IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case number: A95/2025

In the matter between:

B[...] B[...] **Appellant**

And

THE STATE **Respondent**

Coram: **SHER J et PANGARKER J**
Hearing date: **13 June 2025**
Judgment delivered: **25 June 2025**

ORDER

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a. The appeal against sentence is dismissed.

b. The sentence of 20 (twenty) years' direct imprisonment is confirmed.

JUDGMENT

PANGARKER J (SHER J concurring)

Introduction

[1] This appeal against sentence is with leave of the Mossel Bay Regional Court which convicted the appellant on 5 March 2021 of the murder of his life partner, Y[...] K[...] (the deceased). On the same date, the Regional Magistrate sentenced the appellant to 20 years' direct imprisonment in terms of section 51(2)(a)(ii) of the Criminal Law Amendment Act 105 of 1997 (CLAA) being the minimum sentence applicable to the appellant who was a second offender for murder as defined in Part II of Schedule 2 of the CLAA.

[2] The State alleged in the charge sheet that the appellant unlawfully and intentionally murdered the deceased on 24 January 2015 at Kwanonqaba, Mossel Bay, by hitting and kicking her. The appellant was legally represented in the Regional Court and after the relevant provisions of the CLAA and competent verdicts were explained to him, he pleaded not guilty to the charge of murder. The appellant's plea explanation and admissions were contained in a written statement made in terms of section 115(2)(b) of the Criminal Procedure Act 51 of 1977 (CPA), which was read into the record[1].

Section 115(2) statement and formal admissions

[3] Insofar as the merits of the case were concerned, the appellant indicated in his statement that they had co-habited for two years prior to the fateful day. During the evening of 23 January 2015, they visited the deceased's niece where they consumed alcohol and around midnight, they returned home to their shared residence in Kwanonqaba, where they consumed more alcohol.

[4] The appellant and deceased became involved in an argument which revolved around the appellant's consumption of wine which the deceased had bought and the

[1] Exhibit A

deceased's accusation that the appellant failed to contribute financially to their joint household. He also stated that the deceased threw wine at his face and threatened to return to her estranged husband and have more children with him.

[5] Consequently, the appellant became angry at the accusation and started hitting the deceased with fists in her face. She fell to the ground, and he started kicking the deceased in her face and on her body. The appellant explained that the deceased lost consciousness. The appellant fetched a jug of water and poured the water over her face. According to the appellant, the deceased regained consciousness and he informed her that he would be leaving. The appellant then left the house.

[6] He stated further that he did not foresee the possibility that he could cause the deceased's death due to being enraged at her actions. He was provoked and angry but could distinguish between lawful and unlawful actions and act according to such knowledge. The appellant's statement indicated that at the time of the assault, his actions were not those of a reasonable person because a reasonable person in those circumstances would have realised that it was not necessary to assault the deceased in the manner in which he did. The appellant, in his section 115(2) statement, pleaded guilty to culpable homicide.

Medical evidence

[7] The State called the pathologist, Dr Christa Hattingh, who confirmed the content of the post-mortem report. The main post-mortem findings were that the deceased sustained deep scalp bruising, intracranial haemorrhage, brain laceration and intraventricular haemorrhage which the pathologist explained was a laceration to part of the brain with haemorrhage into the ventricular. The deceased's body displayed rib fractures and intercostal contusions. The lung and heart showed contusions and there was evidence of mild pulmonary aspiration which indicates that the deceased breathed blood into her lungs.

[8] Dr Hattingh further testified that there was blood in the abdominal cavity and dense retroperitoneal and mesenteric haemorrhage referring to haemorrhage at the

back of the soft tissue, as well as injury to the liver and bruises to the stomach. With regard to the liver, the pathologist noted multiple lacerations to the left lobe and a deep laceration which nearly severed the deceased's liver in two. The right temporal area of the deceased's scalp extending to the back of the head, was bruised.

