IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR8/2021

In the matter between:

SIYABONGA MTHETHWA **Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from: the Regional Court for the Regional Division of KwaZulu-Natal held at Maphumulo, Mr K Jonker presiding with assessors,

1. The appeal against the convictions and sentences imposed in respect of counts 2 and 3 are dismissed.

2. The convictions and sentences of the court *a quo* are confirmed.

JUDGMENT

Henriques J (Harrison J concurring)

Introduction

[1] The appellant, who was legally represented throughout his trial, was charged with three counts in the Regional Court Maphumulo as follows:

(a) Count 1: theft of a Toyota Hiace Kombi, valued at R300 000.00 which is alleged to have occurred on 12 March 2014, from Sibusiso Mhlongo;

(b) Count 2: the murder of Sphamandla Mkhize read with Section 51 and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA) on 31 May 2015 by shooting him with a firearm, the respondent alleges the murder was pre-meditated; and

(c) Count 3: the pointing of a firearm at Andile Jerome Ngema on 31 May 2015.

[2] The appellant pleaded not guilty to all three counts. At the end of the respondent's case, the appellant's legal representative brought an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of counts 1 and 3. The application for the discharge of the appellant on count 1 was granted but was refused in respect of count 3 on 29 May 2018.

[3] The appellant was subsequently convicted on counts 2 and 3 on 12 July 2018 and sentenced on 25 July 2018 on count 2, to life imprisonment and on count 3 to two years imprisonment, the court a quo ordering that the sentence on count 3 would be served concurrently with that of life imprisonment imposed on count 2.

[4] The appellant enjoys an automatic right of appeal against the conviction and sentence on count 2. On 22 August 2018 the appellant sought leave to appeal the conviction and sentence on count 3 which was granted on 6 September 2018.

[5] It is this appeal which serves before us.

Grounds of appeal

[6] In summary, the grounds of appeal that the appellant relies on are the following. He submits that this court ought to in terms of s 304(4) of the CPA find that the court *a quo* failed to comply with the provisions of s 93*ter* of the Magistrates' Court Act 32 of 1944.Having elected to have assessors present at his trial, Mr ZN Khoza and Mr SP Zondi were appointed. An irregularity occurred during the course of the trial in that on 17 February 2017 evidence was led during the course of the respondent's case of a ballistics expert without the assessors being present at court. The appellant submits that this was a fatal irregularity which nullifies the entire proceedings as the court *a quo* was not properly constituted.[1]

[7] In addition, the appellant challenges his conviction on counts 2 and 3 on the basis of his identification as the perpetrator of the offences by the respondent's witnesses specifically Nondumiso Nyaka (Ms Nyaka) and Siyanda Zulu (Mr Zulu). He submits that both witnesses were intoxicated at the time of the incident and Mr Zulu specifically, mistakenly identified him as the perpetrator as the appellant was not known to him prior to the incident.

[8] In addition, the appellant submits that there is a material discrepancy with the post- mortem report and the evidence of Ms Nyaka as to how the deceased was shot. Ms Nyaka testified that the appellant stood in front of the deceased and shot him, which is inconsistent with the post-mortem finding, which indicates that the gunshot entry wound was from the back of the deceased's head. The court *a quo* misdirected itself in rejecting the appellant's defence of an alibi in relation to count 3 and accepting Andile Ngema's (Mr Ngema) evidence.

[9] As regards the sentence imposed, the appellant submits that the court a quo erred in finding no substantial and compelling circumstances to exist given the personal circumstances of the appellant. These cumulatively constituted substantial

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[1] *S v Gayiya* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA), *Chala and others v Director of Public Prosecutions, KwaZulu-Natal and another* 2015 (2) SACR 283 (KZP).

and compelling circumstances. The court *a quo* over-emphasised the recognised objectives of sentencing being deterrence and retribution. The sentence of life imprisonment was grossly inappropriate and severe and induces a sense of shock.

Issues

[10] The issues which this court has to consider are the following, whether:

(a) an irregularity occurred during the proceedings by the non-attendance of the assessors on 17 February 2017, allied to this is whether the irregularity is of such a nature that the entire proceedings fall to be vitiated and the conviction and sentences vacated;

(b) the court *a quo* committed any misdirections in evaluating the evidence presented by the respondent which resulted in the convictions; and

(c) the court *a quo* erred in rejecting alibi defence of the appellant;

(d) the court *a quo* erred and committed a misdirection when sentencing the appellant specifically to life imprisonment on count 2.

