

[2] The Appellant's application for leave to appeal against the conviction and sentence was dismissed by the trial court. The Appellant petitioned the Judge President of this Honourable Court. The petition for leave to appeal was granted against the sentence only. However, the respondent in the written heads of arguments is of the view that the conviction on a count of murder is not supported by evidence and that the appellant should have been convicted on a charge of Culpable Homicide.

[3] The background of the matter is briefly as follows: On the night of the incident, 21st May 2016, the Appellant and the deceased were involved in a physical fight. The record shows that the Appellant was approached by the deceased and the second witness who requested a cigarette from him. The Appellant told the deceased that the cigarette was almost finished. According to the second state witness the deceased held the Appellant with his belt and instructed the second state witness to search the Appellant whereby they found only R8.00 in his pocket and it was taken by the second state witness. The deceased punched the Appellant with a fist on the left side of his face. The second state witness, Levuyi Sonkwala also punched the Appellant with a fist.

According to him the deceased was a bit rough with the Appellant and he had a broken beer bottle in his possession when he confronted the Appellant. The deceased assaulted the Appellant on the head with the broken beer bottle. The Appellant corroborated this version and testified that the deceased attempted to stab him with the broken beer bottle. The Appellant picked up stones and threw them at the deceased and two of the stones hit the deceased on his head. The deceased fell down and the Appellant ran to a nearby garage to ask for help. According to the Appellant he only wanted to stop the deceased from assaulting him but he did not intend to kill him.

- [4] The Appellant throughout the trial in the Regional Court was legally represented. He pleaded not guilty to the charge. His attorney tendered a plea explanation as follows:-

“That on the day in question the accused did meet with the deceased who was in the company of another male person and both the deceased and the other male person robbed the accused and assaulted him. And the accused admit that he hit the other male person with a fist in defending himself, and also hit the deceased with a stone to defend himself.”

- [5] In respect of conviction the version of the state was narrated by two witnesses, namely Wendi Ndabeni and Levuyi Sonkwala. The version of the defence was narrated by the Appellant.
- [6] Notwithstanding the Appellant's not guilty plea, he was found guilty by the Presiding Officer and convicted on 27 September 2016.
- [7] During oral arguments by Mr Mille on behalf of the Appellant submitted before us that the Appellant was indeed threatened by two individuals and the incident happened at night and that provocation on the part of the deceased played a role as well as the consumption of alcohol by the deceased and the two state witnesses. Mr Mile submitted that the Appellant did exceed the boundaries of self-defence. He requested [that](#) the court to take into consideration the circumstances of the night in question and that the Appellant be sentenced to five years imprisonment in terms of s276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA), alternatively, correctional supervision.
- [8] Advocate Pretorius on behalf of the State conceded that the Appellant should have been found guilty of culpable homicide, as

the Medical Doctor was not called to testify and only the post mortem report was handed in as an Exhibit A and thus the appellant's version stand unchallenged. He submitted that direct imprisonment would be appropriate and that there is no need for the court to implement Section 276(1)(i) of the CPA.

Ad conviction

[9] It is trite that the State must prove its case against an accused person beyond reasonable doubt. The state witness, Levuyi at the trial court testified that he and the deceased approached the Appellant and the deceased was in possession of a broken beer bottle and wanted to stab the Appellant. The deceased went further in instructing Levuyi to check if the Appellant had any valuables. The Appellant also testified that the deceased threatened the Appellant. The Appellant clearly testified that the deceased was the aggressor and the Appellant in attempting to defend himself exceeded the boundaries of self-defence.

[10] Adv. Pretorius at the appeal proceedings conceded that the state should have put charges of culpable homicide against the Appellant and further state that the court of appeal has the

authority and discretion to make an order as justice may require to change the conviction by substituting it with a competent verdict (see Kruger: Hiemstra's Criminal Procedure Second issue 2 p31-39).

- [11] Where the accused is charged with the offence of murder, the provisions of section 258 of the CPA find application and provide as follows:

“if the evidence on a charge of murder or attempted murder does not prove the offence of murder or as the case may be attempted murder by

(a) the offence of culpable homicide

.....the accused may be found guilty of the offence so proved.”

