IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Case No. 11/2022**

In the matter between:

MUZI PETROS KHUMALO **Appellant**

and

REX **Respondent**

NEUTRAL CITATION: ***Muzi Petros Khumalo v Rex (11/2022) [2023] SZSC 40 (3rd October 2023)***

***CORAM*: M. C. B. MAPHALALA, CJ; S.J.K. MATSEBULA *et* J. M. VAN DER WALT JJA**

HEARD: 28 February 2023

DELIVERED: 3 October 2023

Summary

Criminal Appeal – Murder – different forms of dolus distinguished

Criminal Law - intention and premeditation distinguished

Criminal Procedure – Sentence – sentence lies within the discretion of the trial Court and the appellate Court will only interfere if there had been a material misdirection

Criminal Procedure – Sentence - increase of sentence on appeal - basic principles restated

Criminal Procedure – Sentence – appeal against sentence - murder - gender based violence – premeditation - wife murdered by husband with axe blow to neck and then beheaded - appellant buried body parts in shallow grave then exhumed and disposed of head and rest of body separately in mountains – appellant thereafter craftily giving out deceased still alive – appellant displaying no

credible remorse – sentence of twenty three (23) years imposed by Court a quo held to be strikingly disparate – appeal dismissed – sentence quashed and substituted with life imprisonment of forty (40) years

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JUDGMENT

Cur adv Vult
(Postea: 3 October 2023)

VAN DER WALT, JA

[1] The appellant was charged with the murder of his wife.

1.1 The appellant pleaded guilty but a plea of not guilty was entered and evidence was presented in the form of oral testimony and documentary exhibits handed in by consent, including a written confession made by the appellant to a Magistrate and the *post mortem* report. Certain Crown witnesses as well as the appellant

testified after which the appellant was convicted on the charge of murder and sentenced to imprisonment for a term of twenty-three (23) years, without the option of a fine.

1.2 The appellant subsequently noted an appeal against the sentence, formulating the grounds as being that the sentence: "... *is so harsh and induces a sense of shock and trauma.*"

A FACTUAL BACKGROUND

[2] A bone chilling, matter of fact narrative is contained in the appellant's written confession to a magistrate.[1] After dealing with suspicions of alleged extra-marital conduct on the part of the deceased, the appellant stated as follows:

> "... *We then went to attend a Jericho night vigil came back home in the morning and slept. Later on that day I again engaged her on the question of her extra marital affairs, again we quarrelled.*
>
> *She lay on top of the bed. I then got angry and took an axe and chopped her on the neck as she was fast asleep. Our children were also sleeping on a sponge mattress on the floor in the same house. It was during broad day light.*
>
> *I then took a peak [sic] and a shovel and went a few steps from my home fence where I dug a pit. I went back to the house picked her on a sheet and buried her there on the pit and replaced the soil. That time was around 1500 hours.*
>
> *At around 1700 hours I bathed our children dressed them up and we left for Manzini.*

[1] Duly admitted into evidence

I secured a room for them at Lukhele stand where I paid for rent and left them there. I proceeded to Mahlabatsini to fetch my other properties. I would occasionally come home at Ekwendzeni on weekends and go back to work.

This past Sunday when I arrived home just before 10:00 hrs I was carrying two sacks which I had intended to dig up plaster sand and bring it home. Whilst seated at home thinking I decided to dig up the deceased and go to bury her at some other place. Indeed I dug her up at around 12 noon. One Musa Masuku came there after I had dug up the corpse and put it in a sack.

I explained to Musa that I had killed a dog which had strayed into my house and buried there. I said I had however decided to dig it up and go to rebury it somewhere further away. When Musa departed I replaced the soil where I had dug the deceased up. I took the corpse and went to the mountain where I removed her from the sack and placed her underneath a tree and then returned home..."

[3] In his evidence before the Court *a quo* the appellant presented a different version amongst others by testifying that the deceased was awake and that they argued, and that the children were at their aunt's home at the time of the commission of the murder.

3.1 Linked to this about-turn that the deceased had been awake and not asleep, the appellant testified that:

"When she slept, I waked her up to ask about the previous night [sic] event. As we were discussing; she responded although some of her responses were hurting. I reminded her that I am from poor background. I am trying to rebuild my home being assisted by her. I was not happy with her conduct. I then failed to control myself. I then took the weapon and used it."

3.2 Crown Counsel put it to the appellant that the appellant had planned to kill the deceased, which the appellant denied.

B PERTINENT FINDINGS BY THE COURT *A QUO*

B.1 MERITS

[4] The core finding of the Court *a quo* on the merits was based on a finding that there had been provocation and the Court *a quo* further held as follows: [2]

> *"... The accused foresaw the death of the deceased and regardless of the foresight, he went ahead and killed the deceased in in an inhuman and cruel manner. It is this court's view that the accused foresaw the death of the [deceased] in the midst of his* ***anger*** *and it was anger that caused the accused to commit the offence. As mentioned earlier, the anger was disproportionate to the* ***provocation****. It is also this court's view that the accused's intention is in the form of* ***dolus eventualis*** *as opposed to dolus directus."*

[2] Paragraph [30] of the Judgment

B.2 SENTENCE

[5] The determination of an appropriate sentence was premised *inter alia* on a finding of provocation in the sense that the appellant had been provoked by hurtful utterances by the deceased and as a result, had committed a crime of passion.

[6] The Court *a quo* held that the following extenuating circumstances had been present: the appellant's level of education is very low; he is from a rural background and there was provocation occasioned by the deceased's response when the appellant enquired about her infidelity, as a result of which the appellant committed a crime of passion.

[7] With reference to the trite sentencing triad involving the personal circumstances of the accused person, the interests of society and the seriousness of the offence:

7.1 Personal circumstances: first time offender; co-operation with the police and guilty plea; remorse; relatively young; and father of two young children

7.2 Offence: the appellant had been convicted of a serious crime, the murder was heinous and inhuman, and the weapon dangerous.