The evidence

[11] Sibusiso Simphiwe Mhlongo (Mr Mhlongo) testified in relation to count 2 that he knew the appellant very well as they had schooled together. He also knew the deceased as they had grown up together. On 30 May 2015 from approximately 18h00 he was at the Zulu Pot Trading Store (Zulu Pot) at Tshobo area where he had been drinking. In the early hours of the morning on 31 May 2015, at approximately 03h00 he saw the appellant. The appellant apologised for stealing his Kombi and requested that he forgive him. He did and they bought alcohol and drank together.

[12] Whilst drinking together, the appellant informed him that Mantsontso (his name for the deceased in count 2) and his companions had to travel to Inanda to retrieve the stolen vehicle which was the subject matter of count 1. On their arrival in

Inanda, Mantsontso and his companions assaulted the appellant. He advised the appellant to speak to Mantsontso to resolve the matter as the vehicle had been recovered. The appellant responded and said that he could not forgive him and at that point in time removed a firearm from his waist and removed the magazine from the firearm. The appellant indicated that he was going to shoot Mantsontso who was also sitting drinking at the Zulu Pot.

[13] Mhlongo then proceeded to warn Mantsonto about what the appellant had informed him. He then left the Zulu Pot in the early hours of the morning and went to sleep. Later, on that same morning at approximately 07h00, his father had woken him to inform him that Mantsontso had died. He then proceeded to the Zulu Pot and on his arrival observed the deceased lying on the ground.

[14] He described the firearm which the appellant removed from his waist as being 'a 9' and short firearm. When the appellant removed the magazine from the firearm, he observed the round inside the firearm. He did not know the deceased by any other names but knew that his surname was Khumalo. During cross-examination, he confirmed that both he and the appellant had consumed quite an amount of alcohol on the night in question but despite this he still knew what was going on around him. He had not seen the accused for quite some time prior to him seeing him at the Zulu Pot.

[15] When pertinently questioned, he confirmed that he had consumed alcohol but was not drunk. He disputed the appellant's version that he had not seen him during the morning of 31 May 2015 nor had he advised him of the incident with the deceased and that he wanted to shoot him or that he had produced a firearm and shown it to him. He was adamant that whilst he and the appellant were sitting at the Zulu Pot, the appellant was sober and not drunk when he informed him of his intention to kill the deceased.

[16] Nondumiso Nkululeko Nyaka (Ms Nyaka) testified that on the evening of 30 May 2015, she was at Zuma's bottle store at approximately 19h30, with her mother Ms Skadu Sibisi. They saw the appellant and both she and her mother approached him to hug him. When they had hugged him, he informed them not to touch him on

the right side of his waist and she could see a firearm inside his t-shirt. Thereafter she and her mother proceeded to Zulu Pot where she observed the appellant and the deceased, Mantsontso Mkhize, were also there. She consumed alcohol whilst at Zulu Pot. She observed the appellant talking to Mr Mkhize but she did not overhear the conversation.

[17] The deceased left and returned, but she did not observe the appellant at that time. She and her mother stayed at the Zulu Pot, drinking until the early hours of the morning when she requested the sum of R12 from the deceased. The deceased requested her to accompany him to the gate where he was going to hand over the R12 to her. That is when she saw the appellant as the deceased was about to reach the gate. As she was proceeding down the stairs with the deceased in front of her, she observed the appellant in front of the deceased and observed the appellant shoot him. After the deceased had been shot, the appellant ran into one of the taxis, which were parked at the Jobo area bus stop.

[18] Whilst the appellant was running away, she observed someone by the name of Za, who tried to grab the appellant to dispossess him of the firearm but she observed the firearm fall down. She was not certain where the firearm ended up and did not know where the appellant had disappeared to. She observed the deceased lying on the floor with a gunshot wound to his forehead. She knew the appellant prior to 30 May 2015 as she grew up in front of him and he stayed in the area. She explained that she and her mother were happy to see the appellant, hence the reason why they had hugged him, as they had not seen him for a long period of time. She and the appellant had a good relationship. Although she had consumed alcohol on the night in question, she was not drunk.

