THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 37/2018

In the matter between:

LESIBA SIMON KEKANA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kekana v The State* (37/2018) [2018] ZASCA 148 (31 October 2018)

Coram: Shongwe ADP, Majiedt, Van der Merwe, Molemela and Makgoka JJA

Heard: 18 September 2018

Delivered: 31 October 2018

Summary: Criminal law and Procedure – appeal against sentence – premeditated murder – appellant pleaded guilty in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 – even a few minutes enough to constitute premeditation – court exercising its power in terms of s 322(6) of the Criminal Procedure Act 51 of 1977 – court retains its inherent power and therefore entitled to consider life imprisonment in terms of s 51(1) as a sentencing option – appeal dismissed – appellant sentenced to life imprisonment on each of the murder counts.

ORDER

On appeal from: Limpopo Division, Polokwane (Makgoba JP, Kgomo and Semenya JJ sitting as court of appeal):

1 The appeal is dismissed, subject to what is stated in 2 below.

2 The order of the court a quo is set aside and substituted with the following:

'1 The sentences imposed by the trial court on counts 1, 2, 3 and 4 are set aside and substituted with the sentences of life imprisonment on each of those counts. The sentence imposed on count 5 stands.

2 The sentences on counts 2, 3, 4 and 5 shall run concurrently with the sentence on count 1.

3 The substituted sentences are ante-dated to 29 April 2016.'

JUDGMENT

Makgoka JA (Shongwe DJP, Majiedt, Van der Merwe and Molemela JJA concurring)

[1] In the early hours of 6 September 2015, the sleepy village of Moletlane in Zebediela, Limpopo Province, woke up to the shocking news of the gruesome murder of four little children: Hlologelo (13), Keneilwe (10) Bokang (6) and Lekgoledi (4). They had been killed by their father, the appellant, who slit their throats with a knife. The appellant was subsequently indicted on four counts of

murder and one count of assault with intent to do grievous bodily harm. The latter count concerned an assault on his wife, the mother of those children, Mrs Lorraine Kekana (Mrs Kekana) on 21 June 2015.

[2] In its summary of substantial facts that accompanied the indictment in terms of s 144(3)(*a*) of the Criminal Procedure Act 51 of 1977 (the CPA), the State averred that the murders were pre-planned. As a result, the formulation of the indictment was such that the murder counts were to be read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). In terms of the latter section, in the event of a conviction, the applicable sentence was life imprisonment on each of the murder counts, unless substantial and compelling circumstances were present.

[3] The appellant appeared before Raulinga J on 25 April 2016. He pleaded guilty to all five counts, and submitted a written statement in terms of s 112(2) of the CPA, which the State accepted. In paragraph 8 of the written statement the appellant stated that he pleaded guilty to the murder counts 'in terms of s 51(2) of 105 of 1997'. Apart from this reference to s 51(2) of the CLAA, it is not mentioned anywhere in the statement what the relevance of that reference was, nor are there any facts set out why the appellant pleaded guilty 'in terms of s 51(2)'. I shall revert to this aspect.

[4] The appellant was convicted on the basis of his guilty plea in terms of s 112(2) of the CPA. On 29 April 2016 he was sentenced to 20 years' imprisonment on each of the murder counts, and to two years' imprisonment on the count of assault with intent to do grievous bodily harm. Ten years of each sentence on counts 2, 3 and 4 were ordered to run concurrently with the sentence on count 1.

The effective sentence was thus 52 years' imprisonment. The appellant appealed to the full court against the sentence imposed for the murder counts, which appeal was unsuccessful. This further appeal is with the special leave of this court.

[5] The crimes committed by the appellant took place against the following factual background.[1] As stated already, the appellant and Mrs Kekana are married to each other. They had four children – the deceased in the matter. The parties did not live together. The appellant lived in Moletlane with the deceased children, while Mrs Kekana worked in Pretoria and lived in Mamelodi, east of Pretoria. The couple experienced marital problems.

