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

CASE NUMBER: CC31/2019

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

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

(3) REVISED: YES

DATE: 13 January 2025

SIGNATURE:

In the matter between:

THE STATE

and

JACOB BHUTI MLAMBO

Accused 1

MISHACK MABUSA MATSHIYA

Accused 2

MFUNDO INNOCENT MLAMBO

Accused 3

P[...] M[...] J[...]

Accused 4

F[...] L[...] M[...]

Accused 5

THOMAS MOSES KABINI

Accused 6

PAULINAH ZANELE MASANGO

Accused 7

LANCELOT SIPHO MTHIMUNYE

Accused 8

SIMON PATRICK NXUMALO

Accused 9

PAULINAH NURSE SIBIYA

Accused 10

TRYPHINA NTOMBIFUTHI SIBIYA

Accused 11

JUDGMENT ON SENTENCE

AVVAKOUMIDES AJ

THE SENTENCE AND APPLICABLE LEGAL FRAMEWORK

1. The 11 accused were found guilty of the murder (read with the provisions of section 51(1) of the Criminal Law Amendment Act 107 of 1997) of Lehlohonolo Joseph Sekhotho (the deceased), in that they intentionally and unlawfully, acting in the execution, or furthering of common purpose, killed the deceased. In addition, accused 1, 2 and 3 were convicted by this court of kidnapping as charged.

2. Section 51 of Act 105 of 1997 has been amended by section 33 of Act 62 of 2000 and section 36 of Act 12 of 2004 by the inclusion of the word "Discretionary". The heading of the subsection now reads as follows: "**Discretionary minimum sentences for certain serious offences**".

3. I find it necessary to deal with the relevant provisions of the section.

4. Section 51 (1) provides that, notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person:

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or

(b) ... shall sentence the person to imprisonment for life.

5. Subsection (3) (a) provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

6. Before I deal with the question of substantial and compelling circumstances it is necessary to briefly deal with the relevant cases on sentencing in general and the factors which a court must consider in the sentencing process.

7. It is trite that in sentencing proceedings the point of departure by courts are to consider the offender, the offence and the interests of society. See *S v Zinn* 1969 (2) SA 537 (A).

8. This case has taken over three and a half years to finalize mainly because the court could only sit during the various periods of recess, commencing after the March 2021 court term. This court sitting periodically during the recess periods follows the Judge President's directive on part heard cases.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

9. What constitutes substantial and compelling circumstances as envisaged in section 51(3)(a) of the Criminal Law Amendment Act? The term '*substantial and compelling circumstances*' has not been defined.

10. In terms of Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 (the Act, as amended), a court is, instead, granted discretion to impose a lesser sentence than that one prescribed by the Act where '*substantial and compelling circumstances*' exist. There is no definitive answer to the question of what '*substantial and compelling circumstances*' are.

11. In general, a court must evaluate all the evidence, including the mitigating and aggravating factors, to decide on a sentence but in cases where minimum sentences are legislated, *as in this case*, a court must consider whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentence. The courts must be aware that the legislature has legislated a particular sentence for such an offence and there must be convincing reasons to depart therefrom, which must be recorded, when departing from the prescribed sentence.

DISCUSSION OF APPLICABLE CASE LAW

12. The courts have not defined the meaning of the phrase '*substantial and compelling circumstances*', even though the imposition of sentence is pre-eminently the domain of a sentencing court. The determination of the existence of '*substantial and compelling circumstances*' can thus only be arrived at on a case-by-case basis. All the circumstances, including the factors traditionally considered by courts when sentencing offenders must be considered. For circumstances to qualify as substantial and compelling, they 'need not be *exceptional*' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender' (see *S v Pillay* 2018 (2) SACR 192 (KZD) at paragraph 10).

13. In *S v Pillay* the accused was convicted of the murder of Annelene Pillay (the deceased), committed under circumstances contemplated in s 51, part I of schedule 2 of the Act, in that the state alleged the offence was planned or premeditated (count 1), and, possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 read with s 51, part II of schedule 2 of the Act (count 2). The issue which concerned the court was whether to impose the prescribed minimum sentences of life imprisonment in respect of count 1- and 15-years' imprisonment in respect of count 2, or whether to deviate from such sentences.

14. Henriques J stated that where a court is convinced, after considering all the factors, an injustice would follow if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.

15. Henriques J referred to *S v Vilakazi* 2009 (1) SACR 552 (SCA), where the court (in Vilakazi) explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. In deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court considers the personal circumstances of an accused. However, only some carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence.

16. The minimum sentences have been legislated to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances, which justify a departure therefrom. In addition, the Supreme Court of Appeal has indicated that the minimum sentences must not be departed from for '*flimsy reasons*' and are the starting point when imposing sentence.

