

SOUTH AFRICA / JUDGMENT

## S v Heugh (A99/2023) [2025] ZAWCHC 150 (27 March 2025)

[2025] ZAWCHC 150

COURT

Western Cape High Court, Cape Town

BEFORE

Fortuin, Bhoopchand

CASE / FILE NUMBER

A99/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER: A99/2023

REGIONAL COURT CASE NUMBER: SSD52/20218

In the matter between

MARLON HEUGH

APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

Date of scheduled hearing: 14 March 2025

Date of judgment: 27 March 2025

Coram: Fortuin J, Bhoopchand AJ

BHOOPCHAND AJ:

1. Even in a society dulled by the ceaseless hum of violence, some nights carve themselves onto the tombstones of senseless killings occurring in our midst. A young man, twenty-one, steadies his hand, the metallic click of his weapon echoing twice. Two lives fall silent, their stories abruptly severed. A third, cloaked in the mercy of shadows, slips away from the grasp of fate. That night, heavy with sorrow, leaves behind a silence that screams louder than words, a haunting reminder of the dark side of humanity.
2. The Appellant was charged with murder under sections 51(2), 52A, and 52B of the Criminal Law Amendment Act 105 of 1997, also known as the minimum sentencing provisions. On 3 September 2017, the Appellant unlawfully and intentionally murdered Dominique Smith, an adult, by shooting him with a firearm at the corner of Tracy and Annike Street, Strand. He was also charged with the provisions of sections 51(1), 52(2), 52A and 52 B of Act 105 of 1997. He shot and killed Regan Phillips, an adult male, at the same location. The killings occurred in quick succession. The State did not rely on premeditation on the first charge but did so on the second charge.[1] The Appellant was found guilty. He was sentenced to eighteen years imprisonment on the first charge and life imprisonment on the second charge. He appeals his sentence.
3. The Appellant qualified for an automatic right to note an appeal under section 309(1)(a) of the Criminal Procedure Act 51 of 1977, given that he received a life sentence on the second charge of murder. The parties agreed that this Court could decide the appeal on the appeal record and the heads of argument submitted by the parties. The Appellant has not defined the grounds of appeal regarding the sentence. He made general references to the conventional triad of factors a Court considers in its sentencing procedure. The Appellant referred to his personal circumstances and the interests of the community. He also referred to the purpose of punishment and emphasised that a Court imposing sentence should not ignore the need for rehabilitation. He urged this Court to intervene and impose an appropriate, just, and balanced sentence.
4. The Appellant recognised that a departure from the prescribed minimum sentences should not be made for insubstantial reasons. The Appellant submitted that there were substantial and compelling circumstances warranting a deviation from the prescribed sentence. He emphasised his personal circumstances. He referred to his age, his employment status, his child and the need for him to play an active role in her upbringing, and the two-year period he spent in prison awaiting trial. He also referred to him being a first offender. The Appellant submitted that the sentence imposed on him would serve two of the three purposes of sentencing, namely deterrence and retribution. It did not serve the third purpose, namely reformation and rehabilitation. The appeal record suggests that the Appellant's submissions are unsustainable, as the Regional Magistrate carefully considered all these factors before imposing the sentence. This Court shall briefly outline the background circumstances that led to the Appellant's conviction before addressing the presentencing procedure and the imposition of sentence.

5. The evidence led by the State was both compelling and conclusive of the Appellant's guilt. The deceased were two of a group of three young men who went in search of alcohol late on that fateful night. The surviving member of that group, Heinrich Carelse, testified. The three were directed to a house where they could obtain alcohol. In their unsuccessful attempts to attract the occupants' attention, they eventually threw stones on the roof of the house. The three abandoned their attempts to secure the occupant's attention at this venue and were departing when four persons, including the Appellant, emerged from the house. The two groups began arguing with each other when the Appellant pulled out his gun and shot Dominique Smith in the head. The two others began running. The Appellant pursued Regan Phillips. Phillips fell and lay on his stomach on the ground. The Appellant shot him in the back of his head. The group of four that emerged from the house then went in search of Carelse, who escaped by hiding.
6. Martino Herschel Siebrits was with the Appellant from earlier that night. His testimony was that the group of four were drinking in the informal structure at the back of the house at the corner of Tracy and Annike Street when a brick landed on the roof. They rushed out to investigate and saw three boys walking away. The Appellant and another pursued them. The Appellant shot the first and then the second, who had slipped and fallen whilst running away. The Appellant had the gun for about one year and walked around the area with it. The Appellant handed the gun to him after the shootings with instructions to hand it to another member of the community. Anwill Wewers was also with the Appellant that night. He confirmed Siebrits testimony that the Appellant and the three went out after they heard stones landing on the roof. The Appellant shot the two.
7. The Appellant admitted in his plea explanation that on 2 September 2017, the victims were assaulted with a gun and that both were shot in the head. Dominique Smith and Regan Phillips died of gunshot wounds to their head. He admitted the post-mortem findings, the photo plan and key, as well as the ballistic report. In his changed plea explanation, the Appellant raised an alibi stating that he was at a party in Beverley Hills informal camp from 6 pm till quarter past ten and could thus not have been on the scene where the murders occurred. The Appellant remained steadfast in his testimony that he was not at the scene of the murders. He testified that he proceeded to his grandmother's house, where he remained until the following morning. The grandmother, Ms Maria Heugh, confirmed his testimony. Her evidence was most unsatisfactory. The Court a quo found him guilty of both murders.
8. In the presentencing process, the defence called the Appellant and his mother to testify. The Regional Magistrate had access to the probation officer's report. The Appellant was 23 years old. He was 21 when the offences occurred. He completed grade 9 at school. His child was a year old. The child's mother maintained contact with him whilst he was in prison. He was employed at the time of his arrest for committing the offences. He worked for a subcontractor to the City of Cape Town doing landscaping. He had been imprisoned for two years since September 2017.

