

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
20 August 2025
DATE
 SIGNATURE

CASE NUMBER: A21/2025

In the matter between:

MAHLATJI TSOALEDI KAIZER

Appellant

and

THE STATE

Respondent

JUDGMENT

DOSIO J:

Introduction

- [1] The appellant was charged with one count of murder read with the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'). The court a quo found the appellant guilty and sentenced him to 20 years imprisonment.

- [2] The appellant was legally represented. On 10 February 2017, the appellant was granted leave to appeal his sentence.

Ad sentence

- [3] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.
- [4] A sentence imposed by a lower court should only be altered if:
- i. An irregularity took place during the trial or sentencing stage.
 - ii. The trial court misdirected itself in respect to the imposition of the sentence.
 - iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.¹
- [5] As stated by the learned Maya DP (as she then was) in the case of *S v Hewitt*²
- “It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.”
- [6] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.
- [7] Section 51(2) of Act 105 of 1997 states that:
- “(2) Notwithstanding any other law but subject to subsections (3) and (6). a regional court or a High Court shall sentence a person who has been convicted a person of an offence referred to in –

¹ *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591 F-G, and *Kgosimore v S* 1999 (2) SACR 238 (SCA).

² *S v Hewitt* 2017 (1) SACR SCA.

(a) Part II of Schedule 2, in the case of —

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years; ...

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years."

- [8] It is common cause that the transcript of the court a quo is incomplete, however both the counsel for the appellant and the respondent agreed that the available record is sufficient for this court to adjudicate the appeal against sentence.
- [9] Counsel for the appellant contended that the court a quo misdirected itself in that:
- (a) it failed to enquire into the personal circumstances of the appellant, even though the appellant was legally represented. As such, the court a quo failed to exercise its judicial discretion, in the absence of the personal circumstances, to consider an appropriate sentence. Reference was made to the case of *S v Dhlamini*.³ Reference was also made to the case of *S v Hepworth*⁴ where the appellate division, (as it then was), stated that: "A criminal trial is not a game where one side is entitled to claim the benefit to any omission or mistake made by the other side ... A judge or an administrator of justice ..., has not only to direct or control proceedings according to recognized rules of procedure but to see that justice is done." As a result, it was contended that the court a quo overemphasized the seriousness of the offence and the interests of society, resulting in a sentence that is shockingly inappropriate.
- [10] Reference was made by the appellant's counsel to the case of *S v Makatu*,⁵ where the Supreme Court of Appeal changed a sentence of 15 years imprisonment to 12 years imprisonment for a man that had pleaded guilty to shooting his wife seven times.
- [11] Reference was made by the appellant's counsel to the case of *Director of Public Prosecutions, Gauteng v Pistorius*,⁶ where notwithstanding that the respondent elected

³ *S v Dhlamini* 2000 (2) SACR 266 (T).

⁴ *S v Hepworth* 1928 AD.

⁵ *S v Makatu* 2006 (2) SACR 582.

⁶ *Director of Public Prosecutions, Gauteng v Pistorius* 2018 (1) SACR 115 SCA.

not to give evidence in respect to sentence, a term of 15 years imprisonment was still imposed.

- [12] As a result, it was argued by the appellant's counsel that the failure of the appellant to provide an explanation why he stabbed the deceased, ought not to disentitle him from being given a lesser sentence. Furthermore, his failure to testify in mitigation of sentence and to explain why he killed the deceased ought not to be found as an indication that he was not remorseful.

Evaluation

- [13] The matter of *S v Makatu*,⁷ is distinguishable from the matter in casu, in that the appellant in the matter of *Makatu*⁸ showed remorse during the course of the evidence. In addition, after killing his wife, he even tried to commit suicide by shooting himself in the chin and chest. The injuries had damaged his nervous system. The Supreme Court of Appeal correctly reduced his sentence. In addition, the appellant in the matter of *Makatu* pleaded guilty as opposed to the appellant in the matter in casu.
- [14] The matter of *Director of Public Prosecutions, Gauteng v Pistorius*⁹ is equally distinguishable from the matter in casu, in that the appellant in that matter, although he did not take the court into his confidence and did not show signs of remorse, stated that he shot his girlfriend through a wooden door believing there was an intruder in the toilet of his home. He was convicted on the basis of *dolus eventualis* and not *dolus directus* as in the matter in casu. In addition, the court in the matter of *Director of Public Prosecutions, Gauteng v Pistorius*¹⁰ had heard the benefit of the appellant's testimony, which was absent in the matter in casu.
- [15] In the matter in casu, the following aggravating factors cannot be overlooked, namely:
 (a) That the brazen attack upon the deceased was unprovoked and the appellant inflicted multiple stab wounds upon the deceased. The accused was armed with two knives and the trial court determined that there was an absence of self-defence.

⁷ *S v Makatu* (note 5 above).

⁸ *Ibid.*

⁹ *Director of Public Prosecutions, Gauteng v Pistorius* (note 6 above).

¹⁰ *Ibid.*

(b) That the attack was brutal and painful. It cannot be overlooked that the forensic pathologist determined that the deceased had stab wounds upon her hand and palm which she possibly sustained in attempts to grab, block or ward off the attack. The deceased lost almost four litres of blood due to the nine stab wounds upon an unarmed woman.

(c) That this was a clear case of gender based violence.

