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**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA 127/2025

**NOT REPORTABLE**

In the matter between:

S[...] M[...]

**Appellant**

and

**THE STATE**

**Respondent**

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**APPEAL JUDGMENT**

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**HARTLE J,**

[1] This appeal, against sentence, is before us with the leave of the trial court.

[2] The appellant was convicted of the murder of his three-year old daughter under circumstances which, all the parties agree, were grievous.

[3] The appellant used a “*knobkierie*” to inflict multiple wounds to his child’s head that caused her death. The doctor who compiled the customary J88 report in his testimony before the trial court emphasized that the injuries were “*very severe*”, “*gross in nature*”, “*extensive*”, and quite unlike typical assault wounds. Indeed he explained that the injuries inflicted on the child were the sort that one would see in motor vehicle accidents occasioned by high impact blows to the body, or mob-justice attacks where the experience would be of “*many men beating one person*”.

[4] The trial court, consistent with the doctor’s opinion, found that severe blunt force would have been necessary to have fractured the child’s skull. The doctor explained that scalp fractures in children are rarely seen because their bones are almost like “*plastic*”, or softer, for want of a better description. This analogy helped the doctor to speak to the extent of the force that had been applied to the child’s head to have caused the extreme head injuries.

[5] To paint a complete picture of the gravity of the offence, the trial court in its judgement on the merits and in an attempt to get to the bottom of the appellant’s

motive for the killing, evidently wrestled with the “*ferocity and sheer senselessness of the assault*”.

[6] At least one of the witnesses who testified, Mr. Dini, was privy to the assault when it commenced inside the appellant’s house. On the facts related by the trial court the child had said to the appellant that she was hungry. Although indicating that he would prepare some food for her, he instead assaulted her with the stick which he took from behind the sofa. He struck the child (at that point only with a single blow) causing her to fall to the ground. The witness saw an open wound on the side of her head and blood coming from her nose. When he protested, the appellant urged him not to involve himself. He also insisted that the child was a witch. He drew an okapi knife and forced the witness outside before closing the door behind him. Mr. Dini clarified that he was afraid that the appellant would stab him if he attempted to intervene further. As he departed, to seek help, he heard a commotion from inside the house and assumed thereby that the appellant had resumed his assault on the child. When he returned to the house later he saw the child lying motionless on the sofa.

[7] Another witnesses, a neighbour to the appellant, who had been summoned by Mr. Dini’s sister to assist, related that he had found the child lying face down on the veranda when he arrived at the appellant’s home. Asked what had happened, the appellant picked the child up from the ground and placed her on the sofa inside. Asked again what had happened, the appellant let out a cry of despair and reported that a group of people had come to attack him, a version that the appellant roundly rejected. What he did assert though is that Mr. Dini, who he suggested bore a grudge against him, killed his child while he was asleep, a defence that the trial

court in its judgement on the merits had no hesitation in rejecting as false beyond reasonable doubt.

[8] The child was born of a relationship between the appellant and her mother. They had cohabited for almost four years but by the time of the incident had separated for about two months. The mother testified - and related the same collateral to a social worker who compiled a victim impact statement presented to the trial court during sentencing, that the appellant had been abusive toward her. She ascribed the reason for the breakdown of their relationship as being due to the fact that he often threatened her with a knife when there was conflict between them. He often falsely accused her of having other boyfriends. Despite this she had not seen the appellant be aggressive to anyone else, and she was further confident that her child, when she visited with the appellant on the fateful day, was in safe hands. On the day of the incident she coincidentally encountered the appellant at a taxi rank in Ugie. This was the first time she had seen him since their separation. The child was happy to see her father. The appellant in the nature of an accusation had questioned whether she was in a relationship with another man but had allayed her fear that he wanted to make a fuss about this. He asked if he could take the child home with him since he had not seen her for a long time. He undertook to return with her the next day. The parents tarried together in each other's company for a while, buying groceries together at a local supermarket. They all left Ugie in the same taxi. She alighted first leaving the appellant with their daughter to travel further together. That was the last time she saw her child alive.

[9] The timeline was not subjected to any introspection by the trial court, but it appears that Mr. Dini was present when the appellant arrived at his destination

from town with the child and assisted him by transporting his groceries in a wheelbarrow from the bus stop to the appellant's home where the killing played out shortly thereafter.

