



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO.: CA&R 6/2020

In the matter between:

MILANI BEYI

Appellant

and

THE STATE

Respondent

JUDGMENT ON APPEAL

ZONO AJ:

Introduction

- [1] This is an appeal against both the conviction and sentence. The appeal emanates from Zwelitsha Regional Court. On 01st September 2021, the appellant, together with three (3) other accused persons were convicted on two counts of murder, robbery with aggravating circumstances and attempted murder. On 30th September 2021 the Regional Court sentenced the appellant and the other accused persons.

- [2] The Regional Court imposed a sentence of life imprisonment in respect of count one (murder) in terms of section 51(1) of the criminal law amendment Act 105 of 1997 read with Part 1 of Schedule 2 thereof. In respect of count two (murder) the appellant and other accused persons were sentenced to undergo life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2 thereof. In respect of count three (robbery with aggravating circumstances) the appellant and other accused persons were sentenced to undergo a period of 15 years' imprisonment in terms of section 51 (2) read with Part II of schedule 2 of the Criminal Law Amendment Act 105 of 1997. In respect of count four (attempted murder) they were sentenced to undergo a period of 12 years' imprisonment. In terms of section 280(2) of the Criminal Procedure Act 51 of 1997 the imprisonment sentences imposed in respect of count two, count three and count four were directed to run concurrently with the sentence imposed in respect of count one. In respect of the appellant the sentence of 20 years' imprisonment that he was serving at the time of sentence was also ordered to run concurrently with the sentences imposed in this matter. Effectively the sentence imposed by the Regional Court was one term of life imprisonment for each accused person.
- [3] The appellant and other accused persons were deemed unfit to possess firearms in terms of section 103(1) of the Firearms Control Act 60 of 2000. In terms of section 103(4) of the same Act an immediate search and seizure was authorised for seizure of competent certificates, licences or authorisation permits and ammunitions in their possession. Lastly, in respect of sentences (life imprisonment) imposed in respect of count one and count two (murders) the appellant and other accused persons were declared to have an automatic right of appeal against the convictions and the sentences and they were not required to apply for leave to appeal as provided in section 309(1)(a) and 309B(1)(a) of the Criminal Procedure Act 51 of 1977 as amended by section 10 and section 11 of the Judicial Matters Amendment Act 52 of 2013.
- [4] This appeal was noted by the appellant and proceeded with in respect of count three and count four with the leave of the Regional Court granted on

18th November 2023. Effectively the appellant is appealing both conviction and sentence in all four (4) counts. Other accused persons are not appealing at all. The appellant was accused one in the court *a quo*. The appellant and accused no 1 will be used interchangeably as the context require.

[5] With regard to conviction, the appellant places in issue that the state had proved his guilt beyond reasonable doubt. He contends that the court *a quo* erred in finding that he acted in common purpose with accused 2, accused no 3 and accused no 4. He places the identification in issue as he contends that there was complete darkness at the scene. He therefore states that the court *a quo* erred in finding that there was sufficient light at the scene for proper identification of the appellant.

[6] With regard to sentence, the appellant contend that the court *a quo* erred in not finding that substantial and compelling circumstances existed with reference to his personal circumstances and circumstances of the offences which warranted lesser sentences. The court *a quo* should have explored or approximately considered alternative sentencing options that may have been suitable for the appellant's circumstances. The sentences imposed in respect of count three and four were disturbingly inappropriate and ought to be ameliorated with lesser sentences in respect of each count. The appellant further contends that the court *a quo* misdirected itself in overemphasising the seriousness of the offences at the expense of the factors which reduced the appellant's moral blameworthiness and his personal circumstances.

Relevant Evidence

[7] The first state witness, Mr Payi, the survivor in the incident that took place on 18th September 2018, testified that, he and the two deceased persons, who were his friend went to the tavern at about 19:30 to buy some beers. It was the second time that he went to the tavern as they went to buy some liquor during the day. On their arrival at the tavern they bought three beers with R100.00 and got a change of R40.00. They went out of the tavern after buying

the beers. He testified that as the sun had already set the street lights were on to assist with the sight.

