

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Edited:	YES / NO



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

CASE NO: **CA&R 50/2025**

In the matter between:

TUMISANG DIOKA METSWE

Appellant

and

THE STATE

Respondent

Neutral Citation: ***Metswe TD v The State [CA&R50/2025]***
 Heard on: **01 June 2026**
 Delivered on: **03 July 2026**
 Coram: **Tlaletsi JP et Olivier AJ**

ORDER

In the result, the following order is made:

The appeal of the Appellant against his conviction on a charge of murder, read with the provisions of Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 as well as his sentence of life imprisonment is dismissed.

JUDGMENT

OLIVIER AJ

1. The Appellant appeared in the Regional Court, Kuruman on a charge of the murder of Malebogo Mavis Modisa ("**the deceased**"), read with the provisions of Section 51(1) of the **Criminal Law Amendment Act**, Act 105 of 1997 ("**the CLAA**") and was subsequently convicted and sentenced to life imprisonment on 22 October 2024.
2. The Appellant comes before us by way of automatic appeal against his conviction on a charge of murder and against his sentence of life imprisonment.
3. In the notice of appeal and with reference to the conviction, it is alleged on behalf of the Appellant:
 - 3.1 That the State failed to present sufficient evidence to the effect that the Appellant had killed the deceased;
 - 3.2 That the second witness for the State who testified as a single eyewitness, was not a credible witness;
 - 3.3 That none of the other witnesses for the State witnessed the incident and that their testimony cannot be said to corroborate the evidence in support of the charge of murder;
 - 3.4 That the evidence presented by the Appellant is reasonably possibly true; and

- 3.5 That the State had failed to prove the guilt of the Appellant beyond reasonable doubt.
4. The sentence of life imprisonment, so it is contended, is inappropriately severe based thereon:
 - 4.1 That a reasonable possibility exists that another Court, on appeal, may find that there are substantial and compelling circumstances present which would justify a deviation from the prescribed minimum sentence of life imprisonment;
 - 4.2 That the Court *a quo* erred in not finding such circumstances; and
 - 4.3 That the Court *a quo* erred in overemphasising:
 - 4.3.1 The seriousness of the offence;
 - 4.3.2 The interests of society;
 - 4.3.3 The deterrent purpose of sentencing; and
 - 4.3.4 The retributive purpose of sentencing.
5. Mr. Biyela, who appeared for the Appellant, raised a point *in limine* in his heads of argument to the effect that the Court *a quo* erred in not adhering to the provisions of Section 93ter of the **Magistrate's Courts Act**, Act 32 of 1944 ("**the MCA**").
6. It is alleged that the Regional Court Magistrate ("**the Magistrate**") acted irregularly in failing to appoint two assessors to assist in the trial of the matter, that this failure by the Magistrate constitutes an irregularity which vitiates the entire trial and that the conviction and sentence should be set aside on this ground alone.

THE POINT IN LIMINE:

7. Section 93ter of the MCA, after its amendment which came into effect on 3 April 2024, states as follows:

“(1) *The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice—*

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his or her assistance any one or two persons who, in his or her opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him or her as assessor or assessors.”

8. It is trite that prior to its amendment, Section 93ter read as follows:

“(1) *The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice—*

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in any regional Court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors whereupon the judicial officer may in his discretion summon one or two assessors to assist him. (My underlining)

9. The difference between Section 93ter pre-amendment and post-amendment is clear to see namely that pre-amendment, Section 93ter contained a *proviso* which applied in instances where an accused

stood trial in a Regional Court on a charge of murder and which made it compulsory for a judicial officer to be assisted by two assessors, unless the accused person requested otherwise.

