IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A272/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED
DATE:11/07/2023
SIGNATURE

In the matter between:

THAMSANQA ANTON MLAMBO Appellant

and

THE STATE Respondent

JUDGMENT

PHOOKO AJ

Introduction

[1] This is an appeal against the sentence imposed by our brother, Makume J, who was sitting as the court of first instance on 15 August 2014. Makume J found the appellant guilty of premeditated murder.

[2] Leave to appeal was granted only against sentence.

THE ISSUE

[3] The issue to be determined by this Court is whether the court a *quo* erred or misdirected itself when it found the appellant guilty of premeditated murder and sentenced him to a term of life imprisonment, being the prescribed minimum sentence in terms of section 51(1) of the Criminal Laws Amendment Act, 105 of 1997 ("the Act"). Section 51(1) to (3) read as follows:

> **"51 Discretionary minimum sentence for certain serious offences**
>
> (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or 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.
>
> (2) Notwithstanding any other law but subject to subsection (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 offence, 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
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> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in case of –

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment 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.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings

and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed."

THE FACTS

[4] The appellant, an adult male who was at the time 26 years old, was charged with murder, read with the provisions of section 51(1) of the Act in that on/or about 3 November 2012 at or near Wakkerstroom in the district of Wakkerstroom, he unlawfully and intentionally killed S[...] S[...] N[...], an adult female person. The deceased was 33 years old at the time of her death.

[5] The deceased had three children including the appellant's son. A post-mortem report showed that she died because of being strangled with a rope that was tied to her neck. The deceased was left dead in an outside toilet and was discovered on the following day.

[6] The trial court convicted the appellant on the aforesaid charge and sentenced him to a direct term of life imprisonment having found no substantial and compelling circumstances as envisaged in section 51(3) of the Act.

[7] The facts that are relevant to the issue of sentencing are the following. These facts are gleaned from the evidence led by the State and are largely circumstantial. The appellant's evidence was rejected by the court below as not reasonably possibly true. However, the court below used one aspect of his evidence to conclude that he formed the intention to kill the deceased at her father's tavern earlier in the day. He had then, knowing that she was proceeding to her own home from there, proceeded to her house with a rope in his possession to use it to strangle her to death. The question is whether the court below erred in drawing an inference based on this that he had decided and planned the murder at this point. If the court below erred in drawing this inference, then the decision to kill the deceased moves closer to the time when he confronted her at her house.

[8] The above inference was drawn from the appellant's own evidence when explaining the presence of his DNA on the rope. He said that he had handled the rope at her father's tavern when he was helping her to tie a case of beers onto a wheelbarrow that she was using. This led to the inference that the rope had been brought by the appellant to the deceased's house. If his evidence about the rope is rejected, could it be taken into account only for the purposes of drawing a timeline as to when he formed the intention to kill and devised the method of killing?

[9] The evidence is as follows:

[9.1] The appellant and the deceased were estranged at the time of the deceased's death.

[9.2] The deceased had previously obtained a protection order against the appellant.

[9.3] The deceased had first been brutally assaulted before she was strangulated by a rope that was fixed to the rafters of an outside toilet.

[9.4] The deceased's father had seen the appellant at his tavern on the previous day.

[9.5] Ms Nkosi had seen the appellant at the deceased's house at 09:00 and at the deceased father's tavern at 10:00 the previous day.

[9.6] The appellant testified that he had assisted the deceased to tie a case of beer onto a wheelbarrow the day before her death. This was to explain away the presence of his DNA on the rope used to kill the deceased.

[9.7] The deceased had left her father's tavern in the evening when it closed and had, according to Nkosi, proceeded to another tavern.

[9.8] Nkosi had arranged for the deceased's children to be locked in (until the deceased returned home) and the doors were still locked when her body was discovered in the outside toilet.

[9.9] The deceased was "clutching" the keys to the house when she was found dead.