[9] The deceased's ribs were bruised and fractured[2]. The pathologist testified that chronic lung disease was detected but did not contribute to the injuries which caused the death of the deceased. With reference to contusions on the deceased' lungs, it was noted that the upper and lower lobes of the lungs were bruised and that blood entered the airways causing the deceased to breath in and swallow blood. Furthermore, the right upper chamber of the heart was bruised due to compression against the vertebral column. The pathologist explained that the injury to the heart was caused by severe force applied to the chest, most often seen in motor vehicle accidents. The pathologist's view was that direct force, likely a kick, caused the severe injury to the deceased's liver.

[10] In addition to the above injuries, the further injuries sustained by the deceased were severe bruises to the kidney and bladder as a result of blunt force injury. The deceased's ribs broke laterally, meaning that the force was applied to the front of her body. The pathologist's view was that the deceased died fairly quickly. The fresh injuries observed and identified by the pathologist all occurred during/at the same period. A blood alcohol sample was taken for testing but the pathologist had yet received the report.

[11] Dr Hattingh's view was that all the injuries to the deceased's body were severe, at multiple sites and in her opinion, severe blunt force was applied, akin to the impact sustained by a person involved in a motor vehicle accident. The deceased was of average physique, weighing 54kg at 1.61 metres in height.

Judgment on conviction

[2] Right side of the ribs

[12] The State closed its case, and so too did the appellant. The issue before the Court *a quo* was whether the appellant had the intention to kill the deceased. In its judgment, the Court *a quo* accepted the testimony of Dr Hattingh regarding her findings in the post-mortem report, the manner of infliction of the severe blunt force injuries, the serious nature thereof and the cause of death. She also found that the deceased must have died quickly, and that the mechanism of assault (as admitted by the appellant) was that the appellant hit the deceased with his fists and kicked her.

[13] The Court *a quo* also found that the appellant continued to assault the deceased by kicking and hitting her while she was lying on the ground. The further findings were that the assault was perpetrated over a sustained period and that it must have been obvious to the appellant that the deceased was seriously injured. Despite his partake in alcohol, the appellant could appreciate the wrongfulness of his actions toward the deceased.

[14] The Regional Magistrate further found that the appellant wished to escape liability for the deceased's death by stating that he had no intention to kill her. However, the evidence presented by the State established that the severe assault by the appellant caused the deceased's death. In addition, the Regional Court found that no other injuries were caused to the deceased except that caused by the appellant's assault, and in the absence of an answer from the appellant, it was held that the appellant had the intention to kill the deceased. He was thus convicted of murder.

Sentencing proceedings in the Regional Court

[15] One previous conviction of murder committed in March 2002[3] was proved against the appellant, for which a sentence of 10 years' imprisonment was imposed. The appellant's legal representative handed in a letter written by him which the Court was informed, showed that he expressed remorse for his actions and had found God.

[3] SAP 69s, Conviction on 9 February 2004

[16] In an *ex parte* address by his legal representative, the appellant's circumstances were placed before the Court *a quo.* He was 43 years old, completed grade 11, and worked at Mullers Construction for three years. His minor children aged 16, 11 and 10 years old respectively, whom he maintained, lived with their mother in Sedgefield. In mitigation of sentence, it was submitted on behalf of the appellant, that the deceased was his life partner for two years, and he had expressed remorse for his actions and his previous conviction was approximately 18 or 19 years ago. It was consequently submitted that there were substantial and compelling factors present and the Court should show mercy toward the appellant when imposing sentence.

[17] The State called the deceased's brother, J[...] S[...], in aggravation of sentence. To summarise, he testified that the deceased's youngest child of 12 years had lived with the couple in their shared bungalow prior to her mother's death, and she was struggling to come to terms with her mother's death. Due to an argument between the deceased and appellant on the fateful day, Mr S[...] was asked if the deceased's daughter could stay with him. Subsequent to his sister's death, all her children lived with him.

[18] In cross examination, Mr S[...] denied that the deceased's children lived with their father. He explained that the deceased had a good relationship with her children and would give them money for food. The State requested the Regional Magistrate to impose the prescribed 20 years' direct imprisonment for murder by a second offender.