[6] On 4 September 2015, the appellant drove to Mamelodi with the children to visit Mrs Kekana. It was with a view to resolving their marital problems, with the assistance of their families. The meeting, instead of resolving their problems, exacerbated them. It emerged later in the discussions between the appellant and Mrs Kekana that the latter had an extra-marital affair. Later that evening, she informed the appellant that she had spoken to her lover and had terminated the extra-marital relationship. However, when the appellant later called the lover in question, the latter not only admitted to the affair, but denied that it had been terminated. An argument ensued between the appellant and Mrs Kekana. The appellant decided to leave that night and drove back to Moletlane with the children. Upon arrival, he called Mrs Kekana to inform her that they had arrived safely. Further argument between the parties continued over the phone. During that

[1] This is distilled largely from the appellant's written plea of guilty in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the CPA), and the evidence in mitigation of sentence.

telephone conversation, Mrs Kekana repeated an assertion she had made to the appellant on a previous occasion, that the appellant was 'nothing'.[2]

[7] What happened thereafter is set out in graphic and gory detail in the appellant's written statement in terms of s 112(2) of the CPA:

'I got extremely angry and decided that I should kill myself. Immediately after hanging up the phone Bokang Kekana, the deceased in count [3], came to where I was. I then thought of what will happen to my children since they were staying with me and I was the one taking care of them. I thought that they will suffer without me. I immediately took a knife and cut Bokang Kekana's throat with intent to kill him and he died as a result.

My other three children were in their bedroom. Immediately after killing the deceased in count [3], the deceased in count [1], Hlologelo Clement Kekana, came to the sitting room. I gave [him] the phone to say goodbye to [his] mother, afterwards I cut his throat with a knife with intent to kill him and he died as a result.

I then immediately proceeded to the bedroom where my other two children were sleeping. On my arrival I found Keneilwe Kekana the deceased in count [2] sleeping on a sponge. I cut his throat with a knife with the intent to kill him and he died as a result. When I finished killing the deceased in count [2] I immediately cut Lekgoledi Kekana, the deceased in count [4] on his throat with a knife with intent to kill him and he died as a result. All the deceased are my biological children. I then cut my throat with intent to kill myself but unfortunately I did not die. I then took a rope with the intent to hang and kill myself. While I was busy I heard a knock on the door and people came and called [the] police. I was arrested and taken to hospital for treatment.'

[2] The first occasion during which Mrs Kekana mentioned this was on 21 June 2015. While she was home for the weekend, the appellant requested to have sexual intercourse with her. She rebuffed his advances and told him that 'he was nothing' and that she felt 'dirty' whenever she had sexual intercourse with him. The appellant became angry and chopped Mrs Kekana's hand with an axe. This incident formed the basis of count 5.

[8] The injuries to which the children succumbed, are described in post-mortem medical reports in respect of each. Each of them suffered a deep horizontal incised wound (of varying sizes) to the neck and a severed airway. The cause of death in respect of each one of them is recorded as 'SHARP FORCE TRAUMA TO THE NECK'.

[9] In the notice of appeal and written submissions filed on behalf of the appellant in this court, the sentence was assailed on three broad propositions. First, it was contended that the sentence was harsh, disproportionate and induced a sense of shock. In this regard, it was further submitted that the trial court misdirected itself by not ordering the sentences in counts 2, 3 and 4 to run concurrently with the sentenced imposed in count 1. Second, that the trial court misdirected itself by imposing a sentence in excess of the minimum sentence of 15 years' imprisonment in respect of each murder count, without identifying the aggravating circumstances to justify the increased penal jurisdiction. Lastly, it was contended that the trial court misdirected itself in finding that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences.

[10] Upon perusal of the record, a notice was issued to the parties informing them that this court was considering exercising its power in terms of s 322(6) of the CPA. The section provides the court of appeal with the power to impose a punishment more severe than that imposed by a lower court. Counsel for the parties were requested to file supplementary written submissions on this aspect. Both counsel obliged. Accordingly, the matter is properly before this court for the exercise of the discretion conferred by the section.