[10] The sole question before us is whether the trial court was correct in finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment that is legislated in terms of section 51 of the Criminal Law Amendment Act, No. 51 of 1997 (“CLAA”), referring to the murder of a child.

[11] There is no question that such a sentence would, as a starting point, be considered as appropriate for the intentional taking of the life of a child which the trial court found proven beyond a reasonable doubt.

[12] In filicide cases our courts have frequently highlighted amongst the commonly aggravating features of such unfortunate incidents, the breach of parental trust, the vulnerability of the child, pre-meditation, and concealment.

[13] Mr. Geldenhuys, who appeared for the appellant, reminded this court of the principles guiding the imposition of the minimum sentences and the determination of whether a sentencing court can deviate from them as set out in the well-known case of *S v Malgas*.<sup>1</sup> The relevant provisions of the CLAA have limited, but not eliminated, a sentencing court's discretion. The import of the minimum sentencing provisions is that the prescribed sentences should be deviated from only when there is weighty justification for the deviation, and not for flimsy reasons. Traditional factors continue to play a role, and ultimately the test is whether the

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<sup>1</sup> 2001 (1) SACR 469 (SCA).

prescribed sentence is proportionate to the crime, the criminal, and the needs of society, and is therefore just.<sup>2</sup>

[14] The underlying reason for the appeal is that the sentence is not a just one.

[15] In this instance the trial court found a sentence of life imprisonment to be appropriate in all the circumstances.

[16] In sentencing, the trial court appears to have correctly applied the guiding principles applicable to the serious offence of which the appellant had been convicted, referencing *S v Malgas*,<sup>3</sup> as well as *S v Dodo*<sup>4</sup> and *Vilikazi v S*<sup>5</sup> which underscore the need for a court to meaningfully apply the principle of proportionality so that courts do not become vehicles for injustice by being mechanical about the application of the minimum sentencing provisions.

[17] In the present appeal the appellant submits that the trial court erred in under-emphasized four mitigating features. The first is his age. He was a 51 year old first offender in respect of the murder conviction. It is absolutely fair to accept that if one reaches such an age, with a clean record, that this would generally be a mitigating factor. The second is that he “*acted out of character*” during the commission of the offence. The third factor is that he had consumed alcohol prior to the commission of the offence, and the fourth is that he had acted in a state of emotional upheaval at the time of killing his child.

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<sup>2</sup> *S v Bhala and Others (Sentence)* (CC 62/2019) [2025] ZAWCHC 61 (21 February 2025) at para [32].

<sup>3</sup> *Supra*.

<sup>44</sup> (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC); 2001 (1) SACR 594 (CC) (5 April 2001).

<sup>5</sup> (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008).

[18] Mr. Geldenhuys urged upon this court to find that the trial court erred in not considering that these factors were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment, and, as a necessary corollary, that it erred in over-emphasizing the obvious seriousness of the offence and the interests of the community at the expense of his client's personal circumstances.

[19] Mr. Mgenge who appeared on behalf of the State conversely argued in support of the sentence, pointing out the obviously aggravating circumstances that would have militated against a deviation from the prescribed minimum sentencing benchmark. These in themselves, so he submitted, justified the imposition of the harshest of sentences.

[20] I summarize these aggravating features: The offence is a serious one which is rife and prevalent not only in this court, but throughout the country. The deceased was a defenceless three-year old. There was a relationship of trust between the deceased's mother and the appellant which he took advantage of. The child was brutally assaulted with a stick. The appellant is not remorseful at all of his crime and therefore is not a candidate for rehabilitation. The child was murdered in her own home where she was entitled to expect protection from a parent. Finally, the impact of the crime to both the child's mother and grandmother was significantly damaging.

[21] I should point out that other than inputting his personal circumstances, the indisputable fact of his age and the absence of any history of violent crime

committed during his lifetime, the appellant hardly took the trial court into his confidence regarding the last three mitigating circumstances contended for.

[22] The State during sentencing proceedings adduced the evidence of Ms. Stamper, a social worker, in aggravation of sentence. In response to a request by the Director of Public Prosecutions in Makhanda, she compiled a report in respect of the victim with regard to the impact of the offence to the child's mother.

