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| Reportable:                        | YES / <b><u>NO</u></b> |
| Circulate to Judges:               | <b><u>YES</u></b> / NO |
| Circulate to Magistrates:          | YES / <b><u>NO</u></b> |
| Circulate to Regional Magistrates: | YES / <b><u>NO</u></b> |

**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape High Court, Kimberley)**

CASE NO: **KS 18/2013**  
DATE HEARD: **12/09/2016**  
DATE DELIVERED: **16/09/2016**

In the matter between:

**PHOKOJE, J M**

Appellant

and

**THE STATE**

*Coram:* Williams J et Olivier J et Mamosebo J

**JUDGMENT**

**Olivier J:**

[1.] The appellant, Mr S M Phokoje, together with Mr S D Malgas and Mr N E McKenzie, appeared in the High Court on a charge of murder. After the charge was provisionally withdrawn against Mr Malgas, both the appellant and Mr McKenzie pleaded guilty to it. Their pleas, and the factual basis thereof, were

accepted by the prosecutor, Adv CG Jansen of the Office of the Director of Public Prosecutions, and the appellant and Mr McKenzie were duly convicted as charged.

- [2.] After it had been found that there were no substantial and compelling circumstances which justified a lesser sentence than that prescribed in the circumstances, both the appellant and Mr McKenzie were sentenced to life imprisonment. The appellant's application for leave to appeal against his sentence was dismissed, but on petition he was granted leave.
- [3.] Although the addresses on sentence have not been transcribed, it appears from the judgment on sentence that Ms Jansen had suggested a sentence of between 18 and 22 years imprisonment for both the appellant and Mr McKenzie. As counsel for the respondent in the appeal Ms Jansen, however, supported the appellant's sentence of life imprisonment in her heads of argument. In doing so she made a reference to the trite principle that a court of appeal will only interfere with a sentence where it is shockingly inappropriate or the result of a material misdirection<sup>1</sup>. This, however, is not the correct approach where a prescribed sentence is concerned. In such an appeal the court will reconsider the findings of the sentencing court regarding the existence or not of substantial and compelling circumstances<sup>2</sup>.
- [4.] In any event, as will appear in due course the court *a quo* in this case did misdirect itself in several respects in arriving at the conclusion that there were no substantial and compelling circumstances justifying a lesser sentence than life imprisonment.
- [5.] It was common cause that the appellant, Mr Malgas and Mr McKenzie had on the particular night gone to a tavern, intent on stealing from other patrons. Mr

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<sup>1</sup> Compare **S v Kgosimore** 1999 (2) SACR 238 (SCA) para [10]; **S v BF** 2012 (1) SACR 298 (SCA) para [7]

<sup>2</sup> Compare **S v PB** 2013 (2) SACR 533 (SCA) para [20]; **S v GK** 2013 (2) SACR 505 (WCC) para [7]

McKenzie was caught in the act of trying to steal a cell phone from the deceased, who reported the incident to a security guard. An argument ensued between Mr Malgas and the security guard.

[6.] According to the plea-explanation of Mr McKenzie the security guard hit him, and Mr Malgas then intervened and threatened to stab the guard. He too was hit by the guard. The appellant's plea-explanation, however, made no mention of anybody being hit. According to the appellant's plea-explanation there had been an argument between Mr Malgas and the security guard, who wanted to stab each other<sup>3</sup>, and the appellant then intervened and stopped them. This difference in the two versions was never cleared up.

[7.] It was common cause, however, that the appellant, Mr Malgas and Mr McKenzie had then left and gone to a park, where they smoked dagga and mandrax.

[8.] At this point again, however, there is a difference in the versions of Mr McKenzie and the appellant. According to Mr McKenzie they had been sitting there when they noticed the deceased walking past in the company of another man. Mr Malgas called the deceased and when he came closer, Mr Malgas stabbed him. The appellant's version was also that Mr Malgas had been the first one to attack the deceased by stabbing him, but the appellant made no mention of anybody walking with the deceased and according to the appellant's plea-explanation the stabbing by Mr Malgas happened after Mr Malgas had approached the deceased and after an argument had then ensued between the deceased and Mr Malgas about the earlier events at the tavern.

[9.] According to both plea-explanations the appellant then hit the deceased with a bag of empty bottles, took Mr Malgas's knife and, while Mr McKenzie was hitting the deceased with a wheel spanner, stabbed the deceased more than

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<sup>3</sup> Which would imply that the security guard had also produced a knife.

once. At some stage thereafter, and apparently after the deceased had moved away from him, the appellant followed him and stabbed him again. Although the deceased had also suffered blunt force trauma the cause of death was noted as multiple stab wounds.