[8] He stated that, when they were leaving the tavern they left the accused persons in the process of leaving the tavern as well. As they were walking down the street towards the community Hall, accused persons were following them. Accused persons reached Mr Payi and the deceased persons. At the spot where they reached them there was moon light. The street lights were not all on. Mr Payi knows the accused persons and he testified that on that day he saw them in the tavern during the day and again in the early evening. He did not see any other people except them in the tavern and next to the tavern.

[9] As the accused persons were approaching Mr Payi and the deceased persons they commanded them to stop. When reaching them accused persons started clapping them with open hands and searching them. Mr Payi categorically testified that the appellant (Milani) clapped him. The appellant and the deceased persons were also assaulted by the other three accused persons. From Mr Payi his cell phone and sandals were taken. He was particularly searched by accused no 2, M. Mogale.

[10] As the road was still under construction the accused persons pelted them with stones near Mbiko homestead, family of which was bereaved and was preparing for a funeral. They were assaulted with many stones by all the accused persons until he became unconscious as a result of the injury he sustained on his head. He regained his consciousness after two months of the incident. There were other parts of his body that were injured.

[11] During cross-examination the following version was put to the witness, Mr Payi by defence Counsel:

“ Mr Mkhumatela: Mr Payi, all four accused are going to testify later in this trial and they are going to testify that they saw you late in the evening buying something, they don't know what you bought and you

were inside the tavern and you put whatever you bought on the table before it was closing the tavern, you were inside.

.....

Mr Payi: I do not remember buying anything inside the tavern on the day in question, your worship, and the accused were outside the tavern.

Mr Mkhumatela: They are going to, the accused are going to testify further, Mr Payi, that at that time immediately after you purchased this, they were sitting inside and tavern closed and you all walked out at the same time.

Mr Payi: I agree, you worship, with the fact that the tavern was closing and we all left the tavern, that is we all went out of the tavern.

.....

Mr Mkhumatela: No, no your worship, the accused were in front.

.....

Mr Payi: That is not correct, that is not true your worship, I dispute that.

Mr Mkhumatela : And, ja, you can dispute it as well it is your right. And accused No 1, No 2 and No 3, they were in front and accused No 4 was walking behind of the three.

Mr Payi: I wont lie, you worship, I disagree with their version that they were walking in front of us.

.....

Mr Mkhumatela: Thank you, Your worship. Mr Payi, sorry your worship.

Mr Payi, accused No 4 is going to testify that he was the one that came from behind and you turned, you personally turned around and advanced towards accused No 4. The other three accused were already in front of you. What do you say to that?

Mr Payi: I dispute that, your worship. As far as I can remember, I was walking with my friends. I do not remember turning back and approaching.

Mr Mkhumatela : Infact he is going to testify further, that's No 4, that at the time they left you, all of you left the tavern , he went home to fetch his jersey. That's why he was walking behind the other three.

Mr Payi: No comment, your worship.”(sic) (my underlining)

[12] With regard to the allegation between the two groups the following version was put:

“Mr Mkhumatela : And you turned back from the other two of your friends, advanced towards accused No 4 and you started attacking accused no 4.

Mr Payi: I dispute that, your worship, it is not true.

Mr Mkhumatela: Accused No 4 is further going to testify that when you attacked him, he tried to run away but you tripped him and he fell down and you started hitting him with fists.

Mr Payi : That is not true, your worship.

Mr Mkhumatela : Further on, Mr Payi, the accused is going to say your two friends joined the attack and he screamed.

.....

Mr Payi :That is not true, your worship.

Mr Mkhumatela : And he screamed and that's when accused No 2 and No 3 returned to go and stop the skirmish between you and accused No 4.

Mr Payi: That is not true, your worship, it did not happen like that.

.....

Mr Mkhumatela : The only assault, if there was an assault, accused No 3 pushed one of the deceased and he fell down and that was the end of the skirmish between your group and them.