7.3 Interests of society: crimes of passion are on the increase and a deterrent sentence will help in reducing such crimes.

C NOTICE WITH REFERENCE TO SECTION 5(3) OF THE COURT OF APPEAL ACT, 1954

[8] Certain provisional reservations arose in the collective mind of this Court upon perusal of the record as a result of which. the Court ordered *inter alia* as follows:

> *"2. Counsel are directed to file Supplementary Heads of Argument and Bundles of Authorities in respect of the following issues:*
>
> *2.1 Whether the evidence of record does not disclose dolus directus and/or premeditation.*
>
> *2.2 Whether the evidence of record discloses extenuating circumstances.*

2.3 Whether the sentence imposed by the Court a quo is commensurate with the offence committed."

Counsel complied with the order and additional full argument in respect of these issues was presented and heard.

D APPLICABLE LEGAL PRINCIPLES: BRIEF OVERVIEW

D.1 MURDER

D.1.1 Definition

[9] The respective definitions of the offences of murder and culpable homicide consistently have been defined as follows, for instance in ***Rex v Mancoba Muzi Nhlabatsi:***[3]

> ***"Murder is the unlawful killing of a human being with intent to kill. Where this intent is absent, the offence is Culpable Homicide... A definition of Culpable Homicide is the unlawful negligent causing of the death of a fellow being. See R V Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09, R V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11."***

[3] ***(344/09) [2014] SZHC153 (17July 2014)***

D.1.2 Intention

[10] The issue of intention was expounded as follows in ***Rex v Mangaliso Fana Dlamini"*** [4]

> *"...With regards the question of the intention of the accused to kill the deceased; the position is settled in our law that whether or not there was in a given situation an intention to commit a certain crime is construed in terms of what was said by this court in* ***RV Jabulane Philemone Mngomezulu 1970-76 S.L.R. Page 7B-C*** *as was quoted in my judgement in* ***Rex Vs Thokozani Joseph Samson King Mngomezulu, Criminal Case No. 481/2010 at page 12, Paragraph 21*** *where the following excerpt was captured:*
>
> *"A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such results or not.""*

10.1 The difference between intention and negligence and the different forms of intention are set out in **Black v Joffe** in the following terms:[5]

> ***"[39] Fault can take the form of intention (dolus) or negligence (culpa). The appellant's intention can either be dolus directus (ie the attainment of a particular consequence which the appellant intends to bring about), dolus indirectus (ie a secondary result which was a necessary consequence of the intended conduct), or dolus eventualis (ie where one acts with the intention of attaining a particular object but subjectively realises or appreciates that another consequence may reasonably result and one reconciles oneself with this possibility, and recklessly proceeds with the conduct nevertheless). (See Wentzel v SA Yster en Staalbedryfsvereniging en Andere; Wentzel v Blanke Motorwerkersvereniging en 'n Ander 1967 (3) SA 91 (T) at 98) ..."***

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[4] ***(91/2011) [2018] SZHC 182 (6th August 2018)***, Paragraph [34], own abbreviation
[5] **2007 (3) SA 171 (C)**, Paragraph [39]

10.2 As regards the law on the imputation of *dolus* by inferential reasoning, the following passage from **S v Dlodlo** [6] was cited with approval in ***Rex v Pleasure Mphumelelo Sibanyoni:*** [7]

> ***"The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury.*** *Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn. If they do not exclude every other reasonable inference, then there must be a reasonable doubt whether the inference sought to be drawn is the correct one. (See R. v Blom, 1939 AD 188 at pp. 202 - 203)."*

10.4 The essential requirements of *dolus eventualis* were summarised as follows in ***Thandi Tiki Sihlongonyane v Rex:***[8]

> ***"They are: 1. Subjective foresight of the possibility, however remote, of the accused's unlawful conduct causing death to another;***
> ***2. Persistence in such conduct, despite such foresight;***
> ***3. The conscious taking of the risk of resultant death, not caring whether it ensues or not;***
> ***4. The absence of actual intent to kill."***

D.1.3 Premeditation

[6] **1966 (2) SA 401 (A)**
[7] ***(493/11) [2019] SZHC 71 (3 May 2019)***
[8] ***Criminal Appeal No. 40/1997*** at page 4 of the judgment

[11] There is a distinction between intention and premeditation.

11.1 The following formulation is contained in Paragraph [13] of the judgment in **The State v Celumusa Dube:**[9]

> *"Premeditation and intention are different in that **premeditation involves a thought process** that contemplates a certain outcome and a means to achieve that outcome. **Intention** in all of its forms (dolus directus, dolus indirectus and dolus eventualis) **involves the perpetrator's state of mind before and while the criminal act is being committed."***[10]

11.2 This is expounded on as follow in Paragraph [16]:

> *"[16] In S v Raath 2009 (2) SACR 46 (CPD), the Full Court had to decide on appeal, whether the murder committed by the accused upon his wife constituted premeditated murder. The accused was prone to violent and aggressive behaviour towards the deceased and also abused alcohol. At the night of the incident, the accused had gone out drinking. The evidence showed that the accused decided that he wanted to kill his wife and within a few minutes carried out the murder. The accused was heavily intoxicated when he shot his wife. The court had to decide whether the murder was premeditated or not. The time lapse between the accused deciding that he was going to shoot his wife and the time of the actual murder became a prominent factor in deciding the issue of premeditation. The court said at paragraph 16 as follows:*
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> *'Planning and premeditation have long been recognised as aggravating factors in the case of murder. See S v Khiba* 1993 (2) SACR 1 *(A) at 4 and S v Malgas* 2001 (1) SACR 469 *(SCA) at para 34. As Terblanche, Guide to Sentencing in South Africa, Lexis Nexis, 2nd edition 6.2.2 states, planned criminality is more reprehensible that unplanned, impulsive acts. However, there must be evidence that the murder was indeed premeditated or planned. See e.g. S v Makatu* 2006 (2) SACR 582 *(SCA) at paras 12 – 14. The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The Concise Oxford English Dictionary, 10th edition, revised, gives the meaning of*

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[9] **(CC03/22) [2022] ZAMPMBHC 28; 2023 (1) SACR 513 (MM) (3 May 2022)**

[10] Own emphasis

premeditated as to "think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time". Clearly the concept suggests a deliberate weighing up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".'

