

SOUTH AFRICA / JUDGMENT

S v H.J.W (CC 71/2024) [2025] ZAECKMKHC 7 (31 January 2025) [2025] ZAECKMKHC 7

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

CC 71/2024

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FLYNOTES: CRIMINAL – Murder – Sentence – Gender based violence – Alcohol – Accused spent the day drinking and suspected wife of infidelity – When the accused found deceased she was breastfeeding their child – Kicked and stomped on deceased – Presence of other workers and accused's own infant was insufficient to deter him – Injuries included ruptured liver, fractured ribs, a crack fracture of the skull and bleeding of the brain – Effective 24 years imprisonment.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: CC71/2024

In the matter between:

THE STATE

and

H[...] J[...] W[...]

Accused

JUDGMENT ON SENTENCE

Govindjee J

- [1] The accused has been convicted of kidnapping and murder as contemplated in s 51(1) of the Criminal Law Amendment Act, 1997.[1] The consequence is that the discretionary minimum sentence prescribed for the murder count is imprisonment for life.[2] The main question to be addressed is whether there are substantial and compelling circumstances to deviate from this and whether life imprisonment is proportionate to the crime.

Nature of the crimes and surrounding circumstances

- [2] Low-income worker + alcohol + a trigger for domestic violence = brutality + intimate femicide. The facts of this matter rehash, like a recurring nightmare, the tragic equation that all too frequently summarises the plight of women in South Africa. The accused and deceased lived together as a married couple for almost a decade. At the time of the incident, the couple lived with two of their four children at Klipfontein Farm in Graaff-Reinet, where the accused worked as a general labourer. The accused suspected

the deceased of infidelity involving a fellow farmworker (Buys). He spent most of Friday 23 February 2024 drinking with his friends.

Between five or six individuals they managed to complete three bottles of brandy, numerous litres of boxed wine and cans containing

alcohol. The result was a drunken stupor that served as the catalyst for what was to follow.

- [3] The deceased and her sister (J) obtained permission from the accused to visit a neighbour, promising to return within half an hour. When they failed to do so, the accused saw fit to visit the neighbour and instructed the deceased to return home. Despite promising to do so, the deceased did not return for some time. Angry and still under the influence of alcohol, the accused went in search of the deceased. He met another farmworker who suggested that he visit Buys.
- [4] Buys initially refused to open the door to his home, but did so once the accused threatened to report to the farm owner that Buys was sleeping with his wife. Buys eventually opened the door armed with a long metal shaft. The accused himself was armed with a knife. Buys admitted that the deceased was inside his home, and suggested that he had allowed the deceased to sleep in his bed while he slept in an adjoining room. Eventually the accused found the deceased who was breastfeeding their child. He took the child and repeatedly instructed the deceased to return home with him. She only did so once verbally threatened by the accused.
- [5] Despite Buys requesting the accused not to harm the deceased, matters soon turned violent. The deceased sat down in the middle of the footpath and, when asked, confirmed that she was having an affair with Buys. The accused, who had placed the baby on the ground, proceeded to slap, kick, choke and stomp the deceased. Wearing slaps, he kicked the deceased once with all his might before stomping on her head twice and stomach once, again as hard as he could. In between, he pulled the collar of the deceased's T-shirt tight around the front of her throat towards the back of her neck.

[6] The deceased was too weak to be lifted. Her body kept collapsing when the accused attempted to pick her up. He took the child to J's home before returning to the deceased. He dragged her for some distance before throwing her on the ground, more than once, in anger. Two adult men arrived and assisted him to carry the deceased home. Given that a child slept in the bed, the deceased,

who was still alive, was placed on a towel on the bedroom floor.

[7] The accused sat in the lounge until J returned the child to him. He placed the child on the bed. After J asked the accused to check again on her sister, the accused discovered that there was no pulse and realised that his wife had passed away. He burst into tears and wept loudly, before explaining the position to J. He unsuccessfully attempted to report the matter to the farm owner, who was absent. He returned home, placed a blanket over the deceased's body and fell asleep with his arm over the deceased.

