

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 244/2024; 571/2024 and 754/2024

In the matter between:

RUDI NEVILLE GERICKE **APPELLANT**

and

THE STATE **RESPONDENT**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE **APPELLANT**

and

RUDI NEVILLE GERICKE **RESPONDENT**

Neutral citation: *Gericke v The State; The Director of Public Prosecutions, Free State v Gericke* (244/2024; 571/2024 and 754/2024) [2026] ZASCA 150 (03 November 2026)

Coram: KOEN and COPPIN JJA and DLODLO AJA.

Heard: 25 August 2026.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 03 November 2026.

Summary: Criminal Law and Procedure – Appeal in respect of special entry in terms of s 318 of the Criminal Procedure Act 51 of 1977 – whether an irregularity occurred during or in connection with the trial proceedings giving rise to prejudice and a failure of justice sufficient to vitiate the trial – whether conviction and sentence should be set aside.
Criminal Law– appeal against conviction – private defence – whether appellant was the aggressor – whether assault of victim and killing of deceased unlawful.
Sentence – whether trial court materially misdirected itself in not applying s 51(1) of the Criminal Law Amendment Act 105 of 1997 – whether killing of the deceased premeditated – whether there are 'substantial and compelling circumstances' justifying the imposition of a sentence lesser than the prescribed minimum – whether sentence imposed is disturbingly inappropriate.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Boonzaaier AJ) sitting as the first court of instance:

The appeals and the cross-appeal are dismissed.

JUDGMENT

Coppin JA (Koen JA and Dlodlo AJA concurring)

[1] The Free State Division of the High Court, Bloemfontein, on circuit in Ficksburg (the high court), convicted the appellant of murder and assault with intent to do grievous bodily harm and sentenced him to 12 years' imprisonment for the murder and 2 years' imprisonment for the assault. The appellant is appealing against his convictions and he is also advancing an appeal in terms of s 318 of the Criminal Procedure Act 51 of 1977 (the CPA) pursuant to a special entry made by the high court in terms of s 317 of the CPA, at his behest. The Director of Public Prosecutions (the State) opposes the appellant's appeals and cross-appeals the sentence imposed for the murder. Leave to appeal to this Court was granted by the high court.

[2] The issues are relatively crisp. In respect of the conviction for murder, the question is whether the appellant's killing of the 28-year-old Evan Felix Sorour (the deceased), on 8 January 2023, was justified. In respect of the assault, the question is whether the appellant justifiably attacked the complainant, Mr Reuter Albert Sorour (Mr Sorour). In respect of both the killing and the assault, the appellant contends that he acted in self-defence. Concerning the special entry, the question is whether the irregularities alleged

in the entry were established, and ultimately, if so, whether the appellant's rights to a fair trial, guaranteed in terms of s 35(3) of the Constitution, were so compromised as to constitute a miscarriage of justice warranting the setting aside of his convictions and sentences. In the cross-appeal, the State contends that the sentence of 12 years' imprisonment for the murder was irregularly imposed by the high court, or alternatively, is inappropriate and shocking. Ultimately, the issue is whether any grounds exist for this Court to interfere with the sentence imposed.

[3] Following a brief overview, the issues will be addressed sequentially: first, the s 318 appeal, then the appeal against the convictions and finally the cross-appeal. There is an inevitable overlap between the appellant's grounds of appeal.

OVERVIEW

[4] At the time of the crimes, the appellant was 38 years old and resided with his family as a tenant in the house on the farm Moolmanspruit, held under a long lease by Mr Frederick Dell (Mr Dell). The appellant traded in livestock on another farm. Mr Dell farmed with Simbra stud cattle. On a neighbouring farm, Uitkyk, Mr Sorour, and his family, including his son, the deceased, farmed with cattle of a mixed breed.

[5] On 8 January 2023, while the Sorours were visiting elsewhere, Mr Dell telephoned the deceased to report that the Sorour's cattle had strayed onto Moolmanspruit. The herd, comprising about 200 cattle, had broken out of a paddock on the neighbouring farm, Oliviersrust, where they were kept by the Sorours. In response to the call, the deceased and Mr Sorour, went to Moolmanspruit on motorcycles to retrieve the cattle. The cattle were gathered in the camp or kraal close to the house at Moolmanspruit. With Mr Dell's assistance and consent, the Sorours identified and separated their cattle from his. They subsequently drove their cattle across the veld back to their property on their motorcycles.

[6] Shortly after their departure, Mr Dell returned to the kraal at Moolmanspruit to check on his cattle. As he prepared to leave in his vehicle, the appellant arrived and halted alongside him, enquiring about the Sorours' presence on the farm. According to the State, the appellant persisted in demanding an explanation despite Mr Dell's response. Mr Dell appealed to the appellant in Afrikaans to desist, stating: 'Rudie, asseblief los hulle net'

(Rudi, please just leave them). The appellant denies being told not to interfere with the Sorours; his account is that he was told to tell them not to come to Moolmanspruit again. The State contends that the appellant appeared aggrieved with Mr Sorour and Mr Charl Malan. Mr Malan managed the security company engaged by Mr Sorour and other farmers in the area to combat stock theft. He worked closely with the South African Police Service Stock Theft Unit in recovering stolen cattle. The appellant claimed to be a police informant. The State's evidence was that the appellant had previously telephoned Mr Malan to question his contact with one, Jan Le Grange (Mr Le Grange). The appellant expressed dissatisfaction with that contact and made allegations implicating the Sorours in criminal activity. In the course of the conversation, according to the State, Mr Malan had also cautioned the appellant to refrain from interfering with the Sorours.