[23] She was constrained to point out, quite firmly, that although everyone was quite surprised by the appellant's actions, given the community's regard for him as a "*very calm*" and "*very humble*" person and one who loved his daughter, she herself did not believe that he had acted out of character on the day in question. She explained, in answer to a question posed to her during cross examination by Mr. Geldenhuys that quite to the contrary, the appellant had exhibited "*coercive behaviour*" during his relationship with the mother towards her and she thought it inevitable that the "*end result of it,...went to, the child being...killed*". She referenced the appellant's controlling behaviour in the relationship and her experience of such violent relationships where the abuser escalates violence to another level in a bid to maintain control. She agreed that she had not consulted with the appellant to understand what had gone on in his mind when he killed his child, but qualified her understanding of the situation with reference to her expertise in working with abused people and their abusers.

[24] It is necessary to reference the seminal paragraph in her report on which she relied to voice her opinion against the notion that the appellant, even just on the basis of the outrageous nature of the attack upon the child, had acted contrary to expectation:

“The perpetrators of this kind of abuse are manipulators or are using manipulative behaviors and tendencies to instill trust. The first thing they do is to kill the victim’s self esteem. Being accused of being in a relationship, making her to doubt her decision of allowing her child to go with him, making her to make excuses for his behaviour by accepting his acts as being caused by jealousy or evil spirit, denying the paternity of their child and later took responsibility, acting calm and understanding at times are all the means of destroying the self worth when making the victim to doubt herself. These affect the victim’s cognitive abilities. This form of abuse heightens the feelings of guilt and self-blame to the victim finding herself justifying for the accused’s actions. The calm personality that is sometimes presented by perpetrators is an act that is the reason the victims are sometimes not believed and the community at times is overwhelmed with disbelief. The known personality and the act seemed to clash. This is the danger and the intensity of the impact of these kinds of abuse on victims. They leave emotional and psychological scars which are having long term effects on victims.” (sic)

[25] She concluded with her view, based on the examining doctor’s evidence put to her regarding the vast extent of the injuries and the force that must have been employed, which is that she saw anger and power coming to the fore in the appellant’s behaviour that clearly needed to be addressed by the court in the sentence which it imposed. In her opinion and professional experience this kind of behaviour was not uncommon, namely that aim is taken at the loved ones of the abused person to get at the latter.

[26] Following Ms. Stamper’s testimony, the trial court raised a concern with counsel regarding the question of the appellant’s criminal responsibility at the time of the commission of the offence. The trial court revealed in its judgment on sentence that it had been startled by the violent nature of the attack on the child, the absence of clear evidence regarding the extent of his use of alcohol at the time of

the incident, and the lack of a clear motive. This had formed the basis for the court's perceived need to issue a directive for an inquiry into and report on his criminal responsibility in terms of section 79 of the Criminal Procedure Act, No. 51 of 1977 ("*CPA*").

[27] The appellant was duly assessed by Ms. Karen Andrews, a clinical psychologist, at the instance of the trial court. She produced a report soon after.

[28] In her subsequent testimony she absolved the appellant of any mental instability at the time of the commission of the offence or the lack of an appreciation between right and wrong and the ability to act accordingly. She explicated, but clearly within her mandate to report on his criminal capacity, that he relied on a psychological defence of denial as a mechanism to cope with the fact that he had killed his own daughter.

[29] For so long as he remained in denial, so she explained, the appellant would be unable to demonstrate remorse. As was related by the trial court in its judgment, Ms. Andrews' opinion was that denial would enable him to avoid the feelings of pain and horror associated with any recognition of such a heinous fact and to maintain his mental and emotional integrity.

[30] Whatever concerns the trial court had had up until that moment in respect of the appellant's mental status, they were upon receipt of Ms. Andrews' report and upon testing her views in court, laid to rest. The court accepted without hesitation her opinion that the appellant had acted with the necessary criminal capacity at the time of the killing of his child and that his mental functioning was entirely up to par.

[31] On the issue of his abuse of alcohol she noted the appellant's insistence that he had minimized his use of alcohol in the days leading up to the incident, and on the day itself. He further denied the possibility that he may have been more intoxicated than he had maintained he was. It is to be noted that the trial court too in its merits judgement had discounted the role of alcohol as a basis for diminished responsibility especially since the appellant had never relied on this factor as a basis to avoid liability. Indeed in his testimony the appellant had thrice said that alcohol had not affected him that evening. He offered that he did drink one beer that day which he shared with the child's mother, but that this had no effect on him and that he was not drunk. He claimed that what had made him to sleep that day – it was his defence that the child was attacked by Mr. Dini while he slept, was the fact that he had had a headache.