10. Section 93ter post-amendment does not contain the above pre-amendment *proviso* with the resultant effect that, even in murder trials, the appointment of assessors is no longer compulsory and, if regards are to be had to the wording of the section post-amendment, in the sole discretion of the judicial officer.
11. Mr. Biyela relied primarily on the pre-amended version of Section 93ter of the MCA and argued that, in view of the fact that the Court *a quo* proceeded with the criminal trial in the absence of two assessors, the Court was not constituted properly and that the conviction and sentence stand to be set aside on this ground alone.
12. The problem facing the Appellant though, apart from the amendment to Section 93ter of the MCA, is the fact that all of the authorities that we were referred to by Mr. Biyela in support of his above argument, stems from the period before the amendment to Section 93ter became effective and are consequently of not much use to the Applicant's case.¹

We were not referred to any authorities that specifically dealt with the application of Section 93ter post-amendment, but given what is stated herein below, it is of no consequence.

13. Mr. Biyela further argued that, even if his primary argument proves to be unsuccessful, the Magistrate acted irregularly by prompting the

¹ We were referred to *S v Gayiya* 2016 (2) SACR 165 (SCA); *S v Khambule* 1999 (2) SACR 365 (O); *Chala and Others v Director of Public Prosecutions, Kwazulu-Natal and Another* 2015 (2) SACR 283 (KZP) and *S v Du Plessis* 2012 (2) SACR 247 (GSJ).

Appellant into waving his right to have two assessors present during the trial.

In support of his argument in this regard, Mr. Biyela relied on the following exchange that took place between the Magistrate, the Appellant and the legal representative of the Appellant at the time:

“COURT: I see the issue of the assessors here. You said you want assessors and it looks like you don't have it. Ms Ntuli, can you confirm that? Some of the assessors have now resigned and it's going to take a whole year to get others like we struggled in the past. Cases just don't move.

MS NTULI: Court pleases, Your Worship.

COURT: Can you check who's that.

MS NTULI: May I approach him? I [indistinct] consultation, Your Worship. The accused says his withdrawing that he needs assessors to assist in this matter, Your Worship.

COURT: Can we confirm then from Mr Metswe that he now no longer will need assessors.

ACCUSED: Correct so, Your Worship.”

14. Mr. Biyela implored us to consider the context of the above exchange and argued that the only inference that may be drawn from same is that the Appellant was unduly influenced by the Magistrate to waive his right to assessors.
15. I hold the view that what appears clearly from the above exchange is the following:
 - 15.1 That the Appellant apparently knew before the date of the above discussion that he had the right to request the appointment of assessors to assist during his trial;

- 15.2 That he did in fact exercise this right on an earlier date by requesting such an appointment;
 - 15.3 That he was legally represented at the time of the above quoted discussion;
 - 15.4 That his legal representative requested an opportunity to consult with the Appellant prior to making a final decision in respect of the possible appointment of assessors; and
 - 15.5 That he made the decision to waive his right to have such assessors appointed after consulting with his legal representative on the issue.
16. Mrs. Van Heerden, who appeared for the Respondent, argued that the Appellant was afforded sufficient opportunity to make an informed decision regarding the appointment of assessors and that his eventual decision does not raise any question marks.
17. When pressed, Mrs. Van Heerden acknowledged that the way in which the Magistrate dealt with the issue of the possible appointment of assessors at the time, might raise some eyebrows, but she argued that this certainly did not render the Appellant's decision to waive his right to the appointment of assessors irregular.
- I agree with Mrs. Van Heerden in this regard, especially in view of what I have pointed out in paragraphs 15.1 to 15.5 above.
18. I am of the view that, although the way in which the Magistrate dealt with the issue might be described as inelegant, I find nothing irregular in the way in which the events panned out and I consequently find no

basis to uphold the point *in limine* raised on behalf of the Appellant and the point *in limine* therefore stands to be dismissed.

Considering how the trial proceeded, I am unable to find that the Appellant was prejudiced or that the questioning by the Magistrate caused him an injustice.

