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

Case no: K/S 26/2019

Reportable: **YES** / NO

Circulate to Judges: **YES** / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

MICHAEL PIETERSON

Appellant

and

THE STATE

Respondent

Coram: PHATSHOANE DJP, MAMOSEBO and NXUMALO JJ

Heard: 11/08/2025.

Delivered: 07/11/2025.

Summary: Criminal law – whether a conviction on a count of murder and obstructing the course of justice is sustainable – whether the search and seizure was unlawful and evidence obtained therefrom inadmissible – whether a conviction on obstructing the course of justice amounts to a duplication of convictions – and whether substantial and compelling circumstances exist warranting a deviation from the prescribed minimum sentence of life imprisonment.

ORDER

On appeal from the Northern Cape High Court, Kimberley, (Coetzee AJ sitting as the court of first instance):

1. The appeal against the convictions in all three counts and sentences of life imprisonment is dismissed.

JUDGMENT

Mamosebo J (Phatshoane DJP and Nxumalo J concurring)

[1] The appellant, Mr Pieterse, was convicted in this Court on two counts of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act,¹ as well as defeating or obstructing the course of justice by Coetzee AJ, sitting as the court of first instance. He was sentenced to life imprisonment on each count of murder and five years' imprisonment for obstructing the course of justice. This appeal, with leave of the trial court, is directed against his convictions on all three counts and sentences of life imprisonment.

[2] The grounds of appeal are that the trial court erred:

1. in admitting the evidence of the search and seizure at the end of the trial within a trial;
2. in finding that the circumstantial evidence was sufficient for a conviction;
3. in not finding that the conviction in respect of count 3, namely, obstructing the course of justice, amounts to a duplication of convictions; and
4. in finding that there were no substantial and compelling circumstances to warrant a deviation from imposing the prescribed minimum sentence of life imprisonment on counts 1 and 2.

Evidence adduced by the State

¹ 105 of 1997.

- [3] The deceased in count one was Ms K[...] M[...] (Ms M[...]), and the deceased in count 2 was N[...] M[...] (N[...]), Ms M[...] and the appellant's 11-month-old son. There was no direct evidence on, or eyewitnesses to, the two counts of murder. Doctor Lemainé Fouché, a Principal Forensic Pathologist, conducted the post-mortem examinations on the two bodies on 13 May 2019 and compiled separate reports. Her qualifications and experience were not challenged.
- [4] The first body was identified as Ms M[...]’s. She had incised wounds caused by a sharp instrument above her left eye, on the front of her left shoulder above her breast, and on the front of her right hip. The incised wound on the front fascia illiaca caused the small bowel to protrude and to bleed. The body had a cooked appearance, with skin splitting on the front of her left breast, the left side of the abdomen and the front of the right upper leg. The front of the head, neck and torso (chest, abdomen, arms and legs) were covered in burns. The skull had extensive under scalp haemorrhages (bleeding) over the frontal and occipital bones, that is, there was bleeding inside the skull, most likely caused by the incised wound above the left eye. There was a fracture stretching into the left parietal bone, which could have been caused by a hard blunt object or taking the head and hitting it against a hard object. The brain was swollen. The tongue was bitten between the two front teeth, and the epiglottis was swollen and red due to the inhalation of warm air. The trachea was erythematous with sloughing of the mucous membrane of the upper trachea. The doctor concluded that the deceased was alive when she sustained all these injuries and inhaled the hot air prior to being burnt. Dr Fouché took a blood sample from the deceased and marked it under seal number DD450790 and handed it to the investigating officer, Cst ZP Maqwevo. The death of the deceased was caused by a head injury and smoke inhalation.
- [5] The second post-mortem examination was conducted on the same day on the body identified as N[...]’s. There were burns covering the right side of the face and the back of the head as well as burns in different shapes and sizes

on the torso, legs and right hand; an incised wound on the frontal bone above the left eye as well as a penetrating incised wound through the left frontal bone into the left anterior cranial fascia; an abrasion on the left cheek and the frontal bone above the right eye; and an under scalp haemorrhage on the left frontal bone. According to Dr Fouché, the stab wound just above the left eye penetrated until just before the brain. N[...]’s brain was microscopically swollen. The doctor opined that N[...] was already deceased when the fire was set. The cause of N[...]’s death according to the doctor was a stab wound to the face above the left eye.

