

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

06/2/2015

CASE NUMBER: A1043/2013

**DELETE WHICHEVER IS NOT  
APPLICABLE**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES:  
~~YES~~/NO

(3) REVISED

DATE: 18 Dec 2014.

SIGNATURE: Jansen

In the matter between: —

**ABIEL THABISO RALETSOHO**

Appellant

And

**THE STATE**

Respondent

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**JUDGMENT**

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**JANSEN J**

- [1] This appeal is against the conviction and sentence of the appellant by the Standerton magistrate's court on the count of murder. The appellant was convicted and sentenced to a prison term of ten years in terms of section 52(1) of Act 105 of 1997 on 16 October 2012. He was also held to be unfit to possess a firearm in terms of section 103 of Act 60 of 2000.
- [2] It was alleged in the charge sheet that upon or about 17 July 2010 and near Sakhile in the regional district of Mpumalanga, the appellant unlawfully and intentionally killed a certain Mr Vincent Sipho Hlatshwayo.
- [3] The magistrate refused leave to appeal in respect of the conviction and sentence, but such leave was granted on petition to this court.
- [4] At the outset it is important to emphasise that the appellant is a forty year old reservist in the South African Police Service. He pleaded not guilty.
- [5] The state called three witnesses. The first witness was Mr Pontsho Mofokeng. Mr Mofokeng testified that on 17 July at 03h30 in the morning he was attending a family gathering at the home of Ms June Sithole. He further testified that Ms Sithole's home was situated at Sakhile in Standerton. He stated that they had slaughtered some cattle and they had sat around a "konka" which was still burning. He went to his home to fetch a cigarette and upon his return to Ms Sithole's home she told him that she had seen people at the residence of person named Thato. He testified that they then phoned Thato to

find out whether the people that were at his house were perhaps Thato and his girlfriend but it transpired that Thato was not at his house but at Embalenhle.

[6] Thato instructed them to find out who the people were and what they were doing on his property. Mr Mofokeng testified that they shouted at the intruders that they could see what they were doing although they could not see who they were.

[7] Mr Mofokeng testified that there were two people removing things from Thato's yard and throwing the items over the fence. He testified that the two suspects split up and that he chased the one with Ms Sithole lagging behind him. He testified that the one suspect that he chased ran to a certain yard with dongas and then disappeared around a house and hid in a toilet. Mr Mofokeng cornered him only to see that it was a person he knew very well. He asked him what he thought he was doing and the suspect (Mr Vincent Sipho Hlatshwayo) responded that he was only trying to make a living.

[8] Mr Mofokeng said he panicked and was shocked because he knew Mr Hlatshwayo so well, and as a result decided to let him contact Thato upon Thato's return from Embalenhle. Mr Mofokeng further testified that Mr Raletsoho, the appellant, who is Thato's brother, arrived at the house and asked him (Mr Mofokeng) whether he was the person committing an offence. Mr Mofokeng testified that he answered in the negative and stated that it was

Mr Hlatshwayo (hereinafter referred to as the deceased) who was committing an offence and who was now hiding in the toilet.

- [9] Mr Mofokeng explained that even though the appellant was Thato's brother, he also referred to the appellant as his brother, because he respected him. Mr Mofokeng testified that the appellant then took the deceased out of the toilet by holding onto the front of his clothes and slapped him with the palm of his hands. The deceased fell as a result. Mr Mofokeng told the appellant that they should remove the deceased from the yard before the people woke up and wanted to start fighting. Hence the appellant took the deceased by his belt and they left the yard. Mr Mofokeng testified that he and the appellant walked with the deceased along the street and met up with Ms Sithole, and they all proceeded to return to Ms Sithole's yard where they had been sitting prior to the incident. He testified that he and Ms Sithole told the appellant as they had to work in the morning they were leaving and because the appellant was a policeman, they trusted him and left the deceased in his care and control. The appellant told them that he would lock the deceased in the garage and call the police, whereupon Mr Mofokeng and Ms Sithole left, only to hear the next morning that the deceased was in the Intensive Care Unit of the hospital. Mr Mofokeng testified that when he left the deceased that night it was the last time that he saw him.

