Reportable:	**YES**/NO
Circulate to Judges:	**YES**/NO
Circulate to Magistrates:	**YES**/NO
Circulate to Regional Magistrates:	**YES**/NO

HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: K/S 12/12

Heard on: 01/06/2015

Delivered on: 03/07/2015

In the matter between:

VICTOR LESEGO ASELE APPELLANT

And

THE STATE RESPONDENT

Coram: Kgomo JP; Olivier J et Mamosebo AJ

JUDGMENT

ORDER

1. **The appeal on sentence is dismissed.**
2. **The Registrar of this Court is directed to forward a copy of this judgment specifically to the Northern Cape Director of Public Prosecutions and the Provincial Commissioner of Police.**

KGOMO JP (MAMOSEBO AJ CONCURRING: OLIVIER J DISSENTING)

1. I have read the judgment of my brother Olivier J and disagree, with respect, with his approach, his conclusion and some of his findings and assessments.

2. The appellant, 23 years of age, appeared before Madame Justice Hughes AJ (as she then was), along with his brother Peace Kagisho Asele, who was two years younger than him, and Ishmael Boitumelo Keohitletse, who was the youngest at age 20. A fourth alleged accomplice, Olebogang, evaded arrest. The three co-accused were charged with:
   2.1 Kidnapping: Count 1.
   2.2 Robbery with aggravating circumstances as contemplated in s 1 of the Criminal Procedure Act, 51 of 1977 (the CPA) and read with s 51 of the Criminal Law Amendment Act, 105 of 1997: Count 2;
   2.3 Murder, read with s 51 (1) of the Criminal Law Amendment Act: Count 3.

3. The appellant pleaded guilty to all aforementioned charges as described in the indictment. The trial Judge was satisfied that he admitted all the elements of the offence with which he was charged and convicted him accordingly. He was then sentenced as follows:
   3.1 For the Kidnapping: 10 years imprisonment;
   3.2 For the Robbery: 15 years imprisonment; and
   3.3 For the Murder: Life imprisonment.
   These sentences were ordered to run concurrently. The appeal, in respect of the Life Imprisonment only, is with leave of the trial Court.

4. In summary Olivier J is of the view that the trial Court misdirected itself in the following respects:

4.1 That the facts admitted by the appellant neither establish that he had the intention to murder nor was the murder premeditated as the trial Judge found;

4.2 That the appellant declared that he foresaw the possibility of the attack culminating in the death of the deceased but was reckless to the consequences of whether the death ensued or not and that such conduct constitutes *dolus eventualis*; but that, in any event, the appellant specifically pleaded guilty to murder with *dolus eventualis* as the form of intent and that is in fact what state counsel, Mr Rosenberg, accepted before the trial Court;

4.3 That the fact that the appellant pleaded guilty, co-operated with the police and expressed regret were a manifestation of remorse and that he was a good candidate for rehabilitation.

4.4 That the factors in paras 4.1, 4.2 and 4.3 together with the appellant's youthfulness, he was 21 years when the offences were committed, constitute substantial and compelling circumstances, which should have persuaded the trial Court to deviate from the ordained Life Imprisonment sentence. Olivier J accordingly propose that a sentence of 20 years imprisonment would be appropriate.

5. The learned trial Judge expressed herself in these terms on how the murder was perpetrated:

"Another factor that was argued in favour of the accused was that the offences were committed on the spur of the moment, thus without a direct intention to murder the deceased. I disagree. Yes, it can be said that it started out as such. But in my view it graduated to a direct intention to kill the deceased. I say so boldly for the reasons that follow: Once the knife was pulled out by Olebogeng, there began a progression from merely kicking the deceased on his head to inflict him harm with a sharp object, that being the knife which could cause fatal injuries. It progressed even further when his hands were tied behind his body,

wounded and bleeding the deceased was placed in the boot of the vehicle.

More so when he tried to escape, he was captured again and placed in the boot of the vehicle. The finale was when he was removed from the boot, stabbed yet again and left tied up, wounded, bleeding and motionless in a deserted field. What is most despicable is that the accused and his companions later that evening returned to the scene. He noted that the deceased was exactly where they had left him earlier but they continued with their quest and removed the vehicle to another location."

6. I wish to add the following or remark as follows:

6.1 The offences are gang-related. According to the appellant there was a prior conspiracy by the four of them to rob the deceased, an Ethiopian immigrant, and in fact executed their plan. At the first scene of the crime, "Scene A", at the cross-roads where the deceased had relieved himself after alighting from his vehicle, when he sensed an imminent attack he fled. There he was pursued, he stumbled over some obstacle and fell. He was descended upon and kicked, evidently with booted feet. One of them, Olebogeng, stabbed the deceased with a knife. The appellant says he was unaware that Olebogeng was armed with a knife but adds (translated):

"7.8 I nevertheless reconciled myself with the actions of Olebogeng. The four of us jointly bound the deceased, hands and feet. We dumped him into the boot of the [deceased's] vehicle and drove off."

The point being made is that at "Scene A", because the robbers' common purpose was to deprive the deceased of his goods by force, there was no need to have pursued and viciously attack the unarmed and defenceless man;

6.2 "Scene B" starts with the deceased being dumped in the claustrophobic boot, because it was closed. He was bound and bleeding. Who is driving? The appellant, the eldest of the three accused. The deceased furiously kicked against the boot. He managed to force it open. When the vehicle stopped the deceased jumped out and fled again. He is once again pursued, captured and forced into the boot. If the robbers merely wanted the deceased's goods, including his vehicle, this was a second opportunity to let him go and allow him to at least seek medical treatment;

6.3 "Scene C". The appellant says (translated):

"I drove the car. We drove up to a forested (beboste) area and stopped. Boitumelo (Accused 1) removed the deceased from the boot/trunk of the car. He and Olebogeng took the deceased deeper into the forest. Olebogeng stabbed the deceased in the chest. The deceased slumped to the ground and lay there."

