firearm “will not discharge unless positive pressure on the trigger is maintained until the shot is fired”, [9] the magistrate misdirected himself in finding that the appellant shot the deceased with the intention to kill her. Mr Stamper urged that the magistrate failed to have regard to the following exchange between defence counsel and Lieutenant Olivier:

“So do you therefore say Lieutenant that even the lightest pressure on the trigger when that firearm is on single action, would discharge?”

Yes, Your Honour, as I explain there is very little energy that is needed for it to discharge in single action, very little.”

[36] Mr Stamper also sought reliance on the concession by Lieutenant Olivier upon being asked by the magistrate to comment on the appellant’s demonstration:

“Your Worship, the scenario showed is possible, definitely possible. With the following circumstances. Number one, the firearm had to be in the single action position and when the shot was discharged, the head of the deceased had to be in hard contact with the actual muzzle of the firearm.”

[37] I do not agree with Mr Stamper that this evidence (which in any event is the product of piecemeal reasoning) is sufficient to indicate that the appellant's version is reasonably possibly true, or that it may support a finding that the state failed to discharge the onus of proof on the issue of intention to kill. Overall indications from the totality of the evidence, and particularly the appellant's

own version, are that the deceased approached the appellant from the front and that they faced each other during their verbal interaction.

This fits in with Nonambane's testimony that he observed the appellant's firearm pointed downward at the deceased's

head because she was shorter than the appellant. It is also consistent with the medical evidence by Dr John regarding the tracking of the bullet in the deceased's skull.

[38] It is also relevant to mention Nonambane's evidence that the appellant and the deceased were arguing. His belief that the parties were arguing also fits in with the magistrate's reasoning that the fears expressed by the deceased to Booi about the appellant's jealousy were not unfounded. On this aspect, Booi's evidence

discloses that the first gunshot was fired in their direction while he and the deceased were walking. Booi stated that the deceased ran to the appellant, pleading with him to stop while at the same time explaining who Booi was. This is not inconsistent with what Nonambane said he overheard when the deceased explained to the appellant about the people she was with. Nonambane also stated that the deceased was still talking to the appellant when the third gunshot was fired. This is not at odds with Booi's evidence that after running from the scene he heard the third gunshot while the deceased was screaming at the appellant. Both of these witnesses maintained a coincidental presence at the scene although neither one knew of the other's presence. Their evidence was independent and credible and the magistrate correctly placed reliance thereon in his evaluation of the inherent probabilities.

[39] The appellant on the other hand did not make for an impressive witness. He contradicted himself on a material aspect of his version that was put to Nonambane and when pressed to explain the contradiction the record reflects that the appellant was evasive and that his version was reconstructed as the trial proceeded. The following example serves to illustrate this point. The appellant's counsel pertinently cross-examined Lieutenant Olivier on the appellant's handling of the firearm initially in double action mode when the first two warning shots were fired and thereafter in single action mode before the third gunshot was fired. This configuration in the handling of the firearm is not consistent with the appellant's own testimony. The appellant testified that he rendered the firearm in single action mode before discharging the first gunshot; thereafter he handled the firearm in double action mode before firing the second warning shot, and in the final instance he rendered the firearm in single action mode before the third gunshot was discharged.

- [40] The evidence by Mdleleni and Nqwelo is peripheral to the events leading to the shooting incident and is of neutral value. The same can be said of the evidence by Warrant Officer Luzuko Naka, more particularly in that no inference can be drawn from blood photographed in the street or in the appellant's vehicle. As for the medical evidence by Dr John, this is largely neutral but for reasons already mentioned it corroborates what Nonambane observed about the manner in which the appellant held the firearm.
- [41] When evaluating the evidence in accordance with the approach postulated in the aforementioned cases, the result supports the conclusion, albeit for different reasons, that the magistrate correctly convicted the appellant of murder.

SENTENCE

- [42] In terms of section 51(2)(a)(i) read with Part II of Schedule 2 of the Act the discretionary minimum sentence for murder is 15 years' imprisonment (absent substantial and compelling circumstances). The section incorporates a proviso that the maximum term of imprisonment a court may impose shall not exceed the minimum prescribed term by more than 5 years.
- [43] It is trite that the prescribed minimum sentence should not be departed from lightly and for flimsy reasons. In providing for prescribed sentences in respect of certain offences, the legislature aimed at ensuring a severe standardised and consistent response from the courts to the commission of such offences unless there were and it could be seen to be truly convincing reasons for a different response. Although the Act does not prohibit a court from weighing all the usual considerations traditionally taken into account when sentencing,[10] it is the ultimate cumulative impact of those circumstances that must be such as to justify a departure from imposing the prescribed
- sentence.[11]
- [44] Mr Stamper contended that the sentence of 18 years' imprisonment imposed by the magistrate is open to interference on the ground that the magistrate misdirected himself in holding that substantial and compelling circumstances were absent.
- [45] A court of appeal does not have a general discretion to ameliorate the sentence imposed by a trial court. The trial court enjoys a wide discretion
- (i) in deciding which factors should be allowed to influence it in determining a suitable punishment; and, (ii) in determining the value to be attached to each factor.[12] An appeal court may only interfere with a sentence imposed by a trial court where, (i) an irregularity occurred; (ii) the trial court materially misdirected itself on the question of sentence; or, (iii) the sentence could be described as so disturbing that it induces a sense of shock.
- [46] The judgment on sentence indicates that the magistrate was mindful of striking a balance between the seriousness of the offence, the personal circumstances of the appellant and the interests of the community without excluding those of the victims (i.e. the deceased's

family).