GROUNDS OF APPEAL

[10] The appellant's grounds of appeal are that the trial court erred:

[10.1] by not timeously warning the appellant that the State was going to argue that the murder was planned or premeditated;

[10.2] by concluding that the evidence of the State supported an inference that the murder was planned or premeditated; and

[10.3] by imposing a sentence of life imprisonment.

APPLICABLE LAW

[11] The law regarding appeals is clear in that a court of appeal should be slow to interfere with the judgment of the court of first instance.[1] The basis for this is that the trial court *inter alia* had the benefit of observing and listening to the witnesses. However, this is not a rigid rule.[2] The appeal court may in certain circumstances interfere and reverse the judgment of the court a *quo* if the facts of the case from the record warrant an intervention. In *Makate v Vodacom (Pty)*,[3] Jafta J accurately stated that:

> "… If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case."

[12] Similarly, in *S v Naidoo & others,*[4] it was stated that:

> "a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."

[13] Considering the above principle, absent any misdirection by the court a *quo*, there will be no basis whatsoever for interference by this Court.[5] However, if somehow the court a *quo* misdirected itself on the facts and as a result came to the wrong conclusion, this Court will be justified to reverse such a decision.

[14] I now consider the submissions of the parties together with the appeal record to ascertain whether this court can interfere with the sentence imposed by

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[1] *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA); *S v Naidoo and Others 2003* (1) SACR 347.
[2] *Mkhize v S* (16/2013) [2014] ZASCA.
[3] 2016 (6) BCLR 709 (CC) para 40.
[4] 2003 (1) SACR 347 (SCA) para 20.
[5] *R v Dhlumayo and Another* 1948 (2) SA (A); *S v Monyane & Others* 2008(1) SACR 543 SCA at para 15.

Makume J.

THE APPELLANT'S SUBMISSIONS

[15] The appellant argued that the indictment only states that section 51(1) of the Act will be relied on by the State but is silent about the circumstances that the State will rely upon to trigger the application of the said provision.

[16] In addition, the appellant argued that the trial court did not explain the provisions of section 51(1) of the Act to him including ascertaining from his legal representative whether the said provision was explained to him or not. To this end, counsel for the appellant relied on the case of *S v Makatu*[6] (*Makatu case*) where the sentence of life imprisonment was overturned, and quoted the following paragraph:

> "…No mention was made in respect of the murder count of part I of schedule 2 of Act 105 of 1997, nor did it indicate whether there were aggravating features which would bring the charge within the ambit of the minimum sentencing regime."
>
> "the deficiencies in the charge and the fact that no evidence had been led to bring the murder within the purview of the section, together with the fact that no mention had been made of the applicable section, except in a cursory manner during the sentencing stage, led to the ineluctable conclusion that the sentence of life imprisonment had been wrongly imposed."[7]

[17] To bolster his case, counsel for the appellant further relied on the case of *S v Khoza and Another*[8] (*Khoza case*) where the accused persons were only informed of the applicability of the Act after conviction. According to counsel, the court there held that:

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[6] 2014 (2) SACR 539 (SCA).
[7] Para 12.3 appellants heads of argument.
[8] 2019(1) SACR 251 (SCA).

> "the question of prejudice was determined by an objective facts-based inquiry and was similar to the question whether an accused person had been prejudiced by a defective charge, which also directly implicated section 35(3)(a) of the Constitution. Prejudice would exist therefore if there was a reasonable possibility that an accused may have conducted their defence differently had they been informed at the outset of the trial of the applicable provisions".[9]

[18] Further, the appellant contended that he was prejudiced in his defence because the trial court did not warn him that the State would argue that the murder was planned or premeditated.

[19] Further, counsel for the appellant contended that the trial court erred when it inter alia drew inferences that the accused followed the deceased from the tavern armed with the rope and had formed his intention and planned to kill the deceased right from the time when he met the deceased at her father's tavern. According to counsel, the basis for this is that during the bail proceedings, the State accepted that the rope was left at the deceased place sometime when the appellant assisted the deceased to tie a case of beer in a wheelbarrow.