[19] In answer to questions from the court, she confirmed that when she observed the appellant shoot the deceased, she was approximately 3 to 4 metres away from him, walking in the same direction and she was following behind the deceased. The appellant appeared from the side, but proceeded straight in front of the deceased. When the appellant shot the deceased, they were approximately a meter and a half away from each other. She observed the appellant raise up his right hand in which

the firearm was and shoot the deceased on his forehead. It was early in the morning at approximately 06h30 and it was starting to get bright although it was winter.

[20] During cross-examination, she indicated that she had not seen the appellant for some time. She was not aware that he was no longer residing in the Maphumulo area and was in fact residing in lnanda since 2013. She disputed the appellant's version that he was not present on the day of the incident and that she was mistaken. She indicated that on the evening she and her mother proceeded to Zulu Pot and reached there at about 20h30 that evening and started consuming alcohol. There were a number of people in their company and they were drinking beers and ciders. During the course of the evening apart from drinking alcohol, she was dancing with the deceased.

[21] She confirmed that prior to the appellant shooting the deceased, there was nothing said and she heard him fire the shot, which struck the deceased on his forehead. She was adamant that she saw him shoot the deceased on his forehead although it was from a distance away. During the course of cross-examination, it was suggested to her that the post-mortem report on the injuries of the deceased reflected an entry wound on the left side of the temple and the exit wound on the right frontal part of the deceased's head. By demonstrating to the court, she pointed the entrance wound in the front of the forehead and the exit wound on the back of the head of the deceased.

[22] The next witness, Siyanda Sanele Zulu (Mr Zulu), testified that on 30 May 2015 during the course of the entire evening he was at Zulu Pot. Whilst leaving with the deceased, two males approached the deceased in the yard of Zulu Pot and spoke to him. Whilst the deceased asked the two men who had approached him if any one of them had a problem with him, a male appeared and shot the deceased. He was approximately 50 metres away when he observed this but did not see who it was that shot the deceased.

[23] At the time the deceased was facing away from him and the person who shot the deceased appeared in front of the deceased. At the time the person shot the deceased he was facing in his direction. He did not observe where the shooter

removed the firearm from, as when he observed this, he was already pointing at the deceased with the firearm and there was a gunshot. The shooter then came in his direction to the gate where he was standing, pointed the firearm at him and the person standing next to him. He then ran away.

[24] After the incident, the investigating officer approached him to identify the shooter. He eventually pointed out the appellant whilst the appellant was at the Maphumulo prison. He confirmed that on the night of 30 May 2015 he observed the appellant at Zulu Pot and saw him the following morning when he shot the deceased. He admitted to having consumed alcohol but not too much that he was unable to recognise the appellant and indicated that visibility was good as it was bright at that time of the morning.

[25] He described the appellant as wearing a roundish sun hat at the time of the shooting, however the hat did not cover his face. He confirmed that on his arrival at the Zulu Pot he noticed people around him drinking and the appellant was walking up and down. There was nothing specific that he observed at the time. He confirmed that although he did not know the appellant, he observed him at Zulu Pot for a while. Although the appellant was wearing a hat when he shot the deceased, when he pointed him out at the identification parade, he was no longer wearing a hat. He disputed that the appellant was not present and was at his home at Inanda area at the time of the shooting of the deceased. During cross-examination, when asked to comment on the omissions in his statement that he made to the police as opposed to his evidence in court, he confirmed that he could not proffer an explanation for this as what he testified to in court is exactly what he explained to the investigating officer at the time his statement was taken. There was also a suggestion that the statement had not been read back to him before he signed it.

[26] Andile July Ngema (Mr Ngema), a taxi driver, testified that on 31 May 2015, at approximately 06h45 in the morning he was near the Zulu Pot at a bus stop. He had parked his taxi there waiting for passengers traveling to Stanger. The bus stop is very close to where the Zulu Pot was located. He was cleaning the taxi when he heard a gunshot. He looked into the rearview mirror of the taxi and observed people

running away from the Zulu Pot towards the road. It was then that he heard the sliding door of the taxi opening and observed the appellant entering the taxi.

[27] At the time he, Mr Ngema, was seated on the driver's seat. The appellant closed the door and he observed him carrying a firearm in his hand. The appellant told him to drive away. When he refused to drive away, the appellant pointed at him with the firearm and informed him that he was going to shoot him. When the appellant pulled the trigger, the firearm did not discharge. The appellant then opened the sliding door and alighted from the taxi and proceeded to the motor vehicle, which had parked behind his taxi. He also opened his door, alighted from the taxi and followed.