7. The cause of death according to Dr Denise Lourens is given as penetrating wounds to the head and chest. The autopsy report further reveals the following:

"(a) Oop wond oor die regter oor: 20 mm. Die wond het `n reëlmatige rand gehad en geen weefselbrûe was aanwesig nie. Die kraakbeen van die oor was deurdring.

(b) Oop wond oor die verteks van die kop: 25 mm. Die wond het `n reëlmatige rand gehad en geen weefselbrûe was aanwesig nie. Die wondgang het die been deurdring met fragmente been en bloeding wat in die onderliggende dura aanwesig was. Die onderliggende brein was te ontbind om enige breinskade direk te kon waarneem.

(c) Oop wond oor die voorkop links: 35 mm. Die wond het `n reëlmatige rand gehad en enkele weefselbrûe was aanwesig in die wondopening. Die onderliggende frontale been het veelvuldige en

uitgebreide frakture getoon wat ook die orbitale plaat betrek het. Die onderliggende dura het veelvuldige fragmente been en bloeding getoon. Die onderliggende brein was te ontbind om enige breinskade direk te kon waarneem. Die oogkas het verbrokkeling agv die frakture getoon. Die onderliggende oog was te ontbind om enige besering te bevestig of uit te sluit.

(d) Oop wond van die voorkop links: 19 mm. Die wond het `n reëlmatige rand gehad en weefselbrûe was aanwesig. Die onderliggende been was intakt.

(e) [Twee] 2 oop wonde van die agterkop met reëlmatige rande en weefselbrûe: 50 mm en 30 mm onderskeidelik. Die onderliggende been was intakt.

(f) Oop wond van die borskas, 1.3 m vanaf die linker hak en 20 mm na links van d e midlyn: 12 mm lank. Die wond het `n reëlmatige rand gehad en geen weefselbûe was aanwesig nie. Die wondgang het die borskas links penetreer via die 4de interkostale spasie. Die linker long was platgeval, maar weens die erge graad van ontbinding kon geen penetrerende wonde van die long identifiseer word nie.

(g) Oop wond van die borskas, 1,29 m vanaf die hake en in die midlyn: 8 mm lank. Die wond het `n reëlmatige rand gehad en geen weefselbrûe was aanwesig nie. Die wondgang het ge-eindig teen die sternum (borsbeen).

(h) Oop wond van die borskas, 1,32 m vanaf die regter hak en 10 mm na regs van die midlyn: 10 mm lank. Die wond het `n reëlmatige rand gehad en geen weefselbrûe was aanwesig nie. Die wondgang het die borskas regs penetreer via die 4de rib. Die regter long was platgeval, maar weens die erge graad van ontbinding kon geen penetrerende wonde van die longe indentifiseer word nie."

8. The appellant concludes his guilty plea by stating (translated):

"9. Although it was not my intention to murder the deceased, I foresaw that he could die when Olebogeng stabbed him with a knife. I have nevertheless associated myself with the actions of Olebogeng. I also foresaw that the deceased could die when we kicked him on his head but notwithstanding this realisation I proceeded to kick the deceased on his head."

9. Unfortunately the doctor did not testify to give a sense of how long the deceased could have survived with such severe and evidently mortal injuries. The appellant has nevertheless admitted the contents and correctness of the autopsy report and that the body did not sustain any further injuries. Needless to say what is meant are further injuries that could have contributed to the deceased's death.

10. At "Scene C" the appellant already knew that Olebogeng was armed with a knife and realised that he was bloodthirsty when he stabbed the halpless deceased unprovoked at "Scene A". The irresistible inference, which is the only on these facts, is that the deceased must have died almost instantly. By leaving him bound fortifies the conclusion that the appellant and his partners-in-crime desired the deceased's death. The deceased never moved from where he fell. How it can be suggested or argued that there was no premeditation or direct intention to murder the deceased is difficult to fathom. Scenes A, B and C establish clearly that the deceased was silenced lest he later identified his attackers.

11. In **S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705i -706c the Court held:

"In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis

of the decision in S v Safatsa and Others 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea ; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SALJ 38 at 39.) In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt." The appellant met all these prerequisites. See also **S v Williams** en `n Ander 1980 (1) SA 60 (A) at 63A-C.

12. The argument advanced that state counsel admitted the appellant's plea as it stands does not assist the appellant. The trial Court did not read into the plea more than what the appellant admitted. The appellant's statement that he was guilty of *dolus eventualis* is a legal conclusion which he is not competent to make. It falls within the competency of the Court. To the extent that state counsel conceded that only *dolus eventualis* has been established such an erroneous concession does not bind us. See **Matatiele Municipality and Others v President of the RSA and Others** 2006(5) SA 47 (CC) at para 69B-D para 67 where the Court held:

"Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession

to be wrong in law. Indeed, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC), this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it."

Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution. This would be contrary to the provisions of section 2 of the Constitution which provides that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'."

See further: **Government of Republic South Africa and Others v Von Abo** 2011 (5) SA 262 (SCA) paras 18 and 19; and **Paddock Motors (Pty) Ltd v Igesund** 1976 (3) SA 16 (A) at 23 F.