11.3 It then follows that the term "*premeditation*" or "*planned*" does not introduce a new kind of intention but it merely focuses on the surrounding circumstances around the act of killing, and the presence thereof would constitute an aggravating factor.

D.1.4 Sentencing

[12] The time-honoured triad of the personal circumstances of the accused person, the interests of society and the seriousness of the offence has been referred to *supra* and there is a plethora of authorities on this subject. The following pronouncements thereon can be singled out:

12.1 In ***the King v Sandile Mbongeni Mtsetfwa:***[11]

"One of the fundamental principles of justice in sentencing is that the court should strive to impose the right sentence for the particular circumstances of the case. On the other hand, it has always been recognized that it is salutary for the court to aim at the measure of uniformity in sentencing, whenever this can reasonably be done."

[11] ***Case No 81/2010*** - unreported High Court decision referred to in a number of local cases

12.2 As per Moore JA in the Botswana case of **R v Motoutou Mosilwa, Criminal Appeal No.124/05,** which has been cited with approval in for instance ***Rex v Nhlonipho Mpendulo Sithole:*** [12]

> *"It is also in the public interest particularly in the case of serious and prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them from serious offenders. By the same taken, a sentence should not be of such severity as to be out of all proportions to the offence, or to be manifestly excessive or to break the offender, or to produce in the mind of the public the feeling that he has been unfairly and harshly treated."*

[13] Murder is an extremely serious offence which upon conviction, can attract life imprisonment or even the death penalty.

13.1 In terms of **section 15(1) to 15(3)** of the **Constitution of the Kingdom of Swaziland Act, 2005** (hereinafter referred to as the "Constitution"): -

> *"Protection of right to life*
>
> *15. (1) A person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted.*
> *(2) The death penalty shall not be mandatory.*
> *(3) A sentence of life imprisonment shall not be less than twenty five years."*

13.2 The Constitutional gravitas goes further, in **section 38** which stipulates that:

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[12] ***(370/11) [2012] SZHC 172 (10 August 2012)***

"38. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms -

(a) *life, equality before the law and security of person;*

(b) *the right to fair hearing;*

(c) *freedom from slavery or servitude;*

(d) *the right to an order in terms of section 35 (1); and*

(e) *freedom from torture, cruel, inhuman or degrading treatment or punishment."*

13.3 As regards the death penalty in neighbouring South Africa, the South African Constitution, 1993 is silent on the issue but that it had been held, in 1995, that the imposition of a sentence of death is in violation of said Constitution.[13] Should one accelerate to the year 2022, almost thirty years later, it appears from the judgment in **African Transformation Movement v Speaker, National Assembly and Others**[14] that there is a call for a referendum on reviving the death penalty in certain instances.

13.4 Executions pursuant to judicial sentences of death are still carried out in Africa for instance in Botswana. Moving further abroad, the death sentence is still being imposed and carried out

[13] See S v Makwanyana and Another 19955 (3) SA 391 (CC)
[14] 2022 (2) SA 468 (WCC)

in for instance in Japan and in some American states (Alabama, Arizona, Mississippi, Missouri, Oklahoma and Texas.)

[14] **Section 15(2)** of the (Eswatini) **Constitution** modified **section 296** of the Criminal Procedure and Evidence Act, 1938 (hereinafter referred to as the "CPE Act") which reads:

> *"Nature of punishments.*
> *296.(1) Sentence of death by hanging shall be passed by the High Court upon an offender convicted before or by it of murder, and sentence of death by hanging may be passed by such court upon an offender convicted before or by it of treason:*
> ... ...
> *Provided also that where a court in convicting any person of murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the death sentence."*[15]

[15] **Section 295** of the **CPE Act** provides as follows:

> *"295. (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:*
> *Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.*
> *(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs."*

[16] As regards extenuating circumstances, the case of ***Bongani Bavukile Dlamini v Rex***[16] contains a comprehensive overview of pertinent authorities and it was held therein *inter alia* that:

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[15] Own abbreviation and emphasis
[16] *(23/2017) [2020] SZHC 03 (21 April 2020)*

"[27] ***It is well-settled that the burden of proving on a balance of probabilities the existence of extenuating circumstances associated with the commission of the offence of murder rests on the accused***[17] *upon his conviction in accordance with section 295 of the Criminal Procedure and Evidence Act.*[18] *Accordingly, a criminal trial involves two phases which are clearly distinguishable from each other. First, it is the juridical guilt of the accused which is concerned with the question of whether the criminal offence of murder has been committed. The onus in respect of this phase rests upon the Crown to prove the commission of the offence beyond reasonable doubt. Secondly, the circumstances which affect the moral guilt of the accused which is concerned with the question of whether extenuating circumstances exist in the commission of the criminal offence. The onus in respect of this phase lies with the accused to prove on a balance of probabilities that there were extenuating circumstances associated with the commission of the criminal offence of murder.*

[28]It is trite law that the determination of the existence of extenuating circumstances ***involves a three-fold enquiry.***[19] *Firstly, whether there existed at the time of commission of the offence circumstances which could have influenced the accused's state of mind; Secondly, whether such circumstances, in their cumulative effect influenced the accused's state of mind to commit the criminal offence; Thirdly, whether this influence was capable of reducing the moral blameworthiness of the accused in committing the offence."*

[17] Each case of course has to be determined on its own facts and merits and there is nothing as simple as a blanket sentence applicable to murder convictions. Examples of sentencing in cases bearing similarities to the case now under consideration, as provided by Counsel for the appellant and described as follows in the appellant's heads of argument, would include:

"(a) ***Elvis Mandlenkhosi case***[20] *– the appellant locked doors, bludgeoned his girlfriend with an iron road and strangled her after deceased had admitted to having sexual encounters with her male employer. The court found as an extenuating*

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[17] [Per Corbett JA in **S v McBride**]
[18] [Act No. 67 of 1938 as amended]
[19] **[S v McBride]**
[20] ***(30/2011) [2013] SZSC 06 (31 May 2013)***

circumstance the appellant's belief that the deceased was cheating on him. A sentence of 15 years was meted out.