[28] He observed the appellant pointing the firearm at Sthabiso Ntuli, who was the driver of the motor vehicle. He grabbed the appellant from behind as the appellant was trying to enter the motor vehicle and the firearm fell and hit the appellant on his leg. When the firearm fell, he released the appellant and picked up the firearm from the ground. The appellant used the opportunity to flee, and jump over the guardrail. He was thereafter informed that the deceased had been injured. He then ran to the Zulu Pot to try and be of assistance to the deceased but when he arrived there, he was informed that the deceased had passed away.

[29] He then returned to his vehicle and observed a number of people standing there. He questioned them as to where the appellant had gone, and they informed him that the appellant had jumped over the guardrail and ran into the forest or bush. He took the firearm and proceeded to the Maphumulo Police Station where he found two police officers and reported the incident to them. He handed the firearm over to Warrant Officer Magwaba.

[30] He testified that prior to 31 May 2015, he knew the appellant because they had attended the same school. The last time he had seen the appellant prior to the day of the incident was in 2013. He testified that while seated in the taxi, the appellant was approximately a meter and a half away from him looking in his direction.

[31] During cross-examination, it was suggested to him that he did not know the appellant very well as the last time he saw him was in 2013. He was adamant that the appellant's version, ie that they did not school together, was wrong and that he did go to school with the appellant. He also acknowledged that the name, which the appellant was known by at school and when they played soccer, was Nyokanyoka. That is the name by which he referred to him in his evidence in chief until he was asked the appellant's name and he provided the name Siphamandla.

[32] It was pointed out to him that the appellant's real name was Siyabonga. He indicated he did not know that and knew the appellant by the nickname Nyokanyoka. He acknowledged that although he did not see the shooting of the deceased, the appellant was the one who had entered his vehicle and wanted him to drive him away whilst pointing a firearm at him. He confirmed that he was not frightened by the appellant pointing the firearm at him as he knew him and he had sufficient opportunity to observe him and exchange words with him. Nothing obstructed his vision of the appellant at the time.

[33] The next witness, Scelo Fortunate Majola (Mr Majola), testified that during the evening of the incident he was at the Zulu Pot, working there, cleaning the tables, collecting empty bottles and dishes. There was a function being held that evening and people were dancing, drinking, and enjoying themselves. During the course of the evening, he saw Nyokanyoka, the appellant, and the deceased. He knew the appellant as they grew up together from around the year 2000, and he also knew him as when they were building the Zulu Pot, he worked with the appellant, as the appellant was one of the brick layers.

[34] On the night in question, he saw the appellant coming from the direction of the toilet and they greeted each other and shook hands. In the early hours of the morning of 31 May 2015, he was on the veranda and looked across from the Zulu Pot and saw the appellant and Mr Ngema struggling at the bus stop. They were grabbing each other and he then proceeded down the stairs toward them. At the gates of the Zulu Pot, he heard people crying and then noticed the deceased lying with a gunshot wound in his forehead. People informed him that it was the appellant who had shot the deceased.

[35] He proceeded to where Mr Ngema was and Mr Ngema informed him that the appellant had pointed a firearm at him and that he was taking the firearm to the police. Mr Majola was on duty and had drunk one beer but was not drunk. After he observed the appellant struggle with Mr Ngema, he observed the appellant run into the forest near the bus stop. On the night in question, he did not observe what the appellant was wearing apart from a jacket which was khaki like in colour. He did not notice anything on the appellant's head.

[36] He confirmed that on the night in question over the two days he had only drunk one can of Amstel beer and was not so intoxicated that he did not know what was going on. Mr Majola confirmed during the course of cross-examination, that there were a number of aspects of his statement, which he did not agree with, which the policeman had taken down which he mentioned to the police officer. He confirmed that although some time had passed since he had seen the appellant, and although the appellant no longer resided in the area, he would come to the area from time to time and he would see him. He disputed the appellant's version that he was at home in lnanda sleeping on 30 and 31 May 2015 and he was not at the Zulu Pot and thus was not the person who shot the deceased.