[7] Having parted company with Mr Dell, the appellant proceeded in the same direction as the Sorours, pursuing them. The State and the appellant offered divergent accounts of the subsequent events. According to the State, the appellant intercepted Mr Sorour' s motorcycle with his vehicle. He approached Mr Sorour aggressively, and while the latter still held the handle bars of the motorcycle, struck him in the face. The State alleges that, after Mr Sorour fell, the appellant continued the assault by kicking, striking and jumping on him. During the attack, the appellant threatened to kill Mr Sorour and Mr Malan, stating in Afrikaans: 'ek gaan julle f…n dood maak. Ek gaan vir Charl Malan doodmaak. Vandag gaan ek Morgan doodmaak en jou dood bl…m' (I am going to f…n kill you. I am going to kill Charl Malan. Today I am going to kill Morgan and trash you to death).

[8] The State further contends that, at one stage during the assault, the appellant twisted Mr Sorour's arm around his neck whilst Mr Sorour was facing down. Mr Sorour testified that he felt close to losing consciousness and perceived that the appellant's expressed intention to kill him, was real. Mr Sorour testified that he managed to break free and flee, but the appellant pursued him, threatening that he would kill him even if he escaped, and even if that was to be in Mr Sorour's own house. The appellant denied making such threats and assaulting Mr Sorour as the State alleged.

[9] It was not in issue that as Mr Sorour was running away, he was joined by the deceased who was on a motorcycle. They abandoned the motorcycle on a cattle path and moved in the veld to rougher terrain in something like a ditch, in order to get away from the appellant. The appellant continued his pursuit, initially in his vehicle and, upon approaching within about 30 meters, on foot.

[10] It is not in issue that the deceased videoed the unfolding scene with his mobile telephone, and that not even this deterred the appellant, who continued to advance towards them. According to the State, the appellant disregarded warnings from the Sorours to keep his distance and to de-escalate the situation. Instead, he taunted them, questioning whether they believed the video footage would be of any assistance. At one point Mr Sorour positioned himself between the appellant and the deceased, who continued filming. The appellant attempted to strike Mr Sorour but missed. The State maintains that the appellant persisted in his advance throughout. The appellant's account is that he merely intended to seize the video footage to present it to the police.

[11] It is not disputed that the deceased produced his firearm, which he usually carried in a holster on his side, pointed it towards the appellant saying in Afrikaans: 'kyk-kyk' (look-look). The deceased pushed his father aside. Although the exact sequence is unclear, the appellant also produced his firearm. After Mr Sorour shouted to the deceased, 'shoot damnit shoot', shots were discharged. The appellant was struck and returned fire. The deceased was severely wounded and collapsed to his left in a crouching position.

[12] Mr Sorour retrieved the deceased's firearm from the ground and aimed it at the appellant, who had his back turned, but the firearm jammed. The appellant who was also injured in the exchange of the gun shots, then went to his vehicle and drove off.

[13] The deceased was subsequently pronounced dead on route to medical treatment. The appellant and Mr Sorour also went for medical attention for injuries sustained in the course of this tragic incident, with the appellant being hospitalised for an extended period.

[14] Following his discharge from hospital, the appellant was arraigned in the high court on the charges of assault with the intention to do grievous bodily harm, attempted murder

and murder. He pleaded not guilty to all the charges and relied on private defence as a justification. The State called Mr Sorour, Mr Dell, Mr Malan, and Dr EP Kleynhans as witnesses. The appellant testified in his defence and called no other witness. Several admissions were made. On 23 February 2024, the high court, having preferred the State's version in so far as there was a conflict between the two versions, convicted the appellant on the charges of murder and assault with intent to cause grievous bodily harm. He was sentenced to 12 years' imprisonment in respect of the murder and two years' imprisonment in respect of the assault. The sentences were ordered to run concurrently. He was accordingly sentenced to an effective term of 12 years' imprisonment.

THE APPEAL IN TERMS OF s 318 OF THE CPA

[15] In the s 317 application the appellant specifically referred to the following remarks made by the prosecutor during cross-examination in the bail proceedings: (a) '[t]he information in the docket is that the deceased was shot five times accurately on the chest. Four times on the chest [and] one at the back'; (b) '[t]here is witness statements to the effect that when you arrived at the scene where the deceased was with the father you had already pulled out the firearm'; (c) '… there is a witness statement in the docket from Mr Dell that said that he was even reprimanding you to leave the deceased and the father alone'; (d) 'He further mentions that you said to him the deceased's father is talking about you all over, and you are going to show him'; (e) 'Okay, [h]e further says that when you left him you said you are going to show him and then you left the scene spinning your car'; (f) 'And you must also bear in mind that there is a witness that also said during – since the cattle were in the farm you have been looking for the deceased father before you met with the landlord. You have been looking for the deceased father'; (g) 'Okay [t]here is evidence to the effect that you – they even ran away from you from the main road, running into the bushes. You chased them into the bushes with your car …'.

