Copy

IN THE SUPREME COURT OF APPEAL BLOEMFONTEIN,

REPUBLIC OF SOUTH AFRICA

1264/17

REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN
2017 -03- 22
T.D.MOCHANE
REGISTRAR'S CLERK

KZN CASE NO: AR 181/16

In the matter between:

GRIFFIER VAN DIE HOË HOF
KWAZULU NATAL HIGH COURT
PIETERMARITZBURG
2017 -03- 10
REPUBLIEK VAN SUID AFRIKA
PRIVATE BAG X9014, PIETERMARITZBURG, 3201
REGISTRAR OF THE HIGH COURT

XOLANI BHENGU **APPLICANT**

And

THE STATE **RESPONDENT**

NOTICE OF MOTION

TO: THE REGISTRAR
SUPREME COURT OF APPEAL
P.O. BOX 258
BLOEMFONTEIN
9300

DIRECTOR OF PUBLIC PROSECUTIONS
PRIVATE BAG/PRIVAATSAK X9008
2017 -03- 10
PIETERMARITZBURG 3200
DIREKTEUR VAN OPENBARE VERVOLGINGS

TO: THE REGISTRAR
KWAZULU NATAL HIGH COURT
31 CHURCH STREET
PIETERMARITZBURG
3200

TO: THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
THIRD FLOOR HIGH COURT BUILDING
31 CHURCH STREET
PIETERMARITZBURG
3200

SIRS,

KINDLY TAKE NOTICE that the abovementioned Applicant hereby applies to his Lordship, the Honourable Judge President of the Supreme Court of Appeal to grant an order in the following terms:

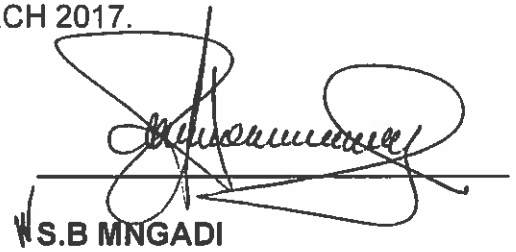
1. The condonation of the late filing of this application
2. Granting special leave to appeal against both conviction and sentence.
3. Further and /or alternate relief.

FURTHER, TAKE NOTICE that the applicant has appointed Bloemfontein Justice Centre, 2nd Floor, 113 St Andrews Street, Bloemfontein at which he will accept notice and service of all process in these proceedings.

PLEASE take notice that the following attachments will be used in support hereof:-

a. Affidavit of **XOLANI BHENGU**
b. Judgement on conviction and sentence
c. Appeal judgment
d. Order dismissing appeal

DATED AT DURBAN THIS 09 DAY OF MARCH 2017.



S.B MNGADI
APPLICANT'S COUNSEL

DURBAN JUSTICE CENTRE
C/O BLOEMFONTEIN JUSTICE CENTRE
SOUTHERN LIFE PLAZA BUILDING
FIRST FLOOR SOUTH WING
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IN THE SUPREME COURT OF APPEAL, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

CASE NO: AR181/16

In the matter between:

XOLANI BHENGU **APPLICANT**

AND

THE STATE **RESPONDENT**

AFFIDAVIT

I, the undersigned

XOLANI BHENGU

Do hereby make oath and state that:

1

Except where otherwise indicated the contents hereof are within my personal knowledge and they are true and correct to the best of my knowledge and belief. Statements in the form of legal submissions are made with advice of my current counsel. I believe them to be true and correct.

X L Bhengu

2

I am the applicant. I am an adult person aged twenty nine (29) years. I am currently incarcerated in Westville Correctional Centre in Durban.

3

The respondent is the State, duly represented herein in accordance with the law by the Deputy Director of Public Prosecution, c/o Third Floor, High Court Building, 301 Church Street, Pietermaritzburg.

4

I was charged before the regional Court with one (1) count of murder as envisaged in Section 51 of Act 105 of 1997, Part II of Schedule 2 of the said Act. I pleaded not guilty to the charge. The regional magistrate having heard the evidence, convicted me as charged. On 21st October 2015 the regional magistrate sentenced me to fifteen (15) years imprisonment.

5

On 27th November 2015 the regional magistrate granted me leave to appeal to the KwaZulu-Natal High Court against both conviction and sentence. On 13th December 2016 the KwaZulu-Natal High Court dismissed my appeal against both conviction and sentence.

X. L

6

I now apply to the President of the Supreme Court of Appeal for special leave to appeal against both conviction and sentence to the Supreme Court of Appeal.

7

CONDONATION

I am indigent and I could not afford fees to engage services of a private legal representative. In the trial and on an appeal before the High Court I was represented by legal representative appointed for me by the Legal Aid South Africa.

8

I was working as a bar assistant before I was arrested. I have no knowledge of the law and the legal process. I place my fate in the hands of those assisting me.

9

I am advised that the appeal before the High Court was heard on 20th October 2016. On 13th December 2016 the appeal judgment was delivered. I was advised in January 2017 that my appeal was dismissed. My request for Legal Aid assistance with a further appeal was granted 20th February 2017.

X.L

10

I pray for condonation for being late in lodging the petition. It was not due to any fault on my part or on the part of my current counsel. I have, as set forth herewith, reasonable prospects of success on appeal against both conviction and sentence.

11

SPECIAL CIRCUMSTANCES

I was employed and earning an income to support my three (3) minor children. My arrest and subsequent conviction deprived my children of their financial support.

12

I was sentenced to fifteen (15) years imprisonment which is a long term of imprisonment. I can only be denied a right of a further appeal if it is found that there are no reasonable prospects of success on appeal, failing that, I will suffer irreparable harm.

13

CONVICTION

The three eye witnesses testified that we were fighting with the deceased. We were fighting with bare hands and we were arguing with each other. Their evidence did not show that during the fight I severely assaulted the deceased. The fact that they and other patrons did not intervene and they had no reason to intervene or to summon the police establishes that there was no serious assault on the deceased.

14

I told the first person who came to the scene as well as the police that the deceased fell in the staircase and sustained injuries from which she succumbed. The injuries sustained by the deceased particularly the fatal chest injuries, on the evidence of the eye witnesses, they were not inflicted during the fight seen by the eye witnesses. There was no evidence that I punched the deceased in the chest with such force that I could fracture her ribs. It is strange that the High Court could find that I brutally punched deceased with intention to kill her.