THE APPEAL:

Ad Conviction:

19. It is an established and long-standing principle that a Court of Appeal is reluctant to upset the findings of a trial Court in the absence of material misdirection of the said trial Court and that *sans* such material misdirection, the findings of fact of the trial Court are presumed to be correct.²
20. In the present matter, the Appellant's primary concern is with the fact that the State relied primarily on the evidence of a single eyewitness and that the evidence tendered by such witness during the trial, was not sufficient to warrant a conviction.
21. The single eyewitness utilised by the State during the trial proceedings in the Court *a quo*, one Olebogeng Macwiri ("*Macwiri*") testified that on the fateful night he met up with the Appellant and the Appellant's girlfriend (the deceased) at a tavern and that at one stage during the evening he (the witness) excused himself in order to relieve himself.

The witness testified that on his way back to the tavern, he had a chance meeting with the deceased on the outside of the tavern, upon

² *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 689 and 690; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645.

which the Appellant appeared and started assaulting the deceased by, *inter alia* grabbing her by her neck and by pushing her up against a fence.

22. Macwiri further testified that he confronted the Appellant but that the Appellant then punched him in the face whereupon he decided to leave with his own girlfriend.

Macwiri finally testified that he was approached at a later stage by the Appellant with a request to alter his evidence which he declined to do.

23. The evidence of the Appellant on the other hand was simply that he did not kill the deceased, but that the deceased was killed by Macwiri.

The Appellant based his above contention thereon that he found the deceased lying on the ground with Macwiri standing nearby, although he also stated that Macwiri was standing on the other side of a fence.

24. The legal position in respect of single witnesses and how such evidence should be treated is well-established and does not need a lot of discussion.

Suffice it to say that the conviction of an accused person on the evidence of a single competent witness is specifically sanctioned in terms of Section 208 of the **Criminal Procedure Act**³ ("**the CPA**").

The Courts have held on numerous occasions that such evidence should be treated with caution but also that the exercise of caution should not be allowed to displace the exercise of common sense.⁴

³ Act 51 of 1977.

⁴ *S v Artman and Another* [1968] 3 All SA 408 (A) at 410.

25. In deciding whether the evidence of a single witness is trustworthy, the merits and demerits of such evidence should be weighed and such evidence may be found to be acceptable even though it might have some shortcomings.⁵
26. Although corroborative evidence is not necessarily decisive or pivotal, it certainly does assist in deciding whether the evidence of a single witness is to be accepted and it has even been held that corroboration may be found in the improbabilities of the version of the accused person.⁶
27. Upon perusing the record of the proceedings in the Court *a quo*, I find corroboration for the evidence of Macwiri in the following:
- 25.1 The evidence of the first witness for the State, Constable Moraukgomo,⁷ who testified that the Appellant phoned him on the night in question and informed him that he had assaulted his girlfriend (the deceased) and that the witness should call the police and the ambulance as she is unresponsive;
- 25.2 The evidence of one Onalenna Thukwi who testified:
- 25.2.1 That she was alerted by her friends about a lady lying in the yard and that upon inspection she found the deceased lying on the ground with blood coming from her mouth and nose;
- 25.2.2 That she saw the Appellant and the deceased together earlier during the day; and

⁵ *S v Webber* [1971] 3 All SA 609 (A) at 613; *S v Sauls* 1981 (3) SA 172 (A) at 180; *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139 to 140.

⁶ *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA) at 171; *Chabalala, supra*.

⁷ It appears from the record that he is the brother-in-law of the accused.

25.2.3 That, upon finding the deceased lying on the ground and upon informing the Appellant that she was going to phone the police, she was told by the Appellant that she should proceed to call the police because he found the deceased sleeping with a man;

25.3 The evidence of Keinetse Kelopetswe, who testified that she is a distant relative of the Appellant, that she found the deceased lying on the ground and that the Appellant confirmed to her, on the scene, that he killed the deceased; and

25.4 The affidavit deposed to by Dr. Kanaomang in terms of Section 212(4)(a) of the CPA who confirms that the deceased died as a result of the complications of a traumatic brain injury that was caused by manual strangulation causing a lack of oxygen to the brain, which is in line with Macwiri's evidence that the Appellant grabbed the deceased by the neck.

The above evidence corroborates the version of the single eyewitness (Macwiri) and in my view lends credibility to it.