[16] It was contended by counsel in support of that application that either, there were statements, as alluded to by the prosecutor, in the police docket, that were subsequently removed from the docket when the video evidence came to light, or were amended, alternatively, that their existence was 'fabricated' and 'misleading'. Counsel then requested the high court to record the following as a special entry:

'Having been placed on his defence to rebut, and the Applicant/Accused having been confronted with statements of what is in the police docket of the State's case as entailed in Paragraph 3 of this Application now serves as evidential material under Section 235 of the CPA before the Honourable Court, is in direct contrast with the present State case and not in accordance with basic fairness, the Rule of Law, the administration of Justice and the Constitution Section 35(3)(h), (i) and (j) with regard to a fair trial.'

[17] In response, the State merely 'noted' the special entry and the high court ruled: 'I accept the application for the special entry on the record, and I accept that – note it.' There is no indication on the record that the high court settled the terms of the special entry, or what its views were regarding the merits of that application. It merely 'accepted' or 'noted' it.

[18] Section 317(1) of the CPA provides:

'if an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application … on good cause be allowed, apply for a special entry to be made on the record … stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the [J]udge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.'

[19] Section 317(4) of the CPA stipulates that '… [t]he terms of a special entry shall be settled by the court which or the [J]udge who grants the application for a special entry.' Section 318(1) of the CPA provides that '[i]f a special entry is made on the record, the person convicted may appeal to [this Court,] against his conviction on the ground of the irregularity or illegality stated in the special entry … ' provided that a notice of appeal in that regard had been given to the registrar of this Court and to the registrar of the high court concerned (other than a circuit court) within the prescribed period.

[20] In this Court, counsel for the appellant submitted that the aforementioned remarks of the prosecutor in the bail proceedings were either contained in statements that have

been removed or amended, or alternatively, were fabricated and misleading. He relied on observations of this Court in *S v Crossberg* (*Crossberg*)[1] that the State's failure to disclose statements that were relevant to 'the true strength of the state's case', had an impact on credibility. There the State gave questionable reasons for the re-taking of statements and did not offer a reasonable explanation why so many statements were missing from the docket. The disclosure by the State that numerous statements had been taken and were missing, only occurred after the State witnesses were 'caught out'; entries were made in the investigation diary of statements even before they were taken. This Court found that the 'conclusion, that the first set of statements did not suit the State's case and that they are missing by design, rather than misfortune, is compelling.' However, this Court did not explore the position further, because the murder conviction could not stand for reasons other than the alleged irregularities pertaining to the non-disclosure.

[21] It was further submitted by the appellant's counsel that the conduct of the State's case was not in accordance with 'basic fairness, the [r]ule of [l]aw, the administration of [j]ustice and the [C]onstitution section 35(3)(h), (i) as well as (j) with regard to a fair trial'.[2] It was also argued that if the appellant had the benefit of the supposed statements 'it would have made a fundamental impact and goes to the true strength of the state case against the [a]ppellant'. Counsel further submitted in that context, concerning the subject of the application for special entry, that the video that the deceased made of the incident only became available 'months later with no reasonable explanation' and that the inference is inescapable that the video was concealed until its existence was disclosed. According to counsel, after the emergence of the video, statements changed and went missing by design rather than misfortune. Finally, he argued that the alleged irregularities go 'to the core of the conviction' and are, consequently, in conflict with a fair hearing. He sought the setting aside of the appellant's convictions and sentences purely on those grounds.

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[1] *S v Crossberg* [2008] ZASCA 13; [2008] 3 All SA 329 (SCA); 2008 (2) SACR 317 (SCA) (*Crossberg*) paras 80-81.

[2] Section 35 (3*)(h), (i)* and *(j)* provides as follows:
'Every accused person has a right to a fair trial, which includes the right –
…
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence …'

[22] The State submitted the following: the appellant's reliance on *Crossberg* is misplaced; unlike in that matter, the appellant here was legally represented throughout the trial, there was no deliberate suppression of statements, and no proof that any statements were missing by design. Further, the appellant did not pursue the alleged non-disclosure by bringing an application in terms of s 87 of the CPA to compel disclosure, and the record of the bail proceedings, handed in as exhibit H, was not used by the State to impeach the credibility of the appellant's testimony. In addition, the State submitted that the forensic evidence about the nature and extent of the gunshot injuries sustained by the deceased, was not contested at all by the appellant; that the appellant had a fair opportunity at the trial to ventilate any alleged inconsistencies; that the trial was fair and none of the appellant's constitutional rights was infringed, and that he suffered no prejudice. The State maintained that all the statements in the police docket were made available to the appellant.

[23] It is the task of this Court to ascertain whether an irregularity has occurred; if so, to define its nature and its impact on the fairness of the trial, as well as the consequences thereof.[3] Should this Court determine that an irregularity has occurred, it is to decide whether the irregularity resulted in a failure of justice that renders the proceedings invalid.[4] Unless it results in or causes a failure of justice, this Court will not reverse a conviction or sentence merely because of the irregularity.[5] If the irregularity did not by itself result in such a failure, the following test was formerly applied to determine whether such a failure has occurred: 'Does the evidence, unaffected by the irregularity, show proof of guilt beyond a reasonable doubt? If it does, the irregularity did not bring about a failure of justice.'[6] Under the Constitution, whether there was a failure of justice as contemplated in s 322(1)[7] of the CPA gives rise to the question whether the irregularity has led to an