[37] The next state witness, Simphiwe Kenneth Mtsweni, a warrant officer stationed at the forensic science laboratory in Amanzimtoti and employed as a forensic analyst, confirmed that during the course of May 2016 in the performance of his official duties, he received a 9mm calibre fired bullet as well is a 9 x 17mm calibre fired cartridge case, two 9 x 17mm calibre fired cartridge cases and a 9 x 17mm calibre semiautomatic pistol with serial number 4[...] and two 9 x 17mm calibre fired bullets fired from a 9 x 17mm calibre semiautomatic pistol with the same serial number. He fired the cartridge cases and bullets to compare the individual and class characteristic markings on them. He could not determine if the bullets were fired or not fired in the firearm, nor could it be determined whether the cartridge case was fired or not fired in the same firearm. Consequently, his tests were inconclusive.

[38] Warrant Officer Joe Chinnia, stationed at Maphumulo Police Station, conducted the identity parade on 18 April 2016, at the request of the investigating

officer, Warrant Officer Guma. He confirmed that prior to conducting the parade, the appellant was given an opportunity to change his clothing, which he did. There were eight persons on the parade and prior to the witnesses being brought into the room, none of the witnesses had had sight of the suspects. The witness, Siyanda Zulu, took less than 30 seconds and placed his hand on the appellant's shoulder identifying the appellant.

[39] During cross-examination, he confirmed that the minimum number of people, being eight, were placed in the identity parade although their ages differed across the spectrum, but they were of the same build and height as the suspect. He confirmed that he did not make the necessary arrangements for the persons who would make up the identity parade, this was done by the investigating officer. He was only asked to assist.

[40] Siphobuhle Zungu, a data capturer, employed at Maphumulo Police Station, confirmed that on 18 April 2016 he was requested by the investigating officer, Warrant Officer Guma, to assist with the identification parade. His role was to be that of translator from English to isiZulu and from isiZulu to English. He was present when Warrant Officer Chinnia indicated to the suspects on the identity parade that they could ask any questions at the time prior to the parade. One of the suspects requested to change his clothing as he indicated he had been seen by Warrant Officer Guma.

[41] After the suspect had changed his clothing, they then all took their positions on the parade and the witness came into the room and was told that if he had seen the suspect, he should touch the suspect on the shoulder using the left hand. The witness came in and touched the suspect and a photograph was taken by the photographer, Warrant Officer Naidoo. He confirmed that the witness pointed out the appellant during the course of the identity parade.

[42] Constable Thabo Khanyi confirmed that he is a constable in the South African Police Services (SAPS) and assisted with the identity parade held in May 2016. He knew the appellant from the holding cells. At the time he had been requested by the investigating officer, Warrant Officer Guma, to guard the witness Siyanda Zulu, so

that he would not talk to anyone. He transported the witness to the Maphumulo Correctional Service Centre and handed the witness over to Warrant Officer Chinnia for the parade.

[43] Warrant Officer Magwaba confirmed that on 31 May 2015 at 06h50 he was the shift commander at the Maphumulo Police Station. A complainant, Mr Ngema walked into the charge office with a firearm in his hand and laid a complaint of pointing a firearm. He took the firearm, a 9mm Browning with serial number 4[...] from him which had a magazine and no live rounds. Mr Ngema informed him that he was a taxi driver and that the appellant had pointed a firearm at him requesting him to drive him away from the scene of the Zulu Pot.

[44] He obtained a statement from Mr Ngema for the charge of pointing a firearm and also learnt that the firearm was suspected to have been used in a shooting when the deceased was shot. He then dispatched a van to the scene and placed the exhibit in an SAPS exhibit bag. He confirmed that Mr Ngema did not indicate where on his body he was pointed at with the firearm and that the suspect was not apprehended but had run into a nearby forest and disappeared.

[45] The investigating officer, Warrant Officer Nhlanhla Guma, confirmed that he was not involved in the arrest of the appellant but was responsible for investigating the matter thereafter. He was responsible for ensuring that the ballistic exhibits were sent to the forensic science laboratory for analysis and was also responsible for arranging the identity parade. He confirmed that the appellant was advised of the parade and that he was entitled to have an attorney present.

[46] If the appellant had informed him that he had an attorney and wanted one present, he would have ensured he or she was present. The appellant did not have an attorney nor did he inform him that he had one that he wanted to be·present at the time. He confirmed that prior to the identity parade Warrant Officer Chinnia would have explained the appellant's legal rights to him. The only request the appellant had made prior to attending at the identity parade was for him to change his clothing, which was allowed. He was not present at the identity parade. That then was the respondent's case.