17. In the event of substantial and compelling circumstances not existing, a sentencing court is then entitled consider departing from imposing the prescribed minimum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be disproportionate and unjust to do so. This is often referred to as the proportionality test. In my view however, the proportionality test must be viewed against all the circumstances of the case, particularly the interests of society in violent and serious crimes.

18. Mandatory minimum sentences should be approached with a degree of caution, because, though there is a discretion to deviate from the prescribed sentences under s 51(3)(a) of the 1997 Act, as amended, courts may easily do so for "flimsy" reasons.

19. There have been views expressed over the years that substantial and compelling circumstances can be found in traditional mitigating factors. If the imposition of prescribed sentences is disproportionate to crime, criminal and

legitimate needs of society, that on its own, constitutes substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

20. In *S v Malgas* 2001 (1) SACR 469 (SCA) the court stated "that the circumstances in which the crime was committed are undoubtedly such as to render it necessary to impose a sentence of imprisonment for life unless substantial and compelling circumstances justify a lesser sentence. The court held that the 'shooting was premeditated and planned'. The fact that the planning and premeditation occurred not long before the deed was accomplished cannot alter that. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest an appropriately severe punishment being imposed for it, the court considered that the personal circumstances of the accused (her relative youth, her clean record and her vulnerability to Carol's influence by reason of her status as a resident in the latter's home at the latter's pleasure) and the fact that she was dragooned into the commission of the offence by a domineering personality are strongly mitigating factors. "As a fact she gained nothing from the commission of the crime. Her remorse cannot be doubted and her spontaneous confession which brought to light the commission of a crime which would otherwise have gone undetected is deserving of recognition in a tangible sense." "She is young enough to be rehabilitated and there is a real prospect even after a long period of imprisonment. "These circumstances, cumulatively regarded, satisfied the court that a sentence of life imprisonment would be unjust. They qualify therefore as substantial and compelling circumstances within the meaning of the provision. None the less, it remains a particularly heinous crime of the kind which the legislature has singled out for severe punishment and the sentence to be imposed in lieu of life imprisonment should be assessed, paying due regard to the benchmark which the legislature has provided." The Judges' view was that imprisonment for twenty-five (25) years is appropriate. This was an appeal against a sentence of life imprisonment.

21. Marais JA said at: "C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. D. The specified sentences are not to be departed from lightly and for flimsy reasons.

Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

22. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58, Nugent JA said the following: In cases of serious crime the personal circumstances of the offender, by themselves, *will necessarily recede into the background*. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment are in themselves largely immaterial to what that period should be, and those seem to be the kind of flimsy grounds that *S v Malgas* case said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment.

23. In *S v Matyityi* 2011 (1) SACR 40 (SCA) the court referred to the fact that such deviations must be based on convincing reasons. Ponnann JA, at para 14, said: 'Turning to the respondent's age: ...Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth.'

24. I am aware that in *S vs Rabie* 1975 (4) SA 855 (A) at 861-2 Holmes JA reminded judicial officers of the importance of being fair to both the accused and to society in handing down sentence. Justice includes the element of mercy which is the hallmark of a civilized and enlightened criminal justice system. And in the same case at p866 Corbett JA eloquently summarized the approach as follows:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and

the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

25. The point of departure in sentencing is to have regard to the three inter-connected factors relevant to an appropriate punishment. It is the Court's task to have regard not only to the offender, but also the offence itself and the interest which society has in the imposition of a suitable sentence (S v Zinn 1969 (2) SA 537 (A)).

26. During sentencing the court must also be directed at addressing the traditional purposes of punishment. These are deterrence, prevention, retribution and rehabilitation of the offender. At the end of it all, it is the unenviable task of the Judge to achieve a proper balance amongst these competing factors and ultimately arrive at a sentence that is just. For that is what the Constitution ultimately requires that a Court must strive for: justice.

ONGOING VIOLENT CRIMES

27. Minimum Sentence Legislation: The emergence of a new political order and a constitutional democracy did not bring about an end to the social ills which plagued our society for so many decades and continue to do so. Levels of serious and violent crime continued, and continue, to increase to unprecedented levels and Parliament saw it necessary to step in and address the problem. In 1997 the Legislature passed the Criminal Law Amendment Act, 105 of 1997 ("Act 105") which was intended to prescribe a variety of mandatory minimum sentences to be imposed by our courts in respect of a wide range of serious and violent crimes. This was said to reflect the stern voice of the people in response to crimes which were perceived to be reaching epidemic proportions.

28. In terms of Schedule 2, Part 1 to Act 105 the murder count in this case attracts the minimum sentence of life imprisonment on two bases. First, because the death of Mr Sekhotho was caused by the accused. They intentionally, hit, kicked and struck the deceased repeatedly with fists, feet and sticks and large objects. This is after tying up the deceased with a rope around his arms and feet, tying the tied-up hands to his tied-up legs together, thus rendering him unable to defend himself. Furthermore, the sentence is applicable because *"the offence was committed by the accused acting in the execution or furtherance of a common purpose or conspiracy"*.