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[3] *S v Botha* 2006 (1) SACR 105 (SCA); [2006] 4 All SA 113 (SCA) (*Botha*) para 3.
[4] Ibid para 4.
[5] Ibid paras 3-4; s 309(3) of the Criminal Procedure Act 51 of 1977 (the CPA).
[6] *S v Xaba* 1983 (3) SA 717 (A) (*Xaba*) at 735-736; *S v Felthun* 1999 (1) SACR 481 (SCA); [1999] 2 All SA 182 (A) at 485I– 486A; *S v Khoza & Others* [2010] ZASCA 60; 2010 (2) SACR 207 (SCA) para 46.
[7] Section 322(1)*(a)* of the Criminal Procedure Act 51 of 1972 reads as follows:
'(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-
(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law *or that on any ground there was a failure of justice*…' (Emphasis added.)

unfair trial. And in turn, the question whether there is an unfair trial is determined with reference to an accused's constitutional right to a fair trial.[8]

[24] In *S v Jaipal,*[9] the Constitutional Court aptly summarised the position under the Constitution as follows:

'Section 317 provides that an accused who thinks that any of the proceedings in connection with or during a trial are irregular or not according to law, may apply for a special entry to be made on the record by the presiding Judge, especially in a case where the alleged irregularity does not otherwise appear in the record. In practice the terms "irregular" and "not according to law" have been regarded as synonymous.

The alleged irregularity stated in the special entry is a ground of appeal, which has to be dealt with by the relevant Court of appeal. In terms of s 322(1) the Court of appeal may allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a "failure of justice". Therefore, a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity had led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.' (Footnotes omitted.)

[25] The facts in *S v Ncaphayi en Andere*[10] (*Ncaphayi*) bear some similarities to the present matter. It is a pre-constitutional decision by this Court, which was not referred to by either of the parties. In that matter there were material differences between the further particulars to an indictment furnished by the State and the testimony of the State witnesses in the trial. The appellants applied for a special entry on the basis that the trial court took into account those witnesses' evidence, despite the fact that the prosecutor had not made their previous, inconsistent, statements available to them. It was further

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[8] *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 (CC); 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) (*Jaipal*) para 39.
[9] Ibid paras 38-39.
[10] *S v Ncaphayi en Andere* 1990 (1) SACR 472 (A).

contended that the differences between the further particulars and their evidence had to be ascribed to the existence of discrepancies between the witnesses' testimonies and their police statements, which the State used in providing the further particulars. The appellants alleged that the failure constituted a failure of justice. In considering leave to appeal the trial court held, inter alia, that even though it had to be accepted that there were indeed discrepancies between the witnesses' police statements and the evidence: (a) the defence had not requested disclosure; (b) the discrepancies were fully explored through cross-examination of the witnesses regarding the differences between their testimonies and the further particulars; and (c) the trial court could not speculate on the outcome if the previous, inconsistent, statements were disclosed and accordingly it only drew an adverse inference against the witnesses concerned.

[26] In that matter the State, apparently adopting the trial court's approach, argued in this Court that the appellants were not seriously prejudiced by the State's failure, because: (a) the state witnesses only deviated from their police statements in those respects where their testimonies differed from the further particulars, and (b) that those witnesses were cross-examined by the defence, and that the trial court accordingly had not erred. This Court rejected those arguments. It held that it was 'pure speculation' and dangerous to assume that there were no other discrepancies between the witnesses' statements and their evidence in court and also to assume that they had been cross-examined enough regarding the discrepancies. It held that the differences were material and that the prosecutor, who ought to have known what the source of the further particulars was, ought to have made the statements available to the defence for the proper testing of the witnesses' testimony in court. The lack of a request by the defence for those statements did not exempt the prosecutor from that duty, unless the defence was made aware of their existence and did not require their disclosure. Finally, this Court held that the prosecutor's failure to make those statements available to the defence was a material irregularity and that the evidence of the witnesses concerned should not have been accepted. Then, applying the test, as summarised in *S v Xaba*[11] and laid down in *S v Yusuf,*[12] this Court determined whether the guilt of the appellants had, nevertheless been proved beyond a reasonable doubt without the evidence of those witnesses.

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[11] *S v Xaba* fn 6 at 735-736.
[12] *S v Yusuf* 1968 (2) SA 52 (A); [1968] 1 All SA 118 (A) at 57C-D.

[27] The facts here differ in material respects from those in *Ncaphayi.* There the discrepancies were in the further particulars to the indictment and the witnesses' testimonies at the trial. The particulars supplied were indeed taken from the witnesses' police statements in the docket, and the State was bound by them. There was no speculation in that regard. The particulars carried the same weight as evidence. They set out the case the appellants had to meet. In contrast to that, the mere remarks of a prosecutor in bail proceedings as to what the State's case entails is not evidence and cannot be accorded equivalent weight. Had the prosecutor led evidence in the bail proceedings that diverged from the testimony subsequently given at the trial, and the State did not disclose the prior inconsistent statement to the defence, the inference sought by the appellant might more readily have been drawn.

[28] It is evident that the appellant's s 317(1) entry is based on conjecture and inference. He contends that because the prosecutor in the bail proceedings had made remarks regarding the nature of the State's case which were not borne out by the evidence given by the State witnesses in the trial, there must have been statements in the docket, at the time of the bail proceedings, which were not disclosed to him. The implications of such inferences are significant; therefore, they should not be drawn lightly. A careful review of certain of the remarks attributed to the prosecutor in the bail proceedings, in the light of the evidence presented by the State, suggests that they merely represent the prosecutor's interpretation or recollection of the docket's contents. Although there are some differences between what he said and the evidence subsequently led by the State, those differences are not material. He may have misinterpreted the statements. In any event, the appellant was at liberty before any evidence was led to apply in terms of s 87 of the CPA for any information, including the alleged statements, to be furnished by the State.