(b) ***Mandla Mlondolozi Mendlula v R*** [21] *– the accused used a spear to kill the deceased. He got a tip off that his lover was in a love relationship with Nkete. He saw them approaching and then hid in a bush, then called her and she did not answer her phone. He had apparently seen them together about 4 times he then ambushed and speared the deceased. He was found guilty of murder without extenuating circumstances and sentenced to 20 years.*

(c) ***Xolani Zinhle Nyandzeni v Rex*** [22] *– the appellant committed a gruesome murder of his brother in the course of which he literally cut off his head completely with a knife while he was still conscious. He first ordered him to face the wall. Then [sic]tied him with a rope on his hands and legs and then he repeatedly assaulted with a hammer on the head and he fell on the ground. In reducing the sentence to 25 years, the court held that "the courts aim at a measure of uniformity in sentencing whenever this can reasonably and justly be done, bearing in mind of course that no two cases can ever be exactly the same."*

(d) ***Ntokozo Adams v R***[23] *– the appellant had been sentenced to 30 years by the High Court for murder without extenuating circumstances. In which he stabbed his then girlfriend who was 9 ½ months pregnant multiple times in which the court described as gruesome and horrendous in the extreme. On appeal his sentence was reduced to 20 years imprisonment."*

[18] As regards "***gender-based violence,***" there does not appear to be any local reported cases using the phrase in the context of murder. South African case authorities offering helpful guidance include the following:

18.1 The **African Transformation Movement v Speaker, National Assembly and Others** case *supra:*

[21] *(12/2013) [2013] SZSC 60 (29 November 2013)*
[22] *(29/2010) [2012] SZSC 3 (31 May 2012)*
[23] *(16/10) [2010] SZSC 10 (30 November 2010)*

18.1.1 The subject matter concerned a motion of no confidence in the President of the Republic, the seventh ground of which was formulated as follows:

> ***"7. The President has failed to adequately respond to the increase in incidences of gender-based violence and to attend to the national outcry for a victim centric justice system where retribution through the death penalty is tested in a referendum.'***

18.1.2 This call for a referendum on the death penalty resonates with the current worldwide emphasis on and concern about gender-based violence, as reflected for instance in Eswatini's own **Sexual Offences and Domestic Violence Act** of 2018.

18.2 The following excerpt from the South African Constitutional Case of **S v Tshabalala and Another** [24] would apply *mutatis mutandis* to our Kingdom:

> *"[61] I interpose to say that, in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape, and passed the Criminal Law Amendment Act 35 which prescribes minimum sentences for certain specified serious offences. The government's intention was that such lengthy minimum sentences would serve as a deterrent, as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis.* ***Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy,***

[24] **2020 (5) SA 1 (CC)**; Footnotes omitted

underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation." [25]

18.3 In **S v Rhode**[26] it was held as follows:

"*[20]* ***It is thus important and the duty of the Courts to contribute in our role as the justice system to impose appropriate sentences, particularly where women are murdered in the context of their marriages, their relationships and homes. Whilst it is so that you, as the accused, cannot be sacrificed at the altar of deterrence for other would-be offenders, nor can it impose punishment in anger, the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly.*** *If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined. Serious crimes of this nature therefore compel that the objectives of retribution and deterrence weigh more than the objectives of rehabilitation of the offender and accordingly the interests of the accused would recede to the background.*

[21] In the matter of ***S v Van Staden (KS21/2016) [2017] ZANCHC 21*** *the Court states at paragraph 14 thereof, the sentiments expressed therein equally to the facts of this matter:*

"[14] ***Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased's partner, who had the duty and the responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes."***

[22] In conclusion of this factor of the triad, it is pertinent to note that it is 20 years or more since the Supreme Court of Appeal so articulately stated in ***S v Chapman 1997 (3) SA 341 SCA at 345 A-B that****: "Women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes their quality and enjoyment of their lives.""*

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[25] Own emphasis

[26] **(CC43/2017) [2019] ZAWSHC 18 (27 February 2019)**, own emphasis

D.2 INTERFERENCE WITH SENTENCE ON APPEAL: DISCRETION AND MISDIRECTION

[19] The pertinent statutory provisions are:

19.1 **Court of Appeal Act, 1954**:[27]

19.1.1 **Section 5(3)** which provides that:

> "(3) *On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and* ***pass such other sentence warranted in law (whether more or less severe)*** *in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal;"*

and

19.1.2 **Section 6** which reads:

> *6.(1) The Attorney-General or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal, against any judgment of the High Court or made in its criminal original or appellate jurisdiction, with leave of the Court of Appeal or upon a certificate of the Judge who gave the judgment appealed against, on* ***any ground of appeal which involves a question of law but not a question of fact, nor against severity of sentence.***
>
> *(2) For the purposes of this Section,* ***the question as to whether there was any evidence upon which the court could have come to the conclusion to which it did come shall be deemed to be a question of fact and not one of law. "***

