



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: A287/24

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
28/11/25	[REDACTED]
DATE	SIGNATURE

SIYABONGA MIYA

APPLICANT

AND

THE STATE

RESPONDENT

Raborife AJ (Retief J Concurring)

Heard: 28 October 2025 and 07 November 2025

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered on 24 November 2025.

JUDGMENT

INTRODUCTION.

1. The appellant was charged in the Regional Court, Tsakane ("the trial court"), with the following offences, to which he pleaded not guilty:

- a. Count 1: Murder, read with the provisions of section 51(1), read with Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentencing Act"); alternative to count 1: Assault with intent to do grievous bodily harm;
- b. Count 2: Assault with intent to do grievous bodily harm;
- c. Count 3: Contravening section 120(6)(a), read with sections 1, 103, 120(1)(a), 121, and further read with Schedule 4 and section 151 of the Firearms Control Act 60 of 2000 – pointing of a firearm;
- d. Count 4: Attempted murder;
- e. Count 5: Possession of a firearm, in contravention of section 3, read with sections 1, 103, 117, 120(1)(a), 121, and further read with Schedule 4 and section 151 of the Firearms Control Act 60 of 2000, and further read with section 250 of the Criminal Procedure Act 51 of 1977 ("the CPA").

2. The trial court convicted him on all the charges (except the alternative count) and sentenced him to life imprisonment in respect of count 1; three (3) years' imprisonment for count 2; five (5) years' imprisonment for count 3; eight (8) years' imprisonment for count 4; and five (5) years' imprisonment for count 5. The sentences on counts 2–5 were ordered to run concurrently with the life sentence imposed on count 1.

3. On 23 February 2022, the appellant exercised his automatic right to appeal against his conviction on the murder count and the sentence imposed.

GROUND OF APPEAL

4. The grounds of appeal against conviction are that the learned Magistrate erred in finding that the State had proved the case against the appellant beyond reasonable doubt; in rejecting the appellant's version; in placing an onus on the appellant to explain why State witnesses would falsely implicate him; and in finding that the murder was planned or premeditated.

5. The appellant argues for a reduction of sentence and submits that the imposition of life imprisonment was a misdirection, as there were no factors supporting a finding of planned or premeditated murder.

INCOMPLETE RECORD

6. This appeal was scheduled for hearing on 28 October 2025. Upon perusal of the record, it was noted that part of the Magistrate's judgment had not been transcribed. The hearing was postponed to 07 November 2025 to allow for transcription of the missing portion or reconstruction of the record, in the event that the missing portion could not be located.

7. The missing portion relates to the Magistrate's summary of the evidence led in respect of count 1.

8. On the return date, it was submitted that all attempts to reconstruct the record had failed. The Clerk of the Court reported that the missing record could not be located on the server. The Magistrate indicated that his notes had been water-damaged. The defence attorney had since left the legal practice where he was employed at the time and no longer had access to the files.

9. Both counsel requested that the appeal proceed on the record as it stands.

10. We are of the view that the transcribed record of the evidence led at the trial is sufficient for this court to adjudicate the appeal. – *S v Chabedi*.¹

EVIDENCE LED AT THE TRIAL

Count 1 – Murder (alternatively assault with intent to cause grievous bodily harm)

11. The State alleged that on 11 December 2016, at or near Tsakane, the appellant unlawfully and intentionally killed Moshelane Alpheus Mogolane ("the deceased") by shooting him with a firearm.

12. The appellant's plea explanation was that the deceased had shot and killed one Sphiwe, who was in the appellant's company. Fearing that he would be shot next, he grabbed the deceased's hand and struggled with him over the firearm. It allegedly went off accidentally and the deceased was shot. The appellant stated that he did not know who fired the shot during the struggle. The appellant testified in his own defence and repeated the plea explanation.

13. The trial court rejected the appellant's version and accepted that of the State witnesses, summarised as follows:

13.1 Eyewitnesses: Ms Sweetness Zanele Cebe and Mr Thabo Mokgaka: They reported to the deceased that the appellant and his friend had attempted to forcibly take Mr Mokgaka's motor vehicle. The deceased found the appellant and his companion tampering with the vehicle's ignition. A fight ensued between them and the deceased. Two shots went off and the deceased fell. The appellant allegedly took the deceased's firearm and shot him twice in the forehead.

