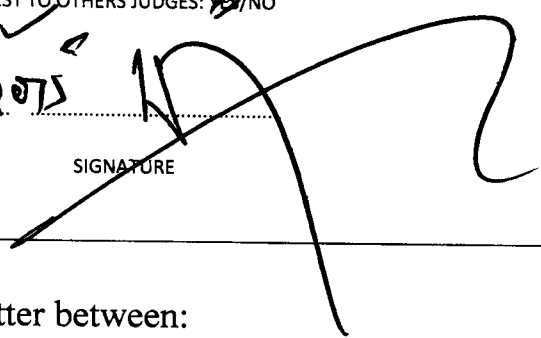




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 25/3/15
CASE NO: A565/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHERS JUDGES: YES /NO
(3)	REVISED ☒
25.3.2015	
DATE	SIGNATURE

In the matter between:

SIBUSISO SIMON MBATHA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] On 28 November 2011, the appellant stood trial in the High Court of South Africa, Circuit Local Division, Ermelo, charged with murder, robbery with aggravating circumstances and malicious damage to property. He pleaded guilty to the charges and was accordingly convicted as charged.

On 29 November 2011, the appellant was sentenced to 25 years imprisonment, 10 years imprisonment and 5 years imprisonment in respect of the murder, the robbery and malicious damage to property respectively. The sentences were ordered to run concurrently. The trial court gave the appellant leave to appeal against sentence and the appeal now serves before us.

- [2] Advocate M B Kgagara (Mr Kgagara) and Advocate J Cronje (Ms Cronje) represented the appellant and the respondent respectively when the appeal was argued.

BRIEF FACTS

- [3] On 23 September 2010 the appellant, in the company of the deceased, proceeded to Nelspruit to do some deliveries on behalf of House and Home [furniture shop]. On their way to Nelspruit, due to the lateness of hour and the fact that he was tired, the deceased who was driving their truck stopped next to the road and slept. The appellant, during the night, saw an opportunity to enrich himself. He strangled the deceased and tied him with the wires which he found in the truck. This was after he had made up his mind to rob the deceased of the goods that were to be delivered together with the truck. He drove to Daggaskraal where he offloaded some of the goods. The rest of the goods were dropped at his parents' home. He then decided to drive back to Johannesburg. He, however, abandoned the idea and decided to use a gravel road which took him to a desolate place where he set the truck alight with the deceased inside, tied as he had been. The idea, of setting the truck alight, as he put it in his plea explanation, was to remove his fingerprints which could link

him to the incident. The truck was destroyed and the deceased was burnt beyond recognition. The state accepted the appellant's version.

- [4] This appeal, as stated above, concerns only the sentence. This court only has to deal with the appropriateness of the sentences.

THE LAW

- [5] Trial courts have the advantage of dealing directly with the accused persons. They watch them as they testify and form their opinions of these accused as they testify. Trial courts, with this advantage, are better placed to exercise their discretion when it comes to the issue of sentences. It is for this reason that appeal courts do not lightly interfere with the sentences of the trial courts. For the appeal courts to interfere with the sentence of the trial court the sentence must have been vitiated by misdirection or irregularity or disturbingly inappropriate. The trial court must exercise its discretion judicially and properly otherwise a situation may arise where the trial court may be regarded as not having exercised its discretion at all. (**State v Rabie 1975 (4) SA 855 at 857D-E; and State v Pieterse 1987 (3) SA 717 (A) and State v Pillay 1977 (4) SA 531 at 535E-G**). X
- [6] Punishment, as I demonstrated in paragraph 5 above, "is pre-eminently a matter for the discretion of the trial court. Appeal courts have to be alert and avoid eroding this discretion. It should also be remembered that "punishment should fit the criminal as well as the crime, be fair to society, and blended with a measure of mercy according to the circumstances." (**State v Rabie (supra) at 862G**).

- [7] The trial court, in my view, was alive to the fact that the triad of **State v Zinn 1969 (2) SA 537 at 540G** is key in the determination of a suitable and appropriate sentence. The triad consists of the crime, the offender and the interests of society.

THE CRIME

- [8] The offences that the appellant has been convicted of are very serious. The deceased was killed in a very painful way. It will, in my view, remain very difficult to establish whether the deceased was in fact dead when the truck was set alight with the deceased inside. It will need a man of sterner steel, to be able to look at photographs of the deceased in the burnt up truck. It needs someone who will first die inwardly to be able to do what the appellant did. The manner in which the offences were committed speaks volumes. In short the offences are serious and heinous. The appellant's and the respondent's counsel agreed.

