



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Reportable

Appeal Case no: K/S 10/2017

ELISA TSILO

Appellant

and

THE STATE

Respondent

Neutral citation: *Elisa Tsilo v The State* (Case no. K/S 10/17)

Heard: 21 October 2024

Delivered: 7 March 2025

Coram: Tlaletsi JP, Mamosebo ADJP *et* Lever J

ORDER

1. The appeal against sentence succeeds and the sentence of life imprisonment in respect of count 2 is set aside and replaced with the following sentence:
 - i. Count 2: The accused is sentenced to fifteen (15) years imprisonment.
 - ii. The above sentence is antedated to 21 November 2017.
 - iii. The sentence of 15 years imprisonment is to run concurrently with the sentences in counts 1, 3, and 4.

JUDGMENT

TLALETSI JP

Introduction:

1. In June 2017, Ms Elisa Tsilo (the appellant) stood trial in this Division on four charges, namely, Arson, two counts of Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) and assault with intent to cause grievous bodily injuries. She was despite her pleas of not guilty on all the counts, found guilty on 12 October 2017.
2. She was sentenced on 21 November 2017. In sentencing the appellant, the trial court found that the murder in count 2 was premeditated. She was consequently sentenced as follows: 5 years' imprisonment for Arson; life imprisonment for murder on count 2; fifteen (15) years' imprisonment for murder on count 3; and 6 months' imprisonment for the assault charge. The trial court ordered that the sentences in counts 1, 3 and 4 should run concurrently with the life imprisonment sentence in count 2. This order was intended to ameliorate the cumulative effect of the sentence on the appellant.
3. The appellant filed an application for leave to appeal on or about 5 December 2017. On 10 December 2020 leave to appeal was only granted against the conviction and sentence on count 2, being the premeditated murder and the resultant life imprisonment sentence.

Factual background:

4. Before I turn to the issue on appeal, I need to set out the factual background of the incident that led to the charges the appellant faced. The appellant and the deceased in count two (the deceased) had a love relationship. They lived together with the deceased's mother, Lena Louw (Ms Louw) and their minor son. On 23 December 2016, the family house caught fire. Inside the house at that moment were the appellant, the two deceased persons in counts 2 and 3, and their son. The two deceased sustained extensive burn injuries. They were taken to Robert Sobukwe Hospital in Kimberley. They succumbed to their burn injuries on 24 December 2016. Their son sustained superficial burn injuries on the finger and elbow. The appellant also sustained some burn injuries.
5. The identity of the victims and the cause of death were admitted by the appellant. According to Dr T C Kanaomang, who conducted the postmortem examinations on both the deceased victims; the first deceased sustained full thickness flame burns of 80% total body surface area and inhalation burns. He developed complications whilst hospitalised. The cause of death is the "complications of burns".
6. Regarding the second victim, Dr Kanaomang recorded that he sustained full thickness burns and inhalation burns; that he was 'intubated at the hospital but endotracheal tube got displaced and it was very difficult to reinsert it due to swelling and oedema of the upper airway; he had hypoxia due to narrowing of the airway from inhalation burns.'
7. It was common cause that petrol was the accelerant that caused the fire. It was further not in dispute that petrol was readily available on the premises as it was used as a source of energy for the electrical generator machine.
8. What was in dispute and what the trial court had to determine was whether the fire was wilfully set or accidental. There were at least two versions from the

respondent's side on how the fire started. The appellant had a different version altogether.

9. The respondent's version of the events rested inter alia on Ms Louw's evidence. She testified that the house in question belongs to her. It is situated at Gong-Gong in the district of Barkly West. It used to be a mud house. During the year 2015, her son (the deceased in count 2) demolished the structure and replaced it with a 5 roomed brick and mortar structure. On 23 December 2016, she was sitting outside her house with a neighbour, Ms Elizabeth Mohale (Ms Mohale). The deceased who had been in the house requested her to talk to the appellant. He reported that they had been involved in an altercation that started the previous day, and she would not stop. Ms Louw stood up and went into the house. She found the appellant sitting on the bed with her legs crossed. She tried to talk to her. She was rude. The appellant mentioned that "*now, I am going to burn now, fire now*". The appellant further mentioned that the deceased had done things to her, she gave birth to his child and had wasted her time.
10. Ms Louw testified that the appellant stood up and mentioned that "*I am going to show you*". She exited the house. The deceased remained in their bedroom. Ms Louw moved to the kitchen and thereafter to her bedroom. She did not stay long in the bedroom. As she left her bedroom, the appellant entered the sitting room in possession of one 5 litre bottle containing petrol which she fetched from the outside room. In the outside room, the family kept the generator machine and petrol. She started to pour petrol on the floor of the sitting room. Ms Louw ran out screaming to go and report to her other child what the appellant was doing to the house. In the process, she noticed that the house was on fire.
11. Ms Mohale testified for the respondent. She mentioned that she came to Ms Louw's house accompanied by her two sons (D and T) and their friend to pay the appellant the money she owed her for the goods she obtained on credit. She sat with Ms Louw outside the house. The deceased came from the house and called

