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| Reportable:                        | NO |
| Circulate to Judges:               | NO |
| Circulate to Magistrates:          | NO |
| Circulate to Regional Magistrates: | NO |



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

CASE NO: **CA 23/2025**

REGIONAL COURT CASE NO: RC 62/2021

In the matter between:

**ABRAM ABEBE ERGICHO**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

**CORAM: SCHOLTZ AJ et FOURIE AJ:**

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 20 February 2026*

**ORDER**

The following order is made:

- (i) The appeal against conviction and sentence is dismissed;
- (ii) The conviction and sentence are confirmed.

## JUDGMENT

**FOURIE AJ**

### INTRODUCTION

- [1] This is a criminal appeal against both conviction and sentence. Appellant was convicted by the Regional Court in Lichtenburg, North West Province on 13 December 2023 on two counts of robbery with aggravating circumstances and one count of pre-meditated murder.
- [2] The charges preferred against the accused were formulated as follows:
- Count 1: That the Appellant is guilty of the crime of Robbery with aggravating circumstances as intended in terms of section 1 of act 51 of 1977 and read with sections 262 of Act 51 of 1977 and further read with section 51 (2) (a) of the Criminal Law Amendment act 105 of 1997 in that upon or about 09 May 2018 and at or near Lichtenburg in the Regional Division of North West, the accused did unlawfully and intentionally assault Mpho Hlome and did then and with force take the following items from him to wit, pies to the value at around R150.00, his property in his lawful possession. Aggravating circumstances as defined in section 1 of act 51 of 1977 prevailed in that the accused, when the crime was committed threatened complainant with a firearm.
- Count 2: That the accused is guilty of the crime of Robbery with

aggravating circumstances as intended in terms of section 1 of act 51 of 1977 and read with sections 262 of act 51 of 1977 and further read with section 51 (2) (a) of the Criminal Law Amendment act 105 of 1997 in that upon or about 09 May 2018 and at or near Lichtenburg in the Regional Division of North West, the accused did unlawfully and intentionally assault Jan Nel Louw and did then and with force take the following items from him to wit, R150.00 cash, a cell phone valued at R500.00 and a Kia Picanto motor vehicle valued at R 40 000.00, his property or in his lawful possession. Aggravating circumstances as defined in section 1 of Act 51 of 1977 prevailed in that the accused, when the crime was committed he threatened complainant with a firearm.

Count 3: That the accused is guilty of the crime of Murder (read with the provisions of Section 51(1), Part1 of schedule 2, of the Criminal Law Amendment act 105 of 1997, as amended and further read with section 98, 256, 258, 270 and 276 of the Criminal Procedure Act 51 of 1977, as amended) in that upon or about 09 May 2018 and at or near Lichtenburg in the Regional Division of North West, the accused did unlawfully and intentionally kill Francois Swart, a male person.

- [3] The appellant was legally represented for the duration of his trial and pleaded not guilty to all the charges. As a plea explanation, the appellant denied being in Lichtenburg on the date of 09 May 2018.
- [4] Pursuant to the conclusion of the trial, the Court *a quo* convicted the appellant on all 3 counts and the following sentence,



- (a) Count 1;      Fifteen years imprisonment;
- (b) Count 2;      Fifteen years imprisonment;
- (c) Count 3;      Life imprisonment;
- (d) In terms of section 103 (1) Act 60 of 2000 the appellant was declared unfit to possess a firearm.

- [5] The matter comes before us in terms of the provisions of section 309 (1) (a) of the Criminal procedure Act 51 of 1977, as amended by the provisions of the Judicial Matters Amendment Act 42 of 2023 entitling the appellant to an automatic right of appeal on both his conviction and sentencing, once the court *a quo* has imposed a sentence of life imprisonment, as was done on count 3.

#### THE GROUNDS OF APPEAL

##### AD CONVICTION

- [6] The appellant submits that the Court *a quo* erred in the following aspects:
- (a) In finding that the state proved the guilt of the appellant beyond a reasonable doubt;
  - (b) The Court erred in failing to properly analyse, or evaluate the evidence of the state witnesses;
  - (c) The Court misdirected itself by finding the accused guilty of pre-meditated murder whilst pre-meditation was not alleged by the state in the charge sheet;
  - (d) The Court erred in rejecting the appellant's evidence;
  - (e) The Court misdirected itself by accepting dock identification evidence without exercising the necessary caution

##### AD SENTENCE

- [7] The appellant submits that the Court *a quo* erred in the following respects:
- (a) By sentencing the appellant to an effective term of life imprisonment in respect of count 3 of murder
  - (b) By not imposing a shorter term of imprisonment more particularly in view of
    - (i) The age of the appellant;
    - (ii) The period that the appellant spent in custody awaiting the finalisation of the matter being (3) years;
    - (iii) The Appellant is a first offender.
  - (c) In overemphasizing the following factors:
    - (i) The seriousness of the offence;
    - (ii) The deterrent effect of the sentence;
    - (iii) The interest of the society.
  - (d) The sentence imposed is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation.