13. In **S v Clive Streak** CA&R 21/2009, delivered on 18/09/2009, Unreported, this Court had the following to say in an appeal (Kgomo JP, Mjali AJ concurring):

"(1) It is a worrying feature which is recurrent when an accused pleads guilty in terms of s 112 of the Criminal Procedure Act and the State signifies that it accepts the plea, usually on a lesser charge, that the accused would contend that the State or, like in this case, the presiding judicial officer was debarred at the sentencing phase from adducing evidence at variance with the facts set out in the accused's guilty plea. If the State states unequivocally that the facts in the guilty plea accord with the information (evidence or documentation) at its disposal and it has no additional evidence extraneous to the accused's statement to present to the Court in aggravation or otherwise then the issue between the parties are

sufficiently circumscribed. The State must then be held to its undertaking.

(2) *However, if the State merely states that it accepts the plea, all that it conveys to the Court is that it is satisfied that the accused has admitted all the elements of the crime with which the accused is charged or the lesser charge or the competent verdict he or she has pleaded guilty to. The State is in effect saying there is now no lis between them as far as the verdict is concerned. It would not only be wrong but also a sheer waste of time and resources to flesh out the sometimes skeletal facts set out by an accused in his guilty plea when all that remains is the sentencing phase. See* ***S v Sparks & Another*** *1972 (3) SA 396 (A) at 404 C-D where Holmes JA says:*

'In that light, the words 'trial' 'verdict' and 'the issues to be tried', in their ordinary meaning, do not refer to any proceedings after conviction. In particular, 'verdict' is traditionally understood to refer to the decision whether the accused is guilty or not guilty. Indeed, on a plea of guilty being entered, the 'trial' ends, since there are then no further issues to be tried in regard to verdict---. This leaves the question of sentence, including facts relating thereto, exclusively within the jurisdiction of the Judge.'
See also ***S v B*** *2003(1) SACR 51 (SCA) at 60e (para 7).*

(3) *The aforegoing view accords fully with the provisions of ss 112(2) and (3) (particularly the latter subsection) of the Criminal Code which we need to remind ourselves of. They read:*

'(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is

satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence*.'*

(4) In ***Maroulis v The State*** *(240/2008) [2008] ZASCA 161 (27/11/28), unreported, this issue was left open but* ***Mpati P****, who wrote the unanimous judgment of the Court, had this to say:*

'[11] Mr Price, who appeared in this court on behalf of the appellant submitted, as he did in the court below, that the magistrate misdirected himself in certain respects. The first such misdirection, it was argued, was that the regional magistrate allowed the prosecutor, after conviction, to lead evidence in aggravation, which was inconsistent with the contents of the appellant's statement in terms of s 112(2) of the Act. This inconsistent evidence relates to the assault described by the complainant after he had allegedly fallen on the pavement until he lost consciousness, and the object allegedly used in the assault. Mr Price submitted that the prosecutor ought not to have been allowed to lead such evidence. He referred in this regard to this court's decisions in ***S v Ngubane*** *1985 (3) SA 677 (A) at 683 D-F and* ***S v Legoa*** *2003 (1) SACR 13 (SCA) paras 26 and 27.*

[12] The court a quo dealt with this submission as follows:

'The evidence led by the state after conviction, in my view, did not contradict the appellant's version in any material respect. The evidence by the complainant regarding the use of his fists and a brick by the appellant is in my view not a contradiction of the version of the appellant. The appellant stated that he used an object but was not at all clear as to what it actually was. His reference to the lid of a dustbin was vague and he himself expressed uncertainty. ***The evidence of the complainant, therefore, does not contradict the appellant's but supplements it and fills in the detail of what occurred. This is admissible in terms of the provisions of section 112 (3) of the Act (see S v Swarts 1983 (3) SA 261 (C); S v Moorcroft 1994 (1) SACR 317 (T)). In any event the magistrate did not make a specific finding that it was a brick, but accepted, as he should have, that the attack was with a blunt object.'***

In the view I take of this matter, I find it unnecessary to enter into this debate. ***Suffice it to say that I agree with the last sentence of the passage just quoted****. '*

(5) *In my respectful view there is a lot to be said for the views expressed by the court a quo with reference to what the SCA quoted in its para 12 of the Maroulis matter. My views are further fortified by what the Appellate Division stated in* ***S v Du Toit*** *1979(3) SA 846 (A) at 857H-858A that:*

'Wanneer die aard van die misdaad en die belang van die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy

geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word. En hy word nie met primitiewe wraaksug beskou nie, maar met menslikheid en dit is hierdie menslikheid wat in elke geval, hoe erg ook al, vereis dat versagtende omstandighede ondersoek moet word. Hierdie versagtende omstandighede, indien daar is, skep die genadefaktor waarna in hierdie Hof vantevore verwys is en wat dan na oorweging van alle ander relevante omstandighede, moet lei tot 'n gepaste vonnis.'

(6) *The State must therefore be vigilant not to render the provisions of s112(3) of the Criminal Code nugatory or to tie the Court's hands behind its back. One cannot fight rampant crime in this way. When the State and the defence intend to enter into plea-bargain proceedings in terms of s 105A of the Criminal Code they must go all the way to the sentencing phase and not stop at the verdict. Plea-bargaining is a specifically designed plea and sentence agreement to do justice and facilitate the disposal of cases, which must be encouraged.*" (Own emphasis).