Ms Louw to the house. The latter complied with the request, and she remained with D outside. T had entered the house to return the cup from which she was served water. She saw the appellant leaving the house and soon thereafter returned with two 5-litre plastic bottles. She did not know what the contents were. Ms Louw came out running. D came out of the house and reported to her that the appellant was pouring petrol. Immediately thereafter the house was on fire. T exited the house with burn wounds. Ms Mohale took his T-shirt off and ran with him to Ms Roro's house for assistance. She did not see what happened to the deceased.

12. Ms Cecelia Tlou is 76 years old. She knows the Louw family and confirms that the appellant was staying with the deceased. On the day of the incident, she was at her house, and she heard screams that the house was burning. She walked to the direction of the burning house. Along the way she met the deceased, and they had a conversation. She did not disclose what the conversation was about. Neither was she asked to disclose. The deceased had visible burn injuries. The appellant approached her from the veld side and handed her child to her. The deceased saw her, and he advanced towards her. She retreated away from them up to the other part of the street. A motor vehicle came, and the deceased and the appellant were transported to the hospital.
13. Ms Magdalene Roro resides in the second house from that of Ms Louw. She ran to the house that was on fire. She came across the appellant running out of the premises followed by the deceased. To her, it appeared that the deceased was chasing the appellant. The deceased was badly burnt on his back compared to the front portion of his body. She asked the appellant what was happening, and the appellant merely laughed without giving any answer. Ms Roro then asked the deceased the same question. The deceased replied that Elisa (the appellant) burnt him. He mentioned that he was lying on the bed in the bedroom, and the appellant poured petrol on him and thereafter took the matches, lit it and threw it and went out. What she says the deceased told her is obviously hearsay

evidence as the deceased could not testify to confirm the veracity thereof. However, the evidence was accepted by the trial court in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

14. Ms Roro testified that after hearing what the deceased said, she asked the appellant why she burnt the deceased. She laughed. A certain Porra arrived in a motor vehicle. She requested him to transport the deceased to the hospital. She instructed the appellant to accompany the deceased to the hospital because of what she did to him. It is common cause that the appellant and the deceased were conveyed in the said vehicle to the hospital. Ms Roro learnt that T was also injured and requested a certain Connie who had just arrived at her house to take T to the hospital.
15. Ms Roro testified that earlier that morning at around 07:00, the appellant went past her house in possession of two cans en route to hike to Barkly West. Ms Roro joked with her that she notices that she was going to "stock" early that day and that she must pour her a bit on her return. By that, she was referring to petrol. She mentioned that the appellant just laughed and said she will do so. She did however not see her return.
16. The respondent tendered the evidence of Sergeant Errol Lionel van Ade. He has 14 years' of service in the South African Police Service (SAPS). His job entails handling a dog in fire investigations. He received training from the Fire Protection Association of South Africa, which is a private institution. He subsequently attended a course in dog handling in Pretoria during 2015. His training was to handle a dog that is trained to identify different fire accelerants such as petrol, diesel, methylated spirits, paraffin and thinners. He testified that the dog undergoes an intensive training so that once it smells something it reacts by sitting down on that spot. Sergeant van Ade mentioned that he is the only police officer trained in this field in the entire Northern Cape province.