15

It was for the State to establish beyond reasonable doubt that the fatal injuries were not sustained by the deceased when she felt in the staircase. The State had an early worrying of my defence and it had an early opportunity to investigate it in particular the position of the steps of the staircase and the size of the staircase. I also told the police that the deceased had prepared and eaten a meal which indicated to me that she was not severely injured.

16

The medical evidence indicated that there was in the stomach of the deceased the contents of the meal she had consumed. There was no medical evidence establishing how soon after sustaining the fatal injuries would have the deceased died.

17

The sum total of the medical evidence was that the fatal injuries were probably not caused by the fall in the staircase. By nature this evidence is speculative and it needs to be approached with caution, particularly, where it is not supported by any evidence. It was the only evidence. It is not enough for the State to establish its case on the preponderance of probabilities but it had to prove my guilty beyond reasonable doubt.

X. L

18

There was no evidence to counter my version that deceased injured herself when she fell on the staircase of how the deceased sustained the fatal injuries. Even if it was found that I inflicted the fatal injuries on the deceased, there was no evidence of how and with what I inflicted the fatal injuries on the deceased. The fatal injuries were not of such a nature that a person who inflicted them intended to kill deceased, except that a reasonable person could have foreseen that inflicting such injuries could result in death. At worst I could have been convicted of culpable homicide.

19

SENTENCE

The High Court as well as the Trial Court attached no weight to my personal circumstances in particular that I was a first offender. It attached no weight that I was gainfully employed and the sole breadwinner of my family.

20

The High Court as well as the Trial Court did not attach any weight to the fact that I had no intention to kill the deceased. My blameworthiness was in the form of negligence or *dolus eventualis*.

21

I did not use any weapons in the fight with deceased. I used my bare hands. The evidence in chief of the eye witness unsummarised did not show sustained brutal assault on the complainant. I was sentenced on the basis of not what was the evidence.

22

The evidence was that we were arguing and fighting with the deceased she did not appear to be in any way injured when she left the bar, and she was walking without any assistance and she was not bleeding.

23

It was the evidence of the State witnesses that as lovers with the deceased we had quarrelled and we had consumed large quantities of liquor.

24

The above factors cumulatively established that it was a misdirection to not find substantial and compelling circumstances for a court to impose a sentence other than the prescribed minimum sentence of fifteen (15) years imprisonment.

DEPONENT

X.L

I certify that the deponent has acknowledge that he knows and understands the contents of this affidavit that was signed and sworn to at WESTVILLE before me on this the 8th day of FEBRUARY 2017. The regulations contained in Government Notices No's 1258 of the 21st July 1972 and 1648 of the 16th August 1977, as amended, having been complied with.

.....

COMMISSIONER OF OATHS

FULL NAMES: BHEKISISA SOLOMON XULU

BUSINESS ADDRESS: SPINE RD. WESTVILLE, 3630

CAPACITY: SENIOR CORRECTIONAL OFFICER

AREA: WESTVILLE

KORREKTIEWE DIENSTE
DURBAN MEDIUM B
RECORDS
2017 -03- 08
PRIVAATSAK / PRIVATE BAG X1
WESTVILLE 3630
CORRECTIONAL SERVICES

JUDGMENT

COURT The accused in this matter is Xolani Luckyboy Bhengu, charged with one count of murder of Chantell Goliath on 2 May 2014 at Montclair within the regional division of KwaZulu-Natal, the accused did unlawfully and intentionally cause the death of Chantell Goliath.

The murder charge was read together with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997, the provisions of which were explained to the accused. The Court also recorded that no assessors were required for the matter.

The accused was represented by Mr Sigcawu from the Durban Justice Centre. He pleaded not guilty to the charge. In terms of section 115 of the Criminal Procedure Act accused elected to remain silent.

The following exhibits were handed in to Court, namely Exhibit A1 to 6, the photos of the bar, Exhibit B photos 1 to 37 of the scene of crime and various points in the Siberia Bar, Exhibit C was the affidavit of Kevin Govender of the Emergency Medical Service pronouncing the deceased dead, Exhibit D the removal statement of the deceased to the Gale Street Mortuary, Exhibit E was the identification of the deceased by Fiona Naidoo, Exhibit F the post-mortem report of Dr Shamase who has determined the cause of death as blunt force chest injury, Exhibit F was the post-mortem, as I indicated was chest injury, G was the photos of the stairs, Exhibit H was the statement of Rajendran Perumal.

In support of the allegations the State called the following

witnesses. The Court will briefly refer to the evidence of these witnesses as it is already on record. Margaret Fanana was a patron at the bar on 1 May 2014 at Siberia Bar in Montclair between half past eight and 9:00 pm. The accused was drinking and assaulting Chantell, who is the deceased in this matter. He hit her with open hands and clenched fists on her face and chest. The accused then moved Chantell downstairs. The deceased was her friend. The deceased and the accused were lovers. The deceased cried for help, but no-one intervened.

Bridgette Reed is the sister of the deceased, that is Chantell Goliath. On 1 May 2014 she spent the day with her sister. Later, the deceased told her she was going home and that is the last she saw of her sister. She did not know where her sister was staying. The next day she got a call from the accused who asked her to come to the bar where he was working, that is Siberia Bar. The deceased told her that Xolani was her boyfriend.

When she got to the bar she was told that her sister is gone. She identified her sister's body. The deceased had the same clothes from the previous day. She noticed the deceased had marks, she called a gash, on the left cheek, blood was on her nose, around the mouth and the left cheekbone, there was also blood on the pillowcase. She did not ask the accused what happened to her sister and no-one told her anything.

Senzo Mongo, he works at the bar, he was also at work on 1 May 2014. He witnessed the accused assaulting the deceased. Both

the accused and the deceased are known to him. The accused hit the deceased on the face, chest and upper parts of her body. He was using open hands and fists. Although he told the accused to stop fighting, he did not physically intervene.

He noticed later the deceased was lying down on the floor, having been called by the accused. The accused told him the deceased fell down the stairs. The deceased had blood coming out of her nostrils. He resides in the next room to the accused at the bar.

Duduzile Chiliza, she is employed as a cleaner at the Siberia Bar. On 1 May 2014 she was on duty. She witnessed the accused assaulting the deceased in the bar, as well as in the toilet. The accused hit the deceased with open palms and also pulled her. The accused is known to her for a long time and the deceased and the accused were lovers.