- [6] Ms Dora S[...] is Ms M[...]’s foster mother. On the afternoon of 07 May 2019, four days before the tragedy, the appellant informed her that a certain police constable had advised him to return to court on Thursday, when the Magistrate would be available, to apply for guardianship (must have meant custody) of his child. She advised him that no court would grant him such an order as the child was still being breastfed. His response was thus, *‘if he cannot get his child, then nobody would because another man will not raise his child’*. He added that he would rather kill them both and set them on fire. Ms S[...] warned him about the consequences that he might face. He left. She described the relationship between the appellant and the deceased as toxic, especially after the birth of N[...].
- [7] Mr George Mosia Vos (Mr Vos) was walking to Holpan on Sunday, 12 May 2019, just after 08:00 in the morning, when he noticed that the footpath had been swept. He turned his head to the right and noticed ash. He went closer and saw crossed legs of a human being. He reported to Capt. Sam Brown, who immediately summoned other police officials and took them to the scene. The distance between the swept area and where Mr Vos stood and the distance between the swept area and the deceased’s feet were about 2 meters, respectively.
- [8] Ms M[...] was Ms E[...] M[...] M[...]’s (Ms M[...]) niece. Ms M[...] and the appellant were in a relationship described by Ms M[...] as stormy or tempestuous. It is common cause that Ms M[...] and the appellant went to Ms

M[...]’s home the evening of Saturday, 11 May 2019. Ms M[...] went there to look for her sister, Ms L[...] M [...], who held N[...] at the time. According to Ms M [...], as the appellant professed his love for Ms M [...], Ms M [...] stopped him and scolded him, stating that if he really loved Ms M [...], she would not have had a blue eye and a swollen mouth. Ms M [...]’s foot was also swollen from being hit by the appellant with a five-pound hammer, continued Ms M [...], who also testified that she told the appellant that what he felt for Ms M [...] was not love but obsession. Further, Ms M [...] had told Ms M [...] in the presence of the appellant that she did not want to be in a relationship with him anymore and will not even go to his shack because he would kill her. To this, the appellant said: *‘This woman does not want me anymore’*; and moved away from the door where he had been standing. They were alerted by Ms M [...]’s son that he was still outside.

[9] Ms M[...] proceeded to testify, stating that shortly thereafter, Ms L[...] M [...], her brother and N[...] arrived. Ms M[...] and her husband later escorted Ms M [...] and N[...] and parted from them when they were about 25 paces from reaching their home, where Ms M [...] stayed with her siblings and their children. Ms M [...] further testified that she and her husband were unaware of the appellant’s whereabouts when they escorted Ms M [...] and N[...] home. That was the last time Ms M [...] saw both the deceased alive. Ms M [...] was carrying N[...] on her back, wrapped in a pink towel. Ms M [...] was wearing a black hat, a white windbreaker jacket and black shorts with blue toe sandals. N[...] wore a red jacket with blue shorts and blue sandals.

[10] On Mother’s Day, 12 May 2019, Ms M [...], as planned, was expecting Ms M [...] to visit her but she never showed up. Instead, Ms M [...]’s sister, K [...], arrived enquiring about Ms M [...]’s whereabouts. Ms M [...] joined K [...] in the search for Ms M [...] and N [...]. They started at the appellant’s place and found him in the company of his friend, Mr Rodger Baker. On enquiry, he claimed to have left Ms M [...] at Ms M [...]’s place the previous night and said that they were safe there. In search of the deceased, K [...] and Ms M [...] went to Ms S [...]’s home and she told them that she last saw the deceased on 07 May 2019 and related to them the ominous threat and rumours of the

death of a woman and a child. At that stage, Mr Vos had already contacted Ms M[...]’s husband, informing him that he had observed burnt bodies of a woman and a child, and the police were at that crime scene. Ms M[...] and K[...] returned to Ms M[...]’s home and called the police to report the deceased as missing persons.