17. Sergeant van Ade attended the scene in this matter on 24 December 2016. On arrival, he noticed that the kitchen cupboards and chairs were outside the house. Among these items was a piece from the wooden door lying on the ground. He concluded that it was forced open because the door locking mechanism was in a locked position. He entered the kitchen which he marked as Room 1. It was empty. There was a lot of soot deposit damage on the walls as well as on the items that had been taken outside. There were wood charring signs on the wooden trusses of the kitchen roof. Parts of the trusses were completely burnt. He left the kitchen and moved in an anticlockwise direction. He came into Room 2. It is the main bedroom of the house. Everything therein was completely burnt out. There was sand on the floor which suggested that people were trying to put out the fire with sand. The fire was still smouldering in the room. The roof sheets were deformed because of the intense heat and had caved in.
18. Sergeant van Ade moved to Room 3 which is a corrugated iron sheet structure attached to the house. In this room, there was only smoke damage on the walls. He moved to Room 4 which is the sitting room. The one part of the room was plastered, and the other part was cladded, to give a rock- finish design. Part of the cement plaster had peeled off because of the intense heat. The cladded wall had extensive smoke damage. The roof trusses were damaged and had wood charring. The refrigerator and freezer chest had fire damage. At the corner, there was a gas cylinder which had fire damage on the paint. He proceeded to Room 5 where there was a bed which was against the wall on the side of the window. There was a protected area on that side of the wall. Behind the door, there were signs of fire pattern, suggesting that something had burnt in that area. The cement floor at the foot end of the bed had a spot where it had shelled up ("gedop") probably because of the intense heat.
19. After completing his investigations inside the house, Sgt van Ade used the dog for further investigations. He took the dog through all the rooms, and it reacted "positively" at Room 5 by sitting and barking at the foot end of the bed. That is at

the point where the cement floor had shelled up as described above. He concluded that that should be the point where the fire started.

20. The appellant's version was as follows. On the day in question, she had a quarrel with the deceased who demanded money from her to buy some drugs. She refused to finance his lust for drugs. He became aggressive and fought her in the sitting room. During their struggle, they knocked down a petrol container. The petrol spilled over the floor. The deceased left her and rushed to the kitchen and said he was going to check whether the stove was on. In his absence, the fire started from the refrigerator area. She ran to the bedroom where their child was. She grabbed him and hurriedly exited the house. She expected the deceased to exit the house through the kitchen door. To her surprise, she saw the deceased exiting the house through the sitting room door which was on fire. Neighbours came to assist in putting the fire off. The refrigerator that was in the sitting room is operated by gas. She suggested that the petrol that spilled on the floor was ignited by the flame of that gas refrigerator.
21. At the hospital the deceased was the first to be attended to. She was surprised to hear that there was a child who sustained burn injuries as well. She was not aware of the presence of the said child in the house. This was in reference to T, the deceased in count 3. She denied that the deceased chased her. She mentioned that it only happened that when they moved away from the burning house having sustained burns, she was walking in front followed by the deceased. She also denied that she hiked to Barkly West to buy petrol the morning of the incident. She further denied meeting Ms Roro that morning. She mentioned that she contributed financially to the construction of the house and the acquisition of the furniture that was damaged by the fire. Although she met Ms Roro after the incident, the deceased did not speak to her or tell her that she poured him with petrol in her presence. She was not instructed by Ms Roro to board Porra's vehicle. She did so voluntarily as she was injured and needed medical help.

The trial Court's judgment:

22. The trial court furnished reasons for admitting the hearsay evidence of Ms Roro regarding what the deceased told her in the judgment. These are: that the deceased made a spontaneous statement shortly before his death in a moment of fear or pain and may be admissible as proof of the contents thereof; that there was close enough gap between the fire and Ms Roro talking to the deceased and that it is inconceivable that the deceased would have had time to contrive a story to tell the witness; the utterance is corroborated by the evidence of Ms Louw that the deceased was sleeping prior to the fire; further corroboration is by Sgt van Ade who testified that the fire started in the bedroom; the post mortem report which shows that the deceased died from burn complications and, the evidence of Ms Mohale that she saw the appellant with two 5-litre cans of petrol. Finally, that the evidence was tendered to identify the person who caused injuries to the deceased and that it is in the interests of justice that the evidence be admitted.
23. The trial court was alive to the fact that the question it had to determine was whether the fire was wilfully set or was accidental. The trial court recognised that there was a material contradiction between the evidence of Ms Louw and that of Sgt van Ade. The trial court rejected the evidence of Ms Louw in as far as it contradicts the evidence of other witnesses. In rejecting Ms Louw's evidence, the trial court accepted the evidence of Sgt van Ade, who testified that if petrol was poured in the sitting room, the dog would have picked it up. Further support was found in the hearsay evidence presented by Ms Roro that the deceased told her that the appellant poured him with petrol and set him alight.
24. In considering whether the murder of the deceased was premeditated, the trial court acknowledged that there was no evidence as to how much time had passed between fetching the petrol and igniting the fire. However, the trial court referred to the decision of the Supreme Court of Appeal in *S v Kekana*