[29] In this matter, the State does not admit that there were statements in the docket at the time of the bail proceedings that were removed or amended, subsequently, for the trial. The appellant wants that to be inferred. Of the seven comments by the prosecutor in the bail hearing relied upon by the appellant there are only three which are specifically linked to the State's witness, Mr Dell. The others are not linked to any particular witness. No one other than the appellant and Mr Sorour could testify about the actual assault and

killing. The video evidence only relates to the subsequent pursuit of the Sorours by the appellant, culminating in the shooting.

[30] There is no witness linked to the following statement: ‘the information in the docket is that the deceased was shot five times accurately on the chest. Four times on the chest, one at the back.’ It was not put to Mr Sorour that he had said so in a previous statement. The provisional list of state witnesses consisted of 26 persons. There is also the medical legal report (Exhibit G) and the forensic statement which included photographs of the cartridges and other material found on the scene. Only the post-mortem report specifies the number and nature of the bullet wounds sustained by the deceased. Without the aid of the evidence of the medical officer who completed it, it could have been misinterpreted or misunderstood. There is no suggestion that there was any other post-mortem report which contradicted that of Dr Kleynhans. Any other information concerning the number and nature of the gunshot injuries, unless from a qualified source, such as Dr Kleynhans or Dr Platt, was not admissible in any event. According to the record, Dr Platt also performed an autopsy, but it is clear from the record that his findings were materially the same as that of Dr Kleynhans. All these documents were made available to the appellant. The appellant’s counsel’s cross examination of Dr Kleynhans was very brief, and there was no reference to any discrepancies. According to Dr Kleynhans the shots were fired at the deceased in quick succession, one hitting him in the back, just as he was turning around.

[31] Regarding the bail prosecutor’s remark that ‘there [are] witness statements to the effect that when you arrived on the scene where the deceased was with the father you had already pulled out the firearm’ - this statement is not attributed to any specific individual. The only persons that could testify about the scene immediately before and at the time of the shooting was the appellant and Mr Sorour. At no stage during the trial did the appellant’s counsel confront Mr Sorour, and either put to him that he made an inconsistent statement, or that there were discrepancies between his evidence and his police statement. Anyone else's testimony of the facts pertaining to the scene, other than the expert opinion, was in any event, inadmissible hearsay evidence.

[32] The next three statements put by the bail prosecutor to the appellant, were all ascribed to Mr Dell. There is no material discrepancy between the statement attributed to Mr Dell - that he requested the appellant to leave the Sorours alone - and his evidence at the trial; indeed, that was in fact his evidence. The term ‘reprimanding’ seems to be the prosecutor's own choice of words to describe the request. Regarding the other two statements ascribed to Mr Dell, there is no material discrepancy between those statements and his testimony at the trial. He may not have stated in evidence that the appellant told him that Mr Sorour was talking about the appellant ‘all over’, and that the appellant had said that he was ‘going to show’ Mr Sorour, or that when the appellant left Mr Dell, he was ‘spinning his car’; but there is no evidence that that is not what was contained in his statement. Counsel for the appellant, who represented him throughout, including at the bail hearing, was acutely aware of the remarks of the bail prosecutor, but never confronted Mr Dell with them. In any event, Mr Dell testified that the appellant was upset when he left Mr Dell in pursuit of the Sorours. The remarks are consistent with the appellant being upset and agitated and there is no material discrepancy to be inferred between Mr Dell’s statement and his evidence at the trial.

[33] The bail prosecutor's reference to a statement that the appellant had been looking for Mr Sorour is not attributed to any particular witness. As pointed out earlier, there were a number of witnesses on the State's list of witnesses. None of the witnesses, including Mr Dell and Mr Sorour, who gave evidence at the trial, were confronted with this aspect. In any event, the statement is not out of kilter with the general tenor of the evidence. It is to the effect that the appellant was looking for Mr Sorour even before he met Mr Dell, after the Sorours’ cattle were at Moolmanspruit. Having considered the testimony, that is the clear impression that one gets, namely, that the appellant's urge to find and confront Mr Sorour preceded his meeting with Mr Dell. There is no material discrepancy.

[34] Lastly, the remark that the Sorours ‘ran away from the main road … into the bushes’ and that the appellant ‘chased them into the bushes’ with his car ‘like the mountain’, can hardly be said to constitute a discrepancy. Although Mr Sorour did not use the words ‘chased into the bushes’ and ‘like a mountain’, that version is consistent with his testimony and the video evidence. One could reasonably describe the terrain as a

'veld' or as 'rough' and 'hilly' or as 'bushy'. And that is most probably how the bail prosecutor saw it. It was his interpretation of the scene.