- [10.] The reason advanced by the appellant, in his plea-explanation, for his attack on the deceased, was that the deceased had fought with his friends. It does not appear from his plea-explanation when that would have happened.
- [11.] The murder count merely made reference to section 51 of the **Criminal Law Amendment Act**<sup>4</sup>, without referring to the specific provisions of that section which the prosecution intended to rely upon when it came to sentence<sup>5</sup>. In the summary of substantial facts accompanying the indictment, however, it was stated that the case for the prosecution would be that the attackers had acted in common purpose, which would in itself of course have made the prescribed sentence of life imprisonment applicable. It can therefore safely be assumed that the appellant's legal representative had advised him of the applicability and risk of the prescribed sentence of life imprisonment before he pleaded to the charge of murder.
- [12.] The court *a quo*, however, found that the murder had been premeditated. This finding, in turn, was apparently based on a finding that the appellant, Mr Malgas and Mr McKenzie had been "involved in a conspiracy of stealing cell phones".
- [13.] That there had been a conspiracy to steal was part of the plea-explanation of Mr McKenzie, but not of the plea-explanation of the appellant. In any event, that they had been in a conspiracy to steal cell phones could never justify the inference that their conspiracy had included a plan to kill their victim/s. Even a

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<sup>4</sup> 105 of 1997

<sup>5</sup> Compare **S v Bhadu** 2011 (1) SACR 487 (ECG) para [3]; **S v Mabaso** 2014 (1) SACR 299 (KZP) paras [81] and [84]

common purpose to assault may have come into existence spontaneously, and must be distinguished from a conspiracy or a plan<sup>6</sup>.

[14.] In fact, the contents of both plea-explanations militate against the existence of premeditation, let alone a conspiracy or a plan, to kill the deceased:

14.1 McKenzie did not even have the direct intent to kill. The presence of a direct intention to kill would not necessarily justify an inference of premeditation<sup>7</sup>.

14.2 The appellant's plea-explanation in fact militates against premeditation. He stated that only Mr Malgas initially approached the deceased and that Mr Malgas and the deceased had then become involved in an argument. Mr Malgas, according to him, had then produced a knife and it was only when Mr Malgas had then stabbed the deceased that the appellant and Mr McKenzie had joined in the attack on the deceased. On the appellant's version Mr Malgas had been the only one of them with a knife. The appellant had only a bag with empty bottles in his possession initially.

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<sup>6</sup> "What constitutes 'premeditated or planned' murder was described as follows in the full bench appeal, **S v RAATH** 2009 (2) SACR 46 (C) at p. 53 par. [16]:

*'Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and one which had been conceived and planned over months or even years before its execution... Only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at the conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated'.*" **S v Radebe** 2011 JDR 0926 (FB) para [24]

<sup>7</sup> "Dolus directus and premeditation/preplanning are not synonymous. While premeditation obviously results in *dolus directus*, the converse is not true. That is clear from the case law." **S v Radebe, supra**, para [23]

14.3 In neither plea-explanation is there so much as a suggestion that any of them had expected the deceased to walk past the park where they were smoking mandrax and dagga.

[15.] It appears that the appellant had drunk beer at the tavern, although it does not appear how much. As already mentioned the appellant and his friends then proceeded to smoke dagga, with a mandrax tablet.

[16.] The appellant, in his plea-explanation, stated that he was “under the influence of alcohol and the drugs, dagga and mandrax”, but he “still knew what (he) was doing”.

[17.] In considering sentence the court *a quo* found that drugs and alcohol had played a role in the commission of the offence, but that “substances are not on their own mitigating factors”. Reference was made to the fact that the appellant had in his plea admitted that he had known what he was doing, and it was, apparently because of that, found that there was no evidence that the appellant’s thinking had been impaired.

[18.] In arriving at this conclusion the court *a quo*, with respect, apparently lost sight of the undisputed statement that the appellant had been “under the influence” of the alcohol and drugs. The fact that the appellant knew what he was doing, would not detract from this. It would mean only that he admitted having been criminally accountable at that stage.

[19.] The mere fact that the appellant had been drinking and using drugs would in itself have raised the question whether it did not possibly play a role in the commission of the crime. As it was put in **S v M**<sup>8</sup> at 29h, “Liquor can arouse

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<sup>8</sup> 1994 (2) SACR 24 (A)

senses and inhibit sensibilities. It is for the State to discount it as a mitigating factor, to show that it did not materially affect the appellant's behaviour"<sup>9</sup>.

[20.] Here, however, the evidence went much further. The undisputed fact that the appellant had been "under the influence" is irreconcilable with the finding that the appellant's thinking had not been impaired at all. Being under the influence necessarily implies impaired thinking. It is just a question of to what extent, and it is to my mind clear that what the appellant tried to convey was that, although his thinking had been impaired, it had not been impaired to such an extent that he had not known what he was doing<sup>10</sup>.

[21.] It must also not be lost sight of that the prosecution had accepted the appellant's factual version and had confirmed that it was in fact in accordance with the information in the police docket.