[20] Consequently, counsel for the appellant argued that it cannot be excluded that the rope may have been already in the toilet as the house was still locked with children inside, and the keys were found in her hand in the toiled. According to counsel, if the trial court accepted the version given during the bail application, then there could be no premeditated murder. As a result, section 51(2) of the Act is applicable.

RESPONDENT'S SUBMISSIONS

[21] Counsel for the respondent sought to persuade this court not to interfere with the sentence of the trial court unless that court did not apply section 51(1) of the Act properly and did not exercise its discretion judicially when imposing the sentence. To this end, counsel submitted that the trial court considered all the

[9] Para 12.4 of the appellants heads of argument.

factors prior to sentencing and therefore did not misdirect itself.

[22] Counsel for the respondent further contended that the provisions of section 51(1) of the Act were applicable because the offence was premeditated. Counsel further contended that the appellant was correctly convicted of an offence referred to in Part I of Schedule 2 of the Act as amended by Act 38 of 2007. Consequently, Counsel submitted that the trial court was obliged to impose a minimum sentence of life imprisonment except if there were substantial and compelling circumstances that justified a lesser sentence.

[23] According to counsel for the respondent, it was unequivocally held that "the specified sentences are not to be departed from lightly and for flimsy reasons" in *S v Malgas*.[10]

[24] Relying on the case of *S v Aliko*[11], counsel submitted that even if there was no premeditation, life imprisonment would still be appropriate given the nature of the offence committed.

EVALUATION OF SUBMISSIONS IN RESPECT OF SENTENCE ON THE COUNT OF PREMEDITATED MURDER

Was the appellant warned of section 51(1) implications?

[25] About the warning of the applicability of the minimum sentence of life imprisonment, I am not persuaded by the proposition that the appellant was not informed and/or warned that if found guilty of murder, he stood a risk of being sentenced as per the minimum sentence of life imprisonment. In my view, counsel for the appellant applies a selective reading of the *Makatu* case by inter alia cherry-picking and co-joining various sentences from the paragraphs of the *Makatu case* to change context.

[26] It is necessary for this Court to repeat what the counsel submitted. For example, counsel said that the court in *Makatu case* said:

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[10] [2001] 3 All SA 220 (A) at para 25.
[11] 2019 JDR 0673 (SCA).

> "the deficiencies in the charge and the fact that no evidence had been led to bring the murder within the purview of the section, together with the fact that no mention had been made of the applicable section, except in a cursory manner during the sentencing stage, led to the ineluctable conclusion that the sentence of life imprisonment had been wrongly imposed."

[27] The above quotation is a misrepresentation of what the court said in the *Makatu case*. As a matter of fact, there is nowhere in the judgment where the court makes mention of "the deficiencies in the charge and the fact no evidence had been led". On the contrary, the court in *Makatu case* said:

> "…A major problem here is that the indictment never made mention of this section or the Act. It does not even give any details to indicate if there are any aggravating features which would bring it within the ambit of the minimum sentencing regime.[12] (Own emphasis added).
>
> Secondly, no evidence was led to bring this murder within the purview of the section. Throughout the trial no mention was made of the section except in a cursory manner during the sentencing stage.[13] (own emphasis added)

[28] Further, the words "throughout the trial" have been omitted in the submissions. This alone defeats the appellant's argument because the indictment does make mention of section 51(1) of the Act.[14] In addition, the trial court warned the accused about the applicability of the above provision including that if the state "manages to proof (sic) that the murder was premeditated…the minimum sentence is life imprisonment".[15] When counsel was directed to the record and asked to comment about the preceding statement, she changed her initial stance and stated that such a warning was too late and should have been done at the beginning of the trial. This also does not assist the appellant's case

[12] Para 23.
[13] Para 24.
[14] Appeal Record Vol. 1 at page 1.
[15] Appeal Record Vol. 1 at page 66.

because the charges were put to the accused, and he indicated that he understood them.[16] Counsel for the respondent also indicated that the provisions of section 51(1) of the Act were read out to the accused. This settles this point. If there is a reference to the section or the Act or a warning given by the Court during the trial before conviction, there is compliance.

