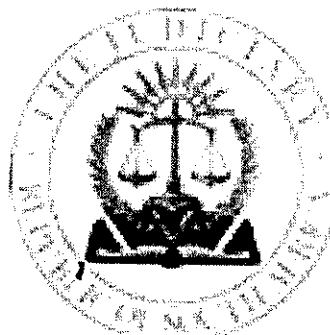




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A87/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

31/1/2017

DATE

Ranchod J.
SIGNATURE

2/2/2017

In the matter between:

MATOME MICHAEL MAROGA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

RANCHOD J.:

[1] This is an appeal against sentence, leave to appeal having been granted by the Supreme Court of Appeal.

[2] The appellant was charged with three counts, namely, murder; unlawful possession of a firearm of an unknown calibre and unlawful possession of

ammunition. He was convicted on all three counts on 17 October 2007. On the same day the court *a quo* (per Webster J) took all the charges together and sentenced the appellant to 30 years' imprisonment.

[3] As this is an appeal against sentence only, the factual findings of the trial court *a quo* must be accepted.

[4] The appellant was convicted of the murder of Ms Moshibudi Georgina Tlouamma (the deceased). It appears that the deceased and the appellant had known each other for about 14 years and had been in a relationship. At some point they had lived together as husband and wife. On a number of occasions the deceased had left the appellant only to return when the appellant fetched her. The deceased finally broke off the relationship with the appellant in August 2004. She then started a new relationship with another man. The appellant was aware of the new relationship. The deceased's mother testified that on one occasion probably in 2004, the appellant arrived at her home and had told her "Jy gaan eendag twee lyke kry in die huis. Ek sal jou dogter dood maak en selfmoord pleeg." The deceased's mother testified further that on one occasion the deceased had come home with a burn wound on one of her upper arms. The deceased had obtained a protection order against the appellant but withdrew it at some stage.

[5] On 23 September 2005 the deceased was in the company of her younger sister, two other adults and a 9 year old girl. They were on their way home at night when they encountered the appellant. Without any provocation, the appellant drew a fire-arm and shouted at the deceased. He called her by name and said if she runs he will shoot her. The deceased and those in her company started running away from the appellant when he fired several shots at the deceased. She died on the scene due to multiple gunshot wounds.

[6] The appellant's primary contentions on appeal are that he was not warned of the applicability of the minimum sentence provisions of Act 105 of 1997 in that the globular sentence of 30 years imprisonment imposed for the three charges is excessive; that the court *a quo* failed to take into account

that the crime was a crime of passion – in other words that the learned Judge did not give sufficient consideration to what motivated the appellant to do what he did. Lastly, that it cannot be said on the facts that he planned to murder the deceased. As I understood it, this last submission is in the context of Act 105 of 1997 which provides for a minimum sentence where the murder was pre-meditated.

[7] The principles applicable to the sentencing discretion of the trial court are trite. In *S v Kgosimore* 1999(2) SACR 238 (SCA) the court said –

“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.’

[8] In *S v Mokela* 2012(1) SACR 431 (SCA) the court also stated –

‘It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court, on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and

set out in many judgments of this court. See *S v Pieters* 1987 (3) SA 717 (A) at 727F – H; *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) para 12; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para 11; and *S v Le Roux and Others* 2010 (2) SACR 11 (SCA) at 26b – d.'

[9] *In casu*, the court *a quo* found that the provisions of Act 105 of 1997 were not brought to the appellant's attention hence it dealt with its sentencing discretion on the basis that the minimum sentence provisions did not apply. But the learned Judge pointed out, correctly in my view, that in an appropriate case it could even impose the maximum sentence of life imprisonment based on its inherent sentencing jurisdiction. The submissions that the appellant was not warned of the provisions of Act 105 of 1997 are in any event irrelevant as those provisions were not taken into account during sentencing.

[10] The trial court took the three counts together for purpose of sentence. The Criminal Procedure Act 51 of 1977 does not expressly prohibit charges being taken together for purpose of sentence nor does such an act in itself constitute a misdirection (*S v Keulder* 1994(1) SACR 91(A) at 101i-102b and *S v Immelman* [1978(3)] 726 [AD] at 728E-729D).

[11] Counsel for the appellant referred to *S v Masiza* 2013(1) SACR 121 (ECG) where the court stated –

'The imposition of a composite or globular sentence for a number of offences should particularly be avoided when the provisions of the Criminal Law Amendment Act 105 of 1997 relating to minimum sentences find application in any particular case. The reason therefor is simply the fact that in such cases there also exists the added possibility that it may be found on appeal that the finding of the court *a quo*, that there were no substantial and compelling circumstances present justifying the imposition of a sentence less than the prescribed minimum sentence, cannot stand and should be set aside. A preferred method of mitigating the cumulative effect of separate sentences is to order that they run concurrently, or to proportionally reduce the

sentence imposed on those counts which do not attract a minimum sentence, so as to meet the exigencies of the case. A more fundamental problem arises with the imposition of a composite sentence, affecting its validity, when a sentence is imposed which is competent on one charge, and incompetent on another.'

[12] The real difficulty is that in imposing a globular sentence it is impossible to determine the proportionality thereof in respect of each count.

