IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: N0

[redacted]

06 FEBRUARY 2025
DATE OF JUDGMENT

CASE NO. A290/2023

In the matter between:

WELMARIE WILHELMIAH SMITH APPELLANT

And

THE STATE RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 06 February 2025.

ORDER

On appeal from: The Gauteng Division Pretoria

1.The appeal against sentence is upheld.

2. The sentence of life imprisonment in respect of count 1 is replaced with a sentence of 15 years' imprisonment.

3. The sentence of 25 years' imprisonment in respect of count 2 is replaced with 5 years' imprisonment.

4. The sentences are ordered to run concurrently. [1]

5. The effective term of 15 years' imprisonment is antedated in terms of section 282 of the Criminal Procedure Act to 29 April 2019.

JUDGMENT

Collis J (Van Der Schyff J and Le Grange AJ concurring).

INTRODUCTION

1. This is an appeal against the sentence imposed by the Gauteng Division of the High Court. On 30 May 2019, the Appellant lodged an Application for Leave

[1] In terms of section 280 of the Criminal Procedure Act, act 51 of 1977. (the "CPA").

to Appeal against both her conviction and sentence.[2] On the same day the trial Court dismissed the Application for Leave to Appeal.[3] She then petitioned the Supreme Court of Appeal which subsequently granted her Leave to Appeal to the Full Court of this Division. Leave, however, was only granted to appeal against the sentence so imposed and this was done on 24 May 2023.[4] As such the trial Court's factual findings on the conviction stand and are accepted by this Court.

2. The Appellant together with her co-accused, being her former husband, was arraigned in the Gauteng Division of the High Court on charges of murder (read with section 51(2) and PART II OF SCHEDULE 2(as amended) of the General Law Amendment Act 105 of 1997) and assault with the intention to do grievous bodily harm. The assault and murder victim was their three (3) year old minor child.

3. On 19 February 2019 the Appellant as well as the erstwhile accused 1, pleaded not guilty to these counts. On 22 February 2019 she was convicted on both counts, while the erstwhile accused 1 was convicted on the assault charge only.[5]

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[2] Record p 367 – 370.
[3] Record p 394 l 11 – 112.
[4] Record p 482 – 483.
[5] Record p 327 l 4 – 22.

4. On 29 April 2019 the Appellant was sentenced to life imprisonment for the murder and 25 years' imprisonment for the assault with the intention to do grievous harm. The erstwhile accused 1 was similarly sentenced to 25 years' imprisonment, for the assault.[6]

5. By operation of law, all sentences imposed with a sentence of life imprisonment will run concurrently with that sentence.[7]

6. Before us, it is unknown as to whether the erstwhile accused 1 pursued any Application for Leave to Appeal as it does not appear from the record so provided. Given the outcome of this appeal, it would appear prudent if he was to be encouraged to also pursue an appeal in respect of his sentence.

7. It is trite law that the guiding principle is that the sentence is pre-eminently a matter for the discretion of the trial court. In S v Rabie 1979 (4) SA 855 (A) at 857 the dictum by Holmes JA states:

'1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-

(a) Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"; and

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[6] Record p 363 l 5 – 8.

[7] In terms of section 39 (2) (a) (i) of the Correctional Services Act, 111 of 1998 all sentences are served concurrently with any sentence of life imprisonment.

(b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised.'

8. In S v Mtungwa and Another 1999 (2) SACR 1 (A), it was held that the appeal court will be entitled to interfere with the imposed sentence if one or more of the recognised grounds are shown to exist, that the sentence is (i) disturbingly inappropriate; (ii) so blatantly out of proportion to the magnitude of the offence; (iii) sufficiently disparate; and (iv) is otherwise such that no reasonable court would have imposed it.

BACKGROUND

9. The charges against the appellant have as their origin an incident that occurred at the home she shared with the erstwhile accused 1; her deceased minor daughter, as well as her two other minor children. Notwithstanding that the incident occurred on 29 March 2007,[8] the prosecution of the matter only commenced on 19 February 2019,[9] some twelve years later.