29. All factors traditionally are taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. All the traditional factors relating to the accused have been taken into account by this court.

30. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as to cumulatively justify a departure from the standardized response that the Legislature has ordained.

31. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.

32. Since the delivery of the judgment in Malgas the provisions of Section 51(3) were amended in 2007 when the word "must" replaced the word "may" therein, thereby directing a court not to impose a life sentence if substantial and compelling circumstances are found to exist. Accordingly, the summary provided by Marais JA in that judgment would now read "is obliged to impose a lesser sentence."

THE OFFENCE

33. The offence, and the events leading to the offence, were horrific. The deceased attempted to rape a young female child. Before the deceased could go ahead with the rape, and, because of the screaming by a friend of the young girl and several other community members, accused 1, 2, and 3 managed to run towards a yellow shack and accost the deceased. An altercation ensued. Accused 1, 2 and 3 emerged from the shack with the deceased, bound as aforesaid and he was already bleeding from his ear. He was dragged outside when they kicked him on the head and his body.

34. The reality of the situation is that the deceased did not go through with the rape because he was accosted by accused 1, 2 and 3. Their evidence was not that they witnessed the rape. They accosted the deceased who was kneeling in front the young girl and he had his underwear pulled down. When they accosted the deceased, the little girl managed to run out of the shack to look for her mother and family. The young girl ran to safety and was no longer in danger. Very little was submitted to the court about the well being or not of the young girl, who suffered the most abhorrent events. It appeared later that the blood that was present on her dress and seen by some members of the community appeared to come from her menstrual cycle, probably caused by the immense fear of what she was facing.

35. The deceased was not a danger to anyone after having been tied up. The little girl fled and was safe. During the continuous assault on the deceased the young girl was taken to the clinic by one of the deceased's brothers. Accused 5 confirmed that at the clinic she was assured that her daughter had not been raped. At that stage, according to accused 1, he had already called the police by using his cell phone. This aspect is crucial because of the position accused 1 holds in the community. He is the traditional leader and is a member of the royal council of the Royal Tribunal/house. The community is respectful to accused 1 and his word is not easily gainsaid.

36. It was submitted for the first time during the sentencing proceedings that accused 1, 2 and 3 laboured under the impression that the deceased had commenced with the act of rape. After the altercation in the yellow shack, accused 1, 2 and 3 started the assault on him outside of the shack. As things unfolded the other accused participated in the assault each of them coming forward and assaulting the deceased by using sticks, hands, feet and other objects.

37. Thereafter, the deceased was dragged along by accused 1, 2 and 3 to the adjacent RDP house (all on the property of accused 1) where they lay the deceased on the ground and the accused took turns to strike the deceased. Eventually, after all the accused partook in the assault, the deceased was dragged outside the property of accused 1 and left there, dead.

38. All of the accused were adamant in their evidence in chief that they never took part in the assault and kidnapping. Notwithstanding eyewitnesses who saw the assault, each accused, maintained innocence. After all the state witnesses testified, counsel for accused 7 put it to all the state witnesses that she had not assaulted the deceased at all. However, after re-examination by the state of Tshepo, counsel for accused 7 sought leave to make a section 220 admission on behalf of accused 7 to the effect that when accused 7 arrived at the scene and the deceased was outside on the street, she admitted picking up a black pipe and assaulting the deceased on his private parts. She is right-handed but because of a prior stroke (her own version) she could not use her right hand and used her left hand instead to assault the deceased. Accused 7 confirmed the admission. The admission came after the version of accused 7 was put to Sibongile, Percy and Tshepo (state witnesses) to the effect that accused 7 had not assaulted the deceased at all.

39. The evidence of accused 1 to the effect that no one would listen to him and wait for the police to arrive is contrived in my view. I cannot align myself with this explanation, given his position in the community and the authority with which accused 1 is vested. I have dealt with this aspect in my judgment on the conviction of the accused. A lot of emphasis was placed on the position of accused number 1 in the community, even by accused number 8 who testified that one could not find and

settle in a home in the village unless you are approved and accepted by accused number 1.

40. The accused procured pre-sentencing reports on their behalf, and I shall deal with the reports in respect of each of the accused.

ACCUSED NUMBER 1

41. Accused number 1 was born on 19 April 1964. The report states that he called the police and was told by a police officer to keep the deceased safe while the police were on their way. The report states that when he entered the shack accused 2 and 3 had already tied the deceased up and noticed some people throwing rocks. In his evidence in chief however he testified that he executed a civil arrest when participated in tying up the deceased. Throughout the trial it was accepted that accused 1 wields substantial power in that he is a member of the school governing body, he is a member of the traditional council and, generally, he is held in high regard by the local community.