[47] The appellant testified in his defence and called no witnesses. He testified that he grew up in the Maphumulo area called Tshobo and moved to lnanda in 2013 where he resides with his father, grandmother, aunt and siblings. He had not returned to Maphumulo since 2013 and was definitely not there specifically at Zulu Pot on 30 and 31 May 2015. He testified that he is not known as Siphamandla Mthethwa as indicated by Mr Ngema and his name is Siyabonga Mthethwa. He testified that all the respondent's witnesses were mistaken or lied about seeing him at Zulu Pot on 31 May 2015 as he was at his home asleep in lnanda.

[48] He denied pointing a firearm at Mr Ngema nor being present and shooting the deceased. During cross-examination, he confirmed that he schooled in Maphumulo. When questioned regarding his other names, he indicated that he did have other names but did not inform his attorney thereof as he was not asked. He confirmed that he was known by the nickname 'Nyokanyoka'. He did not have an ID to prove what his other names were and his birth certificate with his names had been destroyed.

[49] In relation to his alibi defence, he confirmed that he was at home from 29 to 31 May 2015 and did not leave the yard. He was at home at the time with his father and grandmother. When questioned about the witnesses who testified that they knew him and saw him on the night in question at Zulu Pot, he responded as follows:

(a) in relation to Ms Nyaka, he indicated that he had seen her for the first time in court and they did not have any bad relations and he did not know the reason why she would lie about him;

(b) in relation to Mr Ngema, he denied knowing, playing soccer with and attending the same school as him. He also indicated that he did not know of the reason why Mr Ngema would falsely implicate him and pointed to the fact that Mr Ngema did not know his first name and called him Siphamandla. When it was pointed out to him that Mr Ngema also referred to him by his nickname, he said he could not explain it;

(c) Mr Mhlongo testified that he had seen him on the night at the Zulu Pot and had also seen him before in Maphumulo when they were building the store. In relation to all the state witnesses, he indicated that they were mistaken about seeing him on the night of the incident, that he did not know who they were and that there were no disagreements between him and them for them to falsely implicate him.

[50] He confirmed that he knew the deceased and had heard that he had passed away but denied that he was the one who shot the deceased on the night in question, nor did he speak to him at Zulu Pot.

[51] He confirmed however that he was unable to call any witness to confirm his alibi for the night in question. That then was the evidence.

Judgment of the court *a quo*

[52] When convicting the appellant, the court had regard to the evidence of several witnesses who placed the appellant at the scene, observed him with a firearm and observed him shoot the deceased. Although it had regard to the fact that they all referred to him by different names and that alcohol played a role in the commission of the offense, the court *a quo* was of the view that the witnesses identified the appellant by his nickname as opposed to his actual name Siyabonga.

[53] It correctly, in my view, did not attach too much weight to the identity parade but was of the view that the evidence of Mr Zulu is corroborated by the evidence of the respondent's other witnesses, who positively identified the appellant and placed him at the scene. What is noteworthy about the evidence of the respondent was that several witnesses placed the appellant at the scene at different times. These witnesses corroborated themselves in relation to the identity of the appellant and most of the witnesses, the court *a quo* found that they were reliable in their identification of the appellant, that they have a history with him and have known him for many years. In the absence of an explanation as to why the witnesses would falsely incriminate the appellant, the court *a quo* correctly rejected the appellant's defence of an alibi as being highly improbable. The court *a quo* took the view that the

witnesses all had an opportunity to observe the appellant specifically at the time he shot the deceased. The appellant was seen in possession of a firearm, seen pointing it and shooting it. The ballistics evidence, the court *a quo* did not rely on as it was inconclusive.

[54] The court *a quo* found the motive for the killing as being probable given that the respondent's witnesses reported that the appellant had been assaulted by the deceased. Consequently, it was of the view that the evidence in relation to the conviction on count 2 had been proved beyond a reasonable doubt.

[55] In relation to count 3, being the pointing of a firearm, similarly, the court a quo found the evidence of the respondent's witness to be believable when juxtaposed against the appellant's defence. The firearm was found on the scene by the witness who was threatened with the firearm and was handed in immediately. This is consistent with the evidence of the respondent's witnesses, specifically that of the police witness to whom the firearm was handed to, being Warrant Officer Magwaba. The court *a quo* therefore found the appellant guilty.