[16] In the matter of *S v Kasongo*,¹¹ the court stated that:

"The judiciary should speak such that we demonstrate that we are not cold, aloof and far removed from the contemporary challenges. Where circumstances permit, we should show that we heed the public's constitutional call to make the punishment of crimes against women, especially their brutal, cruel and unnecessary killing more severe as part of the overall responsibility of the Republic of South Africa to provide a conducive environment for women to live and love without fear of physical, psychological, economic and sexual abuse and violence. The increase in the involvement of ex partners, spouses, partners and boyfriends in the women's experience of violence needs effective initiatives beyond policy-making and calls for the judiciary to be the leading force and voice." [my emphasis]

[17] In the matter of *Maila v S*,¹² the Supreme Court of Appeal has cautioned that 'Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. ... courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'.¹³

[18] Gender-based violence is widespread in South Africa and has been described as a pandemic.¹⁴

[19] It is noted in the National Strategic Plan on Gender-Based Violence & Femicide that 'South Africa holds the shameful distinction of being one of the most unsafe places in

¹¹ *S v Kasongo* 2022 ZAWCHC 224.

¹² *Maila v S* [2023] ZASCA 3.

¹³ *Ibid* para 59.

¹⁴ Estelle Ellis "Gender-based violence is South Africa's second pandemic, says Ramaphosa" found at <https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-says-ramaphosa/> (accessed 01/11/2024).

the world to be a woman. We have amongst the highest rates of intimate partner violence, and recently released data from Statistics SA show that rape and sexual violence have become hyperendemic. This is a scourge that affects us all: young and old, black or white, rich and poor, queer or cis, rural or urban. It pervades every sphere of our society.¹⁵

- [20] Due to the critical nature of gender-based violence crimes, judicial officers must approach such matters with extreme sensitivity in order to eradicate these types of crimes.
- [21] Murder is the most serious of crimes. Not only does it end the life of a loved family member, but it leaves much hardship and pain for the remaining family members.
- [22] In the matter of *S v Msimanga and Another*,¹⁶ the Appellant Division, as it then was, held that violence in any form is no longer tolerated and our Courts, by imposing heavier sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public that Courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.
- [23] Much has been made by the appellant's counsel that due to no personal circumstances being taken into consideration by the court a quo, that accordingly there is a misdirection.
- [24] This court disagrees. The indictment itself is clear in that it sets out the age of the appellant as being 34 years of age. In addition, the formal admissions made in terms of s220 of Act 51 of 1977, at the inception of the trial, states that the appellant and the deceased were the biological parents of a two-year-old child, called Thapelo Dike. From the evidence of Victor Mhlanga, the two-year-old child was taken to Pretoria to live with the maternal aunt.¹⁷ The only aspect missing as regard his personal circumstances, in the absence of the appellant disclosing his defence and remaining silent in respect to the merits and sentence, is possibly what work was he doing and what schooling did he have. This would not have changed the sentence imposed by the court a quo.

¹⁵ Interim Steering Committee “*National Strategic Plan On Gender-Based Violence & Femicide*” found at <https://www.justice.gov.za/vg/gbv/nsp-gbv-final-doc-04-05.pdf> (accessed 01/11/2024).

¹⁶ *S v Msimanga and Another* 2005 (1) SACR 337A.

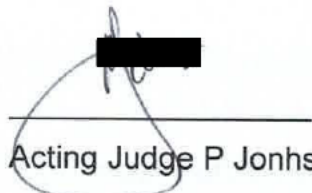
¹⁷ Caselines 003-13 lines 4-5.

- [25] The court a quo made an adequate consideration of the appellant's mitigating circumstances from the evidence at hand and correctly noted that the appellant was a first offender and in a love relationship with the deceased, that ended eight months prior to the incident.
- [26] During the evidence of Victor Mhlanga he stated that the deceased was on the floor and could not defend herself whilst the appellant continued to stab her.¹⁸ It is clear the aggravating circumstances outweighed the mitigating factors, justifying the imposition of a long period of imprisonment.
- [27] The 15 years referred to in s51(2) of Act 105 of 1997, in respect to a first offender is a minimum sentence, not a maximum sentence. A regional court may increase this minimum sentence of 15 years by five more years.
- [28] Although s51(2) of Act 105 of 1997 only refers to a Regional Court, the High Court has inherent jurisdiction and can also impose 20 years imprisonment on a first offender, provided it is proportionate and justified on the facts and if the seriousness of the crime, the offender's conduct during the trial and the interests of society demand it.
- [29] In the matter in casu the appellant closed his case after the State closed their case. He also never testified in mitigation of sentence.
- [30] This court finds no misdirection on the part of the court a quo. The sentence imposed does not induce a sense of shock and neither is it disproportionate to the gravity of the offence committed.
- [31] In the result, having considered all the relevant factors and the purpose of punishment, I consider the sentence of 20 years imprisonment as an appropriate sentence.
- [32] In the premises the following order is made:
1. The appeal is dismissed in respect to the sentence imposed.

¹⁸ Caselines 003-38 lines 7-10.


[Redacted]

Judge D Dosio


[Redacted]

Acting Judge P Jonhson

I agree


[Redacted]

Acting Judge S Liebenberg

I agree

APPEARANCES

ON BEHALF OF APPELLANT:

Adv. M Milubi

Instructed by Legal Aid SA, Johannesburg

ON BEHALF OF THE RESPONDENT:

Adv. A Maharaj

Instructed by the Office of the National

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