

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO: A21/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: Naude-Odendaal J

DATE: 12/11/2025

In the matter between:

THABO RICHARD MSHILOANE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an appeal against both conviction and sentence. The Appellant was convicted in the Regional Court of Mahwelereng on 15 April 2019 on one count of Murder, read with the provisions of Sections 51(1) of the Criminal Law Amendment Act, 105 of 1997, as amended, and one count of Robbery with aggravating circumstances read with the provisions of Sections 5·1(2) of the Criminal Law Amendment Act, 105 of 1997.

[2] The Appellant was sentenced by the court *a quo* to life imprisonment on both counts on 6 August 2020. The Appellant was legally represented at all material times

of the trial by Mrs. Nkwana from Legal Aid SA. The Appellant made certain admissions in terms of Section 220 of the Criminal Procedure Act, 51 of 1977.

[3] The Appellant submitted that it is not in dispute that the Appellant and the witnesses were known to each other. It is further not in dispute that the deceased was found dead at her home by some of the witnesses and that the Appellant was arrested along the road after the relatives of the deceased attacked him. What is in dispute is whether the Appellant sold the phones and handbags to different witnesses and if he was ever in possession of the phones. It is further disputed by the Appellant that the pointing out was made freely and voluntarily.

[4] It was submitted by the Appellant that the court *a quo* had erred in finding that the State had proved its case beyond reasonable doubt in that the State did not present any evidence during the course of the trial that implicated the Appellant in the commission of the offences. The state did not lead evidence of who caused the death of the deceased. The court *a quo* further erred by finding that the cellphones were correctly identified by the nephew despite the police not making any investigations relating to the phones and what led to the phone being discovered.

[5] It was further submitted by the Appellant that the court *a quo* erred by accepting that the Appellant had injuries on his wrist without an explanation of how the injuries were caused and why. To admit that they were caused by hand cuffs but not understand how and why they were caused was not enough to conclude that the pointing out was done freely and voluntarily, especially keeping in mind that the other photos are not clearly visible to show the status of the entire body.

[6] The Appellant submitted that the Magistrate misdirected herself by attaching more weight on the pointing out that was done after the body of the deceased was discovered and by which nothing new came out of.

[7] The Appellant further submitted that the Magistrate drew an inference against the Appellant for closing his case without leading evidence as it was stated in the court *a quo*'s judgment that despite the damning evidence, the Appellant elected to remain silent and no answer or explanation came forward from him. The Appellant

submits that this contention is based on the fact that the State during trial did not present a *prima facie* case as to the identity of the person who caused the death of the deceased and as such there was no case for the Appellant to answer to.

[8] The Appellant submitted that the State did not prove beyond a reasonable doubt that the offence of murder was pre meditated or planned. This was not even put to the Appellant in cross-examination so therefore the conviction in terms of Section 51(1) of Act 105 of 1997 is incorrect.

[9] The State submitted that the Appellant's notice of appeal is defective and vague. With reference to Rule 67(5A)(b) of the Magistrate's Court Rules 32 of 1944; it was submitted that the notice of appeal should clearly and specifically set forth the grounds upon which such person wishes to appeal. Grounds of appeal will be bad if they are so widely expressed that it leaves the Appellant free to canvas every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value, either to the Court or the Respondent, or if they, in general, fail to specify in clear and unambiguous terms exactly what case the Respondent must be prepared to meet. (**Songo v Minister of Law and Order 1996 (4) SA384 (E).**)

[10] The State submitted that Appellant's grounds of appeal are bad for the above reasons. The Appellant does for example specify the improbabilities that exist in the state's case, what the minor contradictions were, and why the witnesses were not satisfactory, the State can only contend that the opposite is true and that the magistrate did indeed not err in any of the submissions set out in paragraph 1, 2 and 3 of the notice of appeal.

[11] The State further submitted that the factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to the record. The State submitted that the trial court gave intelligent and judicial consideration to all the important features on the case and that the Appellant failed to show the trial court was clearly wrong, therefore the appeal on conviction should be dismissed.

[12] In **S v Hadebe and Others 1997 (2) SACR 641 (SCA)** at-page 645 it was, held that when considering a matter on appeal, the appeal court in the absence of any demonstrable and material misdirection by the trial court, presumes that the findings of fact made by the trial court are correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[13] In this court's view, there is nothing in the record of proceedings which would lead to a conclusion that the court *a quo* erred in any material respect or misdirected itself in any material manner regarding the evaluation of the evidence or the weight to be accorded to the said evidence.

[14] The Appellant failed to demonstrate any material misdirection by the trial court and this court could not find any material misdirection either. The trial court's findings of fact were correct and there is nothing on the record indicative thereof that it should be disregarded.

[15] In this court's view, the State managed to prove beyond reasonable doubt that the Appellant was guilty of Murder, read with the provisions of Section 51 (1) of Act 105 of 1997 as amended, as well as Robbery with aggravating circumstances, read with the provisions of Section 51(2) of Act 105 of 1997. The Appeal therefore stands to fail on conviction.

[16] In respect of sentence, it was submitted by the Appellant that the court *a quo* imposed a harsh and disproportionate sentence under the circumstances of the present case. The Magistrate further erred in overemphasizing the seriousness of the offence.

