



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

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

Case number: A240/2018

In the matter between:

KEKELETSO JOSEPH SETLHAKO

Appellant

and

THE STATE

Respondent

CORAM: **MHLAMBI J, *et* MOLITSOANE, J**

HEARD ON: 09 SEPTEMBER 2019

DELIVERED ON: 19 SEPTEMBER 2019

MHLAMBI, J

- [1] The appellant was convicted on a charge of murder