Dr Shamase is the pathologist who conducted the post-mortem on the deceased. Her expert opinion was that direct blows to the chest killed the deceased, which she recorded as blunt force trauma in Exhibit F, which also contains the detailed findings. The deceased also had defensive injuries. Regardless of whether the deceased fell down the stairs, the assault would have been the cause of death. The falling down of the stairs scenario as put to her is not consistent with the injuries she found.

Shireen Dawood, on 2 May 2014, she came to the Siberia Bar. She also noticed the deceased lying on the floor. She had a gash on the left cheek and finger marks on the neck. The deceased and the

accused are known to her. The accused told her the deceased had fallen down the stairs.

That concluded the evidence for the State.

The accused's evidence is that he did not assault the deceased, the witnesses in this matter are lying. He did not see the deceased fall down the stairs, but assumes that she does. Although he noticed she had blood coming out of her nostrils, he did not think that it was that serious, however, he did pick the deceased and lay her on the bed. Subsequently in the morning, he discovered the deceased at the foot of the bed and had passed away. He cannot explain all the injuries the deceased had suffered. The accused had no witnesses to call and closed his case.

The prosecution argued for the conviction of the accused as charged. Mr Sigcawu, at length, argued that the accused ought to be acquitted on the basis that the witnesses are colluding. The evidence of Dr Shamase who conducted the post-mortem is biased in favour of the State and hence her opinion ought not to be considered. That the accused's version is reasonably possibly true that the deceased suffered these injuries as a result of maybe falling down the stairs. At no stage did the accused assault the deceased in any manner whatsoever.

This is then the evidence briefly before Court in order to decide the guilt or innocence of the accused. Insofar as case law is concerned, as correctly pointed out by Mr Sigcawu, the oft quoted case of *R v Difford*, 1937 AD, where the Court held that there is no

onus on the accused to convince the Court of the truth of any explanation he gives. If he has given an explanation, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is false, but beyond reasonable doubt it is false. If there is a reasonable possibility of his explanation being true, then he is entitled to his acquittal.

Also in *S v Mattioda*, 1973 [1], PH at 27 [T] where the Court said,

> "The proper approach in a criminal matter is to consider the totality of the evidence, that is to say examine the nature of the State case, the nature of the defence case, the probability emerging from the case as a whole, the credibility of all the witnesses and ask oneself at the end of all this whether the guilt of the accused has been established beyond a reasonable doubt."

Also see *S v Singh*, 1975 [1] SA 227 [N], where the Court said, I quote,

> "The proper approach for the Court is to apply its mind not only to the merits and demerits of the State and defence witnesses, but also to the probabilities in the case. It is only after so applying its mind that the Court can justify it reaching its conclusion as to whether the guilt of the accused has been established beyond a

reasonable doubt."

The Court is also mindful of the inferences in this matter that it is called upon to consider and mindful of *R v Blom,* 1939 AD where the Court said,

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored. Firstly, the inference sought to be drawn must be consistent with all the proved facts, if it is not, the inference cannot be drawn. Secondly, the proved facts should be of such a nature that they exclude every reasonable inference from them save the one sought to be drawn."

Insofar as the evaluation of the evidence is concerned, the three witnesses, or eyewitnesses to this incident, Margaret Fanana, Senzo Mongo, Duduzile Chiliza, are all known to the accused. Having observed them during their testimony the Court got the impression they gave their evidence in a clear and straightforward manner, as well as a satisfactory manner. They corroborated each other materially on the assault by the accused on the deceased with open hands, as well as the parts of the body that the deceased was assaulted.

Duduzile was honest enough to tell the Court although she heard that the assault was being perpetrated outside, she did not witness this assault. Senzo tried to intervene by telling the accused to stop assaulting the deceased, although he did not physically do so to

get involved in stopping the assault. He also did not witness the assault outside.

For those reasons I do not believe that these two witnesses are trying to falsely implicate the accused by bolstering the State case. Surely nothing prevented them from lying to tell the Court they actually witnessed the assault outside as well.

Senzo's evidence that the accused told him that the deceased fell down the stairs is corroborated by Shireen Dawood, who told the Court the accused also told her that the deceased had fell down the stairs. As I said from the manner in which these witnesses had testified, the Court did not form the impression they were biased or prejudiced against the accused that they want to falsely implicate him in this matter.

Mr Sigcawu referred to the fact that why did they not see blood, why did they not see this type of assault being perpetrated at different points in time. The Court is mindful that each person has different powers of observation, different powers of recollection. The incident was seen from different vantage points, where Margaret was gambling at some point, Senzo is behind the bar, Duduzile is cleaning. So nobody saw the same incident from the same vantage point, hence you are not going to get a 100% corroboration from each of these witnesses insofar as whether they saw the deceased bleeding or not. So nothing really turns on the fact that they did not corroborate each other as to whether she was bleeding at that point in time when she was being assaulted in the bar.

However, what is noteworthy and interesting to note is that these witnesses who say the accused assaulted the deceased on specific parts of the body of the deceased is corroborated in the post-mortem report by Dr Shamase in the findings in Exhibit A. Hence, the Court finds that the eyewitness evidence in terms of these witnesses, they are credible and reliance can be placed on their evidence.

I do not share the sentiments of Mr Sigcawu that Dr Shamase is a biased witness, or she is trying to assist the State case. She does not know either the accused or the witnesses in this matter, let alone the deceased in this matter. On the contrary, the Court finds her as a witness to be an impressive witness, she impressed the Court in the manner in which she had testified. She was objective in the manner in which she had testified. She made concessions where she had to.

After being consulted by the police, the investigator insofar as the possibility of the accused's version is concerned, she was quite honest to refer the Court to outside literature on the subject, what happens when a person falls down the stairs, or steps. However, she stood by her reason that the mechanism of death was attributable to an assault.

Her detailed analyses and findings of 16 injuries on the deceased shows that she was able to make a proper determination as the cause of death of the deceased. In her expert opinion, the falling down scenario presented to her, that is falling down the stairs, is not consistent with the injuries found. Her reasons for rejecting such

findings or such submissions by the defence, is found to be convincing by the Court as to why it was not possible for those injuries to be inflicted or sustained if it was suggested to her that the deceased had fell down the stairs.

The accused as a witness was not an impressive witness at all. He wants the Court to believe and accept his version that the witnesses are lying about the assault on the deceased, but cannot explain why they are lying.