[11] In his supplementary written submissions, counsel for the appellant urged this court not to exercise its power in terms of s 322(6), as the circumstances of this case do no warrant that. Counsel's submissions can be summarised as follows: the appellant's main complaint was that the trial court had misdirected itself by, without giving reasons therefor, imposing a sentence of 20 years' imprisonment on each murder count, instead of the prescribed 15 years. This, he argued, was at odds with what this court held in *S v Mathebula & another* [2011] ZASCA 165; 2012 (1) SACR 374 (SCA) para 11. There, this court held that a sentencing court should identify the circumstances that impel it to impose a sentence higher than the prescribed minimum sentence, and explain why a departure from the prescribed sentence is justified.

[12] Accordingly, counsel submitted that it would be unfair to the appellant, who while expecting this court to reduce his sentence in accordance with the above dictates, is instead confronted with the prospect of his sentence being increased in terms of s 322(6) of the CPA. This was so, contended counsel, especially given that the appellant had pleaded guilty in terms of s 51(2) of the CLAA, which plea was accepted by the State. He submitted, in the circumstances, that the appellant was entitled to expect the court to impose the prescribed minimum sentence in terms of that section, unless the court found aggravating circumstances to justify a sentence more than the prescribed one. Counsel also urged this court not to invoke the provisions of s 322(6) of the CPA lightly, as this could deter would-be appellants from exercising their constitutionally entrenched right to appeal.

[13] The sole issue in the appeal is whether the sentence imposed by the trial court was appropriate in the circumstances. Related to it, is the nature and effect of the appellant's 'plea in terms of s 51(2)' of the CLAA. I consider that issue first.

[14] As stated already, apart from that cryptic reference, there is no indication in the appellant's plea explanation as to why reference was made to that sub-section. In other words, it was simply mentioned without any basis or explanation. I assume, however, in the appellant's favour, that the purpose was to suggest that the murders were not premediated or pre-planned. If they were, s 51(1) of the CLAA was applicable, and the appellant faced life imprisonment on each murder count, unless substantial and compelling circumstances were present. Thus, the appellant sought to bind the trial court to a sentence of 15 years' imprisonment on each murder count, in terms of s 51(2).

[15] The trial court proceeded on that footing, and in light of that reference, it considered itself precluded from considering life imprisonment as a sentencing option. In this regard, the learned trial judge stated the following in his judgment on sentence:

'I have been told that the approach to sentencing the accused should be that the minimum sentence of life [imprisonment] should not apply. Indeed that is true because the accused pleaded guilty in terms of section 112(2) [of] Act 51 of 1977.[3] The State Counsel accepted the plea and therefore, this court must deviate from life sentence.'

[16] I have serious conceptual difficulty in accepting that a trial court's sentencing discretion can be fettered in the manner it was done in this matter. The trial court seemingly had in mind the trite principle that the State is entitled to accept an accused's plea of guilty on a lesser or alternate charge. Corollary to that, is that the court has no power to refuse the State's acceptance of such plea, and must sentence the accused on the basis of the plea accepted by the State. See *S v*

[3] It must be accepted that the learned Judge meant to refer to s 51(2) of the Criminal Law Amendment Act 105 of 1997, instead of s 112(2) of the CPA.

Ngubane 1985 (3) SA 677 (A) at 683E-F, where Jansen JA explained the nature and effect of the procedure in terms of which the prosecutor accepts the accused's plea of guilty on a lesser or alternative charge, as follows:

'It must be seen as a *sui generis* act by the prosecutor by which he limits the ambit of the *lis* between the State and the accused in accordance with the accused's plea. Whether one in a case such as the present speaks of amendment, withdrawal or abandonment of the murder charge does not really seem to matter. That the *lis* is restricted by acceptance of the plea appears from ss 112 and 113. The proceedings under the former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.'

[17] To my mind, the present case is distinguishable from those where a prosecutor accepts a plea of guilty on a lesser charge, as was the case in *Ngubane* and *S v Tshilidzi* [2013] ZASCA 78. In this case, the appellant had not pleaded to a lesser or alternative charge. He pleaded guilty to murder, subject to the penal provisions of the CLAA. In the former cases, the focus is on the type of offence the accused ought to be convicted of. The State is in charge of that process. As Van der Merwe AJA explained in *Tshilidzi* at para 9, the State delineates the *lis* between it and the accused by deciding to accept a plea on a lesser charge. The acceptance by the prosecutor of the plea of guilty on the alternative charge has the result of removing the main charge from the indictment. It follows that a conviction on the main charge could not stand. In other words, in such a case, it is up to the State to determine the offence that the accused is convicted of. The court has no say in that, and must sentence the accused in accordance with the accepted plea.