42. I note that the probation officer's report states further that accused 1 decided to move the deceased into his RDP house because the door of the shack had been broken. According to the parole officer accused 1 stated that he felt the RDP house would be safer. He stated further that the deceased was kicked on his head by the deceased's own brother and people who saw this assault wanted to join in. Two of the deceased's brothers testified on behalf of the state. There was no evidence of either of the brothers assaulting the deceased, excepting a denial of the accusation by Percy, the brother in question. Accused 1 was able to identify the mother of the young victim and Percy but insofar as the other people around the deceased, he maintained that he did not know them and referred to them as members of the community. This is merely an observation.

43. The version furnished to the probation officer differs materially from accused 1's evidence in chief. For example, he told the probation officer that he left the RDP house, while the deceased was alive and bleeding from the kick by Percy however in his evidence in chief, he maintained that at the time accused 5 arrived,

she wanted to lash out and hit the deceased; but he stopped her. Moreover, and crucially, having not testified as to the identity of the community members who allegedly removed the deceased from the RDP house, he explained to the probation officer that the deceased was removed from the RDP house by the child's family, and they assaulted the deceased with a stick and a pipe. Again, I mention this evidence simply as an observation and it should not be construed that I am justifying the conviction ex post facto.

44. According to the probation officer the village is under policed/there is a lack of effective policing which may lead to a culture of impunity in a community. According to the probation officer accused number 1 does not acknowledge that he contributed to the murder of the deceased and that he lacks remorse. Despite illustrating in detail, the dire circumstances of the village Sokhulumi, the probation officer recommends that accused number 1 be placed under correction supervision under section 276 (1) (i) of the Criminal Procedure Act 71 of 1977. This would mean that the accused would return to his home and, for a period of approximately 3 years, would be subject to house arrest and be obliged to comply with such conditions which the Department of Correctional Services would assign to the accused. These conditions include and are not limited to orientation programs which the accused would have to attend, house detention and community service and that he be monitored by Correctional Services by means of unannounced visits and compulsory visits to the community corrections office for consultation purposes. I cannot align myself with the probation officer's recommendation, having considered the entire report, and those in respect of the other accused where correctional supervision under section 276 (1) (i) is recommended. I must express concern whether due and proper consideration was given to the recommendation, given the poor services, under policing and lack of effective policing noted by the probation officer and the ongoing and prevalent offences which occur and making self-help the order of the day.

ACCUSED NUMBER 2

45. The general comments of the probation officer in respect of accused 1 about the conditions of the village and lack of services are equally applicable to all other accused. The recommendations of correctional supervision in respect of the other

accused, where applicable are, in my view, similarly concerning and, whether due and proper consideration was given to such recommendations. Accused number 2 also obtained a probation officer's report. Accused number 2 admits tying up the deceased with the assistance of accused 3. I simply note this in the report. The report highlights that accused 2 does not acknowledge that he contributed to the murder of the deceased. The probation officer stated that he does not take any blame. The probation officer states that it would be speculative to determine whether a person could be rehabilitated or not, however, rehabilitation cannot be achieved without the person acknowledging his error and accepts responsibility for his actions by showing remorse.

46. The probation officer referred to the Vilakazi case referred to above to illustrate that in cases of serious crimes the personal circumstances of an accused will necessarily recede into the background, and, whether the accused has children or is married would be flimsy reasons to be avoided with reference to the Malgas case, also referred to above. The probation officer is of the opinion that accused 2 is unlikely to be rehabilitated and recommends direct imprisonment.

ACCUSED NUMBER 3

47. Accused 3 is the son of accused 1. I note that accused 3 told the probation officer that accused 4 and 5 and other people "flocked in" and community members were threatening to burn down the house of accused 1 if the deceased was not released. Accused 3 said that he then left to go to the shops. On his way back he met with Thomas Kabini, accused 6 who was carrying wooden logs. When he and accused 6 returned to the scene accused 6 hit the deceased three times on the head with the log and the deceased died immediately.

48. According to accused 3, after the deceased died, community members dispersed. Accused 6 walked away and he, accused 3, walked towards the soccer grounds. Accused 3 does not acknowledge the commission of the offence. He mentioned that he was too afraid to say that it was accused 6 who killed the deceased. I simply note the information given to the probation officer. Accused 3 verbalises sincere remorse whilst stating that he was angry with the deceased

because of what he did. The probation officer reported that it could be taken as aggravating that accused 3 pleaded not guilty but found guilty and this may question his remorse. The report continues to state that despite the deceased being assaulted in a brutal and violent manner by numerous members of the community, acting in common purpose, the deceased did not stand a chance against the overwhelming acts of violence. He did not pose any danger and instead of waiting for the police, the community took the law into their own hands and killed the deceased. The probation officer recommends correctional supervision in terms of section 276 (1)(i).