10. On the day of the incident, the deceased became unresponsive which resulted in the appellant contacting an ambulance. The paramedics, upon arrival examined the deceased whereafter she was then declared dead. An undertaker was then summonsed to remove the body. It was at that time that

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[8] Record p 2 l 2.
[9] Record p 8 l 1.

injuries to the body of the deceased were noted and the authorities were alerted. Subsequent thereto, a police investigation ensued. Dr. Pharasi, a Pathologist, performed the post-mortem and during the trial his report was introduced into the record in terms of section 212 (4) of the Criminal Procedure Act, 51 of 1977, as he was no longer available to testify. In his report he concluded that the cause of death was "HEAD INJURIES (ASSAULT)". In addition, the report also reflects multiple bruises and cigarette burns inflicted to the body of the deceased.

11. During the trial, Professor Saayman, the Chief Forensic Pathologist testified to his report which he prepared after considering the postmortem report and photos of the body of the deceased. Although he criticized the postmortem, which in his view was not optimally performed, he confirmed extensive external injuries indicative of abuse. He moreover concluded that these injuries were inflicted at different times. As such the Trial Court accepted that the deceased was severely abused over a period of time.

12. At the trial the erstwhile accused 1 denied any involvement, or knowledge, of the circumstances surrounding the physical condition of the deceased.

13. When the appellant testified during the trial, she claimed that she was not aware of any injuries to the deceased. She however testified to an incident where the deceased was hit on the head by a Marmite jar, thrown at the

deceased by Accused 1. Accused 1 did not deny this particular incident but suggested that he accidentally hit the deceased and therefore downplaying the seriousness of the injury. As to the day of the incident the appellant however testified that on the morning of her death that the deceased accidentally had fallen out of her cot, this at a time when she was alone at the house with the deceased.

14. The trial Court in its judgment accepted the prosecution's version and rejected the version of the appellants and albeit that there was no direct evidence regarding how the deceased sustained all of her injuries, the conviction was founded on inferences drawn from the fact that the deceased was in the care of the appellant and her husband (accused 1), and as her parents they were in law responsible for her wellbeing.

15. The trial Court found that, although both accused were complicit in the assault of the deceased; the deceased was in the care of the appellant on the day that the fatal injury was inflicted and therefore, she alone was found guilty on the murder charge.

16. In determining an appropriate sentence, the court must strike a balance between the personal circumstances of the accused, the seriousness of the

offence, as well as the interest of the public.[10] In the above endeavour the sentencing court considered the four pillars in determining an appropriate sentence, namely deterrence, prevention, reformation and retribution. The court was further alive to the fact that there ought to be a balance of all the above factors, hence the following was taken into account by the court a quo:

i. the fact that the appellant was a first offender;

ii. the comprehensive pre-sentence reports submitted by the defence, setting out their personal circumstances;

iii. the lack of remorse shown by the appellant and her failure to take responsibility for what happened to the deceased;

iv. the fact that the offences were committed 12 years ago to the date of prosecution;

v. the court also took into account the interest of the public and the intensive campaigns against the abuse of children;

vi. as an aggravating factor the sentencing court took into account the fact that the abuse was against their own defenceless child of only three years and that it was perpetrated over a period of time.

17. In the end the court found that whether taken individually or cumulatively, there existed no substantial and compelling circumstances to persuade it to impose a lesser sentence than the prescribed minimum sentence and had in

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[10] S v Zinn 1969 (2) SA 537 (A).

fact found that given the ambit of its inherent jurisdiction it had imposed an appropriate sentence.

18. On behalf of the appellant it was argued that the trial Court misdirected itself in ruling that no substantial and compelling circumstances existed to justify a deviation from the prescribed sentence of 15 imprisonment.

19. In this regard, counsel for the appellant had argued that the delay of 12 years in prosecuting her, together with the fact that she demonstrated that she had turned her life around which was evidenced by her subsequent raising of her remaining children, should have constituted weighty substantial and compelling circumstances justifying the court not to impose the minimum sentence of 15 years; especially when considered cumulatively with all other factors.

20. It is for this reason that counsel for the appellant submitted that the exponential increase by the trial Court of the minimum sentence of 15 years' imprisonment to life imprisonment in respect of the murder charge was not justified having regard to the facts of the matter. It was also contended that the court aquo misdirected itself in imposing a sentence of 25 years' imprisonment for assault, which is wholly out of proportion with the norm for that offence.