## DISCUSSION ON THE CONVICTION

- [8] The core issue in this appeal relates to an analysis of the evidence which was adopted by the lower court.
- [9] The Constitutional Court, in the matter of *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC), par 38 stated as follows: “ *In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and*

*drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In Powell & Wife, Lord Wright formulated the principle thus:*

*“Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.”*

- [10] The powers of a Court of Appeal was set out in *S v Monyane and Others* (160/01) [2006] ZASCA 113; [2006] SCA 141 (RSA); 2008 (1) SACR 543 (SCA) (23 November 2006) as follows in par 15:

*“This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact 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* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e).”*



[11] In **SITHOLE 1999 (1) SACR 585 (W)** at 590 *Nugent J & Schwartzman J* stated as follows: *"There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true" ...*

[12] And further: - **Khumalo v S (723/2020) [2022] ZASCA 39** at par 19:" *considering all the circumstances of this case, I am of the view that the evidence tendered by the state weighs so heavily as to exclude any reasonable doubt about the applicant's guilt. Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant's innocence"*

#### THE RELEVANT EVIDENCE BEFORE THE COURT *A QUO* IN RESPECT OF THE CONVICTION

[13] The facts of the matter are simple and essentially undisputed. On 09 May 2018 around 01h00 am at the Shell Garage in Lichtenburg two perpetrators entered the garage and robbed items, whilst pointing a firearm at the shop attendant Mr Mpho Jonas Hlome. The deceased Francois Swart and Jan Louw Nel entered the shop whereafter the deceased was shot. The deceased died in hospital on 05 June 2018. The perpetrator who shot the deceased also pointed a firearm at the head of Jan Louw Nel and took the money he had. The perpetrator turned to leave but returned demanding the car keys of Mr Nel's car. The two perpetrators then left with the car, a Kia Picanto.

[14] The appellant was arrested on 17 December 2020 when Mr Hlome

approached police officers informing them that he saw the perpetrator and he then pointed out the appellant.

- [15] The appellant was positively identified by both Mr Hlome and Mr Nel as the perpetrator who used the firearm. Mr Hlome at first identified the appellant when he pointed him out to police officers on 17 December 2020 and thereafter at the trial. The identification of the appellant by Mr Nel took place during the trial where he sat in the accused dock. This type of identification by Mr Nel is commonly known as a dock identification and it is trite that such identification must be treated by a court with extreme caution. Generally, a dock identification carries little weight, unless it is shown to be sourced in independent preceding identification. (See *S v Tandwa and Others* 2008 (1) SACR 613 (SCA), par 129-131.)
- [16] There was also video footage of the incident available. The state led the evidence of Warrant Officer Lelanie Dekker who downloaded the video footage and used still photos to do a facial comparison of the appellant with control photos. 15 points of similarity between the still photos and the control images of the appellant were found. (See *State vs Biyela and Others* (CC67/2019) ZAWCHC203 [2023] ,par 233-246 where the court dealt at length with the reliability of facial comparison evidence).
- [19] I, therefore, cannot find any misdirection in the trial court's analysis of the witnesses' evidence and undoubtedly find that the trial court was correct to accept the evidence of the witnesses as satisfactory in all material respects. Thus, the appellant was properly convicted on this evidence.
- [17] The appellant's only defense was that of an alibi. He testified that he was at Setlagole on 09 May 2017. His employer Mr Ahmat was called to



confirm that. The appellant wanted the court to believe that he was at Setlagole from 2016 until he went to Lichtenburg in December 2020. Mr Ahmat could not confirm the date of 09 May 2018 and only stated in general terms that the appellant was at Setlagole. He did not specify a specific date. The appellant and his witness's testimonies differed in various respects for example the appellant had friends visiting him in Setlagole and the reason why appellant left Setlagole in December 2020.

[18] I, therefore, cannot find any misdirection in the trial court's finding of inconsistencies and improbabilities in the evidence of the Appellant and as such it cannot be reasonably true and is rejected as false.