- [11] Constables Marwin Olivier, Kagiso Seele and Tshobeng attended to Ms M[...]’s complaint. Two of the three constables, Olivier and Seele, testified. Their evidence in brief was that as they were gathering information from Ms M [...], the appellant arrived and interrupted their engagement with Ms M [...]. They, at that stage, regarded him as the second complainant because while speaking to Ms M [...], Sgt Mothudi, their shift Commander, contacted them and reported that the boyfriend had called the police station with information pertaining to the missing persons. Cst Olivier alerted Sgt Mothudi that the boyfriend was with them at Ms M[...]’s place. Cst Olivier was then contacted by Capt John Chris Seeley by radio and asked to bring the appellant to the main road R374 for more information, which he did. They met Capt Seeley on the side of the road. Capt Seeley spoke to the appellant through an open window, seeking his permission to search his premises, which he granted.
- [12] Shortly after Capt Seeley had commenced his testimony, the defence raised an objection regarding the admissibility of the evidence obtained during the search and seizure at the appellant’s premises. A trial within a trial was instituted to determine the admissibility thereof.
- [13] Capt Seeley explained that he consulted the appellant at the R374, enquiring from him whether he would object to them attending his premises to search for a possible shoe track similar to the one found at the veld next to the bodies, and also to do so based on information received. He was warned that it was suspected that he could be involved in the alleged incident. The appellant consented. At his home, while the appellant was still in the police vehicle, Capt Seeley searched his yard for the possible shoe track. He explained that he did not take the appellant with him at that stage because that would have caused leaving his foot tracks in the yard and contaminate

the scene. Capt Seeley found tracks in the yard as well as in the main entrance of the appellant's residence and requested Cst Tebogo Malgas, attached to the Hartswater Local Criminal Record Centre (LCRC), to take photographs of the shoe tracks. Thereafter Capt Seeley explained to the appellant what they had done and discovered. Capt Seeley walked with him to the door of the shack which the appellant unlocked himself.

[14] Capt Seeley observed that the floor of the shack was waterlogged. Behind the door but inside the shack was a washing line from which hung a blue-coloured jacket, a blue T-shirt, and a pair of blue track pants which were still wet. Capt Seeley further observed that there was blood on some clothing items. Cst Malgas took photographs thereof and collected them for forensic analysis. Behind the shack they found a pair of All Star tekkies on top of the roof which was also wet. Cst Malgas also photographed the pair and packaged it. Capt Seeley denied assaulting or threatening to kill the appellant or witnessing any of the other officials assaulting him. He added that had the appellant withheld his consent to search his premises he would have cordoned off his premises and posted police officials there whilst launching a formal application for a search and seizure warrant which he believed would have been granted.

[15] Cst Malgas' role, as a photographer and LCRC member, was to properly process the scenes where the bodies were recovered in the veld as well as at the appellant's premises and also to collect exhibits. He also denies that any assault on the appellant took place in his presence. On 15 May 2019, he handed the exhibits over to the investigating officer, Cst Samuel Raymond Mqwevu, for forensic science analysis. Cst Mqwevu took one big forensic bag which contained all the collected clothing items of the appellant and one small bag which contained Ms M[...]s blood sample.

[16] At the time of testifying, W/O Mitchell was already a retired SAPS member having served 29 years. He was off duty on 12 May 2019 when Ms M[...] telephonically reported the deceased missing. He met Olivier, Seele and Tshobeng in a marked police double cab bakkie and joined them. W/O

Mitchell contacted Capt Seeley, who was already at the scene. He confirmed that Capt Seeley spoke to the appellant who gave him permission to search his premises. W/O Mitchell boarded Capt Seeley's vehicle to the appellant's shack. The premises were immediately cordoned off. W/O Mitchell did not enter the premises but remained outside the cordon. W/O Mitchell maintained that when the appellant was questioned, he was not yet a suspect. However, as soon as it became apparent that he was a suspect, he was handcuffed.