[32] So too the appellant denied to Ms. Andrews the possibility that he had unresolved issues with the child's mother who had a new boyfriend, or that he had become irritated with the child when she started complaining that she was hungry, which had triggered a rage response that was easier to indulge under the influence of alcohol.

[33] What Ms. Andrews had objectively noted however was that the appellant had notable yellowing of the eyes, which in her professional opinion was typically associated with chronic alcohol use and/or abuse. In this context she explained that it would take very little alcohol to disinhibit him. She also clarified that having regard to the appellant's abuse of alcohol, his age and its impact on his neuropsychological networking, that he would behave in a typical way whenever he drinks alcohol. In her view there would be no way of circumventing the way he

would normally respond to alcohol, namely with aggression and by being abusive, as the child's mother had reported was a common feature of their relationship.

[34] It appears that Ms. Andrews made certain assumptions in her assessment, based on the trial court's merits' judgement that the appellant may have been under the influence of alcohol at the time he committed the offence, and the noting of his irrational and aggressive behaviour towards the child's mother. In her dealing in her report with his emotional functioning, based on general patterns of behaviour professionally known to her, she offered the following proposition in substitution of what the appellant had blocked out regarding his memory of the incident:

"It is common behaviour to act out unresolved anger indirectly in response to a minor irritation, on a weaker innocent target, particularly when under the influence of alcohol. Alcohol is a disinhibitor - under the influence of alcohol it is easier to indulge one's impulses, often resulting in unacceptable actions."

[35] She enlarged upon this in her testimony as follows:

"So we know that during the incident Mr. Dini, the first State witness, witnessed Mr. M[...] hitting the deceased with the kerie on the side of the head, and accusing, when he was confronted by Mr. Dini he said no the deceased was a witch, and that this was triggered by the 3 year old child saying that she was hungry, and we know the 3 year olds in their immaturity can be quite nagging when they're hungry, and this seems to have triggered Mr. M[...]’s underlying anger related to his girlfriend, and any other unresolved anger from his life possibly, that goes together mentally, and under the influence of alcohol it was easier for him in a disinhibited state to act out this anger on a weaker target, being his daughter."

[36] Ms. Andrews seemed to be stumped when asked whether the appellant was a candidate for rehabilitation given his “*foreclosing*” on anything related to the experience of his daughter or their mother and their relationship and being unable to respond mentally or emotionally to her attempt to draw him out on the fact of his daughter’s death. She explained her predicament thus:

“It’s difficult to say because he is a normal man in all respects, his problem is that he committed a crime under the influence of alcohol and with unresolved aggression, so it’s not that he is, you know because he doesn’t have any previous convictions to my knowledge, is not a typical psychopath or chronic antisocial functioning person. I actually don’t know what to say about his rehabilitation, this is such a unique situation this, it’s out of keeping with his character that he would have done something like this, this is a thing, it’s not like he’s got a criminal history or he’s got a criminal mind, so I’m really I’m not really qualified to answer that, I don’t know how justice works here.”

[37] In mitigation of sentence Mr. Geldenhuys had prevailed upon the trial court to find that that despite the opinion of Ms. Stamper on the issue, the appellant had acted out of character in the sense that he had spent over fifty years not coming into conflict with the law. The trial court repeated this sentiment in its judgement without making a comment on what the social worker and clinical psychologist had meant with reference to such a concept, each in their own context.

[38] On the issue of the use of alcohol, Mr. Geldenhuys had submitted that alcohol had played a *major* role in the commission of the offence, but this based on Ms. Andrews’ conclusion, which was self-evidently against the grain of the appellant’s own evidence and the ultimate finding of the trial court on the issue. The trial court correctly warned Mr. Geldenhuys in this respect that the extent of what alcohol had been used was contentious.

[39] On the issue of the appellant's rehabilitation, he acknowledged the general tenor of decisions of the courts that a person cannot be rehabilitated unless they admit what they have done, but was constrained by the fact that the appellant was in the claimed state of denial.

[40] Concerning the circumstances of the offence relevant to the appellant's moral blameworthiness, it appears that Mr. Geldenhuys had himself resorted to speculation as to what had caused the appellant to act out as he did, assuming as Ms. Andrews' had suggested that he had experienced an emotional upheaval, that something had triggered him, that he had experienced rage, and that he was intoxicated which probably disinhibited him.