The version that was put to Senzo was that the accused told him in the morning that Chantell fell down the stairs. The Court got the impression from the nature of the cross-examination that the trend[?] that was presented as the defence of the accused, was the deceased fell down the stairs, as his defence. He found her lying at the bottom of the stairs. However, on the accused's own version he did not see her fall down the stairs, he merely found her lying there, on his version.

It is highly improbable that all of the injuries sustained by the deceased would be as a result of falling down the stairs if one were to accept she fell down the stairs. In my view, the bloodstains on the pillowcases, on the accused's T-shirt, is also suggestive of the fact that the probabilities are that the assault also occurred in the deceased's room that they shared.

The difficulty the Court had with the accused's version is that given his bare denial of any assault on Chantell, that is the deceased, the reliable and credible evidence of the State witnesses, the

compelling reasons advanced by Dr Shamase, there can be no reasonable possibility of the accused's version being true and is therefore accordingly rejected as false beyond a reasonable doubt wherever it conflicts with that of the State.

In these circumstances, as I indicated insofar as inferences are concerned, the Court finds that the only reasonable inference to draw from the circumstances as presented by the State, that the accused in beating and assaulting the deceased in the manner that he did, which was a sustained and prolonged attack, would foresee the possibility that death would result, but nonetheless continued and reconciled himself with that fact.

The Court therefore finds that *dolus eventualis* is present from the manner in which the deceased was assaulted. The accused is therefore accordingly found GUILTY as charged, that is guilty of murder.

- -

STATE PROVES NO PREVIOUS CONVICTIONS

COURT Address on sentence?

MR SIGCAWU Your Worship, may the matter stand down so that I ...[intervention].

COURT The matter will stand down. Accused will remain in custody until then.

MATTER STANDS DOWN

- -

come over to you and discuss the matter, even after the trial started, saying ...[inaudible]. --- [Inaudible].

NO QUESTIONS BY PROSECUTOR

MR SIGCAWU May I quickly approach the accused?

NO QUESTIONS BY MR SIGCAWU

COURT Thank you, madam.

- -

COURT Any other witnesses the State is calling?

PROSECUTOR None, Your Worship.

- -

SENTENCE 21 OCTOBER 2015

COURT Insofar as sentence is concerned, Mr Bhengu – you can be seated, it is fine – as the Court explained to you at the outset of the trial that the murder charge was read with Part 2 of Schedule 2 of the Minimum Sentences which provides for a first offender, such as yourself, a minimum sentence of not less than 15 years' imprisonment for a first offender. However, the legislation does provide in section 51 [3] that should the Court find substantial and compelling circumstances, then it will be obliged to impose a lesser sentence.

Your attorney has argued that your personal circumstances that he enumerated that you are first offender, you are still relatively young ...[inaudible].

What is important to note is that although factors may be substantial, it must also be compelling for the Court to consider to impose a lesser sentence than the prescribed minimum sentence.

The difficulty the Court has, I do not believe you have shown any remorse for what you have done. You still maintain that the State witnesses were lying insofar as the evidence concerning the assault was concerned. You believe that the doctor for the State, that is the pathologist, is colluding with witnesses to convict you. That is absolutely nonsensical.

Having seen the deceased's sister, Bridgette, testify, from the time she testified initially and now, had you pleaded guilty, accepted responsibility, taken the Court into your confidence, perhaps spoken to them, made them understand what happened, I do not think these are the type of people who would harbour grudges, they perhaps may have been persuaded to mitigate on your behalf.

It is always difficult to consider contrition on your side, or remorse where the Court does not have a full understanding of what happened on the day in question. You are the only person who knows best what happened.

Insofar as the offence itself is concerned, murder is always serious, which involves the loss of life of a person. As you have heard, Chantell had children to see to. Her only other family in KwaZulu-Natal, or Durban area was her sister and she chose to walk out of her marriage to be with you.

As the prosecutor has indicated, the Constitution provides that everyone has the right to life, as well as the fact that everyone has to be free from all forms of violence, whether in the public or private sector. The difficulty the Court has with all these rights in the

Constitution is that they are violated on a daily basis. The people do not respect them, people do not protect them, so eventually it ends up meaning nothing.

Murder is quite prevalent, there is 15 000 to 20 000 people being murdered in this Country every day, it is quite staggering. [Inaudible]. Yesterday the Court dealt with another murder matter, unfortunately it was the mother of the child who killed her own child after birth by stabbing the child in the neck and abdomen because she did not want to lose the job and she was afraid. So even people who owe a duty to their children end up killing them. Unfortunately the Court does not know why people behave the way they do when they decide to take a life.

What is of concern to me insofar as this particular case is concerned is the manner of violence that you showed towards Chantell. Your attorney said no weapons were used. He is quite mistaken, your fists were the weapons that killed her. No doubt she must have suffered quite a bit of pain, given the photos, the nature of the injuries, broken ribs, scalp. It just goes to show the type of person you are that you beat a defenceless woman so viciously that she lost her life. Whatever the reason may have been, only you know that. Whether you got upset she spent the day with her sister, whether she came late, the Court will never know, but from the evidence it is quite clear that you are the one who assaulted and killed her. You did not even offer her any help even when you found out that she was bleeding through the nose to get medical attention for her.

Also a sign of lack of remorse on your side is the fact that you want the Court to accept, or wanted the Court to accept that she fell down the stairs and that is how she obtained those 16 injuries to her body, just by falling down the stairs, which you assume she did and never saw.

All human life is important, including your own. People have a right to live out their lives peacefully and naturally, without becoming victims of violence, which unfortunately is what our Country has been reduced to, a Country of violence.

Unfortunately for you, the type of sentence the Court imposes must reflect the seriousness of the crime, it must punish you for what you have done, it must also try and deter other people like you. It is also sad that spousal relationships, many of them end up in death where one spouse who is supposed to take care of the other, or take care of each other, end up killing each other.

Unfortunately the Court can only take away your liberty, nothing else. The type of sentence, as I have said, must not only deter you and prevent you from doing something, it must also have a retributive effect that members of society, in particular the family of the deceased, will understand that justice has been done.

