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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Not Reportable

Case no: KS 25/2014

In the matter between:

ABRAHAM SEPTEMBER

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *September v The State* (KS 25/2014) (28 November 2025).

Coram: PHATSHOANE DJP, WILLIAMS J and TYUTHUZA AJ.

Heard: 09 September 2025.

Delivered: 28 November 2025.

Summary: Criminal Law – appeal against sentence – sentence of life imprisonment – startlingly disproportionate – sentence set aside and substituted on appeal.

ORDER

On appeal from Northern Cape Division of the High Court, Upington Circuit Court, (Mamosebo AJ, sitting as Court of first instance):

1. The appeal against the sentence is upheld.
2. The sentence imposed by the trial court is set aside and replaced with the following:

“The accused is sentenced to 23 years’ imprisonment.”

3. The substituted sentence is antedated to 4 February 2015 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Phatshoane DJP (Williams J and Tyuthuza AJ concurring):

[1] The appellant was arraigned in this Court on a charge of murder read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). The respondent, the State, said that on 16 November 2012 near 5[...] K[...] Street, Upington, he unlawfully and intentionally killed his cousin, Ms E[...] N[...] (the deceased). He pleaded guilty to the charge of murder read with the provisions of s 51(2) of the CLAA. Having satisfied itself that the appellant admitted all the elements of the offence the trial court (Mamosebo J), returned a guilty verdict. The appellant was subsequently sentenced to life imprisonment. He is before us on appeal against that sentence with leave of the Supreme Court of Appeal (SCA).

[2] The main thrust of the appellant’s argument is that the trial court erred in imposing a sentence in excess of the minimum of 20 years imprisonment without

identifying the circumstances which motivated the imposition of a sentence greater than the prescribed one.

[3] The background is briefly this. On 16 November 2012 the appellant was in the company of the deceased whom he grew up with and was raised by her parents. He told her that her younger brother took him to Bakhwetha Valley, where the appellant was robbed. he was looking for the deceased's younger brother so that they could go in search of the robbers. He repeatedly relayed this statement to the deceased which annoyed her. She reprimanded him to stop repeating the same conversation. She pushed the appellant and he fell. He left but returned to the deceased's home, once more, looking for her younger brother. The deceased enquired why the appellant was seated on the coach. An altercation ensued between them. The appellant followed the deceased to the kitchen where he stabbed her several times with a knife. She screamed, freed herself from the appellant's grip and slumped to the ground outside. He confessed that the deceased did nothing to him that warranted the attack. Following the murder, he handed over to the police the murder weapon and was apprehended. He admitted that he had the direct intention to kill the deceased.

[4] In sentencing the appellant, the trial court heard the evidence of the deceased's 25-year-old son, the younger of two siblings. The deceased also had a one-year-old grandchild who resided with her. The trial court had regard to the appellant's personal circumstances. He was 51 years old with no dependants. He completed standard 5 (grade 7) at school. Prior to his arrest he was gainfully employed as a machine operator at Orange Wine Cellars and earned R3 399 per month. The trial court considered the record of the appellant's previous convictions, which related mainly to assault and theft, of the years 1980, 1983, 1985, 1986, 1987, 1988, 1991, 1992, with the last for murder on 24 April 2001. He was sentenced to 8 years' imprisonment for the latter. The trial court held the view that it was not so much the previous convictions being very old but more concerning a pattern or trend of violence on the part of the appellant.

[5] The trial court noted as aggravating circumstances the following. The appellant stabbed the deceased seven times in her heart and lungs without any provocation or justification. She was unarmed and was killed in the sanctity of her

home. The deceased's parents raised the appellant. The court reasoned that society would have expected the appellant to protect the deceased. The trial court also had regard to the purpose and objectives of punishment, that is, deterrence, prevention, reformation and retribution.

[6] The appellant was a second offender for murder. The trial court remarked that: this would ordinarily attract a minimum sentence of 20 years imprisonment in terms of s 51(2) of the CLAA absent a finding on the existence of substantial and compelling circumstance which would merit a deviation from the prescribed sentence. The trial court found that none existed and further remarked that 'the accused has taken the lives of two human beings. A sentence of life imprisonment is therefore warranted.' Accordingly, that ultimate punishment was imposed.

[7] Essentially the sentence is assailed on the basis that the trial court misdirected itself in imposing the sentence of life imprisonment which, so it was argued, is shockingly harsh and inappropriate. It was contended that the fact that the appellant was a second offender is not an aggravating factor which the court had to employ to justify a sentence of life imprisonment. This factor had already been brought into the reckoning by the legislature when it elevated the minimum sentence from 15 years for a first offender to 20 years imprisonment for a second offender, so the argument continued.

[8] Counsel for the appellant conceded that there were no substantial and compelling circumstances which merited a deviation from imposing a lesser sentence than the sentence prescribed in s 51(2) of the CLAA. However, he contended that the trial court's sole reason for imposing a life sentence, to the effect that the appellant took the lives of two human beings, was a misdirection. Apart from this, it was argued, no circumstances were identified by the trial court which impelled it to impose a sentence greater than the prescribed minimum. Counsel relied on *S v Maake* ("Maake")¹, which approved the dictum in *S v Mbatha*² where it was said that a trial judge should identify the circumstances which impels it to impose a sentence

¹ 2011 (1) SACR 263 (SCA) para 28.

² 2009 (2) SACR 623 (KZP) (at 631f – j):

greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified.