Neither counsel nor Olivier J argued that **S v Clive Streak** was wrongly decided or distinguished it.

14. Mr Rosenberg informed us that he agreed with appellant's counsel at the trial that he would not ask for life imprisonment in exchange for the appellant testifying for the State against his co-perpetrators at a trial in due course. This private arrangement, which is strongly deprecated, was not conveyed to the trial Court. State counsel's undertaking was against what has been stated in the Clive Streak case (supra), which private agreement would, as stated earlier, not have bound or prevented

the Court from imposing life imprisonment if such sentence was called for or deserved.

15. State counsel attached to his written submissions a portion of the record of the subsequent trial against the appellant's co-accused in which the appellant testified for the State. This extra-neous record was, by consent, supplemented by appellant's counsel with a portion of the record he believed completed the full picture. The appellant, in his evidence-in-chief, implicated his co-perpetrators including his brother. When cross-examination commenced the following morning he recanted his evidence on the basis that Adv Theo Fourie, a very experienced counsel who is in his seventies, had coerced him to admit guilt. Appellant was declared hostile and discredited under cross-examination.

16. On account of his somersault one of his erstwhile co-accused walked away scott-free whereas the other was convicted and sentenced to 24 years despite his hostility. State counsel sought now to inform us that whereas he had not asked for life imprisonment at first instance, he now supports the life imprisonment sentence imposed by Hughes AJ on account of the recantation. This is a warped approach to take: *ex post facto*.

17. The true reason why the appellant recanted his evidence was that he expected to be sentenced to 10 months only by the trial Court and not to life imprisonment. The cross-examination went as follows:

"Mnr Asele, u het nou vanoggend vir die Hof toe u nou in die getuiebank klim, toe verduidelik u nou dat u `n vonnis opgelê is waarop u skuldig gepleit het in Maart hierdie jaar, is dit reg so? --- Dit is korrek Edele.
U het nie verwag u gaan lewenslange gevangenisstraf opgelê word nie, is dit reg so? --- Ek was gesê dat dit nie die straf sal wees nie, lewenslank, as ek `n verklaring aflê.

Watter vonnis het u verwag? --- Eintlik ek het niks geweet van die bewerings wat hulle gemaak het nie, ek het verwag - hulle het gesê ek sal 10 maande gevangenisstraf kry.
Is dit nou 10 maande vir menseroof, roof met verswarende omstandighede en vir moord? --- Ek weet nie waarvoor sou die 10 maande gewees het.
Maar hoe dit ookal sy Meneer, u is ongelukkig omdat u lewenslange gevangenisstraf opgelê is, is dit reg? --- Ja volgens ek Edele."

18. In **S v Karolia** 2006 (2) SACR 75 (SCA) at 93b-h (para 36) the Court had this to say on factors emerging post sentence on appeal:

"[36] The general rule is that an appeal Court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (R v Verster 1952 (2) SA 231 (A) at 236A - C and R v Hobson 1953 (4) SA 464 (A) at 466A). However, the general rule is not necessarily invariable (S v Immelman 1978 (3) SA 726 (A) at 730H; S v V en 'n Ander 1989 (1) SA 532 (A) at 544H - 545C; Thomson v S [1997] 2 All SA 127 (A) at 138a-c and Attorney-General, Free State v Ramakhosi 1999 (3) SA 588 (SCA) para [8] 593D - F). Schreiner JA put the matter as follows in Goodrich v Botha and Others 1954 (2) SA 540 (A) 546A - D:

> *'In general there is no doubt that this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. It was so stated in Rex v Verster 1952 (2) SA 231 (A), and in R v Hobson 1953 (4) SA 464 (A). Those cases dealt with appeals against the severity of a sentence; it was sought, in each case unsuccessfully, to prove subsequent happenings to support the contention that the sentence should be reduced. But the language used in the judgments appears to be general. In the absence of express provision, therefore, it is very doubtful, to put it no higher, whether this Court could in*

any circumstances admit evidence of events subsequent to the judgment under appeal, in order to decide the appeal.

It is, however, unnecessary to exclude the possibility that in an exceptional case this Court might be able to take cognisance of such subsequent events, where, for example, their existence was unquestionable or the parties consented to the evidence being so used. For here the foundations for any such exceptional exercise of jurisdiction were clearly wanting. The respondents did not consent to the use of the second report and, if its terms were to be taken into account, it would clearly have been necessary to provide an opportunity for the respondents to lead any rebutting or explanatory evidence that they might wish to. The proceedings have already been very lengthy and no consideration of convenience supports their further prolongation.'

(This is also true where sentence is concerned.)"

See also **S v EB** 2010 (2) SACR 524 (SCA) at 528e-529e (para 5).

19. Having regard to **S v Malgas** 2001 (1) SACR at 478c-h (para 12), concerning the exercise of appellate jurisdiction, and at 481g-482j (para 25), relating to the determination of substantial and compelling circumstances; and further **S v Matyityi** 2011 (1) SACR 40 (SCA) at 47e-48c (para 14) relating to whether youthfulness is a mitigating factor or not, both of which the trial Court had regard to. I have discerned no material misdirection in her approach. In that event we are not at liberty to interfere in the life imprisonment sentence imposed. In **S v Kgosimore** 1999 (2) SACR 238 (SCA) at 241a-h (para 10) the Court stated:

"[10] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there

is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Cf S v Pieters 1987 (3) SA 717 (A) at 727 G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so."