[35] The appellant also had a fair opportunity to challenge the state witnesses regarding any purported inconsistencies and to explore those issues. The facts of this matter are distinguishable from those in *Ncaphayi* and *Crossberg.* What is clear, is that there is no real possibility that the alleged 'none disclosure' has affected the outcome or impacted the appellants right to a fair trial. The interest of justice would not be served by ordering a new trial solely based on the appellant's allegations in his s 317(1) entry.[13]

[36] The facts of this case are relatively straight forward. There is no reasonable possibility that the outcome of the trial might have been different if statements corroborating the prosecutor's verbatim interpretation were not disclosed to the appellant. As noted, the prosecutor's interpretation is in any event not materially inconsistent with the evidence led by the state at the trial, which is the evidence on which the appeal is to be decided. The forensic evidence concerning the nature and extent of the deceased's gunshot injuries was not disputed. Further, only the appellant and Mr Sorour could testify on the actual attack on Mr Sorour and the killing of the deceased. The video clip by the deceased before his demise is evidentiary material, although open to interpretation, which did not materially contradict the State's oral evidence. Moreover, the evidence of Mr Dell and other witnesses was largely peripheral.

[37] The application for a special entry has no merit and borders on frivolity. It is nothing more than pedantry or a 'grasping at straws'. It is plain from the record that the appellant had a fair trial and that there was no material irregularity. There is no reasonable basis for finding otherwise. The appeal in respect of the special entry accordingly falls to be dismissed.

THE APPEAL AGAINST THE CONVICTIONS

[38] The appellant is also challenging his convictions for assault and murder on grounds other than the alleged irregularities recorded in the s 317 entry. He attacks the

[13] *Crossberg* paras 3 and 75.

credibility findings of the high court of the State witnesses, especially that of Mr Sorour and Mr Dell, and to an extent that of Mr Malan. He argues that his version ought to have been accepted, and that on that version the State did not make out a case against him. His version, essentially, is even though he went after the Sorours, he acted in self-defence when he struck Mr Sorour and subsequently shot and killed the deceased.

[39] The prevailing principle is that even though an appeal court will not easily disturb the trial judge's finding of credibility based on demeanour, and will generally respect them, it will not be inhibited from interfering with those findings, and from substituting inferences of the trial court based on other facts and probabilities, with its own, if it considers them to be more appropriate. An appeal court may, arguably, be better positioned than the trial court in drawing such inferences, since it has the benefit of a full record.[14]

[40] This Court is to decide the appeal on the record of the evidence and the reasons which the high court gave for its decision, regarding the appellant's conviction. The high court gave detailed reasons for accepting the versions of the State witnesses and for rejecting the appellant's account, where it differed from theirs. It appears from the judgment that the high court was fully aware of the principles applicable to the assessment of evidence and credibility, and in coming to its conclusions, was not ignorant of the criticism that could be levelled at those State witnesses' evidence. In the light of all the evidence, there is no basis for interfering with its findings on credibility and of fact and for substituting those findings and inferences with any others.

[41] The high court rightly found that the appellants' version, that Mr Sorour was the aggressor and tried to assault him first and that he merely reacted to that, was peculiar in the light of all the other relevant evidence pointing the other way. It correctly found that the appellant's pursuit and confrontation of the Sorours, was probably due to an incident that had occurred previously at the golf club and of which the appellant felt aggrieved. Mr

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[14] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA); [2002] JOL 9514 (A) para 24. See also *R v Dhlumayo and Another* 1948 (2) SA 677 (A); [1948] 2 All SA 566 (A) at 698. Dictum in para 24 applied in *Louwrens v Oldwage* 2006 (2) SA 161 (SCA); [2006] 1 All SA 197 (SCA) para 14; *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA); [2006] 2 All SA 126 (SCA) para 23.

Sorour testified that when the appellant first confronted him, the appellant said to him in Afrikaans: 'jy praat mos k-k van my by die golf klub wat sy jy nou?' (You speak sh-t of me at the golf club what do you say now). This is consistent with the appellant's impulsive, bare-footed, pursuit of the Sorours in the veld and rough terrain, after he left Mr Dell. Further, there is no reason for Mr Dell to have lied concerning what he may have said to the appellant, and there was certainly no reason for Mr Dell to have told the appellant to tell the Sorours that they should not come to his farm again. Mr Dell himself could have told them that.

[42] In light of all the evidence, the high court correctly found various improbabilities in the appellant's account, including the following: that Mr Sorour first confronted the appellant and tried to assault the appellant; that the appellant had information that stock theft was about to take place, but did not convey this to Mr Dell; that Mr Dell would give false evidence against the appellant, or that Mr Malan would do so; that the only reason that the appellant gave for continuing to pursue the Sorours, especially the deceased, after he became aware that the deceased was filming the occurrence, was to get hold of the video footage to take it to the police; and that Mr Dell and Mr Malan never told him to leave the Sorours alone, or that he did not hear them say that. The high court justifiably found that the appellant's defence, in effect, that he was not the aggressor and not confrontational, was a last-minute attempt to salvage his credibility.

[43] The high court rightly decided the case on the version of the State in so far as it was consistent with and corroborated by all the other evidence and the probabilities, both inherent and arising from the evidence. The following, inter alia, was established beyond a reasonable doubt. The appellant was aggrieved by what he may have heard was said about him by Mr Sorour; he believed that Mr Sorour was part of the conspiracy to have him imprisoned; he pursued the Sorours after they left the farm Moolmanspruit in order to confront Mr Sorour, even if it meant violently so; the appellant was told by Mr Malan and Mr Dell to leave the Sorours alone because they perceived the appellant's aggressive mood or attitude towards the Sorours, but he did not heed their advice or caution. On the appellant's version, he acted as more than just an informant regarding the investigation of the stock theft in the area. He took matters in his own hands, and acted on his own

perceptions or misperceptions, that were influenced by unverified information implicating the Sorours in the imminent theft of cattle.