[13] It does appear that the killing of the deceased emanated from her decision to finally leave the appellant. The appellant would not accept it. It is an unfortunate reality that many men still adhere to the notion that they may not be rejected by a woman irrespective of their own unacceptable behaviour. There seems to be a perception that women are mere chattels who may not exercise their own freedom of choice in terminating a relationship. I dare say there are all too many instances of this type of attitude of men who regard it as a personal affront to their masculinity when they are rejected by a woman. Also too often the unfortunate result is the abuse or assault or, as in this case, the killing of the lover or girlfriend or spouse. The learned Judge remarked during sentencing that 'perhaps the accused in his way of thinking whatever it might have been, might have been motivated by the anger that some people experience when they are rejected'. And further that 'It is well known that a crime of passion is a crime which has no logic...'.

[14] What appears from the rather scant evidence about the relationship between the appellant and the deceased is that theirs was not a smooth relationship as can be gleaned from the fact that the deceased left the appellant on several occasions only to return when he would fetch her from her mother's house. The learned Judge referred to the appellant's conduct, in court, during the trial and said –

'In his conduct before this Court during the trial it was clear that he is a person who does not hesitate to try and influence those around him. He is not afraid to speak his mind out and speak it out unwittingly.

The reason for the accused to then have obtained an unlicensed firearm and proceeded to waylay the deceased in this matter clearly does not indicate the intention of a person who wanted to talk about reconciliation. The fact that he approached her at night is another indication of a person, who is not serious about reconciliation. ...Furthermore, a factor which indicates the accused's intention is the fact that he did not just simply shoot into the air or shoot into the ground but he shot at the deceased. He did not shoot once he shot several times.

...she was shot even before [she] started running.'

[15] The learned Judge also took account of the fact that the appellant showed no remorse. He had raised an alibi that he was in another town – Newcastle – at the time the deceased was shot and killed.

[16] As I said earlier, the learned Judge seems to have accepted that the murder was a crime of passion. In these circumstances it seems to me that the sentence of 30 years' imprisonment is disturbingly inappropriate.

[17] In *S v Di Blasi 1996(1) SACR 1(A)* the accused had felt insulted that his wife decided to divorce him. He started harbouring feelings of bitterness and revenge toward her and decided to kill her. When the opportunity presented itself, he fired three shots, two of which killed her, in the street in front of her flat. He thereafter tried to commit suicide but failed to do so. The accused's motivation for killing the deceased was hurt pride, humiliation and revenge and he had planned the killing over a long time.

[18] *In casu*, the deceased's mother testified that the appellant had told her that one day she would find two dead bodies – one of the deceased and the other of himself. He uttered these words about a year before he killed the deceased. One can therefore infer that he harboured anger and resentment towards the deceased for some time before eventually killing her.

[19] In *Blasi* the trial court had imposed a sentence of four years' imprisonment seemingly placing weight on the defence's submission that the accused suffered from diminished criminal capacity at the time. The Appellate Division rejected this submission, set aside the sentence and in its place imposed a sentence of 15 years' imprisonment.

[20] Whilst no two cases are exactly alike, a perusal of a number of cases of so-called crimes of passion seem to indicate that sentences between 10 and 20 years have been imposed.

[21] The personal circumstances of the accused, as submitted during the trial are that he was 35 years old when he committed the crimes, he was not married and has no children. It was also submitted that he supported the family of the deceased financially. He has two previous convictions for theft committed in 1995 and 1996 respectively. The current offences were committed on 23 September 2005.

[22] It was also submitted that the appellant regretted the death of the deceased. In *S v Matyityi 2011(1) SACR 40 (SCA)* drew a distinction between regret and remorse when Ponnar JA said, at 47, paragraph [13] a-e:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement 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.'

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[23] The trial Judge remarked that the conduct of the accused throughout the trial was such that it was clear that he showed no remorse. It is also clear that he steadfastly refused to acknowledge that he did commit the crime. He raised an alibi which was proved to be false.

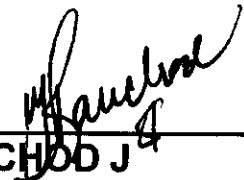
[24] In my view taking all factors into account an appropriate sentence would be 20 years for the murder count.

[25] Insofar as the other two counts are concerned, they may conveniently be taken together for purpose of sentence and order that it run concurrently with that imposed for the murder charge.

[26] I would make the following order:

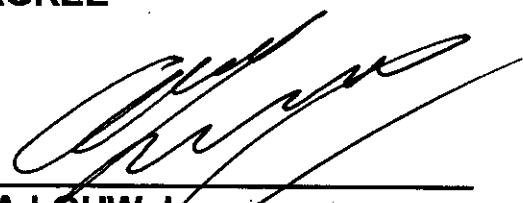
1. The appeal in respect of sentence is upheld.
2. The sentence is set aside and in its place the following sentence is imposed:
 - 2.1 A term of twenty years' imprisonment for count 1, that is, murder.
 - 2.2 Counts 2 and 3 for the unlawful possession of a firearm of unknown calibre and unlawful possession of ammunition a term of imprisonment of seven years is imposed which is to run concurrently with the sentence imposed for the murder count.
 - 2.3 The sentence is ante-dated to 17 October, 2007.

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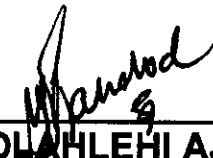
RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE



A.A LOUW J
JUDGE OF THE HIGH COURT

I AGREE



for MOLAHLEHI AJ
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Adv. L.A van Wyk
Instructed by	: Legal Aid SA
Counsel on behalf of Respondent	: Adv. A Roos
Instructed by	: Director of Public Prosecutions, Pretoria
Date heard	: 21 October 2016
Date delivered	: 2 February 2017