Mr Payi : That is not , your worship. That is not yet the truth.” (sic)

[13] About appellant's state of drunkenness, the following version was put to Mr Payi:

“Mr Mkhumatela: Accused No 1 is going to testify that he was so drunk on that night that he was walking and sitting down, walking and sitting down. He was never involved in any skirmish between you and No 4 and other two accused, No 2 and No 3.

Mr Payi: I insist your worship; they are not yet telling the truth. All four of them, your worships, were involved in this.

Mr Mkhumatela: And all four accused are going to testify that you are telling the truth now that you are saying there were two fights on that night, the one that you started with accused No 4 and another skirmish that occurred near the shop you are talking about.

Mr Payi: That is still far from the truth your worship, resultantly I disagree with that version.

[14] Another state witness was called. Mr Wandisile Bani testified that as his home is next to the road he heard the noise of drunk like persons around about 20:00 on 18th September 2018. He went out and saw the two deceased persons, Banzi Miyeka and Luvuyo Mangeni lying on the ground being pelted with stones by four Youngmen. Those youngmen were accused no 1, no 2, no 3 and no 4. Appellant was accused no 1. He saw one of the deceased, Banzi Miyeka being dragged to the deserted building of the shop belonging to the foreigners by all accused persons. A police van appeared with its light shining on and it stopped right in front of the deceased, Luvuyo Mangeni and Siphwiwo Payi. Siphwiwo Payi is the first state witness. The occupant of the police van telephonically called other police officers as he was alone in the scene.

[15] Like Mr Payi, Mr Bani knew the accused persons even before the date of incident. The appellant is coming from the same Village as them, (Mgababa Village). Although the appellant started by intervening, when he was not succeeding in his attempts to intervene. He ended up joining the attack. They were all using stones. In addition to the light that was coming from his homestead as they were preparing for the funeral, there were streetlights that were on as the source of light.

- [16] In cross examination Mr Bani stated that he saw the appellant (accused no 1, picking up a stone from the street as there were lot of loose stones. It was put to Mr Bani that accused no 1 (appellant) would testified that he never attacked anybody. He was so drunk as he did not remember anything that happened on that night. He denied that it was dark on the street as the lights were on.
- [17] Ludwe Sibani was the last factual state witness called. He testified that he was at his home. He went to sleep after 18:00. Accused persons came to him at his home as he was still watching the television. Accused no 4 (Cengimbo) asked for some water, which he brought. Accused no 4 washed his hands and when asked about that, he suspected of having been pushed by others or slipped and fell as they were coming from tavern. Nothing was noticeable about their state of drunkenness. Accused no 1 (appellant) stated that, as he had arrived he decided to come and see Ludwe before accused no 1 (appellant) leaves. Upon being asked by Ludwe, they stated that they were coming from tavern. Accused no 1's (appellant) communication was sound. In fact, accused no 1 was visiting is friend, who is Ludwe's younger brother who was not at home then. No questions were asked by the defence. Ludwe was not cross examined. It is noteworthy that Ludwe's testimony is repeated by accused no 3, Anathi Sam as it is.
- [18] Accused no 1 (appellant) testified. He denied having committed the offences preferred against him. He testified that he saw Mr Payi and the two deceased persons during day on the day in question. He greeted them and passed pleasantries with Banzi Minyela, the deceased. He stated that he knew them very well, especially Mr Payi as he grew up with his nephew. He stated that he was drunk that day to such an extent that he did not know what happened on that day. The last he remembered was that he was in the tavern on the afternoon. He stated that he knows of no reason why Mr Payi would falsely implicate him.