49. Accused 3 is a breadwinner and employed at Sandton Plant Hire. He has a child which he contributes to monthly.

ACCUSED NUMBER 4

50. Accused 4 is the father of the young girl who was the innocent victim. He too pleaded not guilty. When he heard the report about K[...], his wife, accused 5 ran to the scene and he later followed. When he arrived at the scene, he probed accused 1 as to what had happened whereupon accused 1 told him that the deceased was attempting to rape K[...]. They then restrained him (the deceased) by tying his hands and feet and he was told by accused 1 that he had called the law enforcement, and they were on their way.

51. He went to Bangiswani's house to find his daughter and wife and as he arrived accused 5 and their daughter were coming out. Accused 5 and the daughter then went to the police station with the deceased's brother. He returned to his house. The deceased was still alive and was locked inside the RDP house of accused 1 when he returned home. The community members gathered outside accused number 1's house and demanded the release of the deceased. He stated further that approximately 16h00 he noticed about 8 police vehicles passing his house and he then went to see what was happening and discovered that the deceased was dead. Despite the aforesaid he stated to the probation officer that he did assault because he was frustrated, confused and acted out of anger. He did not intend to kill the deceased. He asserted that any parent would have responded the same way. He

acknowledges that mob justice is not an acceptable practice and stated that Sokhulumu community is an aggressive community.

52. The aggression in the community is caused by anger and frustration about the circumstances in the community and stems from the criminal justice system and lack of police visibility and trust between the community and the police. Accused 4 does not acknowledge that he murdered the deceased. He admits hitting the deceased 3 times with a water pipe. He also identified accused 6 as having hit the deceased with a hard object.

53. Accused 4 is a first offender and is one of 11 children. He is married to accused 5 and they have two children together. He says he is the sole breadwinner but at the same time states that his wife is employed with the Expanded Public Works Program. The probation officer, under the topic of various sentence options states that accused 4 has been convicted of a serious criminal offence that justifies a sentence of direct imprisonment. This notwithstanding the probation officer recommends correctional supervision in terms of section 276 (1) (h) of the Act.

ACCUSED NUMBER 5

54. Accused 5 is the mother of the young girl who suffered an attack on her by the deceased. A report was obtained on her behalf as well. She maintained that she was angry at the deceased and wanted to assault him but was prevented by accused 1. This was her evidence in the merits trial. She stated to the probation officer that she was angry and hit the deceased with her hands. She told the probation officer that she saw her daughter being comforted by someone. I note that instead of assisting her daughter she ran to the house of accused 1 to and was very angry. She started hitting the deceased with her hands. While she was assaulting Lehlohonolo, (the deceased) his brother Tshepo arrived and asked her to stop the assault and wait for the police officials. She argued with Tshepo but held onto the deceased and hit him. Tshepo asked her to accompany her to the hospital with K[...].

55. While they were at the hospital they were told to first go to the SAPS and then return to the hospital. At the hospital she was informed that K[...] had not been raped

but that she was menstruating. She told the probation officer that she takes full responsibility for the offence and admits guilt. She regrets acting the way she did on that day and that her actions led to the death of the deceased. Accused 5 told the probation officer that as soon as she appeared in court, (presumably the Magistrates Court) she admitted guilt and took full responsibility for the offence. She did so because she was worried about her family members who were arrested and there was no peace at home. The family was fighting physically and verbally, and she was not coping with the tension and trauma.

56. Accused 6 is the brother of accused 5. According to accused 5 he does not assist her at all and when he receives any money, he spends it on alcohol. I simply take note of the allegations. According to the probation officer accused 5 was honest and willing to provide her version of the offence. She shows remorse and regret and takes full responsibility whilst acknowledging that she participated in the commission of the offence. The probation officer stated that circumstances which may be considered as substantial and compelling are that accused 5 is a first offender, she pleaded guilty to the charges (which is not accurate, the accused having pleaded not guilty), she displays remorse and regret for assaulting the deceased. Furthermore, her actions contributed to the death of the deceased. The probation officer recommends correctional supervision under section 276 (1) (h) of the Act.

57. An addendum report was procured dealing with the wellbeing of the child O[...], if accused 5 would receive a custodial sentence. According to this report there are persons who would look after the child who is about 13 years' old, according to the reports.

ACCUSED NUMBER 6

58. Accused number 6 is the brother of accused 5. He told the probation officer that he was sitting and consuming alcohol on the day of the murder in a tavern. He was with friends. They all went outside upon hearing the screaming. He enquired about his sister's child and was told that she had gone to the clinic. After hearing this he went back to the tavern

59. Accused 6 is a first offender and unemployed. The probation officer stated that within the psychological functioning of accused 6 he was not able and willing to provide any version to the probation officer. He only provided limited information and does not display and verbalise remorse or regret for the offence that he was convicted of. He denies committing the offence or participating or observing the offence. He is dissatisfied with his conviction for an offence that he did not commit. The probation officer observed him as arrogant, not trustworthy and dishonest. The probation officer recommends a custodial sentence for accused 6.