[18] The converse is true in the present case. It concerns the sentence and not the offence. Here, the role of the State and that of the accused is limited to the

presentation of aggravating and mitigating circumstances, respectively. This is because sentence is pre-eminently a matter within the judicious discretion of a trial court. See *S v Sadler* [2000] 2 All SA 121 (A) para 6. As a result, the ultimate decision as to which sentence to impose, remains with the court. Seen in this light, one cannot refer to a *lis* between the State and the accused in the true sense, when it comes to sentence. This is because of the unique and central role played by the court during the sentencing stage. And where the provisions of the CLAA are applicable, neither the State nor the appellant can oust the court's increased penal powers provided for in s 51(1), by a passing reference to s 51(2).

[19] As a general proposition, where the minimum sentences provided for in the CLAA are applicable, an accused is not entitled to pre-determine or pre-empt his or her sentence by referring, without more, to s 51(2).[4] If he or she wishes for that sub-section to apply, and for the resultant lesser sentence to be considered, he or she must set out the facts from which such conclusion can be premised. Without such facts, the court is not restricted to a lesser sentence merely because the accused had made reference to s 51(2). To accept otherwise would lead to absurd consequences.

[20] In the present case, such an approach would mean that even if the court, on a consideration of the facts, found the murders to be premediated or pre-planned, it would be precluded from even considering life imprisonment, by reason only of the fact that the State had accepted an unsubstantiated plea 'in terms of s 51(2)'. This would be untenable. As I demonstrate later, the facts in this case show that there was premeditation on the part of the appellant when he killed his children. It

[4] Except in the limited circumstances permitted by the law, for example, when entering into a plea bargain in terms of s 105A of the CPA.

is therefore difficult to accept that an unexplained, unsubstantiated and a fleeting reference to s 51(2) in a guilty-plea embodied in the s 112(2) statement, should render the court impotent to consider life imprisonment in terms of s 51(1). That would amount to placing form over substance.

[21] In summary therefore, it was for the appellant to lay a factual foundation for a conclusion that the murders were not premeditated, and the issue was one for the trial court to decide. In coming to a decision, the court would have had regard to all the circumstances of the murders, including the appellant's actions during the relevant period. Anything short of this could not bind the court to the sentence in terms of s 51(2) of the CLAA.

[22] There is another reason why the suggestion that the court's power to consider the prescribed minimum sentence in terms of s 51(1) can be ousted simply by mere reference to s 51(2) in a plea explanation, is untenable. The provisions of the CLAA do not create different or new offences, but are relevant to sentence. Thus, murder remains murder, as a substantive charge, irrespective of whether s 51(1) or s 51(2) applies. Simply put, there is no such charge as 'murder in terms of s 51(1) or s 51(2)'. It follows that there can never be a plea to such a non-existent charge.

[23] As Cameron JA explained in *S v Legoa* 2003 (1) SACR 13 (SCA) para 18, with reference to Rumpff CJ's observations in *S v Moloto* 1982 (1) SA 844 (A) at 850C-D:

'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. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed "(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions".).' (Footnotes omitted.)

[24] When viewed in this light, the purpose of reading a particular charge with the provisions of the CLAA is essentially two-fold. First, to alert the accused of the applicability of the prescribed minimum sentence. Second, to afford the accused an opportunity to place facts before the court on which a deviation from the prescribed sentence would be justified, nothing more. It follows therefore that a plea to a particular charge 'in terms of s 51(2)' without stating the facts why that sub-section, and not s 51(1), should be applicable, is a misnomer, and a mere surplusage. Its acceptance by the State has no bearing on the courts' power to consider an appropriate sentence on the charge to which an accused has been convicted of.