- [17] W/O Tshepiso Maria Malatsie is a forensic analyst responsible for performing presumptive testing on evidence provided in forensic bags containing biological material. She compiled an affidavit in terms of s 212(4) of the Criminal Procedure Act² ("CPA"). She received one sealed evidence bag which contained a blood alcohol collection kit containing one liquid blood sample. It was in her safekeeping from the date of receipt until completion of testing. She transferred the liquid blood onto the blood collection card, let it dry, then placed it in an envelope, marked it and placed it in the case file.
- [18] W/O Sibonelo PraiseGod Ngcoya is attached to the Forensic Science Laboratory, Pretoria, as a Forensic Analyst in evidence recovery. He also compiled an affidavit in terms of s 212(4) of the CPA. On 27 May 2019, he received the sealed bags specified in his affidavit. His focus was mainly directed at the sealed evidence bag containing the appellant's blue T-shirt. He broke its seal and took out the exhibit for analysis. He laid the exhibit on a properly disinfected bench, whereafter he observed a stain on the front left part of the T-shirt, which tested positive for blood. Thereafter, the docket was handed over to the administration component for DNA testing.
- [19] Capt Regina Cecilia Janse van Rensburg, a Senior Forensic Analyst stationed at the biology section of the FSL in Pretoria, interpreted the DNA received and compiled a report together with an affidavit in terms of s 212 of the CPA. Capt van Rensburg analysed the specified T-shirt and obtained a

² 51 of 1977.

female DNA result from the bloodstain. Simply put, the blood on the T-shirt came from the deceased (Ms M[...]). The same DNA result was found on a rock marked exh D in exhibit bag PA60033892406, a rock in exhibit bag PA4001897528, and a swab marked exh A from kit 13DCAD5367 sealed in evidence bag PA4001867498. An attempt was made to cast doubt on whether the stain on the T-shirt was blood or could have been skin cells, a possibility that Capt van Rensburg persuasively ruled out.

- [20] I do not deem it necessary to deal with the evidence of Colonel Kate Simon, a quality manager at the biology section of FSL, whose evidence was solely led after the challenge of the accreditation of the FSL by the South African National Accreditation System (SANAS). This aspect was not argued before us, correctly so, I should add.

Evidence adduced by the defence

- [21] The appellant admitted that Ms M[...] was his girlfriend since 2017 and they cohabited until around April 2019. Further that N[...] was his son. He testified that he last had contact with both deceased on 11 May 2019 when he left them at Ms M[...]’s place. Ms M[...] asked him to accompany her to Ms M[...]’s place because she was looking for her son, who was with her sister. Ms M[...] told the appellant that he is an unemployed jailbird and if he continues seeing the deceased, she will make sure he returns where he came from. He told the deceased to fetch her phone from him the following day. He left both deceased at Ms M[...]’s place and never saw them again.
- [22] Later the following morning, Ms M[...] and K[...] looked for the deceased at the appellant’s home. He denied knowledge of their whereabouts. Ms M[...] informed him of two dead bodies found in the veld. He called the police in relation to the two dead bodies, and they informed him that they would come to his place. Subsequently, he saw the police at Ms M[...]’s place and went there. He had just washed the dirty clothes discovered by the police inside his shack, as well as the pair of tekkies they retrieved from the roof. He denied having a conversation with Ms S[...] in which he threatened to kill and

burn the deceased. According to him, he told Ms S[...] that he was returning from the police station where he had deposed to an affidavit for a lost birth certificate. He denied killing both the deceased. In his evidence-in-chief, he disputed that his seized T-shirt had the deceased's blood on it. However, in cross-examination, he conceded that if that is what the professionals say, then he concedes. He conceded that it was the very same wet T-shirt seized by the police that had the deceased's blood on it. He could not explain how the deceased's blood ended up on his T-shirt. He also conceded that the shoe track found at the scene, where the bodies were recovered, matched that of an All Star tekkie and that a wet pair of black All Star tekkies was recovered from the roof of his shack. He denied that his shoeprint was found at the scene where the bodies were recovered.

Search and seizure

[23] The question to be answered under this heading is whether the search and seizure was with the appellant's consent; and if not, whether the evidence obtained is admissible nonetheless?