26. In contrast I find the version of the Appellant, namely that Macwiri killed the deceased, highly improbable seeing that he, on his own version, only found Macwiri standing next to the deceased although on the other side of a fence and seeing that he never implicated Macwiri on the scene but only afterwards and after he had some time to overthink the situation.

I further find the evidence tendered by the Appellant as to why he himself did not call for the ambulance and why he did not take the

deceased to hospital but instead took her home, unsatisfactory and evasive.

27. It appears from the record of the proceedings that all of the above was considered by the Magistrate before convicting the Appellant and I have to agree with the Magistrate that, given all of the evidence tendered, the probabilities favour the State especially in view of the fact that the State has to prove its case beyond reasonable doubt and not beyond all doubt.⁸

28. I could find no material misdirection from the Court *a quo* with regards the eventual conviction of the Appellant and the appeal in respect of the conviction must therefore fail.

Ad Sentence:

29. The question as to whether the sentence imposed by the Court *a quo* is appropriate should be considered against the statement made by Holmes JA in **S v Rabie**⁹ where he held as follows with reference to the jurisdiction of Courts of appeal in matters of sentence¹⁰:

“This Court does not have an overriding discretion to ameliorate the sentences of trial Courts. The discretion is pre-eminently theirs...”

30. The above principle has been reaffirmed and the Courts have consistently held that a Court of appeal should only interfere if the afore-said discretion has not been judicially and properly exercised and if the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.¹¹

⁸ *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182.

⁹ 1975 (4) SA 855 (A).

¹⁰ *Rabie*, supra at 865.

¹¹ *S v Pieters* 1987 (3) SA 717 (A) at 727; *S v Shapiro* 1994 (1) SACR 112 (A) at 119 to 120.

31. In the end, if the judicial officer in the Court *a quo* exercised his/her discretion properly, it is of little concern whether the Court of appeal agrees with the sentence or not and the question to ask is not whether the sentence that is considered by the Appeal Court would have been an appropriate sentence but rather whether it is the appropriate sentence and whether that of the trial Court is not.¹²

32. It is common cause that the provisions of Section 51(1) of the CLAA find application in the present matter and that the minimum sentence of life imprisonment is in play.

The said Section 51(1) reads as follows:

“Notwithstanding any other law... a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.” (My omissions)

33. It is also trite that the proper starting point in determining the appropriate sentence in criminal matters is the so-called triad as set out in **S v Zinn**¹³ namely to consider the circumstances relevant to the particular crime, the circumstances of the criminal involved and the interests of society and to then consider whether substantial and compelling circumstances exist that would warrant a deviation from the minimum sentence of life imprisonment.

34. In his heads of argument on behalf of the Appellant, Mr. Biyela alleged that the trial Court misdirected itself by imposing a sentence of life imprisonment and not considering the personal circumstances of the Appellant which are as follows:

¹² **S v Sadler** 2000 (1) SACR 331 (SCA), par 10.

¹³ 1969 (2) SA 537 (A).

- 33.1 That the Appellant is 34 years of age;
 - 33.2 That the Appellant is not married, but that he was in a long-term relationship with the deceased;
 - 33.3 That the Appellant has a three-year-old child with the deceased and a four-year-old child with another woman;
 - 33.4 That the Appellant only finished grade 10 at school;
 - 33.5 That the Appellant was employed as a general farm worker earning R4 500,00 per month; and
 - 33.6 That the Appellant has five previous convictions.
35. Mr. Biyela further alleged in his heads of argument that the trial Court erred in over-emphasising the seriousness and prevalence of the offence and by overlooking the fact that the above circumstances are compelling and warrants a deviation from the prescribed minimum sentence.
- During argument, Mr. Biyela merely confirmed the above contents of his heads of argument.
36. If proper regards are to be had to the reasons given for sentence by the Magistrate, it appears clearly that all of the above personal circumstances of the Appellant were in fact considered by the Magistrate and the above argument that the trial Court misdirected itself by not taking these circumstances into consideration cannot be sustained.