[22.] The court *a quo* made reference to the fact that the appellant had "a previous record", without apparently viewing that conviction in context. The appellant had in 2010 been convicted of theft committed on August 29, while the present completely unrelated offence was committed on 5 December 2012. The appellant therefore, at the age of 27 years old, had no previous conviction involving physical violence.

[23.] The appellant's undisputed declaration of remorse in his plea-explanation, was validated when it was put on record by the prosecutor that he had from the outset cooperated with the police, and had in fact made a formal confession. Although the trial Judge considered this to be indicative of remorse, the judgment is silent about what role, if any, this had played in arriving at the conclusion that there were no substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

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<sup>9</sup> Compare also **S v Louw** (CA & R 113/2007) [2008] ZANCHC 2 (8 February 2008) para [9]

<sup>10</sup> Had his thinking been impaired to that extent, he would not have been criminally accountable, at least not as far as the common law crime of murder is concerned (Compare section 1 of the **Criminal Law Amendment Act**, 1 of 1988)

- [24.] The court *a quo* found that the deceased had been killed for having reported the attempted theft to the security guard, and made no mention of any argument between the deceased and Mr Malgas. There was no evidence that the deceased was killed for making a report to the security guard. There was also no basis for the finding that the appellant and his friends had “caught up” with the deceased on his way home. There was no evidence that the deceased had been on his way home. Insofar as the words “caught up” would suggest that the appellant and his friends had followed the deceased when he left the tavern, there was also no evidence to this effect before the court *a quo*. There was, as already mentioned, not even an indication that the appellant and his friends had been expecting the deceased to walk past them where they were sitting in the park. These misdirections probably also led to the eventual erroneous finding that the murder had been premeditated.
- [25.] What is aggravating is the clearly relentless attack on an apparently unarmed deceased. The appellant and his friends outnumbered him and even when the deceased must already have been seriously wounded, if not mortally, the appellant followed him and stabbed him again.
- [26.] The appellant admitted having had the direct intent to kill the deceased.
- [27.] The deceased had been completely within his rights to report the criminal actions of the appellant and his friends to the security guard, and even the indirect link between that and the attack on him must certainly be regarded as reprehensible.
- [28.] On the other hand it must be kept in mind that the attack was impulsive, and would not have occurred had fate not led the deceased past the very spot where the appellant and his friends, including the clearly aggressive and armed Mr Malgas, were sitting. The argument between the deceased and Mr Malgas,

and the fact of Mr Malgas attacking the deceased, clearly triggered the appellant to join his friend in that attack. Mr Malgas played a vital role. Whether he had called the deceased or had simply approached the deceased himself, the attack had clearly been triggered by Mr Malgas confronting the deceased.

[29.] In my view the mitigating factors of the impulsive nature of the attack, the appellant's state of sobriety, the absence of relevant previous convictions, the influence and role of Mr Malgas and the sincere remorse on the part of the appellant outweigh the aggravating circumstances and constitute substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

[30.] This court is in a position to impose sentence afresh with the information available on record. In doing so, it is kept in mind that the bench mark sentence<sup>11</sup> would remain life imprisonment.

[31.] It is also kept in mind that the appellant had spent approximately 11 months in custody awaiting trial.

[32.] Mr V Z Nel, counsel for the appellant, referred to the facts and sentences in **Director of Public Prosecutions, North Gauteng : Pretoria v Gcwala and Others**<sup>12</sup>, **S v Nemutandani**<sup>13</sup> and **S v Malgas**<sup>14</sup> and suggested a sentence of 20 years imprisonment. In my view this would indeed be an appropriate sentence in the circumstances.

[33.] In the premises the following orders are made:

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<sup>11</sup> **S v Malgas** 2001 (1) SACR 469 (SCA) para [25]

<sup>12</sup> 2014 (2) SACR 337 (SCA)

<sup>13</sup> 2014 JDR 1898 (SCA)

<sup>14</sup> 2001 (1) SACR 469 (SCA)

1. THE SENTENCE OF LIFE IMPRISONMENT IS SET ASIDE AND SUBSTITUTED WITH A SENTENCE OF 20 YEARS IMPRISONMENT, ANTEDATED TO 22 NOVEMBER 2013.
2. A COPY OF THIS JUDGMENT MUST BE FURNISHED TO MR NEO ELLIOT MCKENZIE, AND TO MS SNYDERS, THE ATTORNEY WHO HAD REPRESENTED MR MCKENZIE AT THE TRIAL.

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**C J OLIVIER**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

I concur.

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**C C WILLIAMS**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

I concur.

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**M MAMOSEBO**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

**For the appellant:**            **ADV VZ NEL**  
                                          **(Legal Aid, South Africa)**

**For the respondent:**        **ADV CG JANSEN**  
                                          **(Office of the Director of Public Prosecutions, NC)**