THE OFFENDER

- [9] The appellant was 28 years old when the offence was committed. He was not married. He went to school up to standard 9. He has two minor children he supported at the time of his arrest. He was unemployed. He spent a year in custody awaiting trial. He is a first offender who has apologised to the deceased's family. He pleaded guilty and demonstrated remorse that was evident to the trial court.

THE SOCIETY

- [10] Society can never be pleased by conduct such as the appellant demonstrated. Society needs protection which must be provided by the

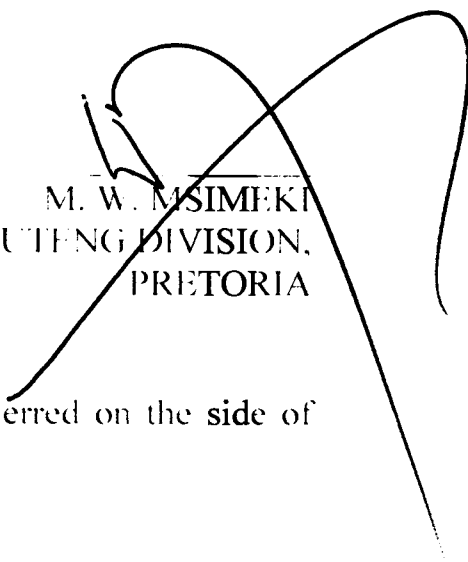
courts. Society's confidence in the criminal justice system is of utmost significance. The loss of such confidence by the society spells out calamity as society, in that event, takes the law into its own hands. We are all well aware of what society does these days. People are burnt to death and their properties set alight. No one is safe anymore. Without unnecessarily appeasing society, society needs to see punishment which will serve the purpose. In this way the purpose of punishment must be deterrent, preventive, reformatory and retributive. (**S v Rabie (supra) at 862A**).

- [11] I need to mention that there are instances where the seriousness of the offence requires that the personal circumstances of the offender recede into the background. These are cases which deserve punishment which should not be avoided "for flimsy reasons" (**State v Matjetje 2011 (1) SACR 40 (SCA); State v Vilakazi 2009 (1) SACR 552 (SCA) at [58] and State v Abrahams 2002 (1) SACR 116 (SCA) at [25]**).
- [12] The trial court duly considered the triad enunciated **State v Zinn (supra)** and all the factors relevant to sentence.
- [13] The court found substantial and compelling circumstances referred to in Section 51 (3) (a) of the Criminal Law Amendment Act 105 of 1997 (CLAA) which enabled it to impose a lesser sentence than the prescribed minimum sentence of imprisonment for life.
- [14] As proof that the sentences were blended with a measure of mercy the trial court ordered that the sentences on counts 2 and 3 run concurrently with the sentence on count 1.

[15] I have found no demonstrable and material misdirections or irregularities in the manner in which the trial court exercised its discretion with regard to the appropriateness of the sentences. The appellant was duly convicted and sentenced. Appeal against sentence should fail. The sentences are appropriate.

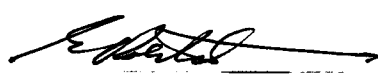
[16] I, in the result, would propose the following order:

The appeal is dismissed.



M. W. MSIMEKI
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

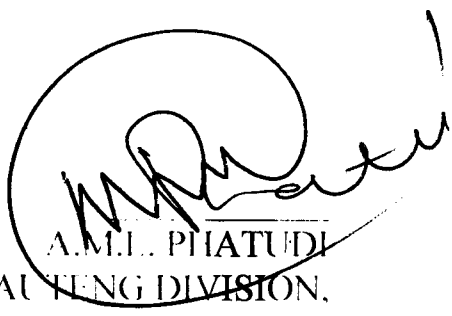
I agree. I wish to add that, if at all, the trial court erred on the side of leniency.



E. BERTHSMANN
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

I agree

And it is so ordered



A.M.L. PHATUDI
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

Heard on:
For the Appellant:
Instructed by:
For the Respondent:
Instructed by:
Date of Judgment:

15 March 2015
Mr MB Kgagara
Pretoria Justice Centre
Adv J Cronje
DPP