19.2 In terms of **section 327(c)** of the **CPE Act** this Court on appeal may:

> "*...(c) give such judgment as ought to have been given at the trial;* ***or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed by the court below)*** *as ought to have been imposed at the trial."*

[27] Own emphasis

[20] The circumstances under which a Court of Appeal may interfere with sentence, are captured as follows in ***Sabelo Kunene v Rex***:

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"[12] By reference to the matter of ***Elvis Mandlenkosi Dlamini v Rex Appeal Case No. 30/11*** *wherein the Court held* ***"It is trite Law that the imposition of sentence lies within the discretion of the trial Court and that an appellate Court will only interfere with such sentence if there has been a material misdirection resulting in the miscarriage of justice. It is the duty of the Appellant to satisfy the appellate Court that the sentence is grossly harsh or excessive or that it induces a sense of shock as to warrant interfering in the interest of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which has been in fact passed by the trial Court and the sentence which the Court of Appeal would itself pass; this means the same as inducing a sense of shock. This principle has been applied consistently by this Court over many years and it serves as the yard stick for the determination of appeals before this Court."***

[13] She further referred the Court to the matter of ***Bhekizwe Motsa v Rex Criminal Appeal Case No. 37/2010*** *in which the Court held that* ***"Whether there was an improper exercise of discretion by the trial Judge. In case for example where the Court is passing sentence has exceeded its jurisdiction for a crime, or been influenced by facts which were not appropriate for consideration in relation to the sentence, a Court of Appeal would have power to interfere. But whereas here no such consideration enters into the matter it is not for the Court of Appeal to interfere with a sentence.""***

[21] Further on the topic of discretion, it was concisely stated in ***Bhekizwe Motsa v Rex***[29] that:

"The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principle and sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of

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[28] ***(05/2016) [2017] SZSC 42 (11 October 2017)***

[29] ***37/2010 [2012] SZSC 6 (31 May 2012)***, Paragraph [14]

the nature and circumstances of the crime, the interest of society and the personal circumstances of the accused, other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment."

[22] As to what a *"misdirection"* in the context of sentencing entails, the following South African Court of Appeal cases lay down appropriate *criteria*: [30]

22.1 **S v Pillay**:[31]

"As to the proper approach for this Court to adopt to an argument of that kind VAN WINSEN, A.J.A., in ***S. v Fazzie and Others, 1964 (4) SA 673 (AD)*** *at p. 684A - B, said:*
"Does this failure (of the Court a quo to have regard to two factors) constitute a misdirection? It is trite law that the determination of a sentence in a criminal matter 'is pre-eminently a matter for the discretion of the trial Court'. In the exercise of this function the trial Judge has a wide discretion in deciding which factors - I here refer to matters of fact and not of law - he should in his opinion allow to influence him in determining the measure of the punishment. See R. v S., 1958 (3) SA 102 (AD) at p. 106."
I pause here to say that, merely because a relevant factor has not been mentioned in the judgment on sentence, it does not necessarily mean that it has been overlooked, for "no judgment can ever be perfect and all-embracing" (R. v Dhlumayo and Others, 1948 (2) SA 677 (AD) at pp. 702,706). Moreover, the value to attach to each factor taken into account is also for the trial Court to assess. Hence, the learned Judge in Fazzie's case said at p. 684B:
"This Court will not readily differ from the Court a quo in its assessment either of the factors to be had regard to or as to the value to be attached to them."
(See also S. v Berliner, 1967 (2) SA 193 (AD) at p. 200D.)
VAN WINSEN, A.J.A., then added this dictum at p. 684B - C:
"Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh."
At first blush this seems to conflict with the preceding dicta quoted above. It has thus given rise to some misgivings about its meaning and correctness - see S. v Nel, 1974 (1) SA 29 (AD) at p. 32B - H, and S. v Hockley, 1974 (1) SA 183 (RAD) at pp. 184 - 5. ***Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the***

[30] Own emphasis
[31] **1977 (4) SA 531 (A)** at 534 and 535, own emphasis

facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be 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. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh" (cf. Nel's and Hockley's cases, supra)..."

22.2 **General Council of The Bar of South Africa v Geach and Others**[32] with reference to **S v Pillay:**

*"[60] **There are two enquiries to be made when exercising a discretion. The first is to establish the material facts. The second is to evaluate those facts towards the correct objective.** The various grounds for interference referred to in the cases merely identify the failures that might occur in that process. Where the conclusion arrived at has been actuated by bias, or is capricious, there has been no evaluation at all. Where the evaluation proceeds from incorrect facts, or from an incorrect appreciation of the law, or where a wrong principle is applied, the evaluation has gone in the wrong direction. As this court said S v Pillay, which related to criminal sentencing in which the same principles apply, 'misdirection in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence;'"* and

22.3 **S v Salzwedel and Others**:[33]

*'An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is **"disturbingly inappropriate", or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.'***

[32] **2013 (2) SA 52 (SCA)**, Paragraph [60]
[33] **2000 (1) SA 786 (SCA) (1999 (2) SACR 586)** at 790D - E

E SUBMISSIONS BY COUNSEL

[23] The dilemma with sentencing is that it involves the exercise of a judicial discretion and that it is not capable of mathematical or other uniform form of calculation or assessment. Counsel appeared to be *ad idem* on the purport of the relevant authorities dealing with the general basics of sentencing.