[44] The appellant violently confronted Mr Sorour and assaulted him. In doing so, the appellant, was the aggressor and was not acting in self-defence. His version to the contrary was rightly rejected for being improbable and not reasonably possibly true. He, as the aggressor, pursued Mr Sorour and assaulted him. Mr Sorour was entitled to defend himself against such unlawful attack but chose to avoid the confrontation and ran away from the appellant. Instead of ending the matter there, the appellant continued to pursue Mr Sorour in his vehicle and then on foot, even after Mr Sorour had been joined by the deceased. The fact that this was being filmed did not deter the appellant. On his own version, he wanted to get hold of the video footage to take it to the police. This explanation is so improbable that its rejection was warranted. The actual position is that the appellant, emboldened by the thought of being armed, and encouraged by Mr Sorour's flight following the assault, as well as the deceased's retreat, continued to threaten and taunt them. He was reasonably and justifiably viewed as a real threat to the Sorours, because he had already exhibited unprovoked and egregious violence towards Mr Sorour.

[45] While it is so that the appellant did not draw his firearm first, and that the deceased did so, the deceased did not just shoot at the appellant, even after Mr Sorour urged him to do so. Instead, the deceased tried to deter the appellant's pursuit, by making the appellant aware of the firearm. Despite several warnings from the deceased the appellant persisted. The situation may be likened to a red flag being waved at a charging bull. The high court found that when the deceased fired at the appellant, the latter was a real threat to them. The deceased did so in defence of their safety and bodily integrity. This is consistent with the video evidence. As the victim of an unlawful attack there was no duty on the deceased to flee and to risk injury or death in doing so.[15]

[46] A prerequisite for invoking private defence as a justification is that the conduct must be directed at the attacker.[16] Another is that the attack must be unlawful.[17] The

[15] See CR Snyman *Snyman's Criminal Law* 8 ed (2025) at 89-90 and the authorities cited there.
[16] Ibid at 88.
[17] Ibid at 86 and the authorities cited there.

appellant's version that he returned fire in self-defence and that he accordingly did not act unlawfully in killing the deceased in doing so, was rightly rejected. As the aggressor, he could not avail himself of this defence. In firing at the deceased the appellant was not defending himself against an unlawful assault, but was retaliating against the lawful resistance by the deceased to ward off his unlawful attack on Mr Sorour and the deceased. The appellant intended to overcome that lawful resistance and knew that he was acting unlawfully. He could not believe that he was being attacked unlawfully by the deceased, whereas the deceased would reasonably have held the belief that they were being unlawfully attacked by the appellant.

[47] The deceased's act in shooting at the appellant was not disproportional. The fact that the appellant did not shoot once at the deceased, but fired several times, not only demonstrates his violent disposition at the time, but also his intent to kill the deceased. The appellant's convictions, for the assault of Mr Sorour and the murder of the deceased, are confirmed.

THE CROSS-APPEAL AGAINST THE SENTENCE FOR MURDER

[48] In terms of the indictment, regarding the death of the deceased, the appellant was alleged to be guilty of the crime of 'MURDER READ WITH THE PROVISIONS OF SECTION 51(1) PART I SCHEDULE 2 OF ACT 105 OF 1997'. The indictment further states: 'the provisions of section 51(1) of Act 105 of 1997 [are] applicable in that the murder was planned or pre-meditated.' In terms of that section 'notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a [h]igh [c]ourt shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.' According to Part I of Schedule 2 the sentence referred to in s 51(1) applies to a conviction for the crime of murder, inter-alia, where the murder 'was planned or pre-mediated.'

[49] The high court did not convict the appellant on this count as framed, but simply of murder. In coming to that conclusion, the high court reasoned as follows:

'The State in the indictment stated that this court should find that the actions of the accused [were] pre-meditated. Even, if there may be suspicions that the accused acted with premeditation, the

state bears the onus of proving the guilt of the accused beyond a reasonable doubt. That is an inevitable consequence of living in a society in which the freedom and dignity of the individual are properly protected and are respected. Convictions based on suspicions or speculation is the hallmark of a tyrannical system of law.'

[50] The high court subsequently applied s 51(2) to the appellant, to whom, as a first offender, a minimum sentence of an imprisonment of not less than 15 years was applicable (s 51(2)*(a)*(i)). In respect of a conviction under s 51(1) or (2) the sentencing court has to impose the prescribed sentence unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence (s 51(3)*(a)*).

[51] In imposing the sentence, the high court again expressed the view that the crime was not pre-meditated. It held the view that the appellant's intention was 'to confront the Sorours' but doubted whether 'he anticipated the killing of the deceased'. The high court further found substantial and compelling factors present that justified the imposition of a sentence less than the prescribed 15 years' imprisonment.

[52] The State argued, that the high court 'did not find that pre-meditation was absent [and] nevertheless proceeded to sentence the appellant under section 51(2)' and that this constituted a material misdirection. This argument is misconceived and is unsupported by the record. As indicated above, the high court found that the state did not prove that the murder was pre-meditated. The State argued that the appellant 'inserted himself unnecessarily'; 'ignored repeated warnings'; 'advanced despite visible danger'; 'fired multiple directed shots'; and that 'each warning afforded an opportunity for reflection'; and that 'this was not a reflexive discharge' and that 'the only reasonable inference is premeditated murder within the meaning of s 51(1)'. The appellant, on the other hand, denied that the killing was planned or premeditated.