[10] It was put to Mr Mofokeng that when the appellant arrived the deceased was severely injured which he denied categorically. This version of the appellant was put to him thrice, and he denied it each time. It was also put to Mr Mofokeng that after Mr Mofokeng had caught the deceased he stated that people from a tavern which was close to Ms Sithole's house had assaulted the deceased which fact Mr Mofokeng denied. It was also put to Mr Mofokeng that the appellant denied that he slapped the deceased, and that he had put him (the deceased) in the garage because the deceased was bleeding severely. This was also denied by Mr Mofokeng. Mr Mofokeng testified that the appellant informed him that he was going to lock the deceased in his garage and call the police. Mr Mofokeng also emphasised that had the deceased indeed been injured he would not have been as callous as to leave the deceased because he knew the deceased very well.

[11] Ms June Sithole, who was called as the third state witness, corroborated the evidence of Mr Mofokeng in all respects. She stated that Mr Mofokeng left her behind when chasing the deceased and returned with appellant and the deceased. She confirmed that the appellant was known to them as Thabiso and was thankful that the deceased had been caught because initially the appellant believed that she and Mr Mofokeng were the thieves. She confirmed that the appellant said he would take the deceased to his garage.

[12] Whilst under cross-examination, Ms Sithole stated that when chasing the deceased the appellant had passed her and she thought he might have been phoned by his brother Thato due her calling Thato. She assumed that the appellant arrived because Thato had phoned him. This corroborated the evidence of Mr Mofokeng who stated that he did not know how the appellant arrived on the scene, but that it was possible that Thato had phoned him. (In any event the appellant had told Mr Mofokeng that he had heard that a housebreaking was taking place at his parental home.)

[13] It was also put to Ms Sithole that she and Mr Mofokeng had caught the deceased and that the deceased had said that the people at the tavern (which was close by) had assaulted him, upon which she answered that he was not injured. Ms Sithole confirmed that the deceased was in a normal condition and not bleeding in the slightest when she saw him and that he was walking by himself although the appellant was firmly gripping him. She confirmed that they left the deceased in the appellant's custody and control since he had said that he was going to take the deceased to his house which was only about only two houses from her home. Ms Sithole stated in cross-examination that the appellant said that he would call the police but did not know whether he called an ambulance.

[14] Ms June Sithole confirmed that she never saw the deceased thereafter and later heard that the deceased had passed away.

[15] The second witness called by the state was Ms Sindisile Poisa Xindi. Ms Xindi testified that she was sleeping when her grandmother woke her and told her to open the door for her grandfather who was outside the house. She testified that upon opening the door her grandfather stated that she must go with him as he had heard that there was a child of Hlatswayo who had committed a crime.

[16] Ms Xindi testified that they proceeded to the appellant's house. She testified that when they were in close proximity of the appellant's house she saw what looked like water coming from the appellant's garage but that upon closer inspection she saw it was water mixed with blood. She testified that some of the water had already turned into ice because it was so cold. When asked at approximately which distance she could see the water coming from the garage, she stated that she saw the water as she entered the gate to the yard. She further testified that the garage was closed and she saw the appellant sitting in his vehicle, a "Kombi" which was parked inside the yard. She then said she saw the deceased's shoes lying on the ground next to the garage door but on the outside of the garage door. She said she was not sure but thought that there were other taxi drivers there and that they were there to collect taxis. She testified that when the appellant saw her he alighted from his vehicle and came towards her. She was asked if the appellant spoke or said anything to

her and she answered in the negative. She testified that the garage door was then opened but she could not remember by whom.

[17] Ms Xindi then testified that when she entered the garage she saw the deceased and could see that he was injured. She testified that she saw he had injuries on his head and face and that his face was covered in blood and that he was naked. She testified that she saw his clothes and that they were wet. She then testified that when the deceased saw her he tried to stand up but fell which she believed was due to the fact that he no strength to stand up. She testified that she asked the deceased why he was in such a condition and said that the deceased did not or could not answer her as he was in the process of falling to the ground. She stated that she then told her grandfather to close the garage door. When asked if the appellant said anything to her she replied in the negative.

[18] Ms Xindi testified that she then went home to inform her grandmother about what had happened. She was asked what her relationship with the deceased was and she answered that the deceased was her cousin and lived with her and their grandparents.

[19] When asked if Ms Xindi asked the appellant about the deceased she testified that she did not question him at all because she was afraid of him.