Analysis

[56] On receipt of the initial heads of argument in which non-compliance with s 93*ter* was raised, the court directed enquiries to the parties requiring them to file supplementary heads of argument with reference to the necessary case authorities dealing with the following aspects:

> '1. Does the non-attendance of the two assessors on 17 February 2017 only, vitiate the entire proceedings. The parties are to consider the following in this regard. The Supreme Court of Appeal cases, specifically that on *Director of Public Prosecutions, KwaZulu-Natal v Pillay 2023 (2) SACR 254 (SCA)*. The fact that the appellant was legally represented and neither the prosecutor nor the appellant's legal representative took issue with the proceedings continuing in the absence of the two assessors.

2. Has the appellant's fair trial rights as recognized in section 35 of the Constitution been breached in any way;

3. The relevance, if any, of the evidence led on 17 February 2017 to the overall findings specifically the conviction.'

[57] In response to such query the legal representatives filed supplementary heads of argument. In the appellant's supplementary heads of argument, Mr TP Pillay, who now appeared for the appellant, submitted that the non-attendance of the assessors on 17 February 2017 amounted to an irregularity as the appellant had requested assessors at the start of the trial. On 17 February 2017, the trial proceeded in the absence of the assessors and the respondent led the evidence a Warrant Officer S Mtsweni from the SAPS Forensic Science Laboratory, Amanzimtoti.

[58] His evidence, in essence was that there were insufficient marks to make a finding on the projectile recovered. The appellant's attorney did not cross-examine this witness and admitted the ballistic report in the form of an affidavit in terms of s 212 of the CPA by consent.

[59] A reading of the judgment of the court *a quo* reflects that the court *a quo* did not rely on this evidence against the appellant when convicting him on count 2.

[60] Relying on section 322(1) of the CPA, Mr Pillay submitted that the irregularity in the proceedings did not amount to a failure of justice which vitiated the entire proceedings in light of the fact that the defence had admitted the ballistic report, the evidence of Warrant Officer Mtsweni was inconclusive and was not challenged by the defence, and more importantly, the court *a quo* did not rely on the evidence when it convicted the appellant in respect of count 2. He submitted that it could not be said that the irregularity resulted in a failure of justice.

[61] Ms Essack, who appeared for the respondent, made similar submissions in her supplementary heads of argument on this aspect.

[62] Turning now to consider the first ground of appeal. Section 93*ter* of the Magistrates' Court Act makes provision for an accused when faced with the count of murder to require that a court sit with assessors. There have been a plethora of cases[2] in the various high court divisions and emanating from the Supreme Court of Appeal in which the provisions of s 93*ter* of the Magistrates' Court Act have been dealt with. In essence, these authorities have found that the provisions of s 93*ter* are pre-emptory and where they are not adhered to it results in a nullity of the proceedings.

[63] The court in *Gayiya* held:[3]

> 'The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.'

[64] In *Director of Public Prosecutions, KwaZulu-Natal v Pillay*[4] the Supreme Court of Appeal highlighted the fact that over the years conflicting judgments have emerged between the various divisions of the high court and that it was necessary to

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[2] *S v Gayiya* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA) *(Gayiya); Chala and others v Director of Public Prosecutions, KwaZulu-Natal and another* 2015 (2) SACR 283 (KZP); *Hlatshwayo and another v S* [2022] ZAKZPHC 8; *S v Mabaso* 2023 (2) SACR 217 (KZP).
[3] *Gayiya* para 8.
[4] *Director of Public Prosecutions, KwaZulu-Natal v Pillay* [2023] ZASCA 105; 2023 (2) SACR 254 (SCA) (Pillay).

resolve the conflict.[5] The court proceeded to discuss the various judgments from the high court and issues that have ensued with the interpretations.

[65] I acknowledge that the provisions of s 93*ter* are pre-emptory and that for a court to be properly constituted, both assessors as well as the presiding officer ought to be present. On the facts of this matter, however, I am not satisfied that the irregularity in these proceedings is of such a nature to vitiate the entire trial proceedings. I align myself with the sentiments expressed by Mr Pillay as well as Ms Essack that this did not result in an unfair trial and the evidence presented was not taken into account when the magistrate convicted the appellant. Consequently, I am of the view that this ground of appeal must fail.