[19] I, therefore find that the Appeal against conviction stands to be dismissed.

#### DISCUSSION ON SENTENCING

[20] The court *a quo*, when finding the appellant guilty specifically on Count 3 invoked the provisions of section 51 (1) of **The Criminal Law Amendment Act, Act 105 of 1997** which read: “ *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*”

[21] In respect of Count 1 and 2 the trial court accordingly invoked section 51 (2) of this Act: “ *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 (a) Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years;*”

[22] Section 51 (3) (a) of this act provides a judicial discretion and states: “*If*

*any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exists which justifies 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....”*

- [23] In ***Mpofu v Minister for Justice and Constitutional Development and Others*** (CCT 124/11) [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC) (6 June 2013) per VAN DER WESTHUIZEN J at [42]

*“The inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially. A misdirection that could result in the setting aside of a sentence on appeal is an error committed by the Court in determining or applying the facts for assessing an appropriate sentence. However, a mere misdirection is not by itself sufficient to entitle a court to interfere with the sentence on appeal. It must be of such a nature, seriousness or degree that it shows that the Court did not exercise its discretion or exercised it improperly or unreasonably”.*

*And per SKWEYIYA J at [64]*

*“....Ordinarily, an appellate court can only interfere with the `sentence of a lower court where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”*

- [24] And per: ***S v Jimenez*** (73/2002) [2003] ZASCA 2; [2003] 1 All SA 535 (SCA) (21 February 2003) Coram: OLIVIER, CAMERON JJA et per LEWIS AJA op [7] *“However, even where a sentence does not seem*



*shockingly inappropriate, a court on appeal is entitled to interfere, or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion”.*

- [25] *S v Rabie* 1974 (4) 855 AD it was stated that “*punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances*”.

At 866 A-C Corbett JA stated:

*"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society, which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case"*

- [26] In *S v Anderson* 1965 (3) SA 494 (AD) at 495 D-H Rumpff JA in dealing with the applicable legal principles affirmed as follows: “*These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induce a sense of shock and outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice*



*requires it”*

- [27] For any court to exercise their judicial discretion in terms of Section 51 (3) (a) of the Criminal Law Amendment Act to justify imposing a lesser sentence than prescribed, the court must be satisfied that substantial and compelling circumstances exist.
- [28] In essence the following personal circumstances was placed before the court *a quo* was the following:
- The appellant is 37 years old;
  - He has an adult child not residing in South Africa;
  - He is not married;
  - He educational level is equivalent to Grade 12
  - He was employed;
  - He was prior to conviction in custody for approximately 3 years
- [29] In the matter *S vs Malgas* 2001 (1) SACR 469 (SCA) Marais AJ dealt specifically with the provisions of Section 51 of the Criminal Law amendment Act by stating the following: par 7 *“the very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes”*
- “In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the 14 legislatures have ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the*

specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may. [9] Secondly, a court was required to spell out and enter on the record the 15 circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* 5 by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based --- than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for [2000] 1 WLR 377 at 381H 5 16 the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from



*consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets “substantial” and “compelling” cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, 17 by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration”*

- [30] In *State vs Matyityi* 2011(1) SACR 40 at par 23 Ponnan JA states the following:

*“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power*



*from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."*

- [31] The court *a quo* in the light of all the circumstances and especially the seriousness of the offences and the manner in which the appellant committed the offences, found that no compelling and substantial circumstances, which will allow the court to impose a lesser sentence, exists.
- [32] I, therefore, cannot find that the court *a quo* misdirected itself in any respect or that the sentence imposed was disturbingly inappropriate that no reasonable court would have imposed it. The court *a quo* clearly exercised its discretion properly.

### **Order**

- [33] In the result, the following order is made:

- (i) The appeal against conviction and sentence is dismissed;
- (ii) The conviction and sentence are confirmed.



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**CM FOURIE**  
**ACTING JUDGE OF THE HIGH COURT,**  
**NORTH WEST DIVISION, MAHIKENG**

**I Agree**

  

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**HJ SCHOLTZ**

**ACTING JUDGE OF THE HIGH COURT, NORTH WEST DIVISION,**  
**MAHIKENG**

**APPEARANCES**

|                      |                    |
|----------------------|--------------------|
| DATE OF HEARING      | : 13 JUNE 2025     |
| JUDGMENT HANDED DOWN | : 20 FEBRUARY 2026 |
| FOR THE APPELLANT    | : Mr T.R SEMINO    |
| FOR THE RESPONDENT   | : ADV. N.S MABALE  |