- [12] Culpable homicide “is the unlawful negligent causing of the death of another human being (**S v Mtshisa 1970 (3) SA 747 (A) at 752 D – E**). The question is whether there was negligence on the part of the Appellant. It is clear that the deceased was the instigator and aggressor and the state witness wanted to rob the Appellant of any valuables the Appellant had on him. The Appellant had no weapon on him. The Appellant instead picked-up a brick to ward off the attackers. However, the post mortem report, **Exhibit A p 104**, showed that the deceased had repeated

trauma to the head. Although the Medical Doctor who performed the post mortem was not called to testify to confirm the injuries as sustained by the deceased, but the report shows that the injuries on the deceased were severe.

[13] Indeed the Appellant exceeded the boundaries of self-defence and the trial court erred as such. And this is also supported by the State in the appeal proceedings, as the record clearly showed that the deceased was the instigator and aggressor. The only way to do justice to this appeal is to find the appellant guilty of culpable homicide and this is solely based on the evidence as a whole. Evaluating the evidence in totality, without doubt, lead to the conclusion that the Appellant is guilty of culpable homicide.

Ad Sentence

[14] The trial court in sentencing the Appellant took the following mitigating factors into consideration, that the Appellant was 28 years old, he is a first offender. He was employed as a Security Officer, he has minor children, the deceased was the instigator and the aggressor, the appellant supports his family and has passed grade 10. The Appellant was defending himself against an attack and robbery with aggravating circumstances in which

the deceased wielded a broken beer bottle to commit the offence. The aggravating factors are the seriousness of the offence, the interests of the community and that a human being has lost his life, and whatever sentence is awarded it will not bring back the life that has been lost.

[15] Both the Legal Representatives on behalf of the Appellant and the State agreed that 12 years imprisonment be replaced with a five year imprisonment term in terms of Section 276 (1)((b) of CPA alternatively 276(1)(i) of CPA.

[16] The court must take into consideration the Appellant's personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced against each other in order for the court to reach an appropriate sentence. Both counsels were *ad idem* that a sentence of five years imprisonment would be adequately deterrent, rehabilitative and retributive. The Appellant has been in custody from 27 September 2016 and that is two years already spent in custody.

[17] Indeed killing of another human being whether it was culpable homicide, it is in itself serious by nature. It does not matter what

punishment the Appellant is going to serve, that will not bring back the deceased. However, in spite of the self-defence raised by the Appellant, the court still has to give some form of punishment.

[18] The basic principle of sentencing is that punishment should fit the criminal, the crime and must be fair to society. It must also be blended with an ingredient of mercy and that should be imposed bearing in mind the peculiar circumstances of a particular case at hand (see **S v Rabie 1975 (4) SA 855 (AD)**).

[19] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so. (See **S V Obisi 2015 (2) SACR 35 W at 35i-j**). The State conceded that the trial court should have taken into consideration that the deceased was the aggressor and it therefore, overemphasised the aggravating factors at the expense of the mitigating factors, thus warranting this court to interfere in the sentence.

[20] Following that the Appellant's conviction was changed to a competent verdict of culpable homicide, it therefore follows that the court has to interfere with the sentence as well. The material

misdirection of the trial court in respect of the sentence of twelve years calls for appellate interference. The personal circumstances of the appellant, inter alia, indicates that he is a first offender and for his age of twenty eight years he has not yet been in conflict with the law. This cumulatively gives credit to the Appellant. Thus the Appellant's appeal in respect of sentence should succeed.

[21] In view of the aforesaid, I am persuaded that the trial court misdirected itself and that the sentence can be tampered with.

[22] Accordingly I propose the following order:

1. The appeal against conviction is upheld but is amended as follows:
 - 1.1 The Appellant is found guilty of culpable homicide.
2. The appeal against sentence succeeds. The sentence of twelve years imprisonment imposed on the appellant is set aside and substituted as follows:-
 - 2.1 The appellant is sentenced to five years imprisonment.
 - 2.2 The sentence is deemed to have been imposed on 27 September 2016.
 - 2.3 The order in terms of s103(1) of the Firearms Control Act is confirmed.

S. CHESIWE, J

I concur and it is so ordered.

M.A. MATHEBULA, J

On behalf of the Appellant: Mr P.P. Mile

Instructed by: PP Mile Attorneys

Welkom

On behalf of the Respondent: Adv. D. Pretorius

Instructed by: The Director of Public Prosecutor

Bloemfontein