13.2. Medical evidence – Dr Ntsebeza (Pholosong Hospital) and Dr Skosana (Forensic Pathology Service): Dr Ntsebeza testified that when the deceased was admitted at 07h00 on 11 December 2016, he had two entry wounds on the forehead and two exit wounds on the cranial vault. An X-ray showed a shattered skull, a bullet in the right jaw, and bullet fragments in the head. Form D28 was admitted as Exhibit J.

13.3 Dr Skosana testified to the post-mortem report (Exhibit K), noting two penetrating gunshot wounds: one above the eyebrow, exiting through the right parietal area; and another above the medial left eyebrow, exiting through the cranial vault. No projectile was recovered.

FINDINGS OF THE TRIAL COURT

14. The trial court found the versions of the State and defence mutually destructive and rejected the appellant's version on the following bases:

- a. There was no prior link between the appellant and the eyewitnesses that would motivate them to falsely implicate him.
- b. The appellant offered no explanation for why the eyewitnesses would fabricate their versions.
- c. The appellant's description of the struggle over the firearm and its positioning when it discharged was vague.
- d. It was improbable that the deceased would have held the firearm to his own head and fired twice with a non-self-loading revolver.
- e. Self-defence was excluded, as the deceased had already fallen with the firearm beside him and the attack on the appellant had ceased.
- f. The murder was premeditated because the appellant shot the deceased while he lay on the ground; this was not a spur-of-the-moment act.
- g. The Magistrate added that the appellant's subsequent conduct—chasing and shooting at people and pointing the firearm—indicated premeditation from the moment he became involved in the altercation.

DISCUSSION

Ad conviction:

15. Both counsel submitted that although the appellant was correctly convicted of murder, the State had, however, failed to prove that the murder was premeditated.

16. They requested this Court to set aside the magistrate's finding that the murder was premeditated.

17. The well-established principle when a court hears an appeal on conviction is that, in the absence of a demonstrable and material misdirection by the trial court, its factual findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong – *S v Hadebe and Others*ⁱⁱ.

18. In *S v Legoa*ⁱⁱⁱ it was held that:

"It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The

offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present."

19. Where an accused is charged with murder, the State bears the onus of proving beyond reasonable doubt that the accused unlawfully and intentionally caused the death of another person. If the State alleges that the murder was either premeditated or planned, evidence in support of that allegation must be presented.

20. The Full Bench in *S v Raath*^{iv} stated as follows:

"Planning and premeditation have long been recognised as aggravating factors in the case of murder... However, there must be evidence that the murder was indeed premeditated or planned... The concept suggests a deliberate weighing-up of the proposed criminal conduct, as opposed to a spur-of-the-moment act... Only an examination of all the circumstances surrounding any murder, including the accused's state of mind, will allow one to arrive at a conclusion as to whether a murder is 'planned or premeditated'... The period of time between the formation of the intent and the carrying out of the intention is important but does not, at some arbitrary point, provide a ready-made answer."

21. The charge-sheet forming part of the appeal record reads that *"the provisions of s 51(1) of Act 105 of 1997 are applicable and that the victim was raped more than once by the accused and furthermore grievous bodily harm was inflicted on the victim."* It must be noted that the appellant did not face a charge of rape. This is, in our view, a cut-and-paste error.

22. This portion regarding aggravating factors was not put to the accused when the charge was read by the prosecutor, nor was it mentioned why the State regarded the offence as falling under Part I of Schedule 2 for the purposes of s 51(1) of the Minimum Sentencing Act.