[24] A point was taken that the trial court has not furnished any reasons for admitting the evidence in question. This is what the trial court pronounced in respect of the trial within a trial:

'This is a ruling that I have got to make [in] a trial within a trial. I do not intend giving any reasons for the finding as reasons therefore will be given if necessary at a later stage. I rule as follows: The evidence of the search and seizure is allowed.'³

Despite the provisions of s 146 of the CPA necessitating the provision of reasons by superior courts in criminal trials,⁴ the trial court omitted to furnish

³ Record, volume 3 at 203, line 2 – 6.

⁴ *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A); *S v Immelman* 1978 (3) SA 726 (A) at 729A – C.

its reasons in this regard. Under the circumstances, the appeal court must consider the admissibility of the evidence afresh.⁵

- [25] It is common cause that the police's search and seizure wherein the real evidence was obtained was without a search warrant. However, while there seems to have been various communications between different police officials to varying degrees of the knowledge and involvement of others, the police officials corroborated each other and were consistent in maintaining that the appellant had granted Capt Seeley permission to search the premises. Capt Seeley explained that had the appellant withheld his consent, he would have invoked s 22 of the CPA maintaining that he believed a search warrant would have been issued to him upon application thereof given the seriousness of the case.
- [26] The appellant on the other hand testified that the police did not seek his permission to search his premises, and that had they done so, he would have consented. He further testified that the police officials assaulted him during the search, implying coercion. However, the evidence points to the contrary. There is no evidence that the appellant was coerced to consent to the search or provide the information to the police. Evidently, he initiated his involvement by calling the police station and reporting the missing persons and joining the search by the police and Ms M[...] when the investigation was initiated. Furthermore, the appellant did not express any dissatisfaction with the search conducted at his premises. I therefore accept that the appellant had granted the police permission to search his premises.
- [27] Further, the appellant's attorney, Mr Steynberg, conceded that it would not necessarily follow that, absent his consent, the evidence should be excluded. Assuming in favour of the appellant that he had not consented to the search and seizure, the question whether the evidence is admissible nonetheless is dealt with below.

⁵ *S v Masuku and Others* 1985 (3) SA 908 (A) at 912D – I.

[28] The Supreme Court of Appeal (SCA) remarked in *Director of Public Prosecutions, Gauteng Division v Thato Molefe and Another*⁶ (“Molefe”) that our courts have tended towards the Canadian approach where the decision to admit improperly obtained evidence was left largely to the discretion of the judge, taking into account the individual facts of the case. The SCA proceeded to state that our Constitution⁷ has since codified the South African approach on this issue. Section 35 (5) of the Constitution stipulates:

‘Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.’

[29] The Constitutional Court in *Key v Attorney-General, Cape Provincial Division, and Another*⁸ insightfully pronounced:

‘In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when

⁶ (417/2024) [2025] ZASCA 67 (26 May 2025) para 12.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ 1996 (2) SACR 113 (CC) paras 13 and 14.

fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded. It follows that the applicant is not entitled to an order from this Court in these proceedings that the evidence secured as a result of the searches and seizures will be inadmissible in criminal proceedings against him. Insofar as the decision in *Park-Ross* is inconsistent with this conclusion, it must be taken to be incorrect.’

[30] In *Molefe* the SCA, recognising the tension in respect of the Bill of Rights and the judicial process, remarked:

‘... Courts more readily received improperly obtained evidence, which was real evidence, in the form of tangible objects. As this Court stated in *S v Mthembu* [2008 (2) SACR 407 (SCA) para 22]:

“The reason was that such evidence usually bore the hallmark of objective reality compared with narrative testimony that depends on the say-so of a witness. Real evidence is an object which, upon proper identification, becomes, of itself, evidence....”⁹

[31] I conclude that the evidence is admissible as evidence obtained in violation of the Bill of Rights can only be excluded where (i) the trial will be unfair if the evidence were to be admitted; or (ii) it would be detrimental to the administration of justice. Regard being had to the authorities cited above and the objective facts of what transpired at the appellant’s premises, I am satisfied that admission of this evidence neither rendered the trial unfair nor was it detrimental to the administration of justice. The appellant’s concession

⁹ *Supra* fn 7 para 16.

that he would have granted the police permission anyway tips the scale to a finding that the admission of the evidence in question did not result in the violation of his rights to a fair trial.