Unfortunately for you, your personal circumstances has not persuaded me that they are compelling or substantial in the first place to warrant a deviation from the prescribed sentence. Nothing in your conduct has shown the Court that you are truly contrite for what has happened. You may no attempt to speak to the sister, or via your

family, or even the person that you once phoned to report the incident to, that was called 'Ma', to intercede on your behalf and speak to Chantell's sister about the incident.

As I said, Chantell was severely beating and that beating cost her her life. In the absence of your remorse, in the absence of you not accepting responsibility for your actions, the Court can find no substantial and compelling circumstances to deviate.

For these reasons the Court is of the view the following is the appropriate sentence, it is the maximum sentence for this offence. The Court therefore would apply the minimum sentence and your sentence is one of FIFTEEN [15] YEARS' IMPRISONMENT.

- -

RULING 21 OCTOBER 2015

COURT In terms of section 103 of Act 60 of 2000, that is the Firearms Control Act, no order is made which means that you are automatically DECLARED UNFIT TO POSSESS A FIREARM.

- -

COURT If you are not happy with the sentence or conviction, you are entitled to instruct your attorney to lodge an application for leave to appeal against the conviction or sentence should you so desire. Should such application be granted, the matter will then go to the High Court. If application for leave to appeal is refused, you have twenty one [21] days in which to petition the Judge President. Do you understand?

- -

disproportionate, shocking and startling and another Court may arrive into a different sentence. That is all.

COURT Thank you.

Any reply, State?

PROSECUTOR DOES NOT REPLY TO MR SIGCAWU'S ADDRESS

- -

JUDGMENT 27 NOVEMBER 2015

COURT Mr Bhengu, insofar as the application is concerned, I will deal firstly with the application insofar as the conviction is concerned, the Court is aware that it relied on the evidence of the pathologist, that is the technical part of the evidence, it is expert evidence, and made the finding that it did.

In your favour I will find the fact that it is an arguable case on appeal, if the High Court decides that the evidence discloses the competent verdict, obviously the sentence will be interfered with. In the circumstances, given the technical nature of the evidence that was presented on which the conviction is based, and as I indicate is an arguable case, the Court will GRANT YOU LEAVE TO APPEAL ON THE CONVICTION. That being the position the LEAVE TO APPEAL ON SENTENCE IS ALSO GRANTED for those reasons that the Court might interfere with the sentence.

Stand down.

- -

PROSECUTOR As the Court pleases.

COURT ADJOURNED

CERTIFICATE OF VERACITY

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

STATE v XOLANI LUCKYBOY BHENGU

CASE NO	:	41/71/15
COURT OF ORIGIN	:	DURBAN
TRANSCRIBER	:	L LOTRIET
DATE COMPLETED	:	23 DECEMBER 2015
NO OF CD's	:	5
NO OF PAGES	:	109

OPP

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 136/16

In the matter between:

XOLANI LUCKYBOY BHENGU **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Date Delivered: — December 2016

Maphumulo AJ (Masipa J concurring):

[1] This is an appeal in terms of s 309(1) of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act) against both conviction and sentence by the Regional Court, sitting at Durban. The appellant was convicted of murder read with the provisions of s 51, Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and was sentenced to 15 years imprisonment.

Leave to appeal against both conviction and sentence was granted by the court *a quo*.

[2] The appellant was charged with the murder of his girlfriend Chantelle Goliath on 21 May 2014 at Montclair, Durban. There is no indication that s 115 of the Criminal Procedure Act in respect of disclosing or reserving basis of defence was invoked. No assessors were used. The central issue to be decided is whether the appellant assaulted the deceased as described by the State's witnesses, which resulted in her death and whether he had the necessary intention to kill in terms of *dolus eventualis*.

[3] The State called six witnesses namely Margaret Fanana, Bridgette Reed, Senzo Mongo, Duduzile Caluza, Dr Shamase and Shireen Dawood. The appellant testified but did not call any witness in his defence.

[4] Ms Margaret Fanana, who was 60 years old at the time of her testimony, testified that she was the deceased's friend. She stated that she also knew the appellant as he grew up in front of her. Her evidence was that on the evening of 1 May 2014, she went to the Siberia Bar in Montclair. Between 20h30 and 21h30, she witnessed the appellant assaulting the deceased by slapping her in the face with open hands as well as with clenched fists on her chest. The assault occurred next to the toilet in the bar. The assault continued as the appellant dragged the deceased away from the vicinity of the toilet. Ms Fanana saw the appellant and deceased going towards the appellant's room which they shared but could not see the room itself from where she was sitting. She left the bar when it was closing at around 22h00.

[5] Ms Fanana estimated that the assault lasted for half an hour. She did not hear any exchange of words during the assault. The deceased cried for help but no one intervened despite the presence of other patrons. During cross-examination, Ms Fanana clarified that Mr Senzo Mongo, the bar assistant told the appellant to stop assaulting the deceased.

[6] The second witness to testify was the deceased's sister, Bridgette Reed. Her testimony revolved around how she and her friends had spent the day together with the deceased on 1 May 2014, drinking ciders till 18h00. She testified that she received a call from the appellant the following day to come see him. She took her cousin, Fiona and her friend, Shireen Dawood with to the bar. Upon arrival, the appellant informed them that the deceased had died, after which Ms Reed identified the body. The witness noted that the deceased was in the same clothes as the previous day and had multiple injuries. Ms Reed testified that Fiona asked the appellant why he had killed the deceased to which he responded that the deceased had fallen down the stairs.

[7] The third witness to testify was Senzo Mongo. He is a barman and worked with the appellant at the Siberia Bar. He was on duty on 1 May 2014. He testified that he saw the appellant and the deceased entering the bar carrying groceries. They went downstairs to the appellant's room which was adjacent to his. The appellant and deceased returned to the bar where they drank Smirnoff vodka. Mr Mongo continued with his duties.

[8] Mr Mongo realised that the deceased and the appellant were outside and were having an argument due to the noise they were making. He had not seen them go outside. They returned to the bar and Mr Mongo saw the appellant assaulting the deceased. The appellant was hitting the deceased with open hands and clenched fists on her body. He could not physically assist the deceased as

he was busy working. Mr Mongo did remonstrate with the appellant, telling him to stop assaulting the deceased. He noticed that the deceased was trying to fend off the blows and that she was screaming. Mr Mongo last saw the appellant and the deceased going downstairs towards the appellant's room.