23. Further, when addressing the court on its findings, the prosecutor did not identify which evidence should be considered by the trial court in concluding that the murder was premeditated. This would have enabled the defence to respond before judgment was delivered. It may be assumed that the defence declined to address premeditation because of the incorrect allegations on the charge-sheet and the State's silence on the aspect.
24. The facts of this case are not that the accused was unaware that the State alleged premeditation and would seek a life sentence in terms of s 51(1) of the Minimum Sentencing Act. The trial court explained to the appellant that, if convicted of murder, a sentence of life imprisonment may be imposed.
25. We are instead dealing with a situation where the State elected to include in the charge-sheet aggravating factors entirely unrelated to the offence the appellant faced. The charge-sheet forms part of the further particulars furnished to the defence; it sets out the case he has to answer.
26. The question is therefore whether the appellant's right to a fair trial was violated by the court finding the existence of premeditating factors other than those disclosed on the charge-sheet, alternatively, aggravating factors not disclosed when the charge was put.
27. Under the common law it was "desirable" that the charge-sheet set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction, although not essential. Under the constitutional dispensation, however, the criterion for a just criminal trial is substantive fairness. Section 35 of the Constitution provides that every accused has a right to a fair trial, including the right "to be informed of the charge with sufficient detail to answer it". It is therefore no less desirable—indeed, it is required—that the State clearly set out in the charge-sheet the facts intended to justify enhanced sentencing jurisdiction^v.
28. The magistrate was or ought to have been aware of the aggravating factors alleged by the State. In terms of s 86(1) of the CPA^{vi}, he was empowered to order that the charge-sheet be amended to reflect the correct factors.

29. In *S v Molimi*^{vii} it was held that “the right of the accused at all important stages to know the ambit of the case he or she has to meet goes to the heart of a fair trial.”
30. The appellant was not informed of the charge with sufficient detail to enable him to challenge the assertion that aggravating factors existed for a finding of premeditated murder.
31. We therefore find that the trial court’s finding that the State proved premeditation was a misdirection which warrants interference by the appeal court.
32. The trial court ought to have convicted the appellant of murder under s 51(2) of the Minimum Sentencing Act. The argument at the hearing of this appeal supported by both Counsel is now apparent.

Ad sentence:

33. Both counsel requested that, if this Court finds that the murder was not premeditated, it should set aside the sentence of life imprisonment and impose the sentence applicable under s 51(2) of the Minimum Sentencing Act. Their respective submissions, in the event that the Court accedes to this request, are as follows.
34. Counsel for the appellant submitted that this Court should find that substantial and compelling circumstances exist which justify a deviation from the minimum sentence prescribed under s 51(2) of the Minimum Sentencing Act. Her client was a young person, aged 25 years at the time of the commission of the offence, unmarried, with no children, a Level 4 engineering student, a first offender, and with no history of violence. He spent 23 months in custody prior to sentencing. According to counsel, he was not in possession of the firearm; rather, it was the deceased who approached wielding a firearm. The argument in which the deceased intervened was allegedly between the appellant together with his friends and Mr Mokgaka, and not the deceased himself. The incident occurred between 05:00 and 06:00, and State witnesses testified that the appellant was drunk.
35. Counsel requested that the appeal court find that the above circumstances justify the imposition of a sentence of either ten or twelve years’ imprisonment.
36. The respondent’s advocate submitted that the deceased was shot “execution style”. In her view, the prescribed sentence of fifteen years’ imprisonment under s 51(2) of Act 105 of 1997 is disproportionate to the seriousness of the offence. She

requested that the Court increase the sentence by an additional three years beyond the prescribed fifteen.

37. Regarding the appeal on sentence, Marais JA in *S v Malgas*^{viii} observed:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at simply because it prefers it... An appellate court is at large only where the trial court has materially misdirected itself... Even in the absence of such misdirection, interference is permissible only where the disparity between the trial court's sentence and the sentence the appellate court would have imposed is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate'."

38. When attempts were made to reconstruct the missing portion of the record, it became apparent that both the presiding officer and the attorney who represented the appellant at trial were no longer stationed at the Tsakane Regional Court. A considerable period has also passed since sentencing. It is therefore preferable that this Court itself impose sentence, rather than remit the matter to the Regional Court – s 322(2) of the CPA^{ix}.

39. When considering an appropriate sentence, we must heed the principle emphasised by Majiedt J in *S v SMM*^x:

"Each case must be decided on its own merits... Sentence must always be individualised... Public sentiment cannot be ignored, but it can never displace the careful judgment and balancing required to determine an appropriate sentence."