20. A last aspect: It is a great shame that this Court has to decry in just about every other case that the sketch plans and photos of terrains of scenes of crime are totally unhelpful or even useless. For example Exhibit D, an aerial photo, gives only the following information:

*"**SLEUTEL TOT FOTO'S***
Gefotografeer op 2010-08-23 om 09:30 te Gong-Gong omgewing Barkly-Wes Distrik
***BESKRYWING VAN FOTOS**:*
FOTO 1 en 2:

A - Toon die optelplek te Gong-Gong kruising.

B - Toon die rigting waarin die verdagtes die oorledene na bewering geneem het.

C - Toon die plek waar die oorledene na bewering aangetref is.

FOTO 3: Toon punt A.

FOTO 4: Toon punt C.

_____Signed_____ R E THOMAS: A/O"

What a waste of time and recources.

21. In **S v Fredwell Spangenberg** Case No CA&R54/14, Delivered on 29/08/2014 (Unreported) Mamosebo AJ (Olivier J concurring) made the following useful observation:

"[14] It is disappointing that the skills of a police officer whose specialty it is to take photos and draw plans of an accident scene is leaving so much to be desired. The annotation is too scanty.

14.1 For instance, the cardinal points are omitted from the photos. The cardinal points simplify and facilitate description and makes the depiction of pointed out points better understood---.

14.2 The width of the tarred road was not measured. This is important to show whether the road was wide or narrow and whether an accident could have been avoided with ease or not.

14.3 The barrier (broken) line is clearly visible from the photos. The point of impact is marked "C". Point C is on the correct side (left driving surface) of the deceased. However, no distance was measured from the barrier line to the point of impact. The photos, read together with the sketch plan and the key thereto suggest that the appellant drove over the barrier line and therefore encroached on the deceased's territory. We do not have sufficient evidence though. If the distance was measured it would have shown by what distance the encroachment by the appellant allegedly took place, but the photos, sketch plan and key would still not by themselves, and in the absence of oral evidence regarding the point of impact, have constituted proof that there had been any encroachment whatsoever by the appellant's vehicle.

14.4 The accident is what is normally called a head-on collision; although the photos show that the right-hand side of the appellant's bakkie was smashed and nothing was left of the right-hand side of the deceased's Uno. In such accidents the dust particles that have settled on the tarred road that have been dislodged from both vehicles, have been found to be the best indicators of precisely where an accident had taken place. The police photographer ought to have mapped out that area with a visible marker. This was not done---.

14.5 Particular fixed points must be identified and always be depicted on photos or sketch plans; for example, numbered electricity poles or mile stones etc. This may be of assistance later when the markings have disappeared and an inspection in loco is called for.

The above are useful guidelines for police and traffic officers in particular who are authorised to take over and cordon off the scenes of accidents."

22. The Director of Public Prosecutions of the Northern Cape and the Provincial Commissioner of Police are urged, perhaps jointly, to authorise the conducting of workshop and invite experts on these aspects of investigation on how to collect evidence of crime scenes and prepare sketch plans and photos and how to annotate the keys to them meaningfully for proper presentation to Court. This is in the interest of justice.

23. The appeal must fail. I make the following order:

1. The appeal on sentence is dismissed.

2. The Registrar of this Court is directed to forward a copy of this judgment specifically to the Northern Cape Director of

Public Prosecutions and the Provincial Commissioner of Police.

_____

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

I concur.

_____

M C MAMOSEBO
ACTING JUDGE
Northern Cape High Court, Kimberley

OLIVIER J (MINORITY JUDGMENT)

[24] As is evident from the judgment of my brother Kgomo JP I had made a draft of this judgment available to both him and our sister Mamosebo AJ. I have now had the privilege of reading his judgment. I find myself unable, with respect, to agree with the judgment of Kgomo JP. The issues and aspects on which I differ and my findings and reasons will be apparent upon a careful reading of my judgment and I therefore do not intend to comment on the judgment of Kgomo JP or to add anything at all to my erstwhile draft judgment.

[25] The circumstances of the crimes were, very briefly, that the appellant and three other men (one of whom his brother) were hitch-hiking when they saw the deceased alighting from his vehicle to relieve himself in nearby bushes. They decided to rob the deceased, an Ethiopian man who had come to South Africa to earn a living as a merchant in order to support his poverty-stricken family in Ethiopia.

[26] The deceased tried to escape, but fell, and was then kicked against the head by his attackers. One of the appellant's co-attackers then produced a knife, of which the appellant had until then been unaware, and stabbed the deceased.

[27] All four of them bound the deceased's arms and feet and loaded him into the trunk of his own vehicle. The appellant, accompanied by the other three attackers, then drove off with the deceased's vehicle.

[28] During the trip the deceased kicked and made noise inside the boot and when the appellant stopped the vehicle, the deceased escaped from the vehicle and tried to run off. He was caught by one of the appellant's cohorts and put back into the boot of the vehicle.

[29] The appellant then drove to a wooded area. There the attacker with the knife took the deceased away and stabbed him in his chest. The deceased fell down and lay there while the four of them took all his belongings from his vehicle, including duvet sets, blankets and a carpet which had apparently formed part of the deceased's merchandise, as well as clothes and shoes. They had also taken his cellphone and cash on the scene where they first attacked him.

[30] They left the scene, but later returned to take the deceased's vehicle. At that stage the deceased was still lying where they had left him. They drove to Hartswater and left the vehicle there.