Discussion and Analysis

- [19] Appellant's grounds of appeal are interrelated and interwoven. Whilst the identification and applicability of common purpose doctrine are in issue, all those are piggybacked and rooted on the fact that the appellant was drunk or intoxicated (in such way that he could not remember anything that happened on the evening of 18th September 2018).
- [20] At the hearing of this appeal the dispute narrowed itself down to whether the appellant was drunk to such an extent that he could not remember what happened on the evening of 18th September 2018. It was contended that the appellant was unaware of the circumstances of that day ostensibly as a result of the degree of his drunkenness. Flowing from that, it was contended by his Counsel Mr Van Wyk that when the altercation took place he was not at the scene as he was left and Tandi's homestead. However, when asked by the court if he relies on alibi, he disavowed reliance on alibi. The doctrine of common purpose kicks in, in circumstances where person's state of mind is diminished or impaired in such a way that he cannot remember the events of criminality to which he is linked.
- [21] It is important to anteriorly deal with the rules of evidence, especially those relating to cross examination. During cross examination of the first state witness Mr Payi, it was never put to him that the appellant was drunk in such a way that he does not remember what was taking place at the relevant times in that evening. The only things that were put to this witness were that the appellant would testify, together with other accused persons that when the tavern closed accused persons on the one hand and Mr Payi and the deceased persons on the other, walked out of the tavern almost at the same time. As they were walking, accused groups was walking in front of the other group, save for accused no 4 who was allegedly behind the complainant's group. It was further put to Mr Payi that the appellant would testify that he was so drunk on that night in that he was walking and sitting, and therefore he was never involved in the squabble between Mr Payi and other accused persons. Again, it was put to the witness Mr Payi that the appellant and other accused persons would testify that there were two fights on that night, that is, the one that was started by Mr Payi and the other that occurred near the shop.

- [22] From the version that was put to Mr Payi it is demonstrably clear that the appellant was able to recall the events of that evening. It therefore makes sense why the witness was never called upon to answer during cross-examination about the appellant's state and degree of his intoxication which allegedly impaired his ability to remember important events of that day. It takes someone's memory or remembrance to know that both groups went out of the tavern when it was closing. For one to tell that his group was in front of the other appeals to the memory and remembrance. To know how the fight between Mr Payi and accused no 4 started demonstrates a measure of remembrance and memory. The version put to Mr Payi, demonstrates that the appellant was present at the scene. The later version by the appellant contradicts the one that was put to the witnesses.
- [23] Another version that was never put to any of the state witnesses was that the appellant was not on the scene when the altercation and the squabble between the two groups took place. That version only came for the first time with accused no 2 when he was testifying. During the hearing of this appeal that version sought to take the centre stage to build a case about improper application of doctrine of common purpose by the court *a quo*. It is reiterated that the version put to Mr Payi clear demonstrates that the appellant was present at the scene. A failure to put a version is serious and fatal. The witness must be given an opportunity to deny the challenge, to call corroborative evidence on which reliance is to be placed.
- [24] It is grossly unfair and improper to allow a witness's evidence to go unchallenged during cross examination and then later argue that the witness should be disbelieved. This underscores the importance of putting party's version to the other party's witness during cross examination to allow the witness an opportunity to respond and explain any contradiction. In cross examination parties should put their own version to the witness, especially if it contradicts the witness's testimony, to give the witness a chance to explain¹.

¹ **Small v Smith** 1954 (3) SA 434 (SWA) at 438.

[25] I am in full agreement with the dictum made in *Boesak*² where it was held that:

“50.... it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.

A Failure to put version to the witness when still in the witness box and later rely on that version amounts to a litigation by ambush which is impermissible. A defence that arises when a witness can no longer answer thereto cannot be accepted and can only be regarded as an afterthought.

[26] The Constitutional Court has not been silent on this issue³ where it was held:

*“61. The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn*³ and has been adopted and consistently followed by our courts.”*

² **S v Boesak** (105/99) [2000] ZACSA 24 (12 May2000) Para 50.

³ **President of the Republic of South Africa and others v South African Rugby Football Union and others** 2000(1) SA 1; 1999 (1) BCLR 1059 Para 61.

[27] Classen J⁴ said this:

*“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved.”*⁵

[28] State witnesses, especially Ludwe, testified that the appellant was not so drunk as to be unable to remember the events of the 18th September 2018. The version that was put to the first state witness, Mr Payi gives a clear impression that the appellant was aware of what was happening. Ludwe was never contradicted when he gave the evidence to the effect that he had a sound conversation with the appellant during that same night. Ludwe testified that the appellant stated during their conversation that, he wanted to see Ludwe before he leaves. Accused no 3 corroborated that part of evidence in the following manner:

“Accused 3: Then Cengimbo that he wanted to go and look for his girlfriend who was staying at Buti Ludwe place.