[8] When the police arrived, the accused admitted what he had done but was too upset to discuss the matter. A few hours later, having been arrested, he explained to the police that he had hit, kicked choked and stomped on his wife's head and stomach. He pleaded guilty and accepted that he had no right to assault the deceased in this manner, and that he had caused the various injuries reflected in the post-mortem report. The accused was convicted based on *dolus eventualis*. Despite being under the influence of alcohol, and angered by the deceased's infidelity, the accused appreciated that what he was doing during the assault was wrong. As the post-mortem report indicates, the accused's conduct resulted in a range of severe injuries on the body of the deceased, including a ruptured liver, fractured ribs, a crack fracture of the skull, bleeding of the brain and pale internal organs.

The accused

[9] The accused was 34 years of age at the time of the incident. Although he attempted schooling until the age of 21, he only completed primary school before working on various farms in the Graaff-Reinet area. The deceased accompanied him during part of this time and together they had four children, aged between 13 and one, who are now all cared for by the deceased's mother and sister.

[10] The accused previously supported his mother-in-law by contributing R1500 towards the maintenance of the older two children, who lived with her even prior to the incident. He has managed to hold one or other form of employment for many years prior to the incident, and worked on Klipfontein farm for some 18 months before his arrest. He has no previous convictions

The interests of society

[11] Society demands that stern sentences be meted out in cases where a person's life is extinguished through the conduct of another. As Mr Nohiya argued, for the State, the offence of murder is extremely serious, constituting an irreversible violation of the constitutional right to life.

[12] Importantly, society's outrage at the senseless loss of life in the domestic setting has translated into a prescribed minimum sentence of life imprisonment for conduct of this nature. The relentless plague of gender-based violence, including so-called intimate femicide, is a cause for deep societal concern and anger. As the court held in *S v Robertson*:
[3]

'It is so easy to glibly use the phrases and terminology of femicide and gender-based violence, in part because of the relentless frequency of its occurrence in our society, communities and homes, that it hardly causes anyone to bat an eyelid or to raise an eyebrow ... this disease of gender-based violence and femicide ... permeates the psyche of our country.'

[13] The Domestic Violence Act, 1998, recognises that domestic violence is a serious social evil, that there is a high incidence of domestic violence within South African society and that victims of domestic violence are among the most vulnerable members of society.[4] In *S v Rohde*, [5] the court expressed itself as follows:

'Crime based on gender is an affliction in our society. Crimes against women are a social ill and efforts by government and society are increasing in light of a steady increase in these types of offence. The rate of murder of women in South Africa is alarmingly high, compared to the global average. Attitudes to women determine how women are treated in society. It is the lowered perception of women as human beings, all of whom are entitled to human dignity and equality, which results in the unhealthy social paradigm that they can be victims, and in fact end up as victims of crime because they are women. The judiciary must guard against such perceptions and creating the impression that the lives of women are less worthy of protection.'

[14] The impact on the deceased's family, in particular her children, can only be imagined. As Makaula J has remarked:[6]

'Death of a human being through killing has devastating and dire consequences for the family of the deceased person. It results in

financial, emotional, traumatic and psychological problems on those close and around the deceased. Its adverse effects can never be adequately described and the pain it causes cannot be measured in any way. The pain and helplessness that one feels cannot be verbalised.'

Analysis

[15] The killing of women by intimate partners (also known as intimate female homicide or intimate femicide) is the most extreme form and consequence of violence against women.

[7] In *S v Kasongo* (Kasongo), expert testimony revealed that intimate femicide was much more common in South Africa compared to other countries.[8]

[16] The judiciary is obliged to play its part in ensuring that prescribed minimum sentences, designed to reflect society's opprobrium towards murder linked to domestic violence, are not departed from without good reason. Prescribed minimum sentences are intended to contribute towards the deterrence of violent crime and, thereby, the protection of women, communicating to society that perpetrators must expect to face the full force of the law.