[53] In *Peloeole v Director of Public Prosecutions, Gauteng*,[18] the minority judgment considered the application of the concept 'planned or premeditated murder'. The following

[18] *Peloeole v Director of Public Prosecutions, Gauteng* [2022] ZASCA17; 2022 (2) SACR 349 (SCA); [2022] 4 All SA 1 (SCA) paras 40-57.

is a summary of the salient points regarding the concept. There exists a broad spectrum between a planned or premeditated crime and one that is committed ‘on the spur of the moment’. In assessing whether the crime was planned or premeditated the period of time between when the perpetrator formed the intention to commit it and the execution of that intention is of cardinal importance, but not determinative of whether the crime was ‘planned or premeditated’. The time lapse is but one of the considerations. A lengthy interval is not a prerequisite for planning; however, a longer interval between the decision and its implementation may indicate premeditation; whereas, a shorter interval may suggest the contrary, although not necessarily so. Ultimately every case must be decided on its facts. A finding of planning or premeditation should only be made if the evidence establishes that fact beyond a reasonable doubt. The State bears the burden of proof; any reasonable doubt must be resolved in favour of the accused.

[54] In this matter there is no evidence that the appellant had planned, or contemplated shooting and killing the deceased prior to the deceased firing at him, or at least threatening him with a firearm. Taking into account all the evidence, including that advanced by the State it cannot be found that it has been established beyond a reasonable doubt that the killing of the deceased was ‘planned or premeditated’. The finding of the high court to that effect is unimpeachable.

[55] The State’s second principal argument regarding the sentence is that, even if the high court’s finding on the premeditation was correct, it ought to have imposed the 15 year sentence of imprisonment prescribed by s 51(2), because: (a) there are no substantial and compelling factors justifying the imposition of any lesser sentence, and (b) the high court over-emphasised the appellant’s personal circumstances, including the fact of his detention awaiting trial, the injuries he sustained, and the fact that his children were still minors.

[56] The State argued further that the high court under-emphasised the factors of retribution and deterrence and failed to guard against misplaced sympathy, and to take into account that the appellant showed no remorse. The State also referred to the following ‘aggravating factors’. The deceased was only 28 years at the time of his death; he was killed in front of his father; and that, while he was trying to protect himself and his

father multiple direct shots were fired; the appellant could have avoided the shooting by withdrawing; and the killing was preceded by 'persistent aggression'. Finally, the State submitted that the 12 years' imprisonment imposed, was not only lenient, but 'disturbingly inappropriate'; and failed to 'properly reflect the gravity of the offence, the interest of society and the legislative scheme'. The State wants the sentence imposed to be replaced with a substantially longer term of direct imprisonment.

[57] It is a trite principle that an appeal court may only interfere with the sentence imposed by the trial court where the latter erred in the exercise of its discretion when sentencing, or where there is a shocking disproportion between the sentence imposed by that court and the sentence that the appeal court would impose.[19] The sentencing court is to consider all the facts and circumstances and to determine whether they justify the imposition of a lesser sentence than the prescribed minimum sentence. It has been held by this Court that it is not possible to give 'an all-embracing definition' to the term 'substantial and compelling circumstance'.[20] And that the sentencing court is to bear in mind that the prescribed sentence is not to be departed from 'lightly and for flimsy reasons'.[21]

[58] In this matter the exercise by the high court of its discretion cannot be faulted. Even though it found that the appellant did not show remorse, it found his personal circumstances, which are on record, so 'substantial and compelling' to justify the imposition of a lesser sentence than the prescribed minimum of 15 years' imprisonment. The high court appropriately considered all the relevant factors in sentencing and was aware of both the mitigating and aggravating factors. Ultimately, 'sentencing is pre-eminently a matter for the discretion of a trial court'. It is not an easy process, but complex and involves the balancing and grading of all relevant factors.[22] The sentence imposed by the high court is appropriate and there is no reason for this Court to interfere with it and increase it. The cross-appeal must therefore fail.

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[19] *S v Malgas* 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA) (*Malgas*) para 12; *S v Moagi* [2025] ZASCA 188; [2026] 1 All SA 301 (SCA); 2026 (1) SACR 457 (SCA) para 23.
[20] *Malgas* para 22. Dictum applied in *S v Tiry and Others* 2021 (1) SACR 349 (SCA) para 124.
[21] Ibid paras 9 and 25. Dictum applied in *S v Govender* [2023] ZASCA 60; 2023 (2) SACR 137 (SCA) para 24.
[22] *S v Rabie* 1975 (4) SA 855 (A) et 862 A-B 862 G-H; *S v Banda* 1991 (2) SA 352 (BG) at 354 E-G & 355 A-B.

[59] In the result, the following ordered:

The appeals and the cross-appeal are dismissed.

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JUDGE OF APPEAL

Appearances

For the Appellants:	WJ Edeling SC
Instructed by	Barnard & Venter Inc, Clocolan
	Lovius Block Inc, Bloemfontein
For the Respondents:	JW Roothman
	Director of Public Prosecutions, Bloemfontein.