[31] The body of the deceased was later found in an advanced state of decomposition. His hands were still tied behind his back. It was found that there were several open wounds on his head and in his chest area. One of the wounds to the head penetrated the cartilage of the ear and another penetrated the skull. Another one of the wounds to the head resulted in extensive fractures. Two of the wounds to the chest also penetrated, but because of the state of decomposition of the body it was not possible to say whether the lungs had been penetrated. The cause of death was recorded as penetrating wounds to the head and the chest.

[32] Mr Rosenberg, counsel for the respondent, conceded, in my view correctly, that the trial Judge had misdirected herself in two respects:

32.1 In his statement in terms of section 112(2) of the Criminal Procedure Act[1] the appellant denied having had the direct intention to kill the deceased, but admitted having foreseen that the kicking to the head and the stab wounds could result in the death of the deceased and having nevertheless assisted in kicking the deceased and in associating himself with the knife attack.

The appellant therefore quite clearly denied *dolus directus* but admitted *dolus eventualis* as the form of intent applicable to the murder.

[1] 51 of 1977

The prosecutor accepted the appellant's plea of guilty, together with the factual version in his statement[2], and the trial Judge therefore had no right to find that the appellant eventually formed the direct intent to kill the deceased[3]. The acceptance of the factual version set out in the section 112 statement resulted in that issue having been *"sufficiently circumscribed"*.[4]

32.2 As regards the fact that the appellant had as a matter of record promised to cooperate with the prosecution and to testify against his brother and one other accused in their trial, the trial Judge found that she was not convinced that the appellant had not made that promise with the ulterior motive to actually eventually help his brother. This was based on a finding by the trial Judge that the appellant had not in his statement made mention of his brother's actual participation in the offences.

Apart from the fact that the trial Judge was in the process, with due respect, speculating, a proper reading of the statement reveals that the appellant had indeed in his statement implicated his brother in the crimes, and in the assault on the deceased. The prosecution, with all the evidence and information at its disposal, had apparently been satisfied that what the appellant had stated regarding his brother's role was correct.

[33] These were material misdirections. It is trite that *dolus eventualis* as a form of intent will generally be viewed as less serious than *dolus directus*.[5]

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[2] In argument before us Mr Rosenberg, counsel for the respondent, confirmed that he had also been the prosecutor and that he had indeed at the trial accepted the factual version advanced by the appellant in his section 112 statement. This is in any event also evident from the judgment of the Court a quo.

[3] Compare **S v Legoa** 2003 (1) SACR 12 (SCA) para [26]; **S v Khumalo** 2013 (1) SACR 96 (KZP) para [17]

[4] Per Kgomo JP in **S v Streak**, an unreported judgment on appeal in this Division under case no. CA&R21/09, delivered on 18 September 2009

[5] Compare **Director of Public Prosecutions v Mngoma** 2010 (1) SACR 427 (SCA) para [9]

[34] The absence of any real intention to assist the prosecution and to testify against his brother would have been very difficult to reconcile with the existence of real and sincere remorse on the part of the appellant. Put another way, a false promise of such cooperation, in other words in the sense of the appellant already then knowing that he was not going to honour that promise, would not have been the conduct expected of an accused with real remorse. This is probably exactly why the trial Court's judgment on sentence is silent on the fact that the appellant had surrendered himself to the police, that he had cooperated with the police from that moment onwards, that he had pleaded guilty and that he had expressed remorse in his section 112 statement.

[35] Even if there had been no misdirections it would have had to be established whether the facts before the trial Court constituted substantial and compelling circumstances in respect of either of counts 2 and 3.[6] In doing so the cumulative effect of all facts must be considered. In **S v Malgas** 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) it was held that "… while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable".[7]

[36] Clear mitigating factors in respect of both counts 2 and 3 were that the appellant had been a first offender and that he had, at least at that stage, exhibited sincere remorse.

[37] As far as the murder was concerned there was the additional consideration that the appellant had acted without the direct intent to kill the deceased. That the appellant remained a part of the attack when it *"progressed"* from kicking the deceased to him being stabbed and put

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[6] Compare **S v PB**, 2013 (2) SACR 533 (CSA) para [20]
[7] **Ibid**, para [9]

into the boot of his vehicle, and again being stabbed when they eventually stopped, did not justify the inference[8] that the appellant's form of intent had then also progressed to a direct intention to kill the deceased. I cannot see how the appellant's failure in some way afterwards to disassociate himself from the earlier stabbing of the deceased by another accused in the appellant's absence, could justify the inference that the appellant had in the meantime formed a direct intention to have the deceased killed. In any event, the trial Court convicted the appellant on the basis of the facts in the section 112 statement, and therefore on the basis that the appellant had not acted with *dolus directus*.

[38] In addition the murder itself had clearly not been planned or premeditated in any sense of the word. Even if it had been possible to find that the appellant's continued participation in the attack, and the fact that he had been the driver of the vehicle when the deceased was taken to where he was further stabbed by the other attacker, justified the inference that he had at some point formed the direct intention that the deceased should die, that would not automatically lead to the conclusion that the murder must then also have been premeditated.[9] There was no evidence that the death of the deceased had been "thought out" or "decided on" by the attackers, let alone by the appellant, nor was there evidence regarding the appellant's state of mind when he drove the vehicle to that spot or regarding how long it had taken to drive there[10]. However tempting an inference of direct intent or even premeditation may at this stage be, the admission of only *dolus eventualis* and the appellant's conviction on that basis, *"must stand for the purpose of the sentencing of the appellant".*[11]

[8] Drawn by the Court *a quo.*
[9] Compare **S v Radebe** 2011 JDR 0926 (FB) para [23]
[10] **S v Raath** 2009 (2) SACR 46 (c) para [16]
[11] **S v Magwaza** 2013 JDR 2095 (KZP) para [5]

[39] In my view the trial Court correctly found that the appellant's relatively youthful age of 21 (twenty one) years at the time of the offences could not really serve as a mitigating factor. There was no indication at all that his age had played any role in the sense of him having through immaturity or under the influence of others taken part in these offences[12]. In fact, the appellant had matriculated the year before the offences. As far as the offences were concerned he had not only associated himself with the actions of the others, but had also kicked the deceased. He had driven the stolen vehicle to the secluded area where the deceased was left to die after having been taken away and stabbed again.