2014 JDR 2139 (SCA) ¹ where it was held that it was not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan and that time is not the only consideration, as few minutes are enough to carry out a premeditated action. For this reason, the trial court found that the respondent had proven that the murder of the deceased was premeditated.

The Appeal — Parties' Submissions:

25. The main and only ground of appeal against conviction is that the trial court erred in finding that the murder was planned or premeditated. Mr Steynberg who appeared on behalf of the appellant contended that Ms Louw's evidence was that the appellant mentioned that she was going to burn the house and not necessarily the deceased. She was not able to see whether there was a fight between the appellant and the deceased. She further testified that she did not expect that what happened will in fact happen. Mr Steynberg submitted that the fact that the appellant intended to burn the house, is the basis upon which the indictment and the summary of substantial facts were formulated by the respondent. He submitted that the respondent did not allege that the appellant went to buy petrol with the intention to kill the deceased, nor did the trial court make such a finding. In conclusion, counsel submitted that, for the determination to be made on whether the evidence supports a finding that the murder was planned or premeditated, the court should have regard to the allegations made in the charges proffered against the appellant.

26. On behalf of the respondent, Mr Rosenberg submitted that the trial court was correct in finding that the murder was premeditated regard being had to the proven facts. The said proven facts are that the appellant went to the outside room to fetch petrol and poured it on the deceased whilst lying on the bed and set him alight. He contended that the evidence of Sgt van Ade that the fire was

¹ (629/13) [2014] ZASCA 158 (1 October 2014) para 13. ("S v Kekana")

started in the bedroom was correctly accepted by the trial court. He further contended that the allegations made in the charge sheet, namely that the appellant intended to burn the house are not cast in stone and that they may be cured by the evidence.²

The issues:

27. It is perspicuous that the issue to be considered in this appeal is whether the murder charge for which the appellant was convicted falls within the circumstances described in section 51 (1) of the CLAA, on the basis that it was planned or premeditated. The significance of this question lies in the fact that if the answer is in the affirmative, the appellant faced the prescribed sentence of life imprisonment unless the trial court found the existence of substantial and compelling circumstances justifying a departure from the imposition of the sentence of life imprisonment. An answer in the negative would mean that the murder for which the appellant was convicted of is the one described in section 51 (2) of the CLAA relating inter alia, to a murder that is not planned or premeditated. In terms of this latter provision, the sentence prescribed for a first offender, like the appellant, would be a sentence of 15 years imprisonment, unless the court finds the existence of substantial and compelling circumstances justifying a sentence lesser than the prescribed minimum.

Analysis:

28. The question whether the murder was planned or premeditated is to be answered by consideration of the evidence presented before the conviction of the appellant. A mere allegation in the charge-sheet does not suffice. In *S v Legoa* 2003 (1) SACR 13 (SCA) it was held:

² In the supplementary heads of argument, the respondent conceded that no application for the amendment of the charges in terms of s88 of the Criminal Procedure Act, 51 of 1977 (CPA) was made. He however, contended that s 86(1) and (4) of the CPA may remedy the defect and that the appellant's case would still not have changed.

"[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed '(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions"

29. The distinction between intent and premeditation was clarified in *S v Peloele* 2022 (2) SACR 349 (SCA) thus:

"... Murder is and remains a common-law offence, with all its elements of intent, unlawfulness and the act of killing of a human being (*actus reus*). It is thus trite that, in order for the state to secure a conviction on a murder charge, it must prove all the common-law elements of the offence, including the element of intent (*dolus*). The number of shots a perpetrator fires at the deceased is one of the factors a court would consider as indicative of *the intent* to kill; the determination to end life. The phrase 'planned or premeditated' is not an element of murder. It is a phrase introduced by the minimum-sentence legislation (the Act) as one of the aggravating factors in the commission of murder. In the instance where one or more of these aggravating factors are found to be present, the courts are enjoined to impose a sentence not less than the minimum prescribed. In the case of murder, such a sentence would be life imprisonment. These aggravating factors are listed in s 51(1) of the Act. In *S v Malgas* this court held that it is permissible to depart from the sentence prescribed by the Act, should the court find that there are substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. The question whether the murder was planned or premeditated is thus relevant for sentencing, and not for conviction. Though the perpetrator in his state of mind may have both the intent and premeditation