Mr Mkhumatela : At Ludwe?

Accused 3: Yes

Mr Mkhumatela : And then, when he told you that he wanted to his girlfriend, what happened?

Accused 3: He then pleaded Milani since he is known there, he is attending the same church with the people from Ludwe’s home.

Mr Mkhumatela : Yes

.....

⁴ **Small v Smith** 1954 (3) SA 434 (SWA) at 438.

⁵ D T Zeffertt: The South African Law of Evidence, Second Edition, Page 912-914.

Accused 3: And then Milani said he also wanted to go there. It has long since Buti Ludwe. He wants to see him before he leaves.” (sic)

- [29] The appellant had been desirous of going to see Ludwe and he had shown that desire and expressed it at different places. When going to Ludwe’s place there is no evidence that he had difficulty in walking, notwithstanding that there was mud on the road. That was antithetical to the impression given by accused no 2 that he was drunk in so much he was walking and sitting.
- [30] It is important to repeat the version that was put to the first state witness, Mr Payi that, save for accused no 4, all accused person were walking in front of the other group, that is, Mr Payi and the two deceased persons. It was put that the appellant and other accused persons would say that. This attest to two things, *namely*, that the appellant was at all material times with other accused persons. Secondly, that he had recollection of the events of that night. I am mindful of the fact that such version was not pursued during the evidence of the appellant and accused persons. It is therefore important to note that there was no explanation for a failure to pursue a version that was put to the witness. It would be fair and in the interest of justice that the court, as well as the witnesses be advised of such a last hour decision not to pursue the evidence that had been put to the witnesses and had been debated during their cross-examination. It is impermissible to direct the attention of the other party to one issue and then, at a later stage in the trial, attempt to canvass another.
- [31] Accused no 2’s testimony that the appellant was left at Tandi’s place when the whole ordeal was taking place could and cannot be accepted for two reasons: firstly, that version was never put to any state witness, therefore it must suffer the same fate with and as other pieces of evidence that were never put to the state witnesses. Secondly, it contradicts the version that was put to the first state witness that the appellant and other accused persons were walking in front of the first state witness and two deceased persons after they went out of the tavern premises (when it was closing).

- [32] A crisp issue about the identification deserves a short shrift. The first state witness, Mr Payi and the appellant have been knowing each other, since when Mr Payi was still of a younger age. The appellant testified that Mr Payi was a friend to his nephew and when visiting his sister's house, the appellant would find Mr Payi with his nephew. On the day in question they saw each other at the tavern and the appellant even passed pleasantries with one of the deceased person. The appellant testified that he cannot know or think of any reason for Mr Payi to falsely implicate, link and accuse him of having killed the two deceased persons and of having attempted to kill Mr Payi.
- [33] The evidence of the state witness is to the effect that there was some light from the street lights, lights from the homestead and the moon. The first state witness develops this point to say, as the scene was moving the accused persons were able to see them. The converse of that is that Mr Payi, too, was also able to see them.
- [34] With regard to the fact that the state witnesses and the appellant know each other especially the first state witness, there was nothing that would prevent the first state witness to recognise the appellant, whether by the clothing or voice, because they know each other thoroughly. It is apparent in this case that a person can identify a person by voice because accused no 2 and no 3 allegedly identified accused no 4's voice when he was allegedly screaming during the alleged altercation with the other group.
- [35] The dispute about the light was in so far as it relates to the streetlights. It was said that it was dark because there were no streetlights to provide sufficient light. The following version was put:

"Mkhumatela : Mr Payi, the accused are going to testify, all four of them, that there are no street lights on that street.

Mr Payi: On the main road, your worship, there are no street lights, it is dark but there are street lights, your worship, on the road leading to Mangizi."(sic) (underlining is mine)

[36] The question of moon light was never sought to be gainsaid. The degree and the intensity of the darkness was, too, never canvassed in evidence. Images in the photo album demonstrate that there was sufficient light, especially where the deceased bodies were lying. It was never canvassed in evidence that, if there was darkness, such darkness was such that a person would not be able to recognise a person known to him. The issue of identification, too, is unmeritorious.