[9] Mr Mongo closed the bar at about 01h30 and went to his room. At about 10h20 the following morning, the appellant called him to come and have a look at the deceased. Mr Mongo went to appellant's room and saw the deceased lying on the floor. He noticed blood coming from her nostrils. He was too shocked to ask the appellant anything. The appellant simply informed him that the deceased had fallen on the staircase after which they had gone to sleep.

[10] The fourth witness to testify was Duduzile Caluza, the cleaner at the Siberia Bar. She testified that she was at the bar on 1 May 2014 and saw the appellant and the deceased drinking at the bar. The couple went outside and she heard them arguing. They returned to the bar shortly thereafter. According to the witness, she saw the appellant hitting the deceased with open hands on her face and clenched fists on her chest and the deceased was crying saying that her abdomen was sore. The deceased went to the toilet but the appellant followed her in, pulled her out and continued beating her.

[11] The deceased fell on the floor but the appellant pulled her up. The deceased went out of the bar saying she was going to her sister's house but the appellant told her to come inside so they could go to the room. Ms Caluza testified that the incident at the bar ended when the appellant and deceased left together for the appellant's room.

[12] Ms Caluza testified that she did not see any blood or injuries after the deceased fell down in the bar but she did tell the appellant to stop assaulting the deceased. During cross-examination she conceded that she was not certain of the time of the incident but it was around 22h00.

[13] The fifth State witness to testify was Dr Nonhlanhla B Shamase. She told the court that she qualified as a medical doctor in 2006 and as a specialist forensic pathologist in 2014. She conducted the post-mortem examination on the deceased.

[14] Her chief post-mortem findings included that the deceased had abrasions and bruises on her face and on the side and back of her head, linear bruises, bruises on the upper and lower back, bruises and abrasions on the arms and buttocks, and lacerations above the left eyebrow as per paragraph "C" of the post-mortem report.

[15] Dr Shamase also found the deceased's lungs and face to be congested. There was a laceration of the left atrium of the heart, contusion of the thyroid gland, deep scalp bruising and multiple abrasions and bruises of the face, arms and back. There were also two broken ribs and 100ml of blood in the rib cage.

[16] Dr Shamase found that the cause of death was as a result of a blunt force chest injury. She also testified that she was asked by the investigating officer to comment on the version of the appellant, namely, that the injuries sustained by the deceased were caused by a fall. She used photos 1 to 37 in the photo album compiled by Warrant Officer Alfred Ngubane and the statements of the State witnesses in that regard and arrived at a conclusion that while it was possible for some of the injuries to have been caused by a fall, the highly probable mechanism was assault.

[17] Dr Shamase stated that even if she was not informed of the fall, she would have still found that assault was the cause the death. Her conclusion was that the cause of death was assault.

[18] Under cross-examination, Dr Shamase insisted that the cause of death was a blunt force injury sustained from an assault. However, she stated that since post-mortems are conducted with consideration of the victim's history. She would have been suspicious if she was informed of the deceased falling down the stairs without any evidence of being assaulted due to the nature of injuries sustained.

[19] Apart from the three journals she referred to, which helped her in her findings, Dr Shamase testified that she had the requisite practical experience as she had been conducting post-mortems from the time she had begun her training as a forensic pathologist. However, she could not recall the number of the post-mortems she had conducted. She testified that she was able to distinguish between different types of injuries and their causes.

[20] Dr Shamase conceded under cross-examination that it is difficult to determine whether a person has sustained injuries as a result of a fall or due to a blow. She insisted however that in view of the deceased's injuries, the probable cause of death was an assault as opposed to a fall. According to Dr Shamase, the injuries on the deceased's chest were customarily and statistically a direct result of a direct blow rather than a fall. In this case, it would have been caused by a severe blow or blunt force would have been applied to the deceased's chest. Her evidence was that a clenched fist or a punch fell under the category of blunt force.

[21] Dr Shamase's post-mortem report was admitted as exhibit "A" by the court *a quo*.

[22] The sixth State witness was Shireen Dawood. She testified that she was a friend of the deceased. She was the first person to go to the deceased's room in the company of the appellant. She testified that upon opening the bedroom door, she saw the deceased's body lying on the floor, facing up, with her feet towards the door.

[23] Ms Dawood checked the deceased's pulse but could not find it and realised that the deceased was dead. She saw a gash on the deceased's left cheek and several marks on her neck, arms, upper chest area and her nose. She asked the appellant what had happened and his response was that the deceased was drunk, had fallen down the stairs and that he had picked her up from there. The appellant showed Ms Dawood the bed where he had placed the deceased upon picking her up. She noticed that there was blood on the bedding and pillow cases.

[24] When she asked the appellant why the deceased was lying on the floor, he responded that he had woken up and found her in that position. After this witness the State closed its case.

[25] The appellant testified that on 1 May 2014 he was at his residence situated below his place of employment, the Siberia Bar. The deceased had gone out with her sister and other relatives. On her return to the bar, the deceased sent for the appellant to help her carry groceries. He went to assist her and they both returned to the appellant's room.

[26] According to the appellant the deceased took out a 750 ml bottle of Smirnoff vodka for them to drink. They drank it together but did not finish it. Thereafter, they went up to the bar where they spent time with other patrons including Thami, Warren, Thabani and Thabo. Thami bought three bottles of Smirnoff vodka and they drank together. The deceased left the bar before it closed and the appellant only left for his room when the bar actually closed. When he returned to his room, he found the deceased lying on the staircase and picked her up. He took her to the room and placed her on the bed. He noticed bleeding in her right nostril and took a white wet towel which he placed on her forehead to stop the bleeding.

[27] The deceased complained that she was hungry and the appellant informed her that there were meat balls available. She prepared them, ate and returned to bed. The appellant also slept. He woke up the next morning to find that the deceased was not in bed. After seeing blood on his T shirt and pillowcases, he called out for her but there was no response. He then climbed out of bed and saw the deceased lying on the floor at the end of the bed.

[28] The appellant shook the deceased but she did not respond and her body felt hard. He phoned the State witness Mr Mongo and informed him that the deceased was not responding to his attempts to wake her up. Mr Mongo advised him that he was having a bath and that the appellant should wait for him. When Mr Mongo arrived, they went to the bar and took out money from the till to buy airtime. Upon recharging his airtime, the appellant telephoned the bar owner, Mr Rajendran Perumal to come to the bar. When Mr Perumal arrived, the appellant and Mr Mongo informed him about the deceased's death.