Circumstantial evidence

[32] There was no direct evidence on, or an eyewitness to the killing of Ms M[...] and N[...]. Mr Steynberg, for the appellant, contended that but for the admission of the DNA found on his T-shirt, there would not have been a conviction. He argued this aspect in his heads as follows: the presence of DNA is circumstantial evidence and the court should have used inferential reasoning to come to its conclusion, having regard to all the evidence, especially that of the appellant.

[33] A vital item of part of the circumstantial evidence correctly admitted by the trial court was the deceased's DNA (her blood) that was confirmed by the forensic evidence to have been found on the appellant's T-shirt seized from his residence during the search and seizure. It was common cause that the T-shirt was his, and he failed to explain to the trial court how the deceased's blood was found on it.

[34] It is also common cause that a presumptive test conducted at the forensic laboratory tested positive for blood. The appellant, instead, contended that there was a reasonable doubt whether it could have been there due to skin cells. This contention holds no water in light of the explanation provided by Capt van Rensburg to the trial court, to this effect:¹⁰

'It is not just one skin cell, the court needs to please understand merely touch DNA is not going to do the trick. So if I touch the bench or I lift my hand or I just touch my jacket it does not accumulate enough DNA to actually yield a result based on the chemistry used at the laboratory. ...a serious amount of skin cell for a lot of use accumulate and touch an amount

¹⁰ Record, volume 3 at 247, line 4 – 12.

to actually obtain a result. So, in my opinion, it is definitely blood, it is not skin cells.’ (*sic*)

- [35] Notwithstanding that there was no direct evidence linking the appellant to the commission of these offences, the rules of logic in *R v Blom*¹¹ (“*Blom*”) dictate that the inference sought to be drawn must be consistent with the proven facts and it must be the only reasonable inference to be drawn. The principle was followed in *S v Reddy and Others*¹² (“*Reddy*”) where the approach in assessing circumstantial evidence was found to be this:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such “that they exclude every reasonable inference from them save the one sought to be drawn”. The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that

¹¹ 1939 AD 188.

¹² 1996 (2) SACR 1 (A) at 8C – I.

the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

Best on Evidence 10th ed 297 at 261 puts the matter thus:

“The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances. A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. ... Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...”

[36] The following are the individual circumstances which, when put together, confirm each other, leaving no room for doubt. The evidence is like joining together different pieces of a jigsaw puzzle to complete the mosaic:

36.1 The appellant was placed at Ms S[...]’s place a few days before the murders, and although he denies the content of the conversation, his death threats, as alleged by the foster mother (Ms S[...]) whose version is reliable, cannot be ignored. Both Ms S[...] and Ms M[...] describe the deceased and appellant’s relationship as tempestuous;

36.2 He was at Ms M[...]’s place the night of the disappearance of the deceased, and that happened when Ms M[...] and her husband returned to their own home, having escorted the deceased to within 25 paces of their own home;

36.3 There is no evidence of a fight or violence that happened that could have caused Ms M[...]’s blood to be splattered while she was in Ms M[...] and the appellant’s presence;

36.4 According to Ms M[...], Ms M[...] refused the invitation by the appellant to fetch her phone from his home, fearing that he would kill her;

36.5 It is common cause that the appellant and Ms M[...] shared a son, N[...], and both Ms M[...] and N[...] were mysteriously found dead after being with the appellant at Ms M[...]’s place that night;

36.6 All Star tekkies’ tracks were found next to the dead bodies. Similar tracks were found on the premises and close to the entrance of the appellant’s home. It is also not in dispute that a pair of All Star tekkies were recovered on the roof of the appellant’s shack, washed and wet. This piece of evidence on its own weighs like a feather, but considered with the other pieces of evidence, it presses heavily on the appellant; and

36.7 The blood which was found on the appellant’s washed T-shirt, was confirmed through a presumptive test and DNA by the forensic experts, to be that of the deceased. He was unable to explain how her blood had ended up on his T-shirt if he had parted ways with her at Ms M[...]’s place and never saw her again.