[17] To determine an appropriate sentence, the court must weigh and balance the nature and seriousness of the crime, the interests of society and the personal circumstances of the accused carefully, without unduly emphasising any of these factors.[9] The court must not approach its task in a spirit of anger or a deliberate attempt to demonstrate severity or set an example to

satisfy public opinion. The object of sentencing is to serve the public interest.[10] Where possible, and if the circumstances justify this, the sentence must be blended with a measure of mercy.[11]

[18] The court must also be alive to the purposes of sentence, which, in general terms, are retribution, prevention, deterrence and rehabilitation.[12] That being the case, more serious cases clearly require severity with a certain moderation of generosity where appropriate, for the appropriate balance to be struck. As alluded to above, where minimum sentences have been prescribed by the legislature, these should be viewed as generally appropriate for the offences concerned and are not to be departed from lightly or for flimsy reasons, or based on misplaced pity.[13]

[19] It is accepted that none of the factors highlighted by Ms McCallum, for the accused, on their own constitute a substantial and compelling circumstance justifying deviation from the prescribed minimum

sentence. Although it is true that murder in the context of domestic violence might justifiably warrant life imprisonment in most cases, each case must be carefully analysed and treated on its own merits.[14] It remains incumbent upon this court, before it imposes the prescribed sentence, to assess, upon a consideration of all the circumstances of the case, whether this sentence is indeed proportionate to the offence.[15]

[20] In *Sigwahla*, Holmes JA noted that in considering the relevance of intoxicating liquor to extenuating circumstances the approach of a trial court should be 'one of perceptive understanding of the accused's human frailties, balancing them against the evil of his deed'. [16] It may be accepted that the accused's state of mind was affected by his consumption of alcohol and by the events which confirmed that his wife was being unfaithful to him. Rather

than being a premeditated act, the mix of the two served as the catalyst for the fury and brutality that followed.[17] As in *Sigwahla*, this court may also consider the fact that the murder was not committed with *dolus directus*. [18] To that may be added the accused's clean record and his conduct in the aftermath of his actions, as reflected above, including his expressions of regret, plea of guilty and interactions with the deceased's family. I am also mindful that he has for much of his adult life remained in employment and seemingly contributed to the upkeep of his children on a consistent basis.

- [21] It is appropriate to consider the accused's behaviour accordingly, bearing in mind that any factors that are not too remote or too faint or too indirectly related to the commission of a crime, which bear upon the accused's moral blameworthiness in committing it, should not be ruled out from consideration. [19] Considered cumulatively, I am satisfied that there is justification to enhance the prospect of rehabilitation by departing from the prescribed sentence and imposing a lesser sentence. [20]
- [22] This is not to suggest that a light sentence will suffice. The accused demonstrated controlling behaviour and his wife's freedom of movement was restricted before her bodily integrity was violated and her life extinguished. She was attacked viciously in the proximity of her home environment, which otherwise ought to have been a safe-haven for her and her children, and must have suffered from the injuries inflicted. Even the nearby presence of Buys, other workers and the accused's own infant was insufficient to deter the accused from giving vent to his alcohol-infused rage. Punishment that reflects the deterrent and retributive dimensions of sentencing, proportionate to the interests of society and the circumstances of the crimes, must be imposed. As explained in *Kasongo*: [21]

'The Judiciary should speak such that we demonstrate that we are not cold, aloof and far removed from the contemporary challenges. Where circumstances permit, we should show that we heed the public's constitutional call to make the punishment of crimes against women, especially their brutal, cruel and unnecessary killing more severe as part of the overall responsibility of the Republic of South Africa to provide a conducive environment for women to live and love without fear of physical, psychological, economic and sexual abuse and violence. The increase in the involvement of ex-partners, spouses, partners and boyfriends in the woman's experience of violence needs effective initiatives beyond policy-making and [calls] for the judiciary to be the leading force and voice.'

- [23] I have considered the time already spent in custody and the cumulative effect of the sentences. By operation of law, the accused is prohibited from possessing a firearm. In *S v Manyathi*, [22] this court had occasion to order that a copy of the judgment be sent to the Minister of Health, highlighting the nature of the regulations pertaining to alcohol labels, and the link between alcohol and gender-based violence. The circumstances of this case, in my view, similarly warrant such action.

Order

[24] For these reasons, the accused is sentenced as follows:

1. Count 1: Kidnapping: The accused is sentenced to 5 years imprisonment.
2. Count 2: Murder: The accused is sentenced to 24 years imprisonment.