[29] Mr Perumal instructed them to clean the bar for the police to find it clean. He thereafter te lephoned the police. The appellant also made a call to the deceased's sister to come to bar. Ms Reed came with Fiona and the appellant advised them about deceased's death. Fiona asked the appellant why he had killed the deceased and Ms Reed requested to see the deceased. Ms Reed, Fiona and another lady whose name he did not mention went to see the deceased.

[30] When the police arrived, the appellant relayed the sequence of events to them. He informed them that he did not know what happened but showed them the staircase, where after they took photos. The paramedics came to examine the body and certified the deceased dead. Thereafter the mortuary van came to remove the body of the deceased.

[31] The appellant testified that he heard the evidence of the three State witnesses being Ms Fanana, Ms Caluza and Mr Mongo that he had assaulted the deceased both with clenched fists and open hands on the night in question but denied that this was true. He did not assault the deceased nor did he kill her. He did not know why they would implicate him since he regarded them as his co-workers. He stated that it was not Mr Mongo who phoned Mr Perumal to inform him about the incident.

[32] During the appellant's cross–examination, he denied being upset with the deceased or having any argument with her. He did not know why these witnesses would tell lies against him as they all had a good relationship, especially Mr Mongo.

[33] The appellant also introduced a new version during cross-examination to the effect that apart from picking the deceased up and taking her to the room, he shook her up when he found her lying on the staircase. He mentioned that he

had asked the deceased if she was alright and that she had answered in the affirmative. The prosecutor asked the appellant why he thought that the deceased was alright when she had blood in her nostrils. The appellant initially responded that he only saw the blood while taking the deceased to bed. However, he later conceded that putting a towel on the deceased's forehead was a sign that the deceased was not alright.

[34] The appellant was also asked as to what he said to the deceased's cousin Fiona in the presence of Ms Dawood. His response was that he told Fiona that he thought that the deceased had fallen on the stairs. The appellant denied that he had mentioned Ms Dawood and said that she was unknown to him. He said that he had never spoken to her as she was unknown to him. When the appellant testified in chief, he mentioned Ms Reed, Fiona and another lady arriving at the bar after receiving his telephone call. It was not necessary for him to know her name.

[35] Ms Dawood testified as the last State witness and disclosed her name and surname in court. The presence of Ms Dawood during the meeting was not challenged during her evidence. Notably, the appellant's version of how the deceased was injured was put to Ms Dawood clearly acknowledging that she was present when the deceased's sister arrived at the scene. The appellant's denial of knowing and conversing with Ms Dawood was clearly an afterthought.

[36] The appellant's version that was put to Ms Reed was that his response to Fiona's accusation of killing the deceased was that the deceased had fallen. Another version by the appellant was that he did not know what happened to the deceased. He had found her lying at the bottom of the stairs and thought that she had fallen from the staircase.

[37] The appellant's evidence that he had not seen the injuries on the deceased as she had been wearing a T shirt with sleeves up to her elbows, which hid her injuries, is improbable. Th is version must be seen against t he post-mortem report read by Dr Shamase that referred to the multiple visible injuries on the deceased ,*inter alia,* on the face, the back of the head, front and side, laceration of the left eyebrow, congestion of the face and neck. It begs the question when and how these injuries were inflicted, if he did not see them when he found the deceased at the bottom of the staircase. These injuries cannot be explained away even supposing the deceased fell in the bedroom for the second time; it is improbable that she would have sustained such injuries.

[38] The appellant further testified that the bleeding stopped after he placed a wet towel on the deceased's forehead. She appeared to be fine and even prepared food for herself. This version does not negate the appellant's conduct at the time of assault which resulted in the deceased's death. This also applies to the appellant's submission that they walked to the room together and that the deceased was not seriously hurt and consequently, the appellant could not have foreseen the deceased's death.

[39] Such an approach would entail ignoring events that took place during the assault, namely the deceased's fall at the bar, her escape to the toilet, going outside the bar, her complaint of abdominal pains, the screams and warding off the blows. The State witnesses saw the appellant and the deceased walking downstairs to his room.

[40] The appellant could not dispute that the cause of the deceased's death was due to blunt force trauma injuries to her chest area. He however disputed the evidence of the State witnesses that he had assaulted the deceased on the chest.

[41] It was put to the appellant that he was upset that the deceased had spent the day with her relatives. He denied this and said that they had discussed it beforehand. When it was put to him that he was upset because the deceased returned home after consuming alcohol, he denied this and said that he had no knowledge of that.

[42] He denied that Mr Mongo ever remonstrated with him as no assault took place. This version was not put to Mr Mongo when he was giving his evidence. He also denied that the deceased attempted to go to her sister's residence and that he had called her back so they could go to the room. The appellant's attorney had not disputed when Ms Caluza testified to this.

[43] The appellant introduced a further version during cross-examination that if the assault had taken place, people at the bar could have pressed the panic button to raise the alarm. This was not put to any of the three eyewitnesses. He denied continuing with the assault after he and the deceased left the bar and insisted that he and the deceased did not leave the bar together.

AD CONVICTION

[44] While there were some discrepancies in the evidence of the State witnesses in relation to the assault, this could be attributed to their different locations inside the bar when they observed the assaults and what were they were doing at the time.

[45] Ms Fanana had been gambling and was therefore not facing the direction of the appellant and deceased. However, at some stage she moved away from the slot machine to try and remonstrate with the appellant in vain. Mr Mongo was working at the bar and as such, he was not aware of what was taking place

between the deceased and the appellant at all times. He saw bits and pieces of the assault. The person who appeared to have witnessed the entire episode is Ms Caluza who appeared to have been be socialising with her friends.

[46] None of the witnesses could provide the exact time when the assault took place. There were also discrepancies in respect of the time when the bar actually closed, which discrepancies are not material.

[47] The deceased and the appellant were lovers, thus the patrons might have been reluctant to interfere in their domestic relationship. The most they could do was to persuade the appellant to stop what he was doing. The common thread of the State witnesses' testimonies was that the appellant was assaulting the deceased with open hands on her face and clenched fists on her chest.

[48] The evidence of the eye witnesses was consistent with objective medical evidence of Dr Shamase. This court did not find Dr Shamase to be a biased witness as suggested by the appellant's counsel. She based her findings on the injuries, her research, practical experience, statistics and the extent of the injuries to arrive at her conclusion that assault was more probable than a fall. She conceded that it was difficult to differentiate between injuries from an assault and a fall as they both constitute blunt force. She said however that the cause of death is determined by the history and surrounding circumstances. I find that the court *a quo* dealt with the evidence correctly.