to commit the crime, the intent has to be present *during* the commission of the crime, while premeditation is, as a matter of logic, limited only to the state of mind *before* the commission of the crime. It is for that reason that premeditation would not exist in the case of negligence (*culpa*). There is, therefore, a symbiotic relationship between the two concepts, in that they both relate to the state of mind of the perpetrator. . . .”³

30. The trial court did not set out the factual basis for the conclusion that the murder of the deceased was premeditated. The trial court only referred to the decision in *S v Kekana* where the principle that it is not necessary that the appellant should have thought or planned his actions a long period of time in advance before carrying out his plan and that time is not the only consideration because even a few minutes are enough to carry out a premeditation, was enunciated.⁴ The following is the excerpt that the trial court quoted from *S v Kekana*, where that court held:

“The appellant pertinently admitted that after he saw his clothes, he formed an intention and in his own words he decided to end it all and kill the deceased. He then gave effect to this decision. He went outside to fetch petrol. He re-entered the house and poured it on the bed of the deceased while at the same time telling her of his intention. He set it alight with the petrol. He locked the deceased in the room. He spilled the petrol in the passage, kitchen and dining room. *The locking of the door and further pouring of petrol show that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. To my mind, this is proof of premeditation on his part.* It follows that the appellant was correctly convicted of premeditated murder”.⁵ (emphasis provided)

31. It is trite that a decision of the Supreme Court of Appeal is binding on the lower courts. However, it is important to remember that decided cases are generally of value for the principle of law they pronounce and not for the facts of that case,

³ Para 9 (*footnote omitted*).

⁴ *S v Kekana* *Ibid* fn 1, para 13.

⁵ *Ibid*, para 14.

unless the facts are substantially the same with the case under consideration.⁶ In *Shepherd v Mossel Bay Liquor Licencing Board*, Ogilvie Thompson J held:

“ . . . I find myself in respectful agreement with Scrutton, L.J.'s observations in *Newsholme Bros v Road Transport and General Insurance Co. Ltd.*, 1929 (2) K.B. 356 at p. 375, to the effect that, though the decision of the Court of Appeal on a question of fact is not binding on any other Court except as between the same parties, when the decision is that from certain facts certain legal consequences follow, the decision is binding on the Court of Appeal in any case raising substantially similar facts. So also would a decision of the Appellate Division on an identical set of facts in another case be binding upon this Court.”⁷

32. In casu, the trial court seems to have found the facts in *S v Kekana* to be substantially similar to the facts under consideration. Having so found, the trial court concluded that the murder of the deceased was premeditated. What the trial court failed to appreciate is the fact that in *S v Kekana*, the court did not regard the fetching of petrol, pouring on the deceased, and setting the deceased alight as premeditation. The appellant in that case did other things that the court duly considered, which distinguishes the circumstances of that case from the one under consideration. In that case, the appellant, pertinently admitted that after he saw his clothes, he formed an intention and in his own words he decided to end it all and kill the deceased. He then gave effect to this decision. He went outside to fetch petrol. He thereafter re-entered the house after fetching the petrol, poured it on the bed of the deceased while at the same time telling her of his intention. He set it alight with the petrol. He locked the deceased in the room. He spilled the petrol in the passage, kitchen and dining room. The expressed *ratio decidendi* for premeditation was the locking of the door and further pouring of petrol which was regarded as carefully implementing a plan to prevent her escape and to ensure that she died in the blaze.

⁶ *S v Shabalala* 1986 (4) SA 734 (A) at 742E-F.

⁷ 1954 (3) SA 852 (CPD) at 860H – 861A.