[29] Similarly, the reliance on the *Khoza case* does not assist the appellant's case. There, "the indictment did not refer to the Minimum Sentences Act" and "neither did it contain factual allegations that rendered the Minimum Sentences Act applicable".[17] In addition, the accused were only informed of the applicability of the Minimum Sentences Act after they had been convicted.[18] Further, the accused persons in the *Khoza case* were not represented.[19] These features distinguish the *Khoza case* from the current one in that the indictment does refer to the provisions of section 51(1) of the Act, the trial court warned the accused about the applicability of the Minimum Sentences Act, and that the accused was represented throughout the trial.

[30] Regarding the additional challenge by counsel for the appellant in that the indictment was not detailed in so far as disclosing the entire provision of the applicable Minimum Sentences Act, in my view, the preceding paragraphs adequately address this issue. Therefore, it is not necessary to consider it further. In any event, counsel for the respondent had raised an objection to the effect that this was only raised for the first time on the appeal stage.

Was the Murder Premediated?

[31] Concerning the planning or premeditation of the murder, I understand the appellant's concern if the trial court accepted that the rope was left at the deceased's house at some stage prior to the murder of the deceased. If so, it cannot be said that the accused planned from the time that he was at the tavern and left there with the same rope that was used to kill the deceased at her house. In other words, there exists a possibility that the rope that was used

[16] Appeal Record Vol. 1 at page 6.
[17] *Khoza case* para 2.
[18] *Khoza case* para 13.
[19] *Khoza case* para 13.

to strangle the deceased was found on the premises or in the toilet as the house was still locked when the deceased was discovered. Notwithstanding this, the findings of the trial court that the murder of the deceased was premeditated remains a correct finding as she was murdered through the use of a rope which still demonstrates a degree of premeditation.

[32] In my view, it is immaterial as to where the rope came from during the time of the commission of the offence. Forensic evidence reveals that the accused handled the rope. In addition, killing using a rope is not an instant act. It is a process that requires time, first in deciding on using a rope as a weapon, time taken to tie around the neck in such a way that when pulled, it will tighten and cause the victim to choke, and pulling on it to asphyxiate. In other words, the accused had sufficient time to refrain from his act before his victim died. This act was also preceded by a long period of assaulting the deceased. All in all, the act of planning is involved. It matters not how long or short the planning was. Counsel for the respondent correctly referred this Court to the case of *S v Kekana*[20] (*Kekana case*) where the Supreme Court of Appeal, per Mathopo AJA held that:

> "… it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action".

[33] Evidence reveals that there was blood on the toilet walls, the deceased was bleeding from the nose, and her face was swollen. The appellant could have killed the deceased with his bare hands but at some stage, he stopped, considered the rope to be a proper tool to achieve his mission, and eventually made use of it (rope). To this end, counsel for the respondent further referred to the case of *S v Montsho*[21] (*Monstho case*) where it was held that:

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[20] (629/13) [2014] ZASCA 158 (1 October 2014) at para 13.
[21] 2014 (2) SACR 481 (GP) at para 36.

> "Premeditated" refers to something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension…."

[34] In my view, the *Kekana* and *Montsho* cases are relevant and applicable to the present matter in so far as premeditated, planning and the duration of the execution of the killing thereof are concerned.

[35] Considering the above exposition of the evidence, I am of the view that the trial court was correct and did not misdirect itself on the question of premeditation even if there is no evidence that the appellant procured the rope earlier in the day, but possibly at the time that he confronted the deceased at her home.