[40] Not only mitigating factors are relevant when considering whether substantial and compelling circumstances exist which justifies a deviation from a prescribed sentence in respect of a particular offence. The aggravating factors must also be kept in mind.

[41] The attack on the deceased was a prolonged and particularly cruel attack. He had to suffer not only the brutal physical assault, but also the mental shock and anguish of being kidnapped, stuffed into the boot of his own vehicle and driven away to what he must surely have realised would be further assault and possibly death.

[42] The deceased's passing deprived his family in Ethiopia of his financial assistance. He had left them to seek a better income in South Africa, not only for himself but also to help them. In the end the family had to be financially assisted to get the body of the deceased back to Ethiopia.

[12] Compare **S v Matyityi**, 2011 (1) SACR 40 (SCA) para's [9] - [14]

[43] Mr Rosenberg placed information before us to the effect that the appellant had, at the later trial of his brother and other accused, gone back on his initial undertaking to keep on cooperating and to testify against, inter alia, his brother. Although he initially apparently incriminated his brother, he later alleged that his initial evidence had been false and he testified that he had at his trial pleaded guilty after having been forced to do so and on the basis of a promise that his sentence would be only 10 (ten) months imprisonment.

[44] In exceptional circumstances a Court of appeal may have regard to new evidence that had not been available to the trial Court[13]. This new evidence has a direct bearing on the appellant's earlier undertaking to assist in the prosecution of, inter alia, his brother, which undertaking was at his trial argued to be a mitigating factor that formed part of what was then by both counsel submitted to be substantial and compelling circumstances. It also has a bearing on the sincerity of the appellant's remorse and on the prospects of his rehabilitation. In my view these constitute exceptional circumstances, justifying the admission of the new evidence in this case. Mr Nel, counsel for the appellant, did not object to the admission of the new evidence, which basically consisted of a transcription of the evidence of the appellant in cross-examination at the later trial. Mr Nel in fact submitted so-called replying heads of argument, to which he attached a transcription of the appellant's evidence-in-chief.

[45] In **S v September** 2014 JDR 1105 (ECG) the relationship between remorse and prospects of rehabilitation was explained as follows[14]:

"A genuine expression of remorse and contrition is fundamental if there is to be any real prospect of rehabilitation".

[13] Compare **S v Jaftha** 2010 (1) SACR 136 (SCA); **S v Michele and Another** 2010 (1) SACR 131 (SCA)
[14] **Ibid**, para [21]

[46] In my view the appellant's later change of heart does not justify the inference that he had not initially been sincerely remorseful. It is not only the fact that the appellant pleaded guilty and his expression of remorse in his section 112 statement that were indicative of his remorse. There was also the fact that, after the offences, his conscience drove him to ask his sister to make arrangements with the police for his arrest. He had also at that stage, and from his arrest onwards, cooperated with the police. It unfortunately does not appear from the record whether it was his cooperation that had in fact led to the apprehension of his brother and another accused, but that he had until then cooperated with the police was common cause. On the facts before the trial Court the appellant's remorse was sincere, and it was viewed as such by the prosecution.

[47] In my view the trial Court should have found that, as far as the murder was concerned, the appellant's clean record, his sincere remorse, the lack of planning and the fact of *dolus eventualis* as his form of intent outweighed the aggravating factors and would make the ultimate sentence of life imprisonment disproportionate to the circumstances of the murder. On the evidence before the trial Court there was a clear indication that the appellant was capable of rehabilitation. It follows that I am of the view that Mr Rosenberg had also been correct in conceding, in the Court a quo, that there were substantial and compelling circumstances in respect of the murder count.

[48] I do not think that it could be said that the appellant's later change of stance necessarily meant that he had not initially been sincerely remorseful. I also do not think that it could at this stage, if sentence on the murder count is considered afresh, detract from the appellant's initial reaction, as a relatively young man, when he realised that he had done wrong.

[49] We do not know what may have led to the appellant's turnaround at the later trial. There he initially apparently honoured his undertaking and incriminated inter alia his brother, but later in cross-examination recanted and said that his earlier evidence had been false and that he did not want to answer further questions. Whether it was the trial Court's finding that his undertaking had been made with an ulterior motive that prompted the turnaround of the appellant, as suggested by Mr Nel, or the shock of a perhaps unexpected sentence of life imprisonment, we don't know. Mr Rosenberg in argument disclosed to us that he had at the trial of the appellant given an informal undertaking to the appellant's legal representative that he would not seek a sentence of life imprisonment on the murder count. Although the appellant and his legal representative should have realised that the trial Court would not be bound by the fact that the prosecution did not seek such a sentence, the undertaking may have created an expectation. It is relevant to keep in mind that the undertaking had been given because of the fact that Mr Rosenberg deemed the appellant's cooperation necessary to ensure a conviction of the other accused. It would therefore in my view be unfair, especially against the background of the contents of the section 112 statement and the unchallenged information regarding the appellant's surrender and earlier cooperation, to conclude that the turnaround can only be indicative of a complete absence of remorse at this stage.