33. In this case there is no evidence, and it was never the respondent's case that the appellant mentioned that she was going to kill the deceased, or that she locked the deceased in the room and poured petrol in all the other rooms to ensure that the deceased could not escape death. It was also not the respondent's case that the appellant had earlier acquired the petrol as part of her intention and plan to kill the deceased. The fetching of petrol from the outside room, the pouring thereof, be it either on the deceased lying in bed in the bedroom or around the sitting room and igniting it, is part of the direct intent to kill and not premeditation. More is required to conclude that the only reasonable inference that exclude others is that the killing of the deceased was planned or premeditated.⁸
34. There are other inferences that can be drawn from the appellant's conduct. Premeditation is not a reasonable inference given the proven facts and circumstances of this case. In my view, the trial court misdirected itself and its conclusion on premeditation falls to be set aside on this ground alone. It is settled that the appeal court will not interfere with or tamper with a trial court's judgment or decision regarding either conviction or sentence unless, it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law.⁹ Accordingly, a court of appeal must show deference to the factual and credibility findings properly made by the trial court.¹⁰ A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong.¹¹ Thus, the powers of this Court, sitting as a court of appeal are clearly circumscribed. This Court does not have carte

⁸ See *R v Blom* 1939 AD 188 at 203.

⁹ *R v Dhlumayo & Another* 1948 (2) SA 677 (A); *Tel v S* [2023] JOL 57850 (FB) para 4.

¹⁰ *Modiga v S* [2015] 4 All SA 13 (SCA) para 23.

¹¹ *R v Dhlumayo* (supra) fn 9 at 705-706; *S v Artman & another* 1968 (3) SA 339 (A) at 341E-H; *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426A-F; see also *AM & Another v MEC Health, Western Cape* 2021(3) SA 337 (SCA) para 8.

blanche to interfere with the factual and credibility findings properly made by the trial court.¹²

35. The determination of the controversy about where the appellant poured the petrol is in my view not singularly determinative of premeditation. As I have alluded to above, whether petrol was poured on the deceased in the bedroom or was poured in the sitting room does not take the respondent's case anywhere for purposes of establishing premeditation. It is however evident that the factual finding by the trial court that the appellant poured petrol on the deceased whilst lying on the bed is a factor that played a pivotal role in finding that the facts of this case are similar to those in *S v Kekana* for purposes of finding premeditation. It is therefore necessary to consider whether this factual finding was correctly made by the trial court.
36. It is significant that the indictment and the summary of substantial facts make no mention of the fact that petrol was poured on the deceased. All what is alleged is that it was poured on the dwelling and thereafter set alight with the two deceased sustaining burn wounds in the process. The indictment alleges that the appellant had the intention of causing damage to the dwelling in order to cause Ms Louw loss. Thus, the case that the appellant had to contend with was at all times that she did not pour petrol on any of the deceased but the dwelling. It would have been expected that if the respondent had the information that the appellant poured petrol on the deceased whilst lying on the bed, the respondent would have made such an allegation in the charge sheet and the summary of substantial facts.
37. It is somewhat perplexing that the version of Ms Louw, who is an eyewitness called by the respondent, was not preferred over that of Sgt van Ade. It is to be recalled that her version is that the appellant poured the petrol around in the

¹² *Modiga v S* (supra) fn 10, para 24.

sitting room. She was adamant that she saw her do so. She is to some extent corroborated by Ms Mohale in that D reported to her when he returned from the house that the appellant was pouring petrol. This report should not be considered for its veracity as it constitutes hearsay, but that Ms Mohale testified about what she perceived from D. Put differently, the relevance of the evidence is that she saw and heard D mention to her that petrol was poured and not for the truthfulness thereof.

38. Furthermore, Ms Louw's version is that the appellant mentioned that "*now, I am going to burn now, fire now*". According to her, she did not say that she is going to burn the deceased. It could have been easy for the appellant to have said that she is going to burn the deceased if that was indeed her direct intent. She could not have connived with Ms Louw for her not to reveal that the appellant mentioned that she was going to burn or kill the deceased. It could also have been easy for Ms Louw to testify that the appellant mentioned that she was going to burn the deceased if she heard her say that. Similarly, if she really wanted to make the case difficult for the appellant in defence of her own son, she would have enriched what she said. At the time of the events, the ultimate significance of what the appellant mentioned could not have been known or foreseen by the lay witnesses.
39. The trial court did not consider what could have been the motive for the appellant to burn the house and not the deceased in its determination of premeditation. The uncontroverted evidence of the appellant that she financially contributed to the construction of the house and the acquisition of the furniture is relevant. That could have contributed to her rage. Her version is on this aspect not farfetched. This is because it is common cause that she once worked at the tuckshop and that she was continuing to conduct some form of business on the premises. That explains why petrol was readily available on the premises. Whether the business

was the sale of liquor, or some undisclosed items is immaterial for present purposes.

