



ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal Number: A08/2019

In the matter between:

BONGANI EPHEUS MLENGA

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 15 APRIL 2019

DELIVERED ON: 1 AUGUST 2019

- [1] The appellant was convicted on a charge of murder in the Regional Court, Welkom. He was sentenced to 13 years imprisonment. His application for leave to appeal was granted by this Court on petition after it was refused by the trial court. The appeal is against the sentence only.

- [2] The appellant pleaded not guilty to the charge of murder and offered no plea explanation. However, he admitted to have kicked the deceased and stabbed him with a sharp object. These admissions were recorded and admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 (the CPA).
- [3] On 25 January 2015, the appellant and his two co-accused were relaxing outside their rented house in Thabong, Welkom. They also consumed alcohol. They were joined by the deceased who was holding a bottle of beer in his hand. Although the deceased was not their friend, he occasionally socialised with them. He stayed with them for approximately 15 minutes before he left. Shortly afterwards the appellant realised that their cellphones and his wallet were missing from the house. They walked to the deceased's parental home to enquire from him. They found him asleep and intoxicated. After his mother woke him up, he was assaulted by the appellant and his co-accused. At first he denied stealing their property, but he only confessed after he was stabbed with a sharp object. The stolen goods were restored to the appellant and his co-accused, although the sum of money stolen was less. The deceased died due to a stab wound and the appellant and his co-accused were arrested for murder.
- [4] In *S v Malgas*¹ the court remarked that a court of appeal cannot approach the question of sentence as if it were the trial court, unless the latter has materially misdirected itself. However, where the misdirection by the trial court vitiates its exercise of the

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12

sentencing discretion, the appeal court is entitled to consider the question of sentence afresh.

- [5] It is trite law that an appeal court will not lightly interfere with the findings of the trial court, unless the latter has misdirected itself or has committed an irregularity. We found that the trial court did not misdirect itself and thus interference with its discretion is not justified. The appellant was convicted of murder in terms of Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, with the prescribed minimum sentence of 15 years for a first offender. The trial court correctly found that substantial and compelling circumstances existed which justified a deviation from the prescribed minimum sentence. Also, the sentence is neither harsh nor shockingly inappropriate. The trial court exercised its discretion judicially and reasonably.
- [6] Every person enjoys the right to life and no one has the right to kill anyone. When the appellant and his co-accused realised that their property was stolen, they did not report the incident to the police. Instead, they led a crusade which resulted in the death of the deceased. They took the law into their own hands and committed a violent crime. If the family of the deceased were to resort to retribution, anarchy would prevail. Our society would become a lawless nation. To prevent lawlessness and deter future criminals, only the convicted criminals are punished by the courts.

- [7] The aggravating circumstances are such that the appellant and his co-accused forcefully entered the deceased's parental home; they demanded to see the deceased who was asleep in his drunken stupor; and they assaulted him in front of his mother and sister who pleaded with them to stop, but to no avail. Upon conviction of the appellant, the trial court had no discretion but to apply the prescribed minimum sentence of 15 years imprisonment for the first offender.
- [8] That being the case, the trial court considered the following personal factors as mitigating circumstances:
- (a) the appellant is a first offender at the age of 32 years;
 - (b) he had a clean criminal record;
 - (c) he was still a student at the local tertiary institution; and
 - (c) he formally admitted to committing the offence.
- [9] Having considered the mitigating circumstances cumulatively, the trial court found that the substantial and compelling circumstances existed. Consequently, the existence of the substantial and compelling circumstances justified a deviation from the prescribed minimum sentence. The trial court then exercised its discretion and a lesser sentence was imposed.
- [10] It was stated in *S v Siebert*² that sentencing requires a willingness on the part of the trial court to actively explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of

² *S v Siebert* 1998 (1) SACR 554 (AD) at 559B-D

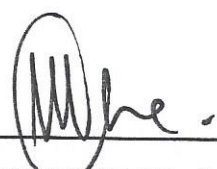
punishment. The court has the authority to determine the extent and nature of the sentence it may impose.

[11] In *S v Bogaards*³ the court said: the court of appeal will only interfere with sentence where there has been an irregularity that results in a failure of justice; that the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is disproportionate or shocking. In *casu*, the appellant demonstrated to the trial court that substantial and compelling circumstances existed. As a result, the court imposed a lesser sentence of 13 years imprisonment.

[12] The sentence imposed is not harsh nor is it inappropriate. I am satisfied that the trial court exercised its discretion judicially in a proper and in a reasonable manner. No misdirection could be found on the part of the trial court. In the light thereof, there is no need to consider the question of sentence afresh.

[13] I propose the following order:

1. The appeal against the sentence is dismissed.


V.M. MOROBANE, AJ

³ *S v Bogaards* 2013 (1) SACR 1 (CC) at 14C-E

I concur and it is so ordered.



M.A. MATHEBULA, J

On behalf of the appellant:

Adv TB van Rensburg
Instructed by:
Jacques Groenewald Attorneys
KROONSTAD

On behalf of the respondent:

Adv MMM Moroka
Instructed by:
The Director of Public Prosecutions
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