60. A supplementary report in respect of accused 6 was obtained. In this report he stated to the probation officer that he heard community members saying that he killed a person. He was under the influence of alcohol and cannot recall anything but believes that the community members and other co-accused are telling the truth. He requests forgiveness and is willing to accept any sentence from the court. In the supplementary report he admits the offence and takes responsibility for his actions. At the time of meeting with the probation officer to compile the supplementary report he appeared to be under the influence of alcohol.

ACCUSED NUMBER 7

61. A probation officer's report was also obtained for accused number 7. She states that as she was walking to the scene of the event, she experienced emotions of anger and hurt towards the deceased. Accused 7 observed the deceased lying down on the floor with his hands tied up and had been severely assaulted by the community. She admits her involvement in the offence however explained that it was not her intention for the deceased to be killed but only to be punished for the crime that the deceased had allegedly committed. She only found out later that there was no rape on K[...].

62. Accused 7 is a first-time offender and has two children. She lives close to her family. She feels sorry for the family of the deceased as he did not deserve to die in such a brutal and violent manner. Accused 7 regrets participating in the offence that resulted in the deceased's death. Accused 7 stated that she deserves to be sentenced to prison. Her sister will take care of her child.

63. Accused 7 accepts her involvement and verbalises regret. She acknowledges the severity of the offence and the consequences of her actions. She shows empathy to the deceased's family. According to the probation officer's report accused 7 is evaluated as a candidate that can be rehabilitated in the community. The probations officer nevertheless states that the serious nature of the offence and the way the defenceless deceased was killed points to an unconscionable level of barbarism and lack of humanity from the accused and her co-accused. The probation officer's report recommends correctional supervision for accused 7 under section 276 (1) (h) of the Act.

64. A supplementary report was procured on behalf of accused 7 dealing mainly with the wellbeing of her one child if she is sent to prison. I note that arrangements have been made in this regard and ,by all accounts there are no concerning issues in the report.

ACCUSED NUMBER 8

65. Accused number 8 is a first offender. He denies the charge of murder and alleges that he only accompanied his brother away from the scene and did not even see the deceased. He is unemployed and dependent upon his father and unable to contribute to the maintenance of his own child. According to the probation officer, elements and factors relating to socio economic conditions and environmental factors may have an impact on one's behaviour. The family background and culture may influence people's behaviour.

66. Accused 8 maintains his innocence and could not furnish the probation officer with any version. The probation officer does not identify any substantial or compelling reasons why the court should not impose "the minimum sentence". The probation officer lastly recommends that the accused "is sentenced to imprisonment in terms of section 276 of the Act, as amended." (sic)

ACCUSED NUMBER 9

67. The probation officer reported that the accused saw a co-accused taking a plastic pipe, which everyone has used to-beat the victim with and assault the victim. Accused 9 took the pipe and hit the victim a few times. The same co-accused took a wooden log which he had uprooted from a fence and hit the victim on his head. The community members were watching. Then accused 9 took his bicycle and rode off. Accused 9 is of the opinion that he did not assault the victim to the extent that he could lose his life. He saw the co-accused deliver what might have been the final blow to the victim.

68. The accused is riddled with guilt and regret over what he terms as being at the wrong place at the wrong time. He finds it hard to forgive himself and to accept the court's judgment. He suffers from anxiety and emotional distress and living at the same place in the community is difficult because he is confronted with the current situation without his wife for support.

69. The probation officer reports that the societal mentality of "taking care of issues" or "keeping them in one's own hands" is prevalent and from this emerged the acceptance of "vigilante violence" as a system of retribution. Limited access to SAPS and poor service delivery has allowed violence to become normalised in the community of Sokhulumi and the nearest police station is 33 kilometres away.

70. Despite pleading not guilty to the charges accused 9 reports a strong sense of remorse and victim empathy. The serious nature of the offence does not however justify a suspended sentence, according to the probation officer. The probation officer recommends correctional supervision in terms of section 276 (h) of the Act.

ACCUSED NUMBER 10

71. Accused 10 does not admit that she committed the offence that she was convicted of. She does not take responsibility for her actions. She told the probation officer that she feels concerned and betrayed. She is a single parent and a breadwinner. She mentioned that her conviction regarding the case was motivated by hatred and jealousy by people who do not want to see her family succeeding. She hopes that the court will be merciful to her for her children's sake. The probation

officer reported that the accused originates from a community which lacks legal information. There is a close bond between community members, and this could have impacted on the members of the community's conduct of taking the law into their own hands. Accused 10 shows no remorse and does not take responsibility.