[20] The state then closed its case.

[21] Part of the appellant's counsel's defence was the alleged inadmissibility of a statement, exhibit "C", which the appellant had made which was allegedly defective and completely at odds with the appellant's version in his trial and which played a role in the magistrate finding the appellant guilty. Given the fact that the statement, exhibit "C", had been handed in by consent it is difficult to follow this line of argument which is clearly devoid of merit.

[22] The appellant's version was bizarre, to put it mildly. He testified that he was sleeping but received a call from an unknown source (later he found out it was Thato's friend) calling him to the scene of an alleged crime. The appellant allegedly then already phoned the police, informing them of a housebreaking in progress at his parent's home. The appellant testified that he went to his parent's home and found that things had been thrown out in the yard outside his parent's house. He then testified that he saw three boys close to a donga site. When asked if he knew who the three boys were he answered that he knew two of them, namely Mr Mofokeng and Ms Sithole (who of course is not a boy). The appellant testified that he did not know who the deceased was as it was the first time he had ever seen him. He further testified that he saw that the deceased was bleeding from his head and testified that the deceased told him that people had assaulted him at the tavern. This evidence is of course a contradiction of the evidence put to Mr Mofokeng that the appellant

would testify that the deceased was assaulted by people from the tavern after Mr Mofokeng had allegedly caught the deceased. The appellant further contradicted the testimony of both Mr Mofokeng and Ms Sithole by stating that they all three put the deceased in his garage at his home and that he telephoned the ambulance in their presence and that they then left. He further testified that the ambulance did not arrive and he allegedly again phoned the police. He testified that he ran out of cellular phone airtime and left for twenty to thirty minutes to go to the Shell garage in order to purchase airtime for his cellular phone. He testified that when he arrived back at his house the brother of the deceased arrived and said that he had heard that his brother is at his house and that he wants to see his brother. He testified that he told the brother that he did not know if the deceased was his brother and then said he heard the brother say that their surname is Hlatswayo. The appellant further testified that the deceased's brother went into the garage alone and came back to inform to him that the deceased was badly injured and that he would take his brother the hospital. Allegedly, according to the appellant the police then arrived after the deceased had already been removed by his brother.

- [23] The appellant also alleged that he never assaulted the deceased; nor slapped him. It was put to him that Ms Sithole and Mr Mofokeng had testified that the deceased was not injured at all, contrary to his evidence.

- [24] When asked why he had placed the deceased in the garage he testified that he placed the deceased in the garage so that the people who had assaulted him could not get hold of him. Given the fact that the appellant also testified that the deceased was a suspect and that the garage was unlocked, his version of the chain of events is highly improbable. He testified that after buying airtime he remained seated in his car. (The question arises: If he were so concerned about the deceased why did he remain in his car instead of trying to assist him or check on him?)
- [25] The appellant also testified, for the first time, that when he returned from buying airtime there were people in his yard. The appellant testified that he yelled at the people in his yard, asking them what they wanted. The appellant then changed his version and stated that he could not remember what happened when he returned after buying airtime but that there were people outside his house.
- [26] According to the appellant, when he was questioned why he did not place the deceased under arrest, he stated that as he was not on duty and he was a reservist he could not arrest him. The absurdity of his version was pointed out to him in cross-examination – due to the fact that a police officer is always on duty.

[27] The appellant testified that he then laid a complaint with the police about housebreaking in which he stated that he saw five or six people assaulting the deceased. This was included in a statement. The appellant then denied that he ever made such a statement. However, the appellant then decided to state that he did not dispute the statement, and did not know what had happened. He admitted that the deceased was severely injured but did not allegedly take him to the hospital as he was allegedly not allowed to transport injured people.

[28] The improbability of leaving him in the unlocked garage was also put to him but he testified that he knew where the deceased came from. (This evidence he gave although he allegedly only ascertained the deceased's surname when the deceased's niece arrived at his garage. (Of course, earlier the appellant had testified that it was the deceased's brother who arrived at the garage.)

[29] The appellant was asked that if the deceased were so severely injured and he, the appellant, was allegedly so caring, why did he leave him in the garage, and not, for example, take him to his sitting room. The appellant could not furnish any answer. It was put to him that he wanted the deceased to die because the deceased was a thief. The appellant could also proffer no explanation why the deceased was naked and wet.