The sentence imposed in respect of count 1 is ordered to run concurrently with the sentence imposed in count 2, so that the accused is effectively sentenced to 24 years imprisonment.

The Registrar is directed to make a copy of this judgment, together with the judgment in *S v Manyathi* (unreported, Eastern Cape Division, Makhanda, case no. CC70/2024) available to the office of the Minister of Health of the Republic of South Africa.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:

28 January 2025

Delivered:

31 January 2025

Appearances:

For the state:

Mr Nohiya

Instructed by:

The Deputy Director of Public Prosecutions,

Makhanda

For the accused:

Ms McCallum

Instructed by:

Legal-Aid of South Africa,

[1] Act 105 of 1997.

[2] S 51(1): 'Notwithstanding any other law, but subject to subsections (3) and (6) ... 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.' S 51(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...’. Part I of Schedule 2 includes murder, when ‘the death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of “domestic violence” in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim’.

- [3] S v Robertson [2022] ZAWCHC 104; 2023 (2) SACR 156 (WCC) para 2.
- [4] Preamble to the Domestic Violence Act, 1998.
- [5] S v Rohde 2019
- (2) SACR 422 (WCC) para 54.
- [6] S v Ximiya [2015] ZAECBHC 9 para 2.
- [7] S Mathews et al ‘Every six hours a woman is killed by her intimate partner: A national study of female homicide in South Africa’ MRC Policy Brief (No.
- 5) (June 2004).
- [8] S v Kasongo [2022] ZAWCHC 224; 2023 (1) SACR 321 (WCC) (Kasongo) para 15.
- [9] S v Zinn 1969
- (2) SA 537 (A) (Zinn) at 540G–H.
- [10] S v Mhlakhaza and Another [1997] 2 All SA 185 (A) at 189. Also see S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC).
- [11] Zinn above n 9.
- [12] S v Rabie 1975
- (4) SA 855 (A).
- [13] S v Matyityi 2011
- (1) SACR 40 (SCA) para 23: ‘Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our

country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is “no longer business as usual”. And yet one notices all too frequently a willingness on the part of sentencing

courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here,

that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement

those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe there fealty to it. Our

constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained the minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing

from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as “relative youthfulness” or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order.’

[14] Cf Kasongo above n 8 para 37.

[15] S v Vilakazi 2009

(1) SACR 552 (SCA) paras 14–15.

[16] S v Sigwahla 1967

(4) SA 566 (A) (Sigwahla) at 571D–E; S v Ndhlovu (2), 1965 (4) SA 692 (A) at 695–696.

[17] Cf S v Peloeole 2022

(2) SACR 349 (SCA) para 24, 26. This decision may also be distinguished based on the SCA’s rejection that the appellant was intoxicated.

[18] Sigwahla above n 16 at 571H: trial courts, in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of *dolus eventualis*; while it cannot be said that this factor must necessarily be an extenuating circumstance, in many cases it may well be so, either

alone or together with other features, depending on the particular facts of the case. Counsel for the state’s reference to Director of Public Prosecutions, Mpumalanga Division v Mofokeng 2023

(1) SACR 670 (ML) para 12 does not alter the position. The main point made in that case was that common purpose and murder during a robbery with aggravating circumstances attracts a prescribed minimum sentence of life imprisonment irrespective of the nature of the

intention (*dolus directus*, *indirectus* or *dolus eventualis*). It may be noted that this issue was considered as part of the discussion on conviction, and not as part of the sentencing enquiry, and that no reference was made to the decision in Sigwahla.

[19] R v Fundakubi and Others 1948

- (3) SA 810 (A) at 818 cited with approval in Sigwahla above n 16 at 571H–572A. Also see S v Tafeni 2016
- (2) SACR 720 (WCC) (Tafeni) para 11.
- [20] Tafeni above n 19 para 9 and the authorities cited there.
- [21] Kasongo above n 8 para 36.
- [22] S v Manyathi (unreported, Eastern Cape Division, Makhanda, case no. CC70/2024) para 23.
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