Conclusion

[37] In the light of the shortcomings in the appellant's evidence, I am unable to find that the appellant was so drunk to such an extent that he could not remember the events of the evening of 18th September 2018. I have found that the weight of the evidence show that the appellant was fully aware of the events of the 18th September 2018.

[38] Appellant's defence about the identification is an afterthought and accordingly devoid of any merit. The evidence is so overwhelming that the appellant was properly identified as he is known to the state witnesses. He could not state any reason for him to be falsely implicated or falsely accused. There was no clear or dim suggestion that the amount of light regardless of its source, was insufficient to enable a person to recognise a person known to him. First state witness's evidence is weighty to say that their assailants were able to see them and I also find that victims were successfully aimed at and hit with stones, some to death and one until he lost consciousness, using the light that was available to assist their sight. Appellant's defence about identification is untenable and unsustainable.

[39] Doctrine of common purpose becomes applicable in these circumstances. If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of the purpose is imputed to others⁶. In *Mgedezi*⁷, the Appellate

⁶ CR Snyman, Third Edition, Page 249.

Division (now the Supreme Court of Appeal) prescribed five requirements for the application of common purpose doctrine:

Firstly, the accused must have been present at scene where the violence was being committed; secondly he must have been aware of the [offence]; thirdly he must have been intended to make common cause with those committing [the offence]; fourthly, he must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others; Fifthly, he must have intended to commit the offence (to kill or to contribute to his death)⁸.

[40] The appellant was present with other accused persons when the offences were committed; he intended to make common cause with them to commit those offences. He manifested his sharing of common cause by stoning the victims and concealing one deceased body. All the accused persons including the appellant should have foreseen the possibility of killing, attempting to kill, and robbery, but reconciled themselves with that possibility. The court *a quo* did not misdirect itself in convicting the appellant.

[41] With regards to sentence, a mandatory sentence of life imprisonment was imposed. In doing so the court *a quo* found that there are no substantial and compelling circumstances justifying deviation from the minimum sentences statutorily prescribed. It also found that the sentences referred to in paragraph 2, 3 and 5 of this judgment were the only appropriate sentences. Lesser sentences would be unjust and would be disproportionate to the crimes, the criminals and the needs of society⁹. The nature of the offences and how the offences were committed was considered by the court *a quo*. Two deceased persons were killed by stoning. They died a painful death. One of the victims was in a coma for a period exceeding five (5) months and he is leaving with

⁷ **S v Mgedezi** 1989 (1) SA 687 (A) 705 I-706C.

⁸ **S v Sefatsa and others** 1988 (1) SA 868 (A).

⁹ **S v SMM** 2013 (2) SACR 292 (SCA).

painful medical effects of that incident to date. No one including the appellant showed contrition for their deeds.

[42] During the hearing of this appeal no argument was made about the sentence by both legal representatives. However, in the appellant's heads of argument, it is submitted that appellant personal circumstances coupled with the intoxication at the time of the offences justify substitution of the sentences imposed by the court *a quo* with lesser sentences. It also appears that the appellant selectively relies on the pre-sentence report. He relies thereon when it articulates his personal circumstances; and when it sets out the interests of society and how the society feels about the appellant, he disavows reliance thereon. The society is afraid of the appellant. In line with observation that the appellant failed to show remorse, he also failed to make submission in mitigation of sentence. He did not give the court *a quo* his personal circumstances.

[43] I disagree with the fact that the court *a quo* failed to consider personal circumstances of the appellant. The fact that, for example, the appellant was sentenced in October 2024 to 20 years' imprisonment and that period was ordered to run concurrently with the sentences imposed in this matter was clearly a consideration of his personal circumstances. Allied to that, the appellant was considered to be a first offender and that, too, was a consideration of his personal circumstances.

[44] The notion that accused personal circumstances were not considered because they did not earn him or yield a deviation from the minimum prescribed sentence cannot be sustained. The triad factors laid down in *Zinn*¹⁰ are the following:

“(i) The personal circumstances of the accused;

(ii) The nature and seriousness of the offence which includes the circumstances under which it was committed; and

¹⁰ **S v Zinn** 1969 (2) SA 537(A).