- [47] Foremost in the mind of the magistrate was the high incidence of crimes of murder in the country particularly where the victims are vulnerable members of society and notably of female gender. In this respect, when having regard to the circumstances attendant on the commission of the offence, the magistrate considered that the appellant shot the deceased directly in the head. The shooting was unprovoked. The facts indicate that the deceased was in the process of explaining herself. Her chances of defending herself against a weapon designed to kill were non-existent. In the view of the magistrate the appellant's conduct in the circumstances was indicative of a direct intention to kill.
- [48] Evident from the testimony of Pumezo Maku, the deceased's father, is that the deceased's death has had a real and devastating impact and left a significant void in the life of her 8 year old daughter. Both Mr Maku and his wife have, as a result, assumed financial and moral responsibility for the child's upbringing. It is clear from the testimony given by Mr Maku that the deceased's family is still struggling to come to terms with the enormity of their loss and in this regard Mr Maku testified that a sentence in excess of the prescribed minimum should be imposed.
- [49] The appellant testified in mitigation of sentence. It is common cause that he is a first offender and that he holds fixed employment as a deputy director in a state department in Bhisho. He was aged 35 at the time of sentencing. He testified that he underwent psychological counselling due to the shooting incident having precipitated an inability to concentrate at work and to fall asleep at night, and that he eventually sold his residential property located not too far off in the same neighbourhood where the deceased resided. He also tendered an apology to the deceased's family and said he was remorseful for what had happened. To accentuate the extent of his remorse he testified that he was willing to establish a trust fund for the welfare and education of the deceased's daughter. Evidence elicited from the appellant under cross-examination not only revealed a scant understanding of the establishment and practical operation of a trust fund, but also served to underscore his naivety. Moreover, Mr Maku testified that the appellant's family made this proposition after the appellant was convicted but before being sentenced. The proposition was rejected by the deceased's family because it was made ostensibly as an incentive for them to concede that a non-custodial sentence should be imposed on the appellant. The magistrate was correctly dismissive of the proposition as an indication of genuine remorse. It was not conceived with honourable intentions and is discordant with the sentiments expressed by Ponnann, JA in *S v Matyityi*[13] when dealing with remorse as a mitigating factor:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate into genuine remorse. Remorse is a gnawing pain of 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 or herself at having been caught, is a factual question. It is to the

surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist, cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper 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 or she does indeed have a true appreciation of the consequences of those actions.”

[50] In the aggregate, the magistrate correctly found that substantial and compelling circumstances were non-existent and that the appellant’s

personal circumstances were outweighed by the nature and seriousness of the offence and the interests of society (including, if I might add, those of the deceased’s family). A finding that the appellant’s personal circumstances on their own amount to substantial and compelling circumstances would be unduly sympathetic and would amount to a departure from the specified sentence, “lightly and for flimsy reasons”. [14] In imposing sentence, it was at all times the prerogative of the magistrate to (i) decide which factors should be allowed to influence

him in determining a suitable punishment; and, (ii) in determining the value to be attached to each factor. [15] Absent any demonstrable indication that particular facts were over-emphasised at the expense of others, there is no basis for interfering with the imposed sentence.

[51] Mr Stamper, in the alternative, sought to persuade this court that the imposed sentence induces a sense of shock and that a sentence of 15 years’ imprisonment with 5 years suspended for 5 years would be appropriate as was considered suitable in *S v Eadie* (2) 2001 (1) SACR 185 (C). *Eadie* (2) affords no grounds for interfering with the sentence imposed by the magistrate and is distinguishable on the facts. In that case the accused was found to have been under severe emotional stress and was provoked into committing the offence while labouring under a measure of intoxication; all in respect of which the trial court found had contributed to a diminished sense of criminal responsibility and qualified as substantial and compelling circumstances. For the present appellant, none of these aspects find comparison for the purpose of ameliorating his sentence.

[52] In the result:

[52.1] The appeal against conviction and sentence is dismissed;

[52.2] The conviction and sentence imposed by the magistrate are confirmed.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Bloem J

I agree.

G H BLOEM

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv. C. Stamper instructed by Mqeke Attorneys, Grahamstown

For Respondent: Adv. L. W. Sinclair instructed by the Office of the National Director of Public Prosecutions,

Grahamstown

[1] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), as amended

[2] Also known as “cocking” as is apparent from the evidence given by the appellant.

[3] 1997 (2) SACR 641 (SCA) at 645 e-645 a

[4] 2000 (1) SACR 453 (SCA) at 455 b

[5] Kopsani & Another v The State (CA&R 123/17) [2019] ZAECGHC 23 (14 March 2019); also S v Van Der Meyden 1999 (1) SACR 447 (W) at 448 h

[6] S v Van Der Meyden 1999 (1) SACR 447 (W) at 448 h

[7] S v Van Der Meyden 1999 (2) SA 79 (WLD) 80 I-J and 81 D; (R v Difford 1937 AD 370 at 373; and S v Kubeka 1982 (1) SA 534 WLD at 537 F- G.

[8] R v Difford supra at page 373

[9] Record Vol IV, page 283 line 23 to page 284 line 2

[10] S v Mahomotsa 2002 (2) SACR 453 (SCA) at paragraph [14]

[11] S v Malgas 2001 (1) SACR 469 (SCA) at page 477 g

[12] S v Kibido 1998

(2) SACR 213 (SCA) at 216 g-h; S v Petkar 1998 (3) SA 571 (AD) at 574 C

[13] 2011 (1) SACR 40 (SCA).

[14] S v Malgas supra at page 477d

[15] S v Kibido 1998

(2) SACR 213 (SCA) at 216 g-h; S v Petkar 1998 (3) SA 571 (AD) at 574 C

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