Sentence judgment

[19] In her judgment on sentence, the Regional Magistrate addressed in detail, the triad and the mitigating and aggravating factors and questioned why, if he was provoked, the appellant did not simply leave and walk away. She emphasised the prevalence of gender-based violence and the cruelty with which the crime was committed and concluded that no substantial and compelling factors were shown which justified a deviation from the prescribed minimum sentence of 20 years' imprisonment, which she duly imposed.

Grounds of appeal

[20] The grounds of appeal are: that the sentence of 20 years' imprisonment is harsh and shocking; that the Regional Magistrate erred when she did not find that the factors, cumulatively considered, amounted to substantial and compelling factors necessitating a lesser sentence as enunciated in ***S v Malgas***[4]; that she placed too much emphasis on the interests of the community, and under-emphasised the appellant's personal circumstances, which included mitigating factors[5], and the Regional Magistrate failed to temper the sentence with an element of mercy.

Discussion

[21] Interference by an appeal Court in the sentence imposed by the Court *a quo* is limited because of the principle that the imposition of sentence is a matter for the discretion of the trial Court, as stated by Holmes JA in ***S v Rabie***[6]. An appeal Court may thus only interfere where there is a misdirection or irregularity by the trial Court which vitiates the sentence, or where the sentence imposed is disturbingly inappropriate[7] or induces a sense of shock or where there is a striking disparity or disproportionality to the sentence which the trial Court imposed and the sentence the appeal Court would have imposed. Thus, if the trial Court exercised its sentencing discretion properly, then the Court of appeal has no power to interfere.

[22] The Regional Magistrate's judgment took account of the appellant's personal circumstances, the previous conviction, the interests of the community, mitigating and aggravating factors, whether the appellant was truly remorseful and the prevalence and impact of gender-based violence crimes in the country.

[23] Turning to the ground of appeal that the Regional Magistrate erred in that she did not, on her consideration of the relevant factors during the trial, find substantial

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[4] 2001(2) SACR 469 (SCA)
[5] Appellants' age; remorse; employment, and that the assault was spur-of-the-moment
[6] 1975 (4) SA 855 (A) 875D-F; See also S v Sadler [2000] ZASCA 13 para [6]; S v Kgosimore 1999(2) SACR 238 (SCA) par [10]
[7] Director of Public Prosecutions, Kwa Zulu Natal v P [2005] ZASCA 127 para [10]

and compelling factors which would necessitate a deviation from the prescribed minimum sentence, I disagree. In my view, she correctly assessed the factors holistically and concluded that there existed no substantial and compelling factors which would warrant a deviation from the prescribed minimum sentence of 20 years' direct imprisonment for the appellant, a second offender for murder.

[24] In this respect, the Regional Magistrate was mindful of the guidance provided by the Supreme Court of Appeal in the often-cited passage from ***S v Malgas***[8], which states that:

> *"The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded".*

[25] During the appeal, the appellant's counsel conceded that the Regional Magistrate did not commit any misdirection nor error in sentencing the appellant. She acknowledged that due to the extremely serious nature of the injuries to the deceased and the brutal way in which the assault was executed, the Regional Magistrate could have imposed a further five years' imprisonment in terms of section 51(2) of the CLAA to the prescribed minimum of 20 years' imprisonment in terms of section 51(2)(a)(ii) of the Act. In my view, this recognition reinforces the view that the seriousness of the offence trumps the personal circumstances of the appellant when considering the ***Zinn*** triad and traditional factors in imposing a just sentence.

[26] The suggestion in the grounds of appeal is that the suddenness of the attack on the deceased is a mitigating factor. I disagree. I must emphasise that the Regional Magistrate correctly held that the appellant's assault on the deceased was a sustained assault and that he must have known that he was inflicting serious injuries which could result in her death. On his own admission, he continued the

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[8] 2001(1) SACR 469 (SCA)

assault after she fell to the ground and only stopped when he fetched water to revive her from an unconscious state.