[9] The SCA in *S v Mthembu*³ made the following pronouncement regarding the above finding in *Maake*:

‘ . . . *Maake*, in support of the broad hypothesis that conclusions by a court should be properly motivated, called in aid *Mbatha*. It was submitted to us that *Maake* cited *Mbatha* with apparent approval and that that constitutes an endorsement of its correctness on this score. We do not agree. *Maake* did not subject the judgment in *Mbatha* to careful scrutiny, nor was the correctness of its conclusion or reasoning properly considered. It sought support from *Mbatha* in a wholly different context.’

[10] As already stated, the appellant pleaded guilty to murder on the basis of s 51(2) of the CLAA, which plea the State accepted. Section 51(2) provides in relevant part:

‘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 of an offence referred to in-

(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) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

. . . ’

[11] The recitation of the dicta in *Mthembu* below sets out insightfully the legal position on the construction of s 51 of the CLAA:

‘Thus far our courts have simply accepted that if, upon an evaluation of the cumulative effect of all the circumstances of a case, a higher sentence was called for, there were no constraints on its discretion to impose a sentence far in excess of the ordained minimum (*Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) ([2008] 4 All SA 132) para 19). . . .⁴

. . .

It is noteworthy that s 51 is headed “Discretionary minimum sentences for certain serious offences”. That, together with repeated reference to the words “not less than” in ss (2), is the

³ [2011] ZASCA 179; 2012 (1) SACR 517 (SCA) (“*Mthembu*”) para 19.

⁴ *Ibid* para 5.

clearest indicator that the legislature did not intend to fetter the discretion of the sentencing court...⁵

...

Plainly what we are dealing with is a legislative provision that fetters only partially the sentencing discretion of the court. That much emerges from ss (3)(a) which entitles a court to impose a lesser sentence than the sentence prescribed if it is satisfied that substantial and compelling circumstances exist which justify the imposition of such lesser sentence. *It follows that, even were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its sentencing discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just.*⁶

...

*Whilst ss (3)(a) obliges a sentencing court to enter the circumstances on the record if it is minded to impose a lesser sentence than that ordained by the legislature, there is no indication in the language of that provision that a similar course must be followed where a more severe sentence is contemplated.*⁷ (My emphasis.)

And in para 18, the SCA further observed:

'... After all, any sentence imposed, like any other conclusion, should be properly motivated (*S v Maake* 2011 (1) SACR 263 (SCA)). And we should not lose from sight that our appellate courts have, in terms of long-standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate. ... [A] "vigilant examination of the relevant circumstances" is required.'

[12] It is trite that punishment is pre-eminently a matter for the trial court's discretion.⁸ The circumstances in which a court of appeal may interfere in the sentencing discretion of a lower court are circumscribed. The principles were restated in *S v Malgas*⁹ as follows:

'... A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to

⁵ *Ibid* para 8.

⁶ *Ibid* para 11.

⁷ *Ibid* para 13.

⁸ *S v Rabie* 1975 (4) SA 855 (A) at 857D – E; [1975] 4 All SA 723 (A) at 724.

⁹ *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (A) para 12.

usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.’

[13] The appellant was a second offender and the minimum sentence he faced in the absence of substantial and compelling circumstance was 20 years imprisonment. The trial court considered his personal and mitigation circumstances in the light of the well-known triad of factors relevant to sentence.¹⁰ The appellant’s previous convictions demonstrate that he has a propensity towards violence. The attack was gratuitous and callous. He stood in a relationship of trust towards the deceased which meant that he had to protect her. Serious crimes, such as the present, have been singled out by the legislature for severe punishment.

[14] The personal circumstances of an accused will recede into the background in cases of serious crimes.¹¹ A guilty plea is not always indicative of remorse. Where the case against the accused is open and shut, such a plea is, at best, a neutral factor.¹² Needless to say, an appropriate sentence must also take into account the overarching constitutional constraint of proportionality. Retribution ought not to be given undue weight and unduly accentuated in the balancing process.¹³ The trial court’s conclusion on the sentence to be imposed, in the main, was motivated by the

¹⁰ See *S v Zinn* 1969 (2) SA 537 (A) at 540G.

¹¹ See *S v Vilakazi* 2012 (6) SA 353 (SCA) para 58.

¹² *S v Barnard* 2004 (1) SACR 191 (SCA) at 197G.

¹³ *S v Makwanyane and Another* 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) para 130 and 341.

fact that 'the accused [had] taken the lives of two human beings.' This overlooks that the appellant had already been sentenced for the previous murder that he committed. In my view, a sentence of life imprisonment is startlingly disproportionate to the sentence we propose to impose and cannot be just. Therefore, we are at large to determine an appropriate sentence.

[15] There can be no question that the fact that the appellant was a second offender is aggravating. Gender-based violence remains a scourge in our society despite our courts' tireless efforts at imposing severe punishment for serious offences such as murder. The evaluation of the cumulative effect of all the circumstances in this case, as the trial court correctly found, impels a sentence greater than the prescribed minimum. In the result, the following order is made.

Order

1. The appeal against the sentence is upheld.
2. The sentence imposed by the trial court is set aside and replaced with the following:

"The accused is sentenced to 23 years' imprisonment."
3. The substituted sentence is antedated to 4 February 2015 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

M V PHATSHOANE
DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

For the appellant: PJ Fourie

Instructed by: Legal Aid South Africa
Kimberley

For the respondent: T Engelbrecht

Instructed by: Director of Public Prosecutions
Kimberley.