[49] The appellant was a very poor witness. He contradicted himself as to how he found the deceased lying on the stairs. His version, which was put to State witnesses, changed from not knowing if the deceased had fallen to that the deceased had fallen as she was drunk and then to a possibility that the deceased had fallen. He was undecided as to what he wanted the court to accept or

believe as his version. He contradicted himself regarding his actions and the enquiries he made when he allegedly found the deceased lying on the stairs.

[50] The appellant was incoherent in his narration. He did not state at what stage Mr Mongo saw the deceased's body and his reaction on seeing it. He simply became longwinded on irrelevant issues relating to Mr Mongo. On the other hand, there are three State witnesses that saw the deceased leaving together with the appellant after brutal assaults by the appellant.

[51] In *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15, the court dealt with the procedure to follow in assessing evidence and Heher AJA held:

> 'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[52] There was no plausible reason why the evidence of the State witnesses should be rejected while the appellant's version was improbable and not possibly true. The court *a quo* was correct to conclude that the appellant assaulted the deceased in the manner described by the State witnesses.

[53] In respect of the cause of death, Dr Shamase testified that it was as a result of blunt force to the chest area. Further, during cross-examination the appellant conceded that the cause of death was as a result of blunt force to the chest area as found by the doctor.

INTENTION

[54] The court *a quo* found the appellant guilty of murder on the basis of *dolus eventualis*.CR Snyman *Criminal Law* 6 ed. (2014) at 181 defines *dolus eventualis* as involving subjective foresight:

i. Of a prohibited result flowing from X is unlawful action. Secondly, X having reconciled himself/herself with such a possibility is reckless and proceeds to act unlawfully. It is immaterial to X if the prohibited result will flow from his action. In the most X is not concerned or deterred alternatively put did the appellant foresee the possibility of the death of the deceased. Did he reconcile himself with such a possibility?

[55] Snyman further at 184 and 185 indicates that it is rare to find direct intention; it is usually by inferential reasoning.

[56] Ms Fanana who was gambling on the date of the assault estimated that it lasted over half an hour. Ms Caluza described the assault as involving the following:-

a) The deceased escaped to the toilet complaining of abdominal pains. The appellant however pulled her away and continued beating her.
b) The deceased falling to the ground with the assault continuing unabated.
c) At a certain stage the deceased going out of the bar and returning.
d) Mr Mongo and Ms Fanana remonstrated with the appellant in vain.
e) Mr Mongo observed the assault continuing at the pool bar with the deceased fending off the blows and screaming.
f) The deceased intended to go to her sister's place of residence but was persuaded to come back and instead go downstairs to the room.

[57] The nature of assaults should be considered together with the injuries sustained. It is clear from the medical evidence that the deceased sustained serious injuries caused by some blunt force. Dr Shamase's evidence confirmed that the deceased had been assaulted. Evidence by the State witnesses was that it was the appellant who had assaulted the deceased.

[58] In *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E, the following was said:

'1) The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis,* as distinct from *dolus directus*.

2) The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus,* not *culpa*. These two different concepts never coincide.

3) Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.'

This was quoted with approval in *S v Combrink* 2012 (1) SACR 93 (SCA) para 17.

[59] This court finds that the appellant had the necessary subjective foresight that by brutally punching the deceased in the chest could lead to her death. Having reconciled himself with that result, the appellant nevertheless continued with the assault. There was therefore no misdirection by the court *a quo* that the appellant had the necessary legal intention in the form of *dolus eventualis* taking into account the duration and manner of the assault, the nature of injuries sustained by the deceased and the injuries that caused her death.

AD SENTENCE

[60] This court finds no misdirection on the sentence imposed by the court *a quo*. Sentencing is pre-eminently within the discretion of the trial court. The appeal court will only interfere if there has been misdirection or if the sentence is inappropriate or disproportionate as to induce a sense of shock. See *S v Malgas* 2001 (1) SACR 469 (SCA).

[61] The court *a quo* took into account the age of the appellant, the fact that he was relatively young, was a first offender and had dependants. The court *a quo* balanced these against the interests of society and the family of the deceased, which included her child. The court also considered the seriousness and prevalence of the offence in South Africa namely violence in domestic relationships. The court *a quo* did not find the presence of any substantial and compelling circumstances.

[62] The appellant did not show any remorse. He did not he take the court into his confidence by testifying in mitigation of sentence. See *S v Matyityi* 2011 (1) SACR 40 (SCA).

[63] In the premises, I propose the following order:

The appeal against both conviction and sentence is dismissed.

MAPHUMULO AJ

MASIPA J

I agree, it is so ordered.

CASE DETAILS

Date heard:	20 October 2016
Date of Judgment:	___ December 2016

APPEARANCES

Counsel for Appellant:	Adv. E M. Chiliza
Instructed by:	Legal Aid South Africa, Justice Centre
Counsel for Respondent:	Adv. J. M. Khathi
Instructed by:	National Prosecuting Authority

Reserved Judgment

Ap56

ORDER OF COURT ON APPEAL
IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION
PIETERMARITZBURG

CRIMINAL APPEAL **AR NO.: 181/16**
Case No.: 41/71/15

AT PIETERMARITZBURG, TUESDAY ON THIS 13TH DAY OF DECEMBER 2016

BEFORE **the Honourable Madam Justice Masipa and**
the Honourable Madam Justice Maphumulo, AJ

In the matter of:

XOLANI LUCKYBOY BHENGU **APPELLANT**

versus

THE STATE **RESPONDENT**

HAVING READ the record in the appeal, and HAVING HEARD (Counsel for) the Appellant and Counsel on behalf of the State, and HAVING RESERVED JUDGMENT on 20 OCTOBER 2016

THE COURT ORDERED THAT:

The appeal against both conviction and sentence be and is hereby dismissed.

R JUDNATH
REGISTRAR OF THE HIGH COURT

The Regional/Magistrate ***Registered Post***
IXOPO

1. Your Appeal No.: 81/15 refers.
2. Two copies of the judgment of the appeal court are forwarded herewith.
3. Your copies of the record including the original record are returned herewith.

R JUDNATH
REGISTRAR

G J Slabbert