[37] If one applies the well-known principles encapsulated in *Blom* and *Reddy* to the evidence set out above, there can be no doubt in reaching the conclusion that the denial by the appellant of any involvement in the killing of Ms M[...] and N[...] is palpably false. The trial court was therefore correct in rejecting his defence. The evidence shows that the appellant was bent on having the custody of his son, failing which he would kill the mother and his son, as no one, in his view, was fit to raise his son for him. The trial court was correct to convict the appellant on both counts of murder based on the circumstantial evidence. Circumstantial evidence, as in this case, can be more reliable than eye-witness testimony.

Was count 3 a duplication of convictions?

[38] Mr Steynberg submitted that there was a duplication of convictions in respect of the third count of obstructing the course of justice. He alluded to these remarks by the trial court:

‘This submission can only relate to Me M[...]. As the causes of her death was undisputed, were a head injury and smoke inhalation. I am therefore of the view that this submission is correct. Child M[...]'s death was caused by a facial stab which is indicative therefore that the accused burned and concealed her body.’¹³ (*sic*)

The argument was that there is no evidence of two separate burnings as the head and upper part of N[...]'s body was below Ms M[...]'s head and shoulders when they were set alight as depicted on photos 14 and 15 of Exh C. There was therefore a single intent, meaning, it cannot be that there was duplication in relation to N[...] and not Ms M[...], argued Mr Steynberg.

[39] The appellant's reliance on the trial court's finding/ruling does not take his case any further because this Court takes a different view. The trite principle enunciated by the Appellate Division in *Rex v Dhlumayo and Another*¹⁴ is that, while an appeal court's interference with the findings of a trial court is limited, it can interfere where it is satisfied that the trial court erred. That the trial court erred on the aspect of duplication is demonstrated below.

[40] In *S v Dlamini*,¹⁵ considering whether there has been a duplication of convictions on the charges, the SCA pronounced:

‘The single intent and continuous transaction test, as applied to an enquiry regarding the improper duplication of convictions, has already been

¹³ Record, volume 7 at 507, line 17 – 23.

¹⁴ 1948 (2) SA 677 (A) at 705 – 706.

¹⁵ 2012 (2) SACR 1 (SCA) para 54.

discussed above. Another test is the enquiry whether the evidence necessary to establish one crime involves proving another crime...'

In the application of the abovementioned tests, the true intention of the accused must be inferred from the circumstances surrounding the commission of the offences and the available evidence.¹⁶

- [41] First, the evidence required to prove murder, and the elements thereto, are not the same as the elements required to establish the offence of defeating the course of justice. Second, in light of the evidence adduced, the appellant must have thought that he had stabbed and killed Ms M[...] and N[...]. It can be reasonably inferred that he subsequently burnt their bodies to destroy the evidence. I hasten to add that the appellant was well aware that the accusing finger to the effect that he perpetrated these crimes would firmly point at him. He therefore endeavoured to avoid taking responsibility or accountability for the deceased's' deaths by burning their bodies. Accordingly, the argument on duplication is misplaced and not supported by the facts in both instances. The trial court was therefore correct to convict the appellant on count 3 as well, albeit incorrectly holding that the count applies only to N[...]’s body.

Are there substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence of life imprisonment on counts 1 and 2?

- [42] The relevant provisions of the Criminal Law Amendment Act¹⁷ bear repeating:

‘51 Discretionary minimum sentences for certain serious offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) ...

¹⁶ *Ibid* at 14E.

¹⁷ *Supra* fn 1.