37. The only question to be answered is whether substantial and compelling circumstances does in fact exist that would warrant a deviation from the minimum sentence of life imprisonment and whether the Magistrate misdirected himself in this regard.
38. It is perhaps apposite at this time to mention **Vilakazi v S**¹⁴ where the Supreme Court of Appeal stated that in instances of crimes of a serious nature, the personal circumstances of an offender will recede into the background.

The Court held as follows:

*“Once it becomes clear that the crime is deserving of a substantial term of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what the period should be.”*¹⁵

39. One cannot, in my view, deny the seriousness of the offence of which the Appellant was convicted especially if it is to be considered that it was committed against someone with whom the Appellant had an intimate relationship and whom relied on the Appellant for protection.
40. The seriousness of the offence is aggravated by the fact that it was committed by a man against a woman and if I may, I would like to quote my brother Tlaletsi JP where he held as follows in **Smous v S**¹⁶:

“Violence in our society, particularly by men against women is prevalent. The interests of society dictate that a strong message to the public that violence will not be tolerated should be sent... Respect for the law must be guaranteed.” (My omissions)

¹⁴ [2008] 4 All SA 396 (SCA).

¹⁵ **Vilakazi**, supra, par 58.

¹⁶ [2017] ZANHC 56 (15 September 2017), par 23.

41. In **S v WV**¹⁷ the Court emphasised the fact that the kind of sentence imposed will cause society to either have confidence in the judicial system or lose confidence in it.

It is important for the public to have confidence in the judicial system and in the sentences imposed by the Courts.

42. In the often-quoted Supreme Court of Appeal case of **S v Malgas**¹⁸ it was held at paragraph 25 that a Court may impose a lesser sentence if the Court, upon due consideration of the particular circumstances of the case, is satisfied that the prescribed minimum sentence is rendered unjust in that it would be disproportionate to the crime, the criminal and the needs of society so much so that an injustice would be done by imposing the prescribed sentence.

The same Court however held earlier that the prescribed sentences should not be departed from lightly and for flimsy reasons.¹⁹

43. The sentencing process is perhaps most aptly summarized in **S v RO and Another**²⁰ where the Supreme Court of Appeal held as follows at paragraph 30:

“Sentencing is about achieving the right balance (or, in more high-flowing terms, proportionality). The elements at play are the crime, the offender and the interests of society, with different nuance, prevention, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.”

44. It should be reiterated that after all is said and done, it remains the duty of the Court to impose a sentence that is fair and just and that in

¹⁷ 2013 (1) SACR 204 (GP).

¹⁸ 2001 (1) SACR 469 (SCA).

¹⁹ *Malgas*, supra, par 9.

²⁰ 2010 (2) SACR 248 (SCA).

order to do so, the Court should consider “...all relevant factors and to find the appropriate balance between often competing factors that would lead to a fair and just sentence in all the circumstances of a particular case.”²¹

45. I could find nothing in the record of the proceedings in the Court *a quo* to suggest that the Magistrate did not consider all relevant factors before imposing the sentence appealed against and I can also not find anything compelling or substantial in the personal circumstances of the Appellant that would warrant a deviation from the minimum sentence of life imprisonment.

46. For these reasons the appeal in as far as the sentence is concerned, should also fail.

ORDER:

47. On the above premises, I make the following order:

THE APPEAL OF THE APPELLANT AGAINST HIS CONVICTION ON A CHARGE OF MURDER, READ WITH THE PROVISIONS OF SECTION 51(1) OF THE CRIMINAL LAW AMENDMENT ACT, ACT 105 OF 1997, AS WELL AS HIS SENTENCE OF LIFE IMPRISONMENT IS DISMISSED.



A.D. OLIVIER
ACTING JUDGE
NORTHERN CAPE DIVISION

²¹ *S v Pitso* [2025] ZANCHC 61(1 August 2025), par 33.

I concur.


P. TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the Appellant:
On instructions of:

MR K BIYELA
Legal Aid South Africa
Kimberley

For the Respondent:
On instructions of:

ADV A VAN HEERDEN
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