21. This submission on behalf of the Appellant, is supported by the conduct displayed by the Appellant since the commission of the offence, especially towards her remaining children, which conduct should serve as a powerful substantial and compelling circumstance.

22. The Appellant, therefore, argued that the trial Court misdirected itself in imposing a sentence of 25 years' imprisonment for assault with the intention to cause grievous bodily harm. It was contended that the sentence is excessive and an extraordinary even for severe assault cases.

23. The Respondent in turn had argued that there was no misdirection on the part of the trial Court, as the Court in its judgment took into consideration the prolonged suffering that had been endured by a defenseless 3-year-old victim. Counsel had argued that this suffering distinguished the present matter from other murders and assaults and that as such the sentence does not induce a sense of shock.

24. The cryptic arguments advanced by the Respondent however does not resonate with this Court. In the present matter the trial Court failed to make any clear findings of law or adequately record any aggravating factors stipulated in the Act, justifying the sentence imposed to as falling under a more onerous category demanding life imprisonment for the murder charge and

twenty-five years for the assault charge.[11] Such failure on the part of the trial Court amounts to a misdirection which warrants an interference by this Court.

25. This is not to be misconstrued as implying that this Court fails to appreciate the seriousness and prevalence of these type of offences or misunderstood as this Court paying lip-service to the legislature's commitment to fight gender-based crimes, especially those perpetrated against children. This Court is alive to fact that the Appellant was the mother and primary caregiver of the victim and in law was obligated to be responsible for the deceased's wellbeing.

26. The minimum sentencing regime provides a statutory guideline and should not be adjusted upwards capriciously. Any increase in the minimum sentence should be suitably substantiated on the facts of the matter.

27. Support for this position is to be found in the decision S v Msimango [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) para 24, where the SCA in dealing with the imposition of a sentence beyond the prescribed minimum sentence in terms of the proviso said the following: 'In terms of s 51(2) of the CLAA, the appellant should have been sentenced to a period of not fewer than 15 years' imprisonment in the absence of substantial and compelling circumstances. It is true that the regional magistrate had the power to add a further five years to the minimum sentence of 15 years' imprisonment. However, the increase is not

[11] In terms of section 51(1) read with Part I of Schedule 2 of the Act.

to be done whimsically but on sound legal principle which can withstand scrutiny. This requires any presiding officer who intends to invoke this power to give reasons therefore. Regrettably, the regional magistrate gave no reasons for increasing this sentence with an additional five years. On the evidence as it stands, the increase is not justified.'[12]

28. In the present matter the trial Court highlighted the aggravating factors without conclusively stating why such a significant increase to life imprisonment would be justified.[13] This to my mind, as mentioned, amounts to a misdirection on the part of the trial Court. Similarly, the trial Court failed to justify the imposition of twenty-five years' imprisonment which is wholly out of proportion from the norm of that type of offence. This too amounts to a misdirection on the part of the trial Court.

29. In the result the appeal against sentence is upheld and the following order is proposed:

29.1 The sentence of life imprisonment in respect of count 1 is replaced with a sentence of 15 years' imprisonment.

29.2 The sentence of life imprisonment in respect of count 2 is replaced with a sentence of 5 years' imprisonment.

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[12] Chonco v The State (1247/2018/) [2019] ZASCA 75 (3 May 2019).
[13] Record p 362 l 22 – 25.

29.3. The sentence imposed in respect of count 2 is ordered to run concurrently with the sentence imposed in respect of count 1.

29.4. The sentence imposed is antedated to 29 April 2019 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

[redacted]

COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

I Agree

[redacted]

VAN DER SCHYFF J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

I Agree

[redacted]

LE GRANGE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES

Counsel for Appellant:	Mr. H L Alberts
Instructed By:	LEGAL AID SOUTH AFRICA, PRETORIA
Counsel for Respondent:	Adv. P C B Luyt
Instructed By:	DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA
Date of Hearing:	19 August 2024
Date of Judgment:	06 February 2025