23.1 Based thereon Counsel for the appellant, in a nutshell, submitted that the sentence was too harsh with reference *inter alia* to sentencing in similar cases and should be reduced, not increased. Further, that there had been no premeditation and that there were extenuating circumstances operating in favour of the appellant, justifying a reduction. [34]

23.2 Counsel for the respondent submitted to the contrary and in particular, to the effect that the murder had been planned, that

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[34] With reference to **S v Rabbie 1975 (4) SA 855 (A)**; ***Bhekumusa Mapholoba Mamba v Rex, Case No 17/2010; R v Maziya (87/2005) [2007] SZHC 176.*** **(18 July 2007)**; **S v Qamata & Another 1997 (1) SA 479**; ***The King v Sandile Mbongeni Mtsetfwa No. 81/2010; Elvis Mandlenkhosi Dlamini v Rex (30/11) [2013] SZSC 06 (31 May 2013); Thandi Tiki Sihlongonyane v Rex No 40/1997; Anna Lokundzinga Mathenjwa v R 1970-76 SLR 25;*** **The State v Celumusa Dube CC03/222** (citations as stated by Counsel)

there are no extenuating circumstances, that it is an extra-ordinary and chilling case and deserves the maximum sentence this Court can impose.[35]

23.3 It is necessary at this juncture to remind Counsel to quote passages from case authorities correctly and to cite case references properly, else the Court has to correct these defects, which is a time-consuming exercise and which operates unfairly on the Court.

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35 With reference to ***Elvis Mandlenkhosi Dlamini v Rex, Criminal Case No.30/2011; Mandla Mlondolozi Mendlula v Rex, Criminal Appeal Case No. 12/2013;*** **S v Zinn 1969 (2) SA 537 at 540;** ***Daniel Coenraad De Beer v The State, Criminal Appeal Case No. 1210/2016 (1210/2016) ZASCA 18;*** **S v Boggards 2013 (1) SACRI (CC).;** ***Bongani Bavukile Dlamini v Rex, Criminal Appeal Case, No.23/2017; Xolani Zinhle Nyanzeni v Rex (29/2010) [2012] SZSC 3 (32 May 2012; Ntokozo Adams v Rex [2010] SASZ 10, 30 November 2010;*** *R v Motoutou Mosilwa Criminal Case No 124/05; Rex v Mangalis Fana Dlamini (91/2011) [2018] SZHC 182 (6TH August 2018;* **Rex v Jolly and Others 1923 AD 176;** ***Rex v Thokozani Joseph Samson King Mngomezulu Criminal Case No. 481 / 2010;Rex v Phiwokwakhe Masilela, High Court Case Number 175/2014; Daniel Dlamini v Rex, Criminal Appeal Case NO. 11/1998; R v Bongani Mkhwanazi & 3 Others, Criminal Appeal Case No 125/1998; Bhekumusa Mapholoba Mamba v Rex, Criminal Appeal Case No. 17/2010; Bongani Bavukile Dlamini v Rex, Criminal Appeal Case No, 2/2017; Rex v Nhlonipho Mpendulo Sithole, Criminal Case No, 370/2011(*** (Citations as stated by Counsel)

F ANALYSIS

F.1 THE EVIDENCE

[24] The provisional reservations which resulted in the Court's call for further submissions included the following:

[25] Firstly, commencing with objective facts that were common cause, these included that:

25.1 The appellant had long suspected the deceased of having affairs, including prior to their marriage as from 2012, but in 2016 elected to marry the deceased nevertheless and had complained about the perceived situation to several persons on several occasions;

25.2 At the time relevant to this matter the appellant and deceased were living in Mahlabatsini Location, Manzini. The appellant told the deceased that he would stop working and stay home

because: ***"I just wanted to know what she would say."***[36] The deceased agreed to such an arrangement and the appellant then induced the deceased to assist in conveying his goods to his homestead in Hlathikhulu and staying there overnight. The deceased fell for this ruse. After the murder, the appellant continued working;

25.3 The deceased was killed on or about the 2nd July 2017. The cause of death was a cut injury to the neck and *post mortem* decapitation was noted, as per the *post mortem* report;

25.4 The appellant in craftily calculated manner created and maintained a fiction that the deceased was still alive by using the deceased's telephone falsely to represent that she was still alive and by telling persons that the deceased was with another man. The appellant also had the deceased's ID card in his possession;

25.5 On the 10th September 2017 the appellant exhumed the remains of the deceased and took same to the mountains. During an

[36] Stated in the confession

exchange with a neighbour regarding the exhumation, the applicant stated that the remains were the remains of a dog;

25.6 The headless body of the deceased was discovered by a passer-by on the 11th September 2017, more than two (2) months after the murder;

25.7 The appellant was arrested and, on the 14th September 2017, made several pointings-out to the police, including pointing out the bloodied sacks used to convey the remains of the deceased, and the head of the deceased which he had hidden under a rock, away from the rest of the body of the deceased;

25.8 The appellant further pointed out a slasher, a long-handled axe, a pick axe ("*peak*") in the thatched home wherein the deceased had been killed. According to the photographs taken by the police at that time, the axe was resting on the top of the wall and the slasher was stuck in the interior thatched roof, next to a hammer and other implements with handles;

25.9 There are no other dwellings in the immediate vicinity of the homestead, which comprises two huts and an open structure in between, according to the police photograph album. [37]

[26] Secondly, it appears to us that the appellant sought to diminish his conduct by contradicting his confession in his evidence:

26.1 According to the confession the deceased had been asleep and the children had been present. The new version in court was that the children were with their aunt and that the deceased, awake, had made hurtful utterances during the course of an argument, triggering the murder. (The contents of these utterances never were specified.)

26.2 At no time did the appellant suggest that the confession was false or inaccurate, as is evident from the following extract from his evidence:

" CC: have you made a confession regarding this matter before a Judicial Officer

ACC: yes

[37] Photograph 33 of the album

CC: do you still remember what you recorded

ACC: yes although it is a long time"

26.3 It would be highly improbable that the deceased was awake and would quietly sit back and allow the appellant to come at her and hack at her with an axe, even less one with a long handle that would be easier to ward off in that the cutting part of the axe would be further away from her body.

26.4 If the children had not been present, there seemingly would be no logic in presenting the following details in the confession:

"At around 1700 hours I bathed our children dressed them up and we left for Manzini. I secured a room for them at Lukhele stand where I paid for rent and left them there."