9. The Appellant confirmed that he was a first offender. He denied knowledge of a firearm or the murders, insisting that he was not at the place where it occurred. The Appellant declined to express any remorse despite the direct testimony that placed him on the scene, being the one who fired the fateful shots, and being convicted on both charges. The Appellant was reminded that he faced sentences of at least fifteen years and a life sentence. He denied that he was a gang member or a follower of one either when he was outside or in prison, although he had a '27' tattooed on his wrist. He considered himself an adult.

10. The Appellant's mother received a social security disability

grant. She wanted to reach out to the deceased's families, but she detected their heartache and restrained herself. She felt

disappointed at her son but asked for mitigation of the sentence as the Appellant had a child. She was caring for the child for about a month when she testified. She confirmed that the Appellant lived the life of an adult

11. The Regional Magistrate summonsed the head of the Detective branch of the area to testify about the circumstances relating to the type of offences committed by the Appellant. Colonel Plaatjies testified

about the proliferation of gangs, drugs, and murders committed with firearms. He, together with the Regional Magistrate, regretted the deterioration of the Strand area, which was once a pleasant seaside village.

12. The mother of the first deceased, Dominique Smith, testified. The

deceased was twenty years old. The news of Dominique's murder shattered their family. Her husband and only other son have not come to terms with their loss. She often encounters her living son sitting alone at night, deep in thought. He had lost interest in his usual activities and has been ill, resulting in his absence from work. She fights with the Appellant in her sleep. She is angry with him. She demands to know from him what right he had to take the life of her youngest child. She wanted the Court to impose the harshest sentence on the Appellant.

13. The mother of the second deceased, Regan Phillips, also testified.

Regan was two months short of his twenty-first birthday when he was killed. He was the eldest of three children. The deceased had an injury on his right shoulder from a shooting that occurred at a party. He was unemployed as he was unable to use his hand as a result of the previous shooting. Regan drew a disability grant. He was the father of a two-year-old child. The mother suffered from nocturnal epilepsy. Regan attended to her when she experienced a seizure in her sleep.

14. Regan's mother was disturbed by the Appellant's refusal

to be truthful. His friends implicated him in the murders. She could not understand why he could not make full disclosure about what happened on the night her son was murdered. The mother testified that If a child is mischievous, then he should be disciplined, not shot and killed. Regan

was still alive after the shooting. The doctor at the hospital informed her that Regan was brain-dead and asked for permission to switch off the life-sustaining machine. She found extreme difficulty in explaining to her daughter that although Regan's heart was still beating, she had to consent to the doctors switching off the machine and bringing his life to an end. She could not cradle Regan's head and bid him farewell because it had burst open like an egg. She asked why children could not go out of their homes without fear and socialise and enjoy themselves. On every occasion that she entered the Court during the trial, she developed panic attacks. She wanted the trial to end so that her soul could rest and she could get closure.

15. The profound impact of crimes like murder extends far beyond the immediate act, leaving families of victims grappling with loss, trauma, and unanswered questions—yet these voices often remain unheard within the trial and sentencing process. Addressing this gap requires a more inclusive approach, such as giving victim impact statements greater prominence and ensuring that restorative justice practices are integrated, allowing families to participate meaningfully and find some measure of closure.

16. The Regional Magistrate considered the conventional triad of factors: the crime, the criminal, and the community in her sentencing

### **judgment.**

She also considered the objectives of sentencing, including retribution, deterrence, prevention, rehabilitation, and restoration. She cited case law that allowed her to emphasise one factor at the expense of the others.[2] She reminded herself that the Court has a difficult task of harmonising and balancing the principles and applying them to the facts in any given case.