[50] I am therefore of the opinion that, even when sentence is considered afresh, the appellant's clean record and at least his initial sincere remorse remain indicative of strong prospects of rehabilitation and that, together with the absence of prior planning and the lesser form of intent, they cumulatively constitute substantial and compelling circumstances justifying a lesser sentence on the murder count.

[51] The appellant did not take part in the stabbing of the deceased, especially not when the deceased was again stabbed where he was left to die. The later stabbing occurred in the absence of the appellant, after the person with the knife had taken the deceased away before again stabbing him. That appears to have been the initiative of the other attacker. The fact that the appellant later accompanied the others to where the deceased's body was, to remove the vehicle, could however be argued to be indicative of a failure by the appellant to actively disassociate himself from that at that stage, and that would be an aggravating factor.

[52] As far as the robbery count and the prescribed sentence of 15 (fifteen) years imprisonment are concerned I am, however, of the view that, even having regard to the appellant's initial remorse and his clean record, the facts at the disposal of the trial Court did not as a whole constitute compelling and substantial circumstances. The robbery had not been extensively planned, but it was preceded by a conscious decision by all of them to rob the deceased. The physical attack on the deceased and the spontaneous kicks to the head of the deceased are indicative of the fact that the decision to rob had right from the outset included a decision to actually inflict physical harm. Taking everything into account the prescribed sentence of 15 (fifteen) years imprisonment is in my view not disproportionate to this robbery.

[53] When considering what a suitable sentence would be in respect of the murder count "*the benchmark which the legislature has provided*"[15] in the form of the prescribed sentence of life imprisonment in murder cases where death results from the commitment of the robbery, has to be kept in mind. That is the sentence which the legislature ordinarily wishes to be imposed in such cases and the lesser sentence should therefore be a sentence adjusted from that benchmark downwards.

[15] Compare **S v Magano** 2014 (2) SACR 423 (GP) para [22]

[54] The fact that the appellant had at the time of his initial sentence already spent approximately 11 (eleven) months in custody awaiting trial will also be taken into account.

[55] In **S v Nemutandani** 2014 JDR 1898 (SCA), an as yet unreported judgment of the Supreme Court of Appeal drawn to our attention by counsel for the appellant, Mr Nel, the appellant had been sentenced to 20 (twenty) years imprisonment for a murder committed in the course of a robbery with aggravating circumstances, and to 18 (eighteen) years imprisonment for the robbery. The Court a quo had not ordered the sentences to run concurrently and on appeal it was held that an affective sentence of 38 (thirty eight) years imprisonment for that appellant, "*who was 21 years old at the time – appears … to be unduly harsh"*[16]. It has to be pointed out that the appellant in that case had been the one who had among that group of robbers taken the initiative, who had on his own taken a knife from one of the others and who had inflicted the fatal stab wounds.

[56] In the later trial the appellant's brother and one other accused was convicted on exactly the same counts on which the appellant had earlier been convicted. The third accused, and incidentally the one who had according to the appellant's section 112 statement inflicted the stab wounds in this case, was acquitted. The appellant's brother and his co-accused were both sentenced to periods of 5 (five) years, 12 (twelve) years and 24 (twenty four) years imprisonment on the respective counts of kidnapping, robbery with aggravating circumstances and murder, and it was ordered that all these sentences be served concurrently, which resulted in an effective sentence of 24 (twenty four) years imprisonment. As regards the sentence on the count of murder there would of course be a striking disparity between a sentence of 24 years imprisonment and one of life imprisonment, and this is a factor which in

[16] **Ibid**, para [7]

my view should be kept in mind when considering the sentence for the murder afresh.[17] According to the indictment in the later trial the appellant's brother and his convicted co-accused were of more or less of the same age as the appellant.

[57] The difference between the sentence of the Court a quo and that Court in respect of the robbery is not as significant as to justify interference. According to the file in that matter social reports were handed in in respect of both those accused, which was not the case in the present matter.

[58] Although leave to appeal had also been granted in respect of the robbery sentence the submissions made on behalf of the appellant were limited to the murder sentence, and the relief sought on appeal was only that the sentence of life imprisonment be interfered with.

[59] The sentence of the appellant on the kidnapping count is not in itself the subject of this appeal.

[60] In my view a sentence of 20 (twenty) years imprisonment on the murder count would be suitable in this case. The appellant's brother and his convicted co-accused denied any involvement and the element of remorse, and the concomitant prospects of rehabilitation, would not have been a factor in their case.

[61] In order to address the cumulative effect of the sentences, and because the kidnapping, murder and the robbery really formed part of one single incident, an order should be made that the sentences to an extent be served concurrently.

[62] The appellant has been imprisoned from the date of sentencing on 12 March 2012.

[17] Compare **S v Mhlakaza and Another** 1997 (1) SACR 515 (SCA) at 524c – e

[63] **I would therefore have allowed the appeal on Count 1 and substituted the sentence of life imprisonment with a sentence of 20 years imprisonment and ordered the sentence on Count 2 to run concurrently with it.**

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C J OLIVIER
JUDGE
Northern Cape Division

On behalf of the Appellant:	**Adv V Z Nel**
Instructed by:	Kimberley Justice Centre
On behalf of the Respondent:	**Adv J J Rosenberg**
Instructed by:	Director Public Prosecutions