[27] On the contrary, the suddenness of the attack is an aggravating factor especially as the appellant, in the section 115(2) statement, blamed the assault on her provocation and his anger at her accusation regarding his drinking, her action of throwing wine in his face and the statement that she would return to her estranged husband. The viciousness and savagery with which the appellant assaulted the deceased by kicking and hitting her while she was lying defenceless on the ground, cannot be downplayed nor diminished at the altar of the appellant's hurt feelings and dented ego. Rather than walk away to calm down, the appellant decided to mete out punishment, which had fatal consequences.

[28] The injuries testified to in detail and set out above, are testament to the excessive force used by the appellant. It bears emphasis that the deceased sustained such severe injuries which were akin to those found in motor vehicle accident victims. She had full frontal bruises on her scalp, multiple lacerations to the liver which nearly severed it, bruises and compression to the heart and multiple other injuries, which must have caused such pain. She had breathed in blood and her death had come quickly. The appellant, in his section 115(2) statement attempted to diminish his culpability and responsibility for the deceased's death, in a cowardly fashion, which was correctly rejected by the State and the Court *a quo.*

[29] On the issue of remorse, the Regional Magistrate questioned the appellant's sudden "change of heart" that he was remorseful of his actions and found that there was no genuine remorse for the consequences of his actions. I point out that the appellant's letter to the Court simply stated that he pleaded guilty to assault, that he was employed in the building industry, that he was sorry he had made a 'mistake' and requested he be given a suspended sentence or a sentence in terms of section 276(1)(i) of the Criminal Procedure Act. He said he had found God, and he had completely transformed his life.

[30] In ***S v Matyityi***[9]***,*** the Supreme Court of Appeal distinguished between regret and genuine remorse associated with an accused person in relation to the consequences and appreciation of their actions, as follows:

"*13. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."*

[31] Taking guidance from ***Matyityi***, it is evident from the appellant's letter that there is no mention of the deceased, nor an expressed appreciation for the effect which her death has/had on her children and family or for that matter, on him. Aside from his section 115(2) statement indicating that he was provoked and angry, the letter is silent on why the appellant went to such lengths to retaliate at the deceased's statements. The Court was thus left with no real idea as to why he committed the heinous crime of murdering his life partner.

[9] 2011 (1) SACR 40

[32] The appellant's submission is that much time has passed since he committed the offence and that he has changed. It is so that more than five years passed from the date of the commission of the offence to the conviction and sentencing, and we are informed that the appellant has found God. The appellant is free to exercise his religion and religious beliefs. However, one would then have expected that his letter to the Court *a quo* would have taken the Court into his confidence and express genuine remorse and contrition, but it does not. His actions are fleetingly referred to as a *"mistake"* and there is no indication of an attack on his conscience. In my view, at face value, the letter is no more than an expression of self-pity and the realisation of the appellant's religious beliefs.

[33] The facts of this matter fall full square under the ever-increasing cloud of gender-based violence. The appellant had no regard for his relationship with the deceased when he violently attacked her, executing brute force and anger on a woman who was of average build, defenceless in the sudden attack and vulnerable as she lay on the ground. The appellant's actions in persistently kicking and hitting her were so severe that the impact of the assault to her body caused her heart chamber to compress and her liver to nearly split in two. Rather than stopping the attack or rushing her to hospital, the appellant walked away unperturbed and left his life partner to die.

[34] This is a case of intimate femicide which is indeed a cause for deep concern, not only to the Courts, but it should be to every law- abiding member of South African society, as it permeates communities regardless of social, cultural, religious and racial differences. Daily, women are targeted, assaulted, raped and treated, as in this case, as if their lives have less value, simply because they are female.