- [30] The appellant was taken back to his statement and had to admit, albeit reluctantly, that he had told the police taking the statement what to write. The defence then closed its case.
- [31] When assessing the evidence, the appellant's version (read with his conflicting police statement) is so inherently improbable, that the appellant can clearly be branded a witness whose credibility is questionable and whose evidence is false. The appellant's version cannot reasonably be true on any construction.
- [32] The post mortem report, which was admitted by consent as exhibit "A" and the photographs which were admitted as exhibit "B", clearly demonstrate that the deceased received multiple stab wounds to his head and that there was also evidence of blunt force trauma to his head. All these injuries led to subdural haemorrhage and the deceased passed away on 22 July 2010, five days later.
- [33] The state witnesses were credible and corroborated each other. Their version was also inherently probable.
- [34] The appellant's attempts to distance himself from the deceased, his alleged absence to buy airtime, his alleged refusal to enter the garage, his lack of any explanation as to why the deceased was naked and wet, his denial that there was a tap in the garage, his denial that he did not know who had thrown water on the deceased, his conflicting versions and the absolute callousness

demonstrated by him on his own version, are shocking. *Quis custodiet custodes?* This is a question which the magistrate asked. It is little wonder that the magistrate found him guilty as charged.

[35] Even so, the magistrate, in a very short sentence, did not give the appellant the minimum sentence of fifteen years, but only a sentence of ten years. The magistrate failed to explain the substantial and compelling reasons why he gave the appellant only a ten year sentence instead of the minimum fifteen year sentence.

[36] Factors which were argued in mitigation of sentence before sentencing were that the appellant had five children, had no previous convictions, his children ranged from four to 13 years and he was also the sole caretaker of the children. Furthermore, it was argued on behalf of the appellant that he had been dismissed from his employment as a result of what had transpired. He was also a first offender and forty years of age. In his short sentence, the magistrate stated that he would send the relevant social workers to investigate the children's situation. As aggravating circumstances, the magistrate took into account that one could not take the law into one's own hands and that the police should protect one, not harm one.

[37] However, the magistrate erred in not explaining which factors he considered as substantial and compelling in order to deviate from the minimum sentence.

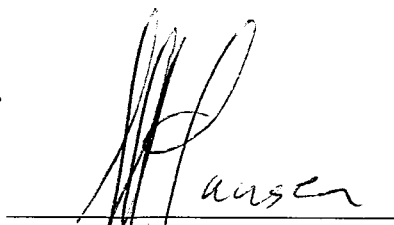
One can only infer that the facts set out above which were placed before the magistrate by the defence, persuaded him that such a deviation from the minimum sentence was called for.

- [38] One is left with the sense that the magistrate might not have applied his mind properly. But as was held by Botha JA in *S v Pieters* 1987 (3) SA 717 (A) at 727F–H the discretion to impose a sentence belongs to the trial court and can only be set aside when exercised improperly or unreasonably. Given the fact that the magistrate did not give a reasoned judgment regarding sentencing, it is impossible to state which misdirections, if any, he committed. The magistrate also did not cite any case law at all. However, as stated, various mitigating factors were placed before the magistrate which clearly persuaded him to exercise his discretion in the manner which he did. In the result that it cannot be held that the magistrate misdirected himself.

### *Order*

In the result, the court holds as follows: —

1. The appeal in respect of conviction and sentence is dismissed, and the convictions are confirmed.

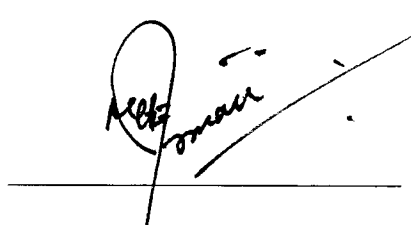
  

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**JANSEN J**

**JUDGE OF THE HIGH COURT**

*I agree*

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**ISMAIL J**

**JUDGE OF THE HIGH COURT**

*For the Appellant Advocate JP Marais (084 288 5401)*

*Instructed by Makobe & Associates (Ref: No: Mr Makobe/R504BSZ)*

*For the Defendants Advocate JP van der Westhuysen (083 755 4265)*

*Instructed by The State Attorney Pretoria (012 309 1563)*