[25] Although considered in the context of a concession by the State, I consider analogous, the approach of this court in *S v Nedzamba* [2013] ZASCA 69; 2013 (2) SACR 333 (SCA). The appellant had been charged with rape. The indictment made no reference to the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It was argued on appeal that the appellant had been charged with the common law offence of rape when it had been abolished by the Act and that consequently the convictions and related sentences

had to be set aside. The State conceded the point advanced on behalf of the appellant. Declining to be bound by the State's concession, this court made an observation that the concession was made 'without careful reflection' and pointed out to the obvious 'absurd consequences that would follow'. (Paragraphs 8 and 9).

[26] The sum total of the above observations is this. Where an accused is charged with an offence subject to or read with s 51(1) of the CLAA, and he or she wishes that, for purpose of sentence, s 51(2), instead of s 51(1), should be applicable, he or she must place facts before the court, why that should be the position. This is irrespective of whether he pleads guilty or not guilty. If he pleads guilty, and tenders a written statement in terms of s 112(2) of the CPA, those facts must clearly and pertinently appear in that statement.

[27] In *S v Negondeni* [2015] ZACSA 132 para 11 it was explained that a statement in terms of s 112(2) handed in to support and explain a plea of guilty to a charge of murder ought to address such factors as the cause of death and the intention of the accused at the relevant time. Thus, a cryptic, unexplained reference to s 51(2) such as the one in the present case, is certainly not sufficient to mutate the sentencing regime from the purview of s 51(1) to s 51(2). It must be emphasised in this regard that even where such facts are stated, the discretion of the court to consider and impose an appropriate sentence remains extant.

[28] In the particular circumstances of the present case, the trial court was entitled to consider life imprisonment as a sentencing option, irrespective of the State's acceptance of an unsubstantiated 'plea in terms of s 51(2)'. The dictates of justice and the need to avoid absurd consequences demanded this. It must also be borne in mind that irrespective of the minimum sentences provided for in the

CLAA, the court retains its inherent power to consider life imprisonment, if the gravity of the offences so requires.

[29] By considering itself precluded from imposing life imprisonment only for the reason that the appellant had pleaded in 'terms of s 51(2)', and without more, the trial court misconceived the reach of its powers as a sentencing court, and misdirected itself in the process. It is a misdirection which materially influenced its approach to sentence – the type envisaged in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F as being 'of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably'. Accordingly, this court is at large to consider sentence afresh, an aspect to which I turn.

[30] When considering an appropriate sentence, the lodestar remains the enduring triad – the crime, the offender and the interests of society, as enunciated in *S v Zinn* 1969 (2) SA 537 (A) at 540G. In *S v Rabie* 1975 (4) SA 855 (A) 862A-B the main purposes of punishment were reiterated as being deterrence, prevention, reformation and retribution.

[31] The following are the appellant's personal circumstances. He was 37 years old when he was sentenced, and a first offender. He is one of the seven children in his family. He passed matric, but could not further his studies due to financial constraints. At the time of commission of the offences, he was married, although his marriage was strained. He was employed as a driver. He spent seven months in custody awaiting the finalisation of his trial.

[32] As to the nature of the offences, it is indeed difficult to imagine a more callous and despicable deed than a parent killing his own children. One after the other, the appellant slaughtered each of his children like animals. Meanwhile, their mother, who was some 280 kilometers away in Pretoria, was, on the appellant's own admission, forced to listen helplessly to the killing of one of her children, after the horrific killing of his sibling. One can only imagine the horror of all the children when their supposedly loving father, protector and provider, summarily extinguished their lives in the most cruel manner.

[33] The brutality and venom which went into the slaughter of the children is gruesomely depicted in the photo album showing their blood-soaked bodies. I have earlier referred to the post-mortem examination reports in respect of all four children which reveals in horrific detail, the nature and extent of the injuries inflicted on them. It is significant that the appellant could not bring to bear the same brutality onto himself when his own efforts to commit suicide failed.