[66] Turning now to the second ground of appeal advanced by the appellant, namely that the court's reliance on the evidence of identification by the respondent's witnesses was unreliable. I accept that a court must approach the evidence of identification with caution and that no matter how honest and credible a witness may seem, the evidence of the identity may be unreliable. The *locus classicus* on identification is to be found in *S v Mthethwa*[6] where the court held the following:

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v*

[5] *Pillay* para 10 onwards.
[6] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-D.

Masemang, 1950 (2) SA 488 (AD); *R. v Dladla andOthers*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlape*, 1963 (2) SA 29 (AD).'

[67] It is common cause that the witnesses who were present on the scene on the night in question had been consuming alcohol. I also accept that one of the respondent's witnesses incorrectly referred to the appellant's first name. However, the appellant was known to all the respondent's witnesses. They all identified him, knew him from the area, some of them had schooled with him, some of them had worked with him, but more importantly, even though there may have been a discrepancy with his first name not being known specifically to Mr Zulu, what is clear is that they knew him by his nickname Nyokanyoka.

[68] All the witnesses had an opportunity to observe the appellant. Mr Zulu's identification of the appellant, specifically at the identity parade, was corroborated by the evidence of the respondent's witnesses. The appellant conceded that these witnesses had no reason to falsely implicate him. The witnesses all placed him on the scene on the night in question, despite the fact that not all of them observed him shoot the deceased. When one considers the evidence holistically, the inescapable conclusion is that they were present on the night in question and some of them observed the appellant shoot the deceased.

[69] The evidence of Mr Ngema likewise is reliable, although he did not see the appellant shoot the deceased, he was able to disarm the appellant and hand over the firearm to Warrant Officer Magwaba on the day in question.

[70] In relation to the assertion that there is a discrepancy in relation to the evidence of Ms Nyaka as to precisely where the entrance and exit wounds were, to my mind nothing much turns on this. The appellant was known to her, he had said to her and her mother to not to touch him on his right side and she observed a firearm on him.

[71] When one views the evidence holistically, together with the alibi defence of the appellant, I can find no misdirections in the assessment of the evidence of the respondent's witnesses nor in the finding that it was the appellant who shot the

deceased. When one views his defence and that of the respondent's case as one is required to do, in terms of *S v Chabalala*,[7] I am of the view that the conviction of the appellant both on counts 2 and 3 is sustainable and the grounds of appeal raised by the appellant in respect of these counts falls to be dismissed.

[72] Turning now to the aspect of sentence. An appeal court's right to interfere with the sentence imposed by a trial court is circumscribed. These circumstances are where there is an irregularity, misdirection, or where the sentence imposed is grossly inappropriate and induces a sense of shock. This gives recognition to the long-standing principle that sentencing falls pre-eminently within the discretion of a trial court. The appellant submits that the court *a quo* erred in not finding substantial and compelling circumstances to exist. This, the appellant submits was as the court *a quo* failed to consider his personal circumstances.

[73] I can find no misdirection by the court *a quo* when it sentenced the appellant. He was convicted of very serious offences, which were callously and brazenly committed. I can find no misdirection with the court *a quo's* finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence on count 2. His personal circumstances are a neutral factor and do not constitute mitigating factors warranting a finding of substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[74] In addition, I am not satisfied that the provisions of s 51(3) of the CLAA have been met and that the sentence imposed is disproportionate having regard to the triad of *Zinn*.[8] The aggravating circumstances of this matter, in my view, warrant the imposition of the prescribed minimum sentence, namely that the appellant showed no remorse during the trial, wielded a firearm, planned to and shot the deceased and approached the complainant in count 3 to demand that he drive him away from the scene. The appellant was brazen when he committed these offences in full view of members of the community and maintained his innocence throughout.

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[7] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[8] *S v Zinn* 1969 (2) SA 537 (A).

Order

[75] Having found no reasons to interfere with the convictions and sentences imposed, the following orders will issue:

1. The appeal against the convictions and sentences imposed in respect of counts 2 and 3 are dismissed.

2. The convictions and sentences of the court *a quo* are confirmed.

Henriques J

Harrison J

CASE INFORMATION

Date of Hearing: 21 February 2025

Date of Judgment: 7 May 2025

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 9h30 on 7 May 2025.