17. The Regional Magistrate viewed the offences in a serious light. The Appellant stood before the first deceased and killed him with direct intent. It was nothing more than a cold-blooded execution. The Magistrate asked rhetorically what the necessity was to kill someone if they threw stones on the roof. It reflected on how little the Appellant valued the life of another. The Appellant could have stopped after shooting the first deceased, but it was insufficient for him to take one life. He proceeded to take another. If the first witness had not hidden, he would have also been killed. The Court a quo would not have had the benefit of his testimony to piece together the events that unfolded on the fateful night. The Appellant felt at ease carrying a firearm around. If the Appellant was not a gang member, then he was a follower of one. Unlicensed firearms are a bane of the Strand community. The people in that community live in fear. They cannot even attend church on Sunday, as they are hiding under their beds to avoid flying bullets.

18. The Magistrate considered all of the factors raised by the Appellant.

She considered the Appellant's age, his youth, his status as a first offender and the time he had already spent in prison awaiting trial. She carefully analysed whether the Appellant was a candidate for rehabilitation. The aggravating circumstances outweighed the mitigating factors, including the Appellant's personal circumstances. The nature of the crimes committed by the Appellant moved the scales of justice away from being favourable to him.

19. The Magistrate was at pains to explain to the Appellant that the minimum sentence on the first charge was fifteen years and the maximum twenty years. On charge two, the sentence was life imprisonment. The Magistrate informed the Appellant that she had to impose the prescribed sentences unless she found substantial and compelling circumstances to justify deviation from them. She could not.
20. The Appellant's legal representative at the presentencing hearing acknowledged the increase in firearm-related offences in the Strand community. She also acknowledged that she would be hard-pressed to argue for mercy after the Court a quo had heard the testimonies of the victim's families. She stated that the Court a quo would not be wrong to impose the minimum punishment as there were few mitigating facts.
21. The Respondent referred to the brazen way in which the Appellant committed the crimes. The victims were unarmed and defenceless. The Appellant could have arrested his insensible action after the first murder but proceeded to kill the second victim. There could have been a third victim but for his good fortune in finding a hiding place in time. A person over eighteen years of age must demonstrate that they are immature before it can be considered a mitigating factor.[3] A first offender is typically considered a person without a history or predilection for committing a crime. It usually counts in their favour.[4] Neither of these factors could turn the scales in favour of the Appellant. The Appellant did not appeal against his conviction, meaning he accepted he committed the murders. Had the Appellant pleaded guilty at the outset and spared the affected families the secondary trauma of a trial, he may have elicited the mercy of the Magistrate.
22. The transcript of proceedings in the Court a quo indicates that the Court conducted an in-depth investigation into the factors impinging on the sentence, namely the crime, the community, and the criminal. The Regional Magistrate considered the objectives of sentencing. She also allowed the voices of the mothers of the victims to be heard. After exploring a wide range of factors, the Court a quo pronounced on sentence.
23. There is no discernible reason to interfere with the sentence imposed by the Magistrate. The minimum sentence legislation requires a Court to consider all the circumstances of the case, including those traditionally relevant to sentencing.[5] The court a quo carried out this task in an exemplary manner. This Court cannot fault the Regional Magistrate for the sentence she imposed. The sentence is fair, procedurally correct and legally compliant. In answer to the Appellant, it is also appropriate, just and balanced. It was carefully thought through and warranted.

24. In the premises, I propose the following order.

ORDER

The appeal against sentence is dismissed.

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Bhoopchand AJ

I agree, and it is so ordered.

Fortuin J

Judgment was handed down and delivered to the parties by e-mail on 27 March 2025

Appellant's Attorney: M W Strauss

Instructed by Adendorff Attorneys

Respondent's Counsel: State Advocate

Instructed by the NDPP

[1] The State and the Defence argued whether the appropriate charges were correctly identified as sections 51(2) on the first charge of murder and 51(1) on the second charge. Section 51(1) carried a sentence of life imprisonment,

whereas section 51(2) had a minimum sentence of 15 years and a maximum of 20 years in this case. Once the Appellant had shot the first deceased, he formed the intention to kill not only the second deceased but the third person who escaped death and testified in Court about the events that unfolded that night.

[2] S v van Wyk 1992 (1) SASV 14 NHC

[3] S v Matyityi 2011(1) SACR 40 (SCA) at para 14

[4] S v Van Breda (SS17/16) [2017] ZAWCHC 120 (31 October 2017)

[5] S v Fatyi 2001(1) SACR 485 (SCA), S v Malgas 2001 (1) SACR 469 (SCA)

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