[34] Undoubtedly, the very fact that these were the appellant's own children, is extremely aggravating. The children reposed trust in him as their protector and provider. A further aggravating factor is that the appellant caused his wife to listen over the phone to the slaughter of one of her children. This leads to an ineluctable conclusion that the appellant killed the children in order to spite his wife for having an extra-marital affair and for rejecting him. He used his children as pawns to be sacrificed in his battle with his wife. Another consideration which counts against the appellant is that he seems to be disposed to violence. It should be remembered that on 21 June 2015, just over two months before the killings, the appellant had savagely attacked his wife with an axe for spurning his sexual advances.

[35] During argument in this court it was submitted on behalf of the appellant in mitigation, that it should be considered that the appellant had lost his beloved children, and has thus suffered loss. This is an exasperating submission. By projecting himself as a victim of some sort, reflects the appellant's self-absorption. It is egregious in the extreme, and distastefully insensitive to Mrs Kekana, the mother of the children, and her family. The submission is mentioned merely to be rejected.

[36] It was also submitted that the appellant's conduct occurred on the spur of the moment, and that his actions were not premeditated. I disagree. The appellant's overall conduct puts paid to that suggestion. It all began with the argument he had with his wife, after which he decided to commit suicide. He rationalised to himself that his children would suffer in his absence. He killed the first child, after which he instructed one of the children to call his wife. He caused his wife to listen to the horror of the killing.

[37] This conduct, to my mind, points to pre-planning or premeditation. In this regard, one must bear in mind what this court said in *S v Kekana* [2014] ZASCA 158 at para 13, that premeditation does not necessarily entail that the accused should have thought or planned his or her action for a long period of time in advance before carrying out his or her plan. This is because 'even a few minutes are enough to carry out a premeditated action'.

[38] I turn now to the interests of society. The community expects courts to mete out appropriate sentences, given the increasing rate of violent crimes like murder, against the vulnerable in our society, including children. Given that expectation, the sentence that is imposed should, among others, reflect the community's

indignation over the appellant's ghastly deeds. It must communicate an unequivocal message that this court will impose the heaviest possible sentence against those convicted of heinous crimes, especially against innocent children.

[39] Due to the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the appellant should be accorded a smaller role. His personal circumstances similarly have to bow to the interests of society. As pointed out in *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58, in cases of serious crime the personal circumstances of the offender, by themselves will necessarily recede into the background. Without doubt, this is one of those cases.

[40] As was stated in *S v Di Blasi* 1996 (1) SACR 1 (A) at 10*f-g*:

'The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct.'

[41] In *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 519*c-e* this court pointed out that given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. Harms JA went on to explain, with reference to *S v Nkwanyana & others* 1990 (4) SA 735 (A) at 749C-D, that in other instances retribution may even be decisive.[5] See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147*c-e*; *S v Swart*

[5] During argument before the full court, a member of that bench stated, without reference to any authority, that *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) had been overturned 'by a subsequent case'. Despite a diligence

2004 (2) SACR 370 (SCA) paras 11 and 12; *S v Govender* & others 2004 (2) SACR 381 (SCA) para 32.

[42] The upshot of all these authorities is that whatever the appellant's complimentary personal circumstances and his prospects of rehabilitation, those pale into insignificance when weighed against the aggravating factors. In all the circumstances, I am of the view that life imprisonment on each of the murder counts is the only appropriate sentence.

[43] In the result the following order is made:

1 The appeal is dismissed, subject to what is stated in 2 below.

2 The order of the court a quo is set aside and substituted with the following:

'1 The sentences imposed by the trial court on counts 1, 2, 3 and 4 are set aside and substituted with the sentences of life imprisonment on each of those counts. The sentence imposed on count 5 stands.

2 The sentences on counts 2, 3, 4 and 5 shall run concurrently with the sentence on count 1.

3 The substituted sentences are ante-dated to 29 April 2016.'

T M Makgoka
Judge of Appeal

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search being conducted, I have not found a case of either this court or the Constitutional Court overturning *Mhlakaza*.

APPEARANCES:

For the Appellant:	DJ Nonyane
Instructed by:	Justice Centre, Polokwane
	Justice Centre, Bloemfontein
For the Respondent:	J Kotzé
Instructed by:	Director of Public Prosecutions, Polokwane
	Director of Public Prosecutions, Bloemfontein