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: **CA&R 113/16**

Heard: **13-02-2017**

Delivered: **17-02-2017**

In the matter between:

JOLANDA MOOS **Appellant**

v

THE STATE **Respondent**

Coram: Kgomo JP et Snyders AJ

APPEAL JUDGMENT

Kgomo JP

1. The appellant was arraigned before Regional Magistrate Ms N Mbalo sitting at Sutherland, Northern Cape, on a charge of murder. She was accused of murdering Mr Reckville Olivier a 21 year old man on 05 January 2016, by repeatedly kicking and trampling him on his head and upper body until he died. The provisions of sections 51(2), 52A and 52B of the Criminal Law Amendment Act, 105 of 1997, were invoked.
2. The appellant was sentenced to 15 years imprisonment and also declared unfit to possess a firearm. Leave to appeal against the

sentence is with leave of the trial Court. The essence of the ground(s) of appeal is that having regard to the sheer weight and number of the mitigating factors the learned Magistrate erred in not having imposed a lesser sentence than the prescribed 15 years minimum sentence. This resumè also basically summarises Mr Fourie's, appellant's counsel's, submission to us.

3. The appellant was legally represented by attorney Ms E Muller attached to the Legal Aid South Africa Centre at trial stage. She pleaded guilty and submitted a written plea in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977, in which she broadly stated that:

3.1 Earlier on the day of the incident the deceased stole her phone and it took a lot of effort to retrieve it from him;

3.2 She had been drinking that day and was fairly heavily under the influence of intoxicating liquor but was fully cognizant to, or appreciated, what she was doing;

3.3 In that state of intoxication she found the deceased lying on a bed where she also happened to have been. He was stuporous drunk (*"tiepdronk",* she says). She dragged him from the bed onto the floor where she kicked and trampled him severely on his head and the chest area. The chief post-mortem finding by the pathologist is the following:

"(1) Uitgebreide kneusing, abrasies gesig;

(2) Groot subdurale bloeding (L) en (R) occipital;

(3) Aspirasie bloed tragea en veral (R) long;

(4) Bloed in maag."

The cause of death is noted as:

"Subdurale bloeding met asperasie en asfiksie."

4. In my view the following may be recorded as mitigating factors:

4.1 The appellant was brought up in a dysfunctional home. She started drinking when she was at High School and developed

a drinking problem, a combination of which let her dropping out of school in Grade 8;

4.2 When the offence was committed, now not surprisingly, she was relatively heavily under the influence of intoxicating liquor. The intake had impaired her thinking faculties. If sober she would not have behaved in the irrational way she did. She says, for instance:

"Ek het net geskop en aangehou skop totdat die mense van die huis my daar weggetrek het."

4.3 The deceased had provoked the appellant earlier in the day by stealing her phone and steadfastly refused to part with it. The sight of him sleeping triggered the rage in her. The meaning of this is that the assault was not just gratuitous in the sense that it stems from somewhere;

4.4 At 19 years of age the appellant was still fairly youthful. It was common cause that she had previously voluntarily submitted herself for alcohol rehabilitation and undertook or was prepared during her trial to do so again. She is, in the premises, a good candidate for rehabilitation. That window ought to be left open for her to look through and reconsider her wayward ways;

4.5 The appellant was a first offender. A combination of this fact with her plea of guilty makes her written expression of remorse the more plausible; and

4.6 The appellant has been convicted of murder with *dolus eventualis* as the form of intent. The state by accepting the plea of guilty in that form conceded thereby that the appellant had no direct intent to cause the deceased's death. The concomitant thereof is that the moral turpitude of her heinous deed was ameliorated.

5. The Supreme Court of Appeal, Marais JA, in **S v Sadler** 2000(1) SACR 331 (SCA) at 334d-g (para 6) re-emphasized the parameters

within which an appellate Court may interfere with the decision/sentence of a court *a quo* by referring to two decisions of that Court where the following was stated:

"[6] The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in S v Shapiro 1994 (1) SACR 112 (A) at 119j-120c:

'It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S v Rabie 1975 (4) SA 855 (A) at 857D - F:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court': and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate"."

6. In **S v Malgas** 2001(1) SACR 469 (SCA) at 482e-f Marais JA made this pronouncement which, for me, is pertinent to this case:

"I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

7. While state counsel, Adv Jansen, emphasized the persistence and viciousness of the assault she declared herself not to be averse to the Court tampering with the sentence. This is also what we intend doing because, on a conspectus of the aforegoing, substantial and compelling circumstances calling for a deviation from the ordained sentence exist and is justified. Although this was not a straightforward balancing act, this is the conclusion which the Magistrate should have reached.

8. **In the result I make the following order:**

(1) The appeal succeeds to the following extent: The sentence of 15 years imprisonment is set aside and replaced with the following:

"The accused is sentenced to 12 (twelve) years imprisonment, 4 (four) years of which are suspended for five years on condition that the accused is not convicted of an offence involving violence to the person of another, and to which she is sentenced without the option of a fine, and committed during the period of suspension."

(2) In terms of s 282 of the Criminal Procedure Act, 51 of 1977, this sentence is antedated (backdated) to 02 February 2016.

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F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape Division, Kimberley

I concur

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J A SNYDERS
ACTING JUDGE
Northern Cape Division, Kimberley

On behalf of the Applicant:	**Mr P.J Fourie**
	(Legal Aid South Africa, Kimberley)
On behalf of the Respondent:	**Adv. C. Jansen**
	(Director Public Prosecutor, Kimberley)