26.5 Neither reason nor equity would demand that an accused person should be able to put himself in a better position by giving evidence which contradicts his freely and voluntary made confession, without any challenge having been levelled by him as against either the admissibility of the confession and/or as against the accuracy of the contents thereof. The appellant's

evidence in Court therefore cannot be considered to be truthful.

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26.6 The version contained in the confession therefore, *prima facie,* is to be preferred.

[27] Thirdly, there were aspects highly indicative of premeditation:

27.1 The appellant's contrived statement to the deceased to the effect that he was going to stop working and stay home, on the face of it served as a pretext to lure her to an isolated rural homestead;

27.2 The fact that the appellant subsequently continued to work and live elsewhere, further would underscore the untruth employed by the appellant to ensure that he had the deceased alone and at his mercy at the rural homestead;

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38 Compare **S v Harris 1965 (2) SA 340 (A)** aa 347 and further **S v Lombard 1967 (4) SA 538 (A)** at 542 and further

27.3 The deceased was asleep, according to the confession. According to the appellant's evidence, they had argued and her words had angered him. It remains a mystery what the deceased allegedly had said to anger the appellant, thereby rendering an assessment of provocative value, if any, impossible. There also was no direct or admissible evidence of actual affairs indulged in by the deceased;

27.4 If the evidence of the appellant is to be believed, he had to contend with alleged extra-marital conduct for many years and as such the appellant would have been well acclimatised to the deceased's alleged dismissal of his complaints, i.e., this was not a sudden and overwhelming isolated incident of such a quarrel causing him to lose control;

27.5 The deliberate selection of two particular weapons which required to be collected from their resting places on top of the wall and the interior of the roof, on the face of it is inconsistent with person acting blindly;

27.6 There was a single and fatal apparently well-aimed blow with a long-handled axe to the side of the deceased's neck, as opposed to a blind hacking or an angry blow directed to the head or rest of the body;

27.7 There was no apparent reason to remove the head of the deceased and the appellant provided none. It clearly was not a question of single blow and then leaving it at that; this act served to dehumanise the deceased and to obliterate her dignity.

27.8 Seemingly there also was no reason ultimately to hide her severed head under a rock, separately from the rest of her body, other than in addition to concealing her death, to conceal her identity;

27.9 Further in line with concealment the appellant cunningly and convincingly maintained a fiction that the deceased was still alive;

27.10 All the above would be consistent not with loss of control, but with exertion of control over the deceased.;

27.11 *Dolus eventualis* requires absence of intention to kill. In view of all the surrounding circumstances, it is our opinion that the appellant did-in fact commit the deed with the direct intention to kill, i.e., *dolus directus*, and not *dolus eventualis*. The finding of *dolus eventualis* by the Court *a quo* therefore is legally incorrect and cannot stand.

[28] As for remorse:

28.1 The discovery of the deceased's remains in no way was thanks to the appellant;

28.2 The appellant was content to let the body of his wife and mother of his children, brutally done to death with an axe and afterwards desecrated by decapitation, lie out and rot in the open;

28.3 There was no indication of remorse in the confession;

28.4 It was only belatedly and in evidence that the appellant in a rather bland fashion professed to have remorse, stating that:

"I am regretting and if it were possible to raise her back; I would be comforted."

F.2 POWERS OF COURT ON APPEAL

[29] An appeal does not lie against the findings or reasons for a judgment but only against the substantive order made by a court. [39]

29.1 *In casu* there was no appeal against the conviction. The question then arises whether it would be appropriate for this Court to revisit the factual findings of the Court *a quo*.

29.2 **Section 6** of the Court of Appeal Act *supra* permits an appeal by the prosecution on a question of law only. This provision excludes any appeal involving a question of fact (which for the

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[39] See for instance ***Swaziland Royal Insurance Corporation v George Edward Green (19/2012) [2012] SZSC 66 (30 November 2012)*** at p.7 thereof, with reference to ***Gugu Prudence Hlatshwayo v The Attorney-General (2006) SZSC 8 (Case No 2/2006)*** and **Administrator, Cape and Another v Ntshwagela and Others 1990 (1) S.A. (A);**

purposes of the section includes the question as to whether there was any evidence upon which the Court *quo* could have come to the conclusion to which it did.) **Section 5(3)** which deals with the powers of this Court permits for a different sentence ***"warranted in law."***

29.3 It would then follow that this Court is bound by the factual findings of the Court *a quo*.

[30] Authorities such as **S v Pillay** *supra* permit of reassessment of sentence in the context of:

> "... ***an error committed by the Court in determining or applying the facts for assessing the appropriate sentence... 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.*** *Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."*

[31] This Court, had it sat as the trial Court, in all probability would have reached different conclusions with reference to the above aspects and in particular as regards indicated premeditation, *dolus directus* and absence of extenuating circumstances.

[32] This however is not the test which, on my understanding, revolves not so much around findings as around factors that ought to have been considered or ought to have been assessed differently and hence whether the sentence imposed was "***disturbingly inappropriate", or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate.***"[40]

G CONCLUSIONS AND ORDER

[33] It is my considered view that:

33.1 The finding of the Court *a quo* that it had been a "***crime of passion***" is a factual conclusion which cannot be revisited on appeal. However, on closer analysis the potency of this finding is greatly diluted by *inter alia* the following:

33.1.1 The appellant on his own version believed the deceased to be a serial adulteress and to have been unfaithful to him even prior to their marriage.

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40 See **S v Salzwedel and Others** *supra*

33.1.1.1 According to the appellant his pleas to the deceased fell on deaf ears. Yet the appellant elected not only to marry the deceased, but to remain in a relationship with the deceased and not to divorce her or to separate from her.

33.1.1.2 A continued pattern of infidelity on the part of the deceased therefore should have occasioned no new surprise or heartbreak, or triggered a blind rage.