LIFE SENTENCE

[36] I need to indicate that the appellant has throughout the trial not shown any form of remorse for the brutal murder of the deceased. At some stage, he even denied the identity of his dead estranged lover who also happens to be the mother of his child. Furthermore, the appellant did not tell the truth about the deceased blood stains that were found on his shirt and trouser. Had it not been for the DNA tests, the State would not have been able to link the appellant to the murder of the deceased.

[37] It is only on appeal that the appellant shows remorse when he inter alia states that "… it was not my intention to kill her as the mother of my child but the anger drove me wrong". He goes on to state that "I fully regret/show remorse for what I did". He had an opportunity to testify in mitigation of his sentence but opted not to do so. This is a belated expression of remorse.

[38] The cause of death is stated as "consistent with manual external pressure to the neck, by ligature". At the very least, one would have expected the appellant to shield his lover and mother of his child as opposed to strangling her to death with a rope. As if that was all, the appellant opted to tie a rope on the rafters so that the murder could be staged as a suicide. This was a further element demonstrating a degree of thought put into committing the murder. The

deceased is one of the most vulnerable groups in society. Femicide has reached alarming rates in South Africa. The courts, when dealing with issues related to sentencing on cases of this nature need to strike a balance between various competing interests including the interests of the accused and those of the society that he lives in. The interests of society would be to adhere to the prescribed sentences unless substantial and compelling circumstances exist.

[39] I am of the view that the sentence, taken together with other factors that are applicable in the sentencing stage, fits the nature of the crime that he has committed, nothing should count in the favour of the appellant in so far as the sentence of life imprisonment is concerned. Ultimately, even if there had been no premeditation, the sentence of life imprisonment would still be appropriate in the circumstances of this case.[22]

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

[40] Section 51(3) of the Act confers a discretion on courts to depart from the prescribed minimum sentence of life imprisonment where substantial and compelling circumstances justify the imposition of a lesser sentence. This provision does not encroach on judicial discretion at the sentencing stage.[23] Rather, it gives the courts leeway to deviate from the prescribed minimum sentence if there are substantial and compelling circumstances justifying a lesser sentence.[24] Further, the courts are called upon to record factors qualifying as substantial and compelling circumstances that warrants the imposition of a lesser sentence.

[41] The Supreme Court of Appeal in *S v Malgas*[25] cautioned that "the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny". It has now been settled that whether certain factors are aggravating or mitigating, they "should not be considered individually and or in isolation to determine whether substantial or compelling

[22] See *Aliko v S* (552/2018) [2019] ZASCA 31 at para 18.
[23] *S v Dodo* 2001 (3) SA 382 (CC).
[24] See *S v Malgas* [2001] 3 All SA 220 (A) at para 34; *S v Pillay* 2018 (2) SACR 192 at para 11.
[25] *S v Malgas* para 9.

circumstances exist".[26] To decide whether substantial and compelling circumstances exist, a court is required to "look at traditional mitigating and aggravating factors and consider the cumulative effect thereof".[27] The court in *S v Pillay* indicated that for circumstances to be exceptional or compelling, they need not be "exceptional in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender*.*"[28] In other words and depending on the facts of each case, the personal circumstances[29] of the accused such as young age and remorse could be regarded as substantial and compelling circumstances that justify deviation from a prescribed minimum sentence in a given case.[30]Equally, In *S v RO and Another*[31], the court warned that the appellants' personal circumstances should not be elevated above that of the society in general, and the victim(s) otherwise that would not serve the well-established aims of sentencing".

[42] The court is required to strike a sentencing equilibrium of the mitigating and aggravating factors and cumulatively give weight to each of the factors advanced to ascertain whether there are substantial and compelling circumstances warranting the imposition of a lesser sentence other than the prescribed minimum sentence. This is known as the proportionality test.[32] It may occur that the aggravating factors might outweigh the mitigating factors or *vice versa*. If the former is found to be present, it may influence the sentence to be imposed. The latter also has the effect of reducing the sentence. A convicted person who seeks to be sentenced outside the ambit of the prescribed minimum sentence must satisfy the court on a factual basis that the mitigating factors justify a departure from the prescribed minimum sentence. I turn to consider the basis that led the trial court not to have found that there existed substantial and compelling circumstances justifying a lesser sentence.