40. The trial court preferred the evidence of Sgt van Ade as “supported by the dog”. Sgt van Ade relied heavily on the behaviour of the dog to exclude any possibility that petrol was poured in the sitting room. It is to be noted that it is Sgt van Ade who is the witness and not the police dog. A party that tenders evidence bears the onus to show that the evidence is relevant; not excluded by any exclusionary rule and that it is not overwhelmingly prejudicial. Such evidence must be relevant to at least one of the *facta probanda*. The following pronouncement by Innes CJ is still apposite:

“But to draw inferences from the actions of a trailing hound as to the identity of a particular individual is to go a great deal further; it is to enter a region of conjecture and uncertainty. We have no scientific or accurate knowledge as to the faculty by which dogs of certain breeds are said to be able to follow the scent of one human being, rejecting the scent of all others. But it is not contended that they act merely on instinct; it is admitted even by their optimistic instructors that they must be carefully trained before they can be relied upon. The discharge of their task and the identification expected of them involve processes closely akin to reasoning. If the dog is to be regarded as the real though not the legal witness announcing by his bark that he has found the person of whom he was in search, the evidence on the point would be so closely analogous to hearsay as to come within the principle of the hearsay rule. But even if he is not so regarded there is too much uncertainty as to the constancy of his behaviour and as to the extent of the factor or of error involved to justify us in drawing legal inferences therefrom. And therefore it should not be regarded as relevant. The danger involved by the admission of such evidence is pointed out by Graham, J.P., in his judgment already referred to, and it is unnecessary to enlarge upon it. But I would remark that not only is there the possibility that the dog may fail to distinguish between one scent and another, or may desert one for the other; but also there is the possibility of a misunderstanding between the animal and his keeper. And there is the further consideration arising from the dramatic nature of the testimony and the super-canine sagacity claimed for these

animals by those in charge of them, that juries might be inclined to attach to such evidence a dangerously exaggerated importance.”¹³

41. What the trial court should have considered is that Sgt van Ade was trained to handle the dog. He is not the one who trained the dog. He can therefore not give credible evidence as to the method and specific aspects regarding the training of the dog. He is not in a position to provide information as to what would make the dog behave in the manner it did. To say that if petrol was poured on the sitting room floor the dog would have picked it up is a form of self-corroboration which is not admissible. He cannot say how the dog can differentiate between different accelerants. Neither can he positively assure the court that the dog is immune from making mistakes. There were inadequate safeguards to render the evidence of the behaviour of the dog admissible.
42. Sergeant van Ade gave an explanation why he, in addition to the behaviour of the dog during his investigations, concluded that the fire indeed originated from Room 5 to the exclusion of any other place in the house. He mentioned that the trusses were completely burnt compared to the kitchen (Room 1). In the sitting room (Room 4) the trusses were not as badly burnt as in Room 5. This to him was an indication that the fire originated from Room 5 and spread to the other rooms.
43. The difficulty with the explanation by Sgt van Ade is that he cannot be certain that the shelled-up spot on the cement floor of Room 5 was caused by heat emanating from the fire. He was seeing the room for the first time after the fire. The shelled-up spot is not relevant because under cross-examination, he testified that the fire started from the bed. He conceded that he had no knowledge as to how the gas refrigerator worked. When it was pointed out to him that it also had an open flame capable of igniting petrol that could have been spilled on the

¹³ *Rex v Trupedo* 1920 AD 58 at 63. See also *S v Shabalala* 1986 (4) SA 734 (A) at 742 - 744.

floor, his reply was that if there was petrol on the floor the dog would have reacted positively to it. It is clear from Sgt van Ade's evidence that his expertise is in the handling of the dog in fire investigations and not that he is himself an expert in the investigation of the causes and origin of fires. It is for this reason that he relied heavily on the behaviour of the dog and not his personal knowledge and expertise. His conclusion that the fire started in the sitting room is not the only reasonable conclusion to the exclusion of other reasonable one regard being had to the entirety of the proven facts.