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

[43] It is trite that sentencing is primarily in the discretion of the trial court. A court of appeal may only intervene when there is an irregularity or where the trial court made a grave error or where the sentence is shocking and inappropriate.¹⁸ Further, where the trial court imposed a prescribed minimum sentence, the approach on appeal is whether or not the facts that were considered by the trial court are indeed substantial and compelling.¹⁹

[44] We take cue from the trite principles in *S v Malgas*²⁰ and *S v Vilakazi*²¹ regarding the determinative test, in considering whether substantial and compelling circumstances exist to warrant a deviation from the prescribed minimum sentences. These are the appellant's personal and mitigating factors: He was 36 years old at the time of sentencing and 35 years old at the time of the commission of the offences. He is single with three children aged 19, 14 and three years. He completed Grade 12 whilst serving a sentence of 20 years imprisonment (murder) for which he was convicted on 13 November 2006. He continued to improve his life skills by completing courses in boiler-making, computer literacy and woodwork. He was released on parole on 29 September 2016. He was in gainful employment as a builder and earned between R8000 and R9000 per month. He was arrested on 12 May 2019 for the current murders. His parole was revoked and has continued to serve his 20 year-sentence since 10 October 2019. He was in custody awaiting trial for five months. It was contended on his behalf that the Court should perceive him as a person willing to develop himself. He has

¹⁸ *S v Pieters* 1987 (3) SA 717 (A) at 728B – C; *Director of Public Prosecutions, Grahamstown v Peli* [2018] JOL 40195 (SCA) para 7; *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8.

¹⁹ *S v PB* 2013 (2) SACR 533 (SCA) para 20.

²⁰ 2001 (1) SACR 469 (SCA) para 25.

²¹ 2012 (6) SA 353 (SCA) para 18.

also completed the anger management course. It was further submitted that he is a suitable candidate for rehabilitation, and imprisonment for life would defeat that purpose, as he would have to spend the rest of his life imprisoned. It was urged upon the Court to accept that, cumulatively considered, the appellant's personal and mitigating circumstances are substantial and compelling, warranting a deviation from the prescribed sentence of life imprisonment.

[45] These are the aggravating factors. The State proved the following previous convictions, which the appellant admitted. On 11 February 2004, he was convicted of housebreaking with intent to steal and theft, and was sentenced to three months' imprisonment, which was wholly suspended for three years. On 13 November 2006, he was convicted of murder and sentenced to 20 years imprisonment; housebreaking with intent to rape and rape; as well as attempted rape and was sentenced to ten years imprisonment. The latter sentence was ordered to run concurrently with the 20 years sentence for murder. The appellant only served 10 of the 20 years imprisonment term as he was released on parole on 29 September 2016. His parole term was supposed to run until 29 May 2026, but was revoked because he reoffended.

[46] The relationship that ought to have been one of trust ended up as toxic and tumultuous. The killing of the deceased was callous and gruesome because they were defenceless. Their lifeless charred bodies as depicted on the photos, are too ghastly to view. It is in such circumstances where the personal circumstances of the appellant must recede to the background. Clearly, this Court must maintain that tension and balance between the rights and interests of the appellant and those of the deceased. Sentencing must also be victim-centred.²²

[47] Our country is plagued by the scourge of gender-based violence. Ms M[...] was stabbed several times before being burnt alive. Needless to say, it matters not that the appellant thought she was already dead, for that takes

²² *S v Matyityi* 2011 (1) SACR 40 (SCA) para 16.

nothing away from the excruciating pain she must have suffered. Her 11-month-old baby was also gruesomely stabbed to death. Their rights to life, dignity, privacy and integrity were cruelly taken away from them. The society demands that the courts must protect its vulnerable members. This is a suitable case where deterrence and retribution must take preference over rehabilitation. The appellant has shown no remorse whatsoever. Evidently, he has carried out his assaults on Ms M[...] throughout the time they had lived together, without any repercussions. Ms M[...] and Ms S[...] bear testimony to that relationship. Having regard to the adduced evidence, the appellant's personal circumstances, the mitigating and aggravating circumstances, I am satisfied that there are no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment on each count of murder as imposed by the trial court. Life imprisonment is not disproportionate under the circumstances and finding otherwise would amount to maudlin sympathy.

[48] There is no reason to interfere with the convictions and sentences imposed, accordingly, the following order is made:

1. The appeal against the convictions in all three counts and sentences of life imprisonment is dismissed.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the appellant

Mr H Steynberg

Instructed by:

Legal Aid South Africa, Kimberley

For the respondent:

Adv. R Makhaga

Instructed by:

The Director of Public Prosecutions.