[41] Mr. Mgenge in arguing in aggravation of sentence raised the same aggravating factors highlighted in paragraph 19 above, but added a further important feature, which is that the appellant had clearly had an opportunity to stop his conduct, even assuming he was enraged, when Mr. Dini tried to stop him. Here was a voice of reason sensitizing the appellant to stop what he was doing. But instead he drew his knife and threatened to stab Mr. Dini. He chased him out of his house and then continued to assault his child until she lost her life.

[42] Also on the subject of his lack of remorse, Mr. Mgenge poignantly noted that the appellant failed to demonstrate signs of remorse during the trial. The child's mother necessarily had to testify, and up until today is none the wiser why he killed their child. She speculates that it was out of jealousy, or perhaps because he was trying to make her feel bad. Not surprisingly Ms. Stamper highlighted the anguish

she feels because the appellant holds the power to these answers that she needs to cope with her grief and to get on with her life.

[43] Ironically Ms. Andrews' assessment of the appellant is that he is devoid of empathy for the life and manner of early death of his daughter because of being emotionally defensive regarding the incident and regarding his relationship with the child's mother. On the flip side, in his defence to the charge that he pursued in the trial (before the trial court requested the criminal capacity assessment), there was no empathy expressed for the supposed murder of his child by another, no regret that it happened on his watch and that he could not protect his own child from danger, and no comfort or apology offered to her mother either, unfortunately making the inference irresistible that he meant to punish her by his conduct.

[44] In giving leave to appeal the trial court cautiously acknowledged that another court may well find, based on Ms. Andrews' opinion of the possible impact on the appellant's conduct by the single unit of alcohol imbibed by him and unresolved anger, and the fact that the killing of his daughter seemed in the opinion of people he knew (because of his character) to cause surprise, that these posed additional or significant factors in the determination of an appropriate sentence which this court on appeal may find gave rise to substantial and compelling circumstances required for a departure from the prescribed minimum sentence.

[45] We are however not persuaded that the trial court misdirected itself in any manner in finding the sentence of life imprisonment to have been appropriate in all the circumstances.

[46] It was, as pointed out above, entirely by chance that the court requested the psychological assessment to rule out any question of a lack of criminal capacity. Ultimately through that exercise Ms. Andrews was largely left to speculate as to the motive for the killing because of the appellant's psychological defence of denial. It is from this lack that these possible excuses for his moral blameworthiness arose, whilst forgetting the appellant's very express defence fashioned in the trial that he stuck to, coupled with his express acknowledgement that he had not been so drunk at the time as not to remember or appreciate what was going on around him.

[47] Whilst we are prepared to accept that the appellant acted "*out of character*" in the sense that he had a clean record and had not come into formal conflict with the law before, quite evidently his violent aggression towards the child's mother was not something new. Further, there is hardly a person who would not be surprised, or outraged, by the senseless killing of a defenceless little child, but that does not equate to non-pathological temporary reduced criminal responsibility on the part of the appellant at the time. This was simply never his defence.

[48] At the end of the day the trial court was in our view correct to find that the latent issues of the suggested role of alcohol, the appellant's "*emotional upheaval*", and the notion that he acted out of character were insufficient, either on their own or cumulatively (even assuming them to be valid or realistic) to have constituted substantial and compelling circumstances. The focus was instead correctly directed at the abhorrent nature of the offence, entailing horrific injuries inflicted on a defenceless child, as well as the community's sense of complete outrage, which by far outweighed his personal circumstances.

[49] In the result the following order is made:

(1) The appeal is dismissed.

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**B HARTLE**

**JUDGE OF THE HIGH COURT**

**I AGREE,**

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**M JOLWANA**

**JUDGE OF THE HIGH COURT**

**I AGREE,**

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**N P NTLAMA-MAKHANYA**

**ACTING JUDGE OF THE HIGH COURT**

DATE OF APPEAL : 23 February 2026

DATE OF JUDGMENT : 3 March 2026

Appearances:

*For the Appellants: Mr. D Geldenhuys of Legal Aid South Africa, Makhanda, (ref. Adv. Geldenhuys/McCullum).*

*For the Respondents: Mr S Mgenge of the Director of Public Prosecutions, Makhanda (ref. Mr. Mgenge).*