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[26] See *S v Letsoalo* (Sentence) (108/2022) [2023] ZAGPJHC 452 at para 13.
[27] *S v Pillay* at para 12.
[28] Ibid at para 10.
[29] *Director of Public Prosecutions, Gauteng Division, Pretoria v D.M.S and A.O.L* (69/2022) [2023] ZASCA 65 at para 26.
[30] See *S v Malgas* at para 34.
[31] 2010 (2) SACR 248 (SCA) para 20.
[32] Ibid at para 32. See also *S v Vilakazi [*2008] 4 All SA 396 (SCA) at para 3; *S v Zinn* 1969 (2) 537 (A) at 540G, and *Maila v S* (429/2022) [2023] ZASCA 3 at para 60.

[43] First, the trial noted that the appellant did not testify in mitigation, but his counsel requested the court to consider that the appellant was a first offender when he committed the crime, he was aged 26 years then, he completed grade 8, and left school because of inter alia financial problems in his family, and that his four siblings were not employed. According to the trial court, counsel for the appellant "requested that the court accepts the personal circumstances as being sufficient to constitute substantial and compelling circumstances, fit and appropriate to deviate from the prescribed minimum sentence".[33]

[44] Second, the trial court considered the aggravating factors advanced by the State in that:

[42.1] The deceased was killed in a most brutal, cold-blooded, and careless manner.

[42.2] She was subjected to blunt force to her face and strangled with a rope tied twice around her neck.

[42.3] The offence was planned and premeditated.

[42.4] There was a history of violent behaviour by the accused towards the deceased.

[42.5] In 2011, the deceased reported a case of domestic violence against the appellant but later withdrew it.

[42.6] In October 2012 before the deceased died, she had reported another case of domestic violence against the appellant but it did not proceed.

[42.7] In October 2012 the deceased reported a case of assault against the appellant. The appellant admitted guilt and paid a fine.

[33] Trial Court judgment page 274 at para 10.

[42.8] The deceased was 33 years at the time of death.

[42.9] The deceased was killed whilst her two minor children aged 2 and 7 were sleeping in the house.

[42.10] The then two-year-old child is the son to the appellant.

[42.11] The appellant did not testify in mitigation of sentence.

[42.12] The appellant did not show remorse for what he did.

[42.13] The appellant disputed the identity of the deceased until the State closed its case despite overwhelming evidence dictating otherwise.

[42.14] The appellant's plea was a denial and avoidance of the consequences that followed the assault on the deceased.

[42.15] The appellant failed to take the court into his confidence to give reasons as to why he did this careless and gruesome act against his girlfriend.

[45] In summary, the deceased in this case was inter alia killed in a brutal manner, there was a reported pattern of abuse against the deceased, and the appellant has shown no respect for the law which is evident from various reported incidents of domestic violence cases in which her intimate partner sought to protect herself from him, the appellant through his act has rendered the children of the deceased motherless including his own child, and the appellant has not shown remorse.

[46] I deem it necessary to highlight further aspects regarding remorse, the court in *S v Matyityi*[34] highlighted the following:

[34] 2011 (1) SACR 40 (SCA) at para 13.

> "…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".

[47] The trial court was alive to the aforesaid consideration and expressed its concerns about the appellant's inter alia bare denials in his plea, the absence of explanation to the trial court as to why he murdered the deceased in the manner that he did, and avoidance of taking responsibility for his actions.