33.1.1.3 It again needs to be emphasised that there was no evidence of adultery, or of any reasonable grounds to suspect adultery.

33.1.2 There was **premeditation** in that the appellant lured the deceased to the rural homestead under a false pretext and was intent on forcing the issue of his discontent with her alleged infidelity, which involved a particular thought process. This further demonstrates that the murder was well planned;

33.1.3 The evidence manifests not only premeditation, but also *dolus directus.*

33.1.4 There was no hesitation and the degree of violence which the appellant meted out at his wife was egregious, excessive and exhibits horrifying aggression;

33.2 Secondly, insufficient weight had been attached to the **subsequent conduct** of the appellant, who exerted his control over his victim *ante- mortem, peri-mortem* and *post mortem:*

33.2.1 Removing the deceased's head after the fatal blow was deliberate, unnecessary and particularly gruesome. Callously disposing of her remains as if she were a dead dog and attempting to conceal not only her death but her identity, renders one at a loss for words; this was a continuous and relentless desecration of a dead person by her callous murderer.

33.2.2 Not content with desecrating her corpse, the appellant convincingly maintained the fiction that she was still alive and

took the opportunity to malign her by alleging that she was with another man, fully knowing that this imputation of her character was false;

33.3 The purported **remorse** on the part of the appellant is gainsaid by *inter alia* by following:

33.3.1 The purported expression of remorse appears to have been an afterthought produced only at the stage of trial.

33.3.2 As highlighted above, the discovery of the deceased's remains in no way was thanks to the appellant and the appellant was content to let the body of his wife and mother of his children lie out and rot in the open, where other animals could freely further feed on, mutilate and further scatter her remains.

33.3.3 Had it not be for the chance discovery by an accidental passer-by, the gory fate and cruel end of life of the deceased would not have been known but instead, the community may have

continued to believe the appellant that the deceased had abandoned her children and was with another man.

33.3.4 The appellant had ensured that the deceased could not speak up in her own defence against the allegations of unfaithful conduct, by silencing her forever.

33.4 Further as regards the findings in relation to **extenuating circumstances**, it is our view that there were no extenuating circumstances. The cunning pattern of behaviour before and after the fact belies any suggestion of a low intelligence and a rural background is not an excuse for savagery.

33.5 This type of murder is the **epitome of domestic violence and of violence of men against women**, which has become endemic in our society.

33.5.1 The excerpts from the South African Constitutional Case of **S v Tshabalala and Another** and the Western Cape **Rhode** case resonate with the state of affairs in our Kingdom. Despite lengthy

sentences and the promulgation of the **Sexual Offences and Domestic Violence Act**, gender-based violence remains a scourge in our nation as well. Also, in terms of the **African Transformation Movement v Speaker, National Assembly and Others** case there is a call in South Africa for a referendum on reviving the death penalty in respect of violence against women and children.

33.5.2 The death penalty still exists in Eswatini and nature and gravity of this type of offence arguably may well justify revival of the imposition thereof.

33.5.3 This is all more so the case since it is evident that sentences previously imposed in matters with similar features, have had little deterrent effect, which begs the question whether precedent-based uniformity in sentencing has the desired effect.

33.5.4 The precedents relied upon by the appellant[41] are not more recent than 2011 and do not appear to have considered the gender-

[41] Paragraph [17] *supra*

based violence angle, which now is acknowledged in law expressly for instance with reference to the said **Sexual Offences and Domestic Violence Act,** that was promulgated in 2018.

33.5.5 It also is widely acknowledged that most gender-based violence is inflicted on women and girls, by men, because it is rooted in power inequalities between women and men.

33.5.6 In these circumstances one is not dealing with a sentence as to satisfy the public that the Court has taken adequate measures within the law to protect them from serious offenders. One is dealing with gender-based and domestic violence, which often is meted out behind closed doors or otherwise away from the public eye. This personal menace is no less demanding of justice than a public menace and because of the underlying motif of gratuitous, oppressive and/or retributive violence with an attendant culture of victims being too frightened of their abusers to approach the authorities and as such, is deserving of very severe sentences.

33.5.7 Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes, hence the duty of the Courts to contribute in their role as the justice system to impose appropriate sentences, particularly where women are murdered in the context of their marriages, their relationships and homes. Whilst it is so that a particular offender cannot be sacrificed at the altar of deterrence for other would-be offenders, the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly.

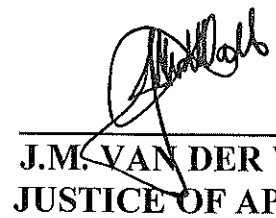
[34] Taking into account all of the considerations set out herein, it is our conclusion that the Court *a quo* had misdirected itself in respect of which factors to take into account and/or in respect of what weight to attach to same. Further, that the sentence imposed is not commensurate with the serious nature of the offence, the dimension of gender-based violence and the conduct of the appellant before, during and after the evil act.

[35] The facts and circumstances of the instant matter in our view is such that the invocation by the Court of its powers under **section 5(3)** of the **Court of Appeal Act** and **section 327(c)** of the **CPE Act,** is called for. By virtue thereof, we hold that an increase of the sentence on appeal is justified and that an appropriate sentence is one of life imprisonment of forty (40) years.

[41] Accordingly, the following order is made:

1. The appeal by the appellant against his sentence of twenty-three (23) years' imprisonment is dismissed.

2. The sentence imposed by the Court *a quo* is quashed and substituted with a sentence of life imprisonment of forty (40) years.



J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

M.C.B MAPHALALA.
CHIEF JUSTICE

I agree

S.J.K MATSEBULA
JUSTICE OF APPEAL

For the Appellant: Ms N Hlope of Mongi Nsibande & Partners Attorneys

For the Respondent: Mr B Ngwenya of the Chambers of The Director of Public Prosecutions