40. The prescribed sentence under s 51(2), read with Schedule 2 of the Minimum Sentencing Act^{xi}, must be imposed unless this Court finds substantial and compelling circumstances justifying a lesser sentence.

41. Section 51(3) of the Minimum Sentencing Act^{xii} empowers a court to deviate from the prescribed minimum sentence if substantial and compelling circumstances exist that justify such deviation.

42. Courts must be mindful that the Legislature enacted the prescribed minimum sentences in response to public outcry over the serious nature of the listed offences. As stated in *S v Malgas*^{xiii}, *"the specified sentences are not to be departed from lightly and for flimsy reasons such as undue sympathy or aversion to imprisoning first offenders."*

43. We must further note the determinative test for deviation, as formulated in *Malgas*:
If, after considering all the circumstances, the sentencing court is satisfied that the prescribed sentence would be unjust—disproportionate to the crime, the offender, and the needs of society—it is entitled to impose a lesser sentence^{xiv}. *Ultimately, the punishment must fit the criminal, the crime, and the interests of society, consistent with the purposes of sentencing.*
44. The appellant was a 23-year-old engineering student when he committed the offence. Although a young adult, no evidence was presented before either the trial court or this Court establishing that immaturity influenced the commission of the crime such that it could operate as a mitigating factor – *S v Matyityi*^{xv}.
45. The appellant spent almost two years in custody before sentencing. Lewis JA (Leach JA and Erasmus AJA concurring) in *S v Radebe*^{xvi} held:
There should be no rule of thumb for the weight to be given to pre-sentence detention... It is merely one factor in determining whether the effective sentence is justified and proportionate... The conditions of detention and the reason for prolonged detention must be considered.
46. The record does not reflect the reasons for the prolonged pre-sentence detention.
47. Counsel for the appellant also submitted that, according to Ms Nhlapo, the appellant was drunk. However, the witness did not explain the basis for this conclusion.
48. It was not argued during addresses in the trial court that drunkenness was a contributing factor to the appellant's conduct. The appellant was arrested by police officers shortly thereafter, and they did not observe or record any signs of intoxication. While he may have consumed alcohol, there is no evidence that his judgement was impaired.
49. Counsel for the appellant further requested that this Court consider that the appellant was not in possession of the firearm; it was brought to the scene by the deceased. The deceased, the owner of a tavern, intervened after his patron, Mr Mokgabo, reported that the appellant and his friend were attempting to steal his vehicle. He intervened out of a duty to protect his patrons and their property.
50. The evidence presented is that the appellant and his friend jointly assaulted the deceased, who fell after a gunshot went off.
51. The trial court correctly rejected the appellant's version that he was attempting to prevent the deceased from shooting him because the deceased had already shot

his friend. Had that been the case, the eyewitnesses would not have observed the appellant and his companion jointly assaulting the deceased. There is no evidence of any other person accompanying the appellant apart from the individual described as wearing white clothing.

52. The deceased was killed in a gruesome manner described by the respondent's counsel as "cold-blooded" or an "execution-style" killing. While lying injured and helpless on the ground, he was shot twice in the forehead.

53. Both expert witnesses testified that the entry points of the two bullets were on the forehead and that the exit wounds were at the back of the head. The deceased's skull was shattered by the bullets. He did not die at the scene and remained conscious for several hours before passing away. One can only imagine the extreme pain he must have endured with a shattered skull during the final hours of his life.

54. Murder is a serious offence. It violates the fundamental right to life. In *S v Makwanyane*^{xvii}, the Constitutional Court described the value of the right to life as follows:

"The right to life is, in one sense, antecedent to all the other rights in the Constitution... It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity... The right to life is central to our constitutional values."

55. The deceased, aged 56 at the time of death, was a family man with three wives. One of them was inside their business premises working when her husband was shot outside.

56. The public killing of the deceased in front of his house is likely to have had a devastating emotional and psychological effect on his family, who are now without a spouse and parent.

57. The remarks of Legodi J in *S v WW*^{xviii} are apposite:

"It is the kind of sentence which we impose that will drive ordinary members of society either to have confidence or to lose confidence in the judicial system. Sentences imposed when offences of this nature are committed should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders."