72. The probation officer reported that the accused has been convicted of a serious and violent crime which resorts under minimum sentence legislation. This notwithstanding the probation officer recommends correctional supervision under section 276 (1) (i) of the Act.

ACCUSED NUMBER 11

73. Accused number 11 maintains her innocence and indicated that she did not go into the yard of the RDP house. She reported to the probation officer that she did not even see the deceased being hit as he was attacked whilst being inside the RDP house. She simply stood outside and inquired about the reason the victim was attacked. She has a four-month-old child, and she suffers due to the consequences of the decision she made that day. She has lost out on an opportunity to obtain her degree in education. The probation officer reported that a suspended sentence is not appropriate because of the seriousness of the offence. The minimum sentence is prescribed and cannot be deviated from due to the seriousness of the offence.

74. The probation officer went on to report that imprisonment is seen as too harsh a sentence even though the prescribed sentence is applicable. Accused 11 expressed sorrow over the death of the deceased. The probation officer reported further that the accused was convicted because of the "notion of common purpose". The probation officer reported that the accused's denial of involvement can question the elements of remorse and acceptance of responsibility.

75. The probation officer is of the view that the accused should not be sentenced to imprisonment because of her young child who would grow up without a mother. The probation officer suggested that section 28 (2) of the Constitution, Act 108 of 1996 be taken into account regarding the best interests of the minor child. The

probation officer's recommendation is correctional supervision in terms of section 276 (1) (h) of the Act.

76. A supplementary probation officer's report was obtained dealing with a proposed foster parent. This person is the accused's mother and who lives in the same village. The probation officer reported that the proposed foster parent has done a commendable job of raising her own children and is described as a loving and responsible mother. Her household is clean and conducive to the upbringing of children.

GENERAL COMMENTS ON THE PROBATIONS OFFICERS' REPORTS

77. I have read each report obtained on behalf of the accused and to the extent that I do not deal with every aspect raised in the various reports, this should not be construed that I have not had regard to the whole of every report. I am aware that the probation officer's recommendation is limited to being a recommendation which is not binding on a court.

78. I have had careful regard to the personal circumstances of, every accused, whether in relation to the other accused to whom they are related, and individually. All the accused have circumstances which would be affected by a sentence of direct imprisonment. Of this there can be no doubt. I am particularly alive to the interests and wellbeing of children who may suffer because of their parent/s being incarcerated,

EVALUATION OF EVIDENCE ON SENTENCE

79. I have dealt with the probation officers' reports. In addition, I was furnished with reports from Correctional Services dealing with the system on how correctional supervision is structured and what the system contains. The crux of the system is to illustrate in respect of each accused under what conditions they would have to serve correctional supervision, for example: not consume alcohol or drugs, not leaving the relevant magisterial district of the area concerned, refrain from making any contact or threatening a person/s by word or action, being monitored by correctional officials by

unannounced visits, and the like. I do not find these recommendations and reports of any assistance. The reports simply ignore the reality of the lack of services in that area, as repeatedly stated by the probation officers and the actual evidence given by most of the accused on the long delay of SAPS to arrive at the scene of the crime.

80. I have carefully considered all the submissions made by counsel on the possible sentencing options. I do not intend to deal herewith in details but in my view and given the facts of this case and the evidence, I find that correctional supervision is wholly inappropriate as an appropriate sentence.

81. Some of the accused, when testifying appeared to me to be regretful for the situation they find themselves in and regret for the family of the deceased. Whether there is true remorse by any of the accused will remain unknown. One of the probation officers reported on the difference between regret and true remorse, stating that regret is often the emotion of being sorry for oneself whereas remorse is the gnawing feeling one may feel for their actions towards others. Others steadfastly refused to take responsibility, as stated above and in the reports of the probation officers' reports. It warrants mentioning that all the accused pleaded not guilty. Their evidence was a denial of having struck or assaulted the deceased or being involved at all.

82. During the sentencing proceedings counsel for the accused argued that substantial and compelling circumstances should be found in their respective circumstances and the fact that they all laboured under the misapprehension that K[...] has been raped and under such misapprehension, took the matter into their own hands. The assault took more than 1 hour. The police arrived about 4 hours later. There is no onus on either the state or the defence to prove substantial and compelling circumstances. This duty is that of the court which must evaluate all the circumstances and if such circumstances appear to be present, these must be stipulated and explained in the judgment, as a basis to deviate from the prescribed sentence in question.