44. The appellant disputed that the deceased told Ms Roro that she poured petrol over him. This factual dispute was not considered by the trial court. Neither did the trial court provide reasons why the appellant's version was rejected on this aspect. It is notable that the deceased spoke to Ms Tlou before he met Ms Roro. There is no evidence that he told Ms Tlou what he later told Ms Roro. There is a reasonable possibility of Ms Roro exaggerating what happened. She introduced seeing the appellant going to acquire petrol in the morning. She only saw her carrying two cans for that purpose. However, the other witnesses saw the appellant carrying one plastic bottle when she poured the petrol in the sitting room (Ms Louw) and two plastic bottles (Ms Mohale). No container was found on the scene after the fire. If Ms Roro is to be believed, the cans that contained petrol would have been found on the scene. These aspects were not considered by the trial court.
45. The trial court found further corroboration of Sgt van Ade's evidence about the fire starting in the bedroom as well as the evidence of Ms Roro on what the deceased is said to have told her in the evidence of Ms Louw that the deceased may have been lying on the bed. Ms Louw could not positively say that the deceased was lying on the bed because she was not in that bedroom. She left the room at the same time when the appellant who was seated on that bed went out. The trial court committed a misdirection in finding that petrol was poured on the deceased whilst lying on the bed.

46. With the finding that the murder of the deceased was not premeditated goes the conclusion that the appellant ought to have been sentenced within the purview of sec 51 (2), read with Part II of Schedule 2 of the CLAA. She is liable to a sentence of 15 years' imprisonment unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.
47. The appellant's personal circumstances on record are that she was 28 years old when she was sentenced, having committed the offence in the preceding year. She was not married though she lived together with the deceased. She had two minor children. Her highest level of education was standard 7. She had been in custody awaiting trial for a period of 11 months. Of significance, she was a first offender.
48. Mr Steynberg's submissions on sentence were directed to challenge the obligatory imposition of life imprisonment for a premeditated murder. The position has now changed. The question to be considered is whether there are substantial and compelling circumstances that would justify the imposition of a sentence lesser than the prescribed sentence of 15 years imprisonment. Mr Steynberg conceded that the deceased died a brutal death having suffered excruciating pain before his death; that the deceased was ripped away from his family and no sentence can bring him back; and that direct imprisonment is the only appropriate sentence for this type of offence.
49. The incident emanated from a domestic dispute between the deceased and the appellant which was about funding for the acquisition of drugs for the deceased. That does not justify the selfish and cruel conduct by the appellant. The setting alight of the house is deplorable conduct. The death of the deceased was brutal. This incident must have caused an outrage to the small community of Gong-Gong. The appellant's personal circumstances are by far outweighed by the seriousness of the offence as well as the community interests. Hard as I tried, I

could not find any circumstances that would rank as substantial and compelling, thus justifying a departure from the imposition of a sentence less than the prescribed minimum.¹⁴ The imposition of the prescribed minimum sentence would in my view not cause an injustice to the appellant.

50. The sentence to be imposed shall be antedated to 21 November 2017, being the date on which the appellant was sentenced. In addition, it would be just that the sentence be ordered to run concurrently with the sentences imposed by the trial court.

51. In conclusion the following order is made:

1. The appeal against sentence succeeds and the sentence of life imprisonment in respect of count 2 is set aside and replaced with the following sentence:

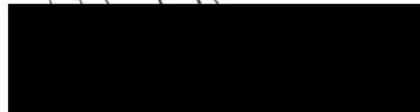
- i. Count 2: The accused is sentenced to fifteen (15) years imprisonment.
- ii. The above sentence is antedated to 21 November 2017.
- iii. The sentence of 15 years imprisonment is to run concurrently with the sentences in counts 1, 3, and 4.



L P TLALETSI
Judge President

¹⁴ *S v Malgas* 2001 (2) SA 1222 (SCA) para 25; see also *S v Vilakazi* 2012 (6) SA 353 (SCA) para 58.

Mamosebo ADJP (Concurring)

MC MAMOSEBO
Acting Deputy Judge President

Lever J (Concurring)




LG LEVER
Judge

For Appellant : **Mr. H Steynberg**
Legal Aid SA
KIMBERLEY

For Respondent : **Adv. J Rosenberg**
Director Public Prosecutions
KIMBERLEY