[48] Although dealing with rape, the Supreme Court of Appeal in *DPP, Pretoria v Zulu*[35] found that there were no substantial and compelling circumstances justifying a deviation from the applicable minimum sentence because the accused there inter alia had a close relationship with the deceased in that he was a step-father and the deceased was his step-daughter. Similarly, in this case, the trial court was alive to the fact that the appellant had committed a "…careless and gruesome act against his girlfriend". One would have expected the victims to get some form of protection from their close assailants in these cases, but it was not the case. All the above factors are some of the aspects that the trial court fully considered and eloquently alluded to. As a result, it found that the aggravating circumstances of the crime far outweighed the mitigating factors. It, therefore, in my view, correctly found that there were no substantial and compelling circumstances present that would justify a deviation from the prescribed applicable minimum sentence.

[49] Third, the trial court was requested to consider the role that liquor may have played given the fact that the appellant had consumed some. It was referred to

[35] *DPP, Pretoria v Zulu* (1192/2018) [2021] ZASCA 174 (10 December 2021) at para 28.

the decisions of *S v Cele*[36] and *S v Raath*.[37]

[50] The trial court noted that in *S v Cele* the court held that:

> "On the day in question he had been drinking with the deceased. It is reasonable to infer that something happened during this session to inflame the appellant's anger. What is was, we do not know. It is also reasonable to infer that the appellant's decision to have the deceased killed may have been induced to some extent by the influence of the liquor he had consumed. The question then is whether these factors inducing the offence can properly be described as mitigating. The fact that a person was a burden and an embarrassment, it may be argued on the one hand, may explain why he was murdered, but does not per se mitigate the extent of the murderer's guilt, and the mere fact that the murderer had consumed an unknown quantity of liquor with an undetermined effect on his faculties would take the matter no further".

[51] In light of the above considerations, the court there found that the above circumstances, "their very special nature does indicate that there is no likelihood that the appellant will ever commit a similar offence again, particularly since he has shown no inclination to violence in the past". The court, therefore, replaced the death sentence with a sentence of life imprisonment.

[52] In *State v Raath*[38] the court held as follows:

> "In the present case there is a considerable body of evidence that, as a result of the very substantial quantity of alcohol consumed by the appellant on the night in question, his faculties were substantially impaired and thus his moral blameworthiness was diminished. In my view, therefore, the learned judge erred in finding that the appellant's

[36] (330/90) [1991] ZASCA 31.
[37] 20099 (2) SACR 46 (C).
[38] At para 28.

consumption of alcohol played no role and was therefore not a mitigating factor".

[53] The court in *State v Raath* inter alia found that the excessive consumption of liquor counted in favour of the accused in mitigating including remorse that was shown. It accordingly replaced the sentence of life imprisonment with 22 years of imprisonment.

[54] I am of the view that the trial court, in so far as the cases of *S v Cele* and *S v Raath* are concerned, correctly found that the evidence related to the appellant's consumption of approximately three 750ml bottles of alcohol had no role to play as the appellant had also indicated that he was not drunk. When the appellant was asked about his state of sobriety, his response was that "No I was not drunk".[39] This distinguishes this case from the *Cele and Raath cases*. Furthermore, in *S v Raath*, there was also an element of remorse which is absent from this case.

[55] Consequently, my reading of the judgment and order of the court a *quo* including the record, and submissions of the parties do not show a misdirection that would justify interference by this Court. I am therefore of the view that the sentence in respect of the murder was proper. For that reason, it follows that there was no misdirection whatsoever from the trial court.

[56] Having carefully considered the appeal, both the appellant's and respondent's written and oral submissions. I am of the view that the appeal has no merit.

ORDER

[57] I make the following order:

(a) The appeal against the sentence is dismissed.

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[39] Appeal Record Volume 2, Trial Court judgment at page 150.

PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I agree it is so ordered.

MALINDI J

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I agree it is so ordered.

VORSTER AJ

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 July 2023.

APPEARANCES:

Counsel for the Appellant:	Adv LA Van Wyk
Instructed by:	Pretoria Justice Centre
Counsel for the Respondent:	Adv LA More
Instructed by:	State Attorney
Date of Hearing:	24 April 2023
Date of Judgment:	11 July 2023