(iii) interests of society”.

[45] The sentencing court must weigh the triad factors one against the other. If the personal circumstances of the accused person outweigh other factors, that may be a basis for deviation. If the interests of the society and the nature and seriousness of the offences which include the manner in the which the offences were committed, outweighs accused personal circumstances, that is not an overemphasis of the nature and seriousness of offences as the appellant puts it.

[46] Appellant's unexplained failure to furnish the court a *quo* with mitigating factors demonstrably showed no remorse on his part. Infact the court a *quo* was not told that a similar offence would not be committed again in the future by the same appellant. The court a *quo* was correct in taking into its own hands and ensures the appellant and other would be offenders are deterred from committing a similar offence.

[47] In *Karg*¹¹ Shreiner JA remarked as follows:

"While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment”.

¹¹ *R v Karg* 1961 (1) SA 231 (A) at 236 A-C.

Deterrence has remained the most important object of punishment¹².

[48] In *Di Blasi*¹³ Vivier JA¹⁴ held:

“In my view the learned trial Judge did not give due consideration to the aspects of deterrence and retribution. The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct. In my view the sentence imposed by the learned Judge does neither, and I consider it to be shockingly inappropriate. Counsel for the respondent submitted that the sentence imposed by the learned trial Judge was in line with the sentences imposed in a number of other cases where the facts were similar.”

[49] The right to life¹⁵ and right to human dignity¹⁶ are the most important of all of other human rights in chapter three (3) of the Constitution. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals¹⁷.

[50] When weighing up the triad factors, the court *a quo* considered not only the personal circumstances gleaned in the probationer's report, but also the egregious, painful and barbaric manner in which these offences were committed by the accused persons. The fact that the probation officer's report demonstrated that the society is afraid of the appellant, and when he was sentenced, he was serving another sentence for a murder, was taken into

¹² **S v Khumalo and Others** 1984 (3) SA 327 at 330 D.

¹³ **S v Blasi** (429/94) [1995] ZSCA 111(21 September 1995); 1996 (1) SACR (1) (A).

¹⁴ At 10 F-G.

¹⁵ Section 11 of the Constitution.

¹⁶ Section 10 of the Constitution.

¹⁷ **S v Makwanyana and others** 1995 (6) BCLR 665; 1995(3) SA391 Para 144.

account. The depth of the pain of the loved ones and the next of kins of the deceased persons and Mr Payi is unimaginable. The blood that was spilled in the streets of that the community village evokes an immeasurable sense of shock and indignation on the part of the society.

[51] In the circumstances, the sentence that was imposed in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 was a demonstration of leniency by the court *a quo*. The sentences which ran concurrently in terms of this provision were to ensure that the cumulative effect of several sentences imposed in one trial or added to sentences which have already been imposed is not severe in the light of the aggregate sentence¹⁸, but at the same time does not underestimate the seriousness of the offence¹⁹. Concurrence of sentences ought to enjoy precedence over the practice of reducing sentences below the desired length for the purposes of justice simply to counteract the cumulative effect. Concurrence can obviously also lead to iniquity when one or more conviction is set aside on appeal²⁰. It will be iniquitous to interfere with the sentence of the court *a quo*. The sentence was not at all shockingly inappropriate.

[52] For the sake of completion, the provisions of section 280(2) Criminal Procedure Act read thus:

“(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently”.

[53] In the result I make the following order.

1. The appeal is dismissed.

¹⁸ **S v Cele** 1991(2) SACR 246 (A) at 248 J.

¹⁹ **S v Maraisana** 1992 (2) SACR 507 (A) at 511G.

²⁰ Hiemstra's Criminal Procedure, Page 28-40 (issue 1).

A.S ZONO
JUDGE OF THE HIGH COURT (ACTING)

I agree

D. POTGIETER
JUDGE OF THE HIGH COURT

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Ref: 10/2/5/1-5/22

Matter heard on	:	18 June 2025
Date of delivery	:	12 August 2025