58. There is no doubt that society expects the criminal justice system—whose final expression lies in the courts—to demonstrate that it is capable of responding effectively to gratuitous criminality executed with boldness, without shame, and with a sense of impunity^{xix}.
59. The offence was committed in full view of members of the public in a residential area. The appellant's conduct was a public display of arrogance, not only shooting the deceased once in the face but twice. Evidence showed people fleeing from the scene, prompting Mrs Nhlapo to pursue individuals who ran past her yard.
60. The appellant's personal circumstances and the mitigating factors advanced on his behalf are far outweighed by the aggravating factors.
61. The mitigating circumstances relied upon—particularly the appellant's youth and the prospect of rehabilitation—do not amount to substantial and compelling circumstances justifying a deviation from the prescribed sentence. In *Moloto v The State*^{xx}, the Supreme Court of Appeal stated:
- "The deceased died a painful, prolonged and merciless death. It is under such circumstances that personal circumstances, in particular the age of the accused, must recede into the background. The callousness of the killing cannot be attributed to the actions of an immature youthful offender. They depict the ruthlessness of the offender."*
62. However, the prescribed minimum sentence of fifteen years' imprisonment is disproportionate given the gruesome manner in which the deceased was killed. In the circumstances, a sentence of eighteen years' imprisonment is appropriate.

63. In consequence the following order is made:

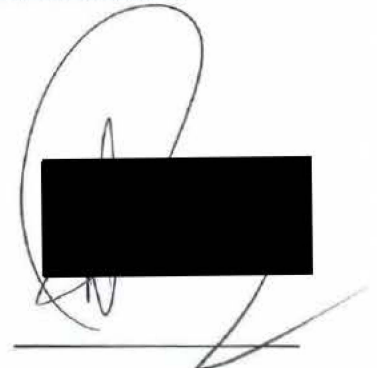
1. The Trial Court's finding of premeditated murder in respect of count 1 is set aside and replaced with:

' The Accused is found guilty of murder without premeditation in terms of the provisions of Section 51(2) Criminal Law (Sentencing) Amendment Act, Act 105 of 1997.'

2. The appeal against sentence succeeds.

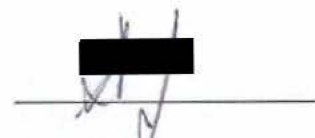
3. The sentence of life imprisonment imposed by the Trial Court is set aside and is replaced with:

'The Accused is sentenced to 18 (eighteen) years imprisonment, which is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977 [the Act] to date of sentence being the 26 November 2018. Furthermore, in terms of section 280(2) of the Act, the sentences imposed in respect of counts 2-5 stand and run concurrently with the sentence imposed in respect of count 1.'



RABORIFE AJ

I agree,



RETIEF J

Appearances:

For the Appellant:

Instructed by :

L Augustyn

Legal Aid South Africa

For the Respondent:

Instructed by :

A Naidoo

Director of Public Prosecution

ⁱ 2005 (1) SACR 415 (SCA) 3 March 2005.

ⁱⁱ 1997(2) SACR 641 at 645e-f

ⁱⁱⁱ 2003(1) (SACR 13 (SCA) par 18

^{iv} 2009(2) SACR 46 (C) at par 16.

^v Legoa para 20.

^{vi} Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

^{vii} 2008(2) SACR 76 (CC) at par 54.

^{viii} [2001] 3 All SA 220 (SCA) para 12.

^{ix} Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial

^x S v SMM 2013 (2) SACR 292 (SCA) para 19.

^{xi} (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

^{xii} (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: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years

^{xiii} 2001 (1) SACR 469 (SCA)

^{xiv} Malgas par 22.

^{xv} 2011(2) SACR 40 (SCA) at page 48.

^{xvi} 2013 JDR 0578 (SCA) at page 6 par 13 & 14.

^{xvii} 1995 (3) SA 391 at par 326

^{xviii} 2013 SACR 204 GNP.

^{xix} S v Beje (CC18/21) [2024] ZAWCHC 102 (18 April 2024) par 24

^{xx} (1546/2024) [2025] ZASCA 169 (12 November 2025)