[35] Thus, I cannot agree more with the sentiments expressed by Kusevitsky J in ***S v Robertson***[10]***:***

> *"It is so easy to glibly use the phrases and terminology of femicide and gender-based violence, in part because of the relentless frequency of its*

[10] S v Robertson [2022] ZAWCHC 104 para [2]

occurrence in our society, communities and homes, that it hardly causes anyone to bat an eyelid or to raise an eyebrow. In this matter the court will take into account the nature and prevalence of the crime and balance these considerations with the effect of the accused's actions, not only in relation to his family, but also to that of his victims and their families, and the court will ultimately consider the question as to what sentence would be appropriate and proportionate to him in light of the prescripts of S v Zinn 1969 (2) 537 (A) at 540G and this disease of gender based violence and femicide which permeates the psyche of our country."

[36] Ultimately, the deceased did not deserve to die a surely painful and excruciating death at the hands of her life partner. In my view, he had time during the assault, when she fell to the ground after the first punch(es), to reflect on his actions, the potential consequences thereof and to desist and withdraw from his unlawful conduct, yet he carried on regardless and relentless, kicking and possibly stomping on her chest and other parts of her body. He only halted the assault to collect water to pour on her face.

[37] Furthermore, in ***S v Rohde***[11], the Court stated that:

"Intimate femicide clearly cannot be viewed as being conduct which is less morally reprehensible".

This statement is equally true in this matter. The deceased was murdered at the hands of the man with whom she shared her life, who cowardly refused to accept that he acted unlawfully in assaulting and killing her. The appellant failed to take responsibility despite the overwhelming medical evidence that the shocking and severe injuries which he caused in a sustained assault unleashed upon her, had caused her death. I am of the view that the appellant regarded the deceased as his punching bag, someone who should be checked for criticising him about his lack of financial support and drinking habits and who should be taught the ultimate lesson

[11] [2019] ZAWCHC 18 at para [23]

so as to never criticise him again. In so doing, he robbed her of her dignity and equality and left her to die, without displaying a shred of conscience.

[38] On the issue of rehabilitation, it was advanced that the Court *a quo's* sentence of 20 years' imprisonment took no account of the potential for his rehabilitation but rather emphasised the other purposes of punishment being retribution and deterrence. I cannot agree, because the issue of rehabilitation must be considered in light of other factors such as the interests of the community and the effect of the crime on the accused and that community. This view was illustrated by the SCA in **Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others[12],** where Navsa JA observed that:

> "*Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when the sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre- and post- Malgas the essential question is whether the sentence imposed is in all the circumstances, just."*

[39] The appellant has indicated in his letter to the Court, that he has changed his life and that he has *"work to do"*[13], presumably religious or faith-based work in prison. This fact may indicate that he is attempting rehabilitation in that manner. However, when regard is had to the prevalence and frequency of gender-based violence matters in society, the seriousness of the murder, the fact that no remorse was shown, then the sentence of 20 years' imprisonment for a second offender such as the appellant, is indeed just, and neither shocking nor disproportionate. To have imposed a lesser sentence than the prescribed minimum would have downplayed the seriousness of the murder and the gravity with which the law and society generally views intimate femicide.

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[12] 2009 ZASCA 72 par 22
[13] Appellant's letter (not marked as an exhibit)

[40] On my consideration and reading of the judgment, I am satisfied that the Regional Magistrate considered these aspects comprehensively and her application of the applicable authorities regarding minimum sentencing cannot be faulted. In my view, the Regional Court would not have been unfair or unjust had it imposed a further five years' imprisonment, so shocking and violent was the assault on the deceased that she had no chance of defending herself against the attack. In the result, there is no room to interfere in the sentence imposed by the Regional Court. The appeal against sentence fails and the sentence of 20 years' direct imprisonment is confirmed.

Order

[41] In the result, I would propose the following order:

a. The appeal against sentence is dismissed.
b. The sentence of 20 (twenty) years' direct imprisonment is confirmed.

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M PANGARKER
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

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M SHER
JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv N Abdurahman
Instructed by:	Legal Aid

For Respondent:	Adv E Erasmus
	Director of Public Prosecutions