83. The accused are all related to each other except for accused 9. Accused number 1 had called the police whilst the deceased was bound in an inhumane

manner, as depicted in the photographs. The state argued that the deceased had been secured and irrespective of how long the SAPS took to arrive makes no difference. Despite protestations by Percy and Tshepo to allow the SAPS to deal with the incident in terms of the law, the assault unfolded from the yellows shack and continued until the deceased was dead. The state argued that accused number 1 who held the position as a traditional leader stood back and allowed the assault to continue when he was able to call everyone involved to order, according to the powers he is vested with. Accused number 1 testified that he had nothing to do with the assault except to execute a civil arrest and then maintained that the community (unidentified) was responsible for the attack and ultimate murder of the deceased.

84. The state referred to the case of *OPP KwaZulu-Natal v Nqcoobo and others* 2009 (2) SACR 361 (SCA). In this case the trial court deviated from the prescribed minimum sentence because they were first offenders and youthful. The trial court handed down a 18-year sentence of imprisonment. The murder of the deceased was gruesome. On appeal the court held that the imposition of a prescribed sentence need not amount to a "shocking injustice". The court stated that: *"If imposing the minimum sentence would be an injustice it should be departed from. The traditional objectives of sentencing include retribution, deterrence and rehabilitation. it does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. The rehabilitation of the offender is but one of the considerations when sentence is being imposed."* Of significance is that the court highlighted that the nature of the offence related to the personality of the offender; the justifiable expectations of the community and the effect of a sentence on both the offender and society" are all part of the same equation. The court held further that *"courts are expected to dispense justice. The brutality of the murder is regrettably too regularly a part of life in South Africa. Courts are expected to send out clear messages that such behaviour will be met with the full force and effect of the law. The legislature is concerned and so should we too".*

85. The accused 1, 2 and 3, in respect of the kidnapping conviction submitted very little, if any, in respect of sentencing on charge number 2. I have taken into consideration that all three maintain that they defended themselves against the deceased because he was violent, that they assisted each other to restrain him from

leaving the area and, in respect of accused 1, that he executed a civil arrest. No evidence was led as to how the civil arrest took place or whether accused 1 had uttered any words to the deceased regarding a civil arrest.

CONCLUSION AND SENTENCE

86. Members of the public, wherever they may live, but particularly in informal settlements and townships are exposed to violent crimes of various descriptions on a regular basis and look to the courts for protection to which they are entitled. The failure by courts to respond adequately to the plight of such victims would result in vigilantism, an ill which undermines the core of the constitutional order in South Africa.

87. Consequently, having considered all the circumstances of the case, the personal circumstances of the accused, the crime which was gruesome and the interests of society, I am unable to find any substantial or compelling circumstances to deviate from the prescribed sentence. That being the case I am persuaded that the accused 1 to 11 must face the prescribed sentence on count 1.

88. Accordingly, accused number 1, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment. In addition, in respect of count 2, on the charge of kidnapping, the accused is sentenced to 3 years imprisonment. The period of imprisonment of 3 years in respect of the conviction on count 2 is to run concurrently with the term of life imprisonment imposed on Count 1.

89. Accused number 2, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment. In addition, in respect of count 2, on the charge of kidnapping, the accused is sentenced to 3 years imprisonment. The period of imprisonment of 3 years in respect of the conviction on count 2 is to run concurrently with the term of life imprisonment imposed on Count 1.

90. Accused number 3, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment: In addition, in respect of count 2, on the charge of kidnapping, the accused is sentenced to 3 years imprisonment. The period of imprisonment of 3 years in respect of the conviction on count 2 is to run concurrently with the term of life imprisonment imposed on Count 1.

91. Accused number 4, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

92. Accused number 5, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

93. Accused number 6, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

94. Accused number 7, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

95. Accused number 8, on the charge of murder (read with the provisions of section 51 (1-) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

96. Accused number 9, on the charge of murder (read with the provisions of section 51 '(1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

97. Accused number 10, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

98. Accused number 11, on the charge of murder (read with the provisions of section 51 (1) of the Criminal Law Amendment Act 107 of 1997) is hereby sentenced to life imprisonment.

G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA

REPRESENTATION FOR PARTIES:

FOR THE STATE: Ms E Kabini

Instructed by NDPP

FOR ACCUSED 1: Adv O Matshego

Instructed by: Legal Aid

FOR ACCUSED 2 AND 7: Adv Mogale

Instructed by: Legal Aid

FOR ACCUSED 3: Adv P D Motsweni

Instructed by: Legal Aid

FOR ACCUSED 4: Adv Mathunzi

Instructed by: Legal Aid

FOR ACCUSED 5 AND 9: Adv Rakobela

Instructed by: Legal Aid

FOR ACCUSED 6 AND 11: Adv N Mazibuko

Instructed by: Legal Aid

FOR ACCUSED 8 AND 10: Adv N Monyakane

Instructed by: Legal Aid

FOR ACCUSED 10 AND 11: Adv Mazibuko

Instructed by: Legal Aid