[17] The Appellant further submitted that the court *a quo* committed a misdirection when it on the count of Robbery with aggravating circumstances imposed a sentence in excess of the prescribed minimum sentence and by doing so failed any mercy towards the sentencing of the Appellant. The Appellant submitted that the count of Robbery with aggravating circumstances, read with the provisions of Section 51(2) of Act 105 of 1997, attracts a minimum of 15 (fifteen years), yet the Magistrate imposed a sentence of Life Imprisonment on him.

[18] The Appellant further submitted that the court *a quo*, in imposing a sentence far in excess than the prescribed sentence ought to have at least given reasons as to why it is deemed that the higher sentence is appropriate, which she failed to do .

[19] The Appellant further submitted that the court *a quo* erred by not attaching due weight to the personal circumstances of the Appellant, which cumulatively amounted to substantial and compelling reasons, warranting a deviation from the prescribed minimum sentence of Life Imprisonment on Count 1 and 15 (Fifteen) years on Count 1 and 15 (Fifteen) years on Count 2. The trial court erred in finding that there were no substantial and compelling factors which may have allowed it to deviate from imposing a lesser sentence than those prescribed.

[20] The Appellant submitted that in committing these misdirections, this court is implored to interfere with the sentences imposed by the trial court. It was consequently submitted by the Appellant that this court must interfere with the sentences imposed and that the sentences must be substituted with an appropriate sentence.

[21] The State submitted that where the Appellant was sentenced, the trial court incorrectly stated that the Appellant was convicted of robbery with aggravating circumstances read with Section 51(1) of Act 105 of 1997 and subsequently sentenced the Appellant to life imprisonment on both the count of murder and that of robbery with aggravating circumstances. This submission is however incorrect. The trial court when convicting the Appellant clearly stated that the Appellant was convicted as follow: -

"Count 1 ... You must stand up. Murder, read with Section 51(1) of Act 105 of 1997, as it was committed during the act of robbery.

And Count 2, robbery with aggravating circumstances, read with Section 51(2) of Act 105 of 1997."

[22] The court *a quo* therefore correctly convicted the Appellant in respect of Count 2, Robbery with aggravating circumstances, read with Section 51(2) of Act

105 of 1997, but erred and misdirected itself in sentencing the Appellant in terms of Section 51(1) of Act 105 of 1997, instead of Section 51(2).

[23] The State correctly however conceded that the sentence in respect of Count 2 should have been 15 (fifteen) years imprisonment as provided for in Section 51(2) and not Life Imprisonment. The State further correctly submitted that the sentence in Count 1 is correct as the murder of the victim was caused while committing robbery with aggravating circumstances.

[24] In this court's view, the Appellant failed to prove that there are any substantial and compelling circumstances present warranting a deviation from the prescribed minimum sentences in respect of both counts. None of the factors that the Appellant submitted in mitigation of sentence are substantial and compelling, even if they are taken cumulatively. The court *a quo* correctly found that there were no substantial and compelling circumstances present. The court *a quo* did however err in imposing an incorrect minimum sentence of life imprisonment in respect of Count 2, instead of 15 years which amounts to a material misdirection.

[25] The settled approach to be adopted by this court is that the sentencing task resorts primarily within the scope of the trial court's discretion, and the court on appeal shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise its discretion judiciously. The Appeal court can only interfere with the court *a quo*'s sentence if the presiding officer had committed a material misdirection and when the sentence was imposed can be considered shockingly inappropriate.

[26] In **S v RO and Another 2010 (2) SACR 2:48 (SCA)** at paragraph 30 that **Hener JA** stated as follows:-

"sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are, the crime, the offender, the interest of society with different nuance, prevention, retribution, rehabilitation, reformation and deterrence. Invariably there are overlaps that render the

process more unscientific, even a proper exercise of the judicial function allows reasonable people to arrive in different conclusions."

[27] In **S v Kekana 2013 (1) SACR 101 (SCA)**, it was stated that: -

"It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock. It has been submitted on behalf of the Appellant that the sentence is out of proportion to the gravity of the offence and that, in the circumstances of this case, a non-custodial sentence was appropriate. It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence."

[28] In the present matter, the presiding Magistrate in respect of Count 1 did not commit a material misdirection and the sentence imposed cannot be considered shockingly inappropriate, under the circumstances. However in respect of Count 2, the Magistrate materially misdirected herself and made an error in fact and in law. Further, any sentence imposed with Life Imprisonment should run concurrently with the sentence of Life Imprisonment. The appeal on sentence in Count 2 stands to succeed.

[29] Accordingly, this court therefore makes the following order: -

1. The appeal against conviction is dismissed.
2. The appeal against sentence in respect of Count 1 is dismissed.

3. The appeal against sentence in respect of Count 2 is upheld.
4. The court *a quo*'s order on sentence is substituted and the Appellant is sentenced as follows: -

"1. In respect of Count Number 1: Life Imprisonment

2. In respect of Count Number 2: 15 (fifteen) years Imprisonment.

3. The sentence imposed on Count 2, is to run concurrent with the sentence of Life Imprisonment In Count 1.

4. No order is made in terms of Section 103(1) of the Firearms Control Act, 60 of 2000."

M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I AGREE:

A. VAN WYK
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON: 6 JUNE 2025
JUDGMENT DELIVERED ON: 12 NOVEMBER 2025

For the Appellant: Mrs. R Scott
Instructed by: Legal Aid South Africa
Polokwane Local Office
Polokwane

For the Respondent:

Instructed by:

Adv. A.P. Van der Kooi -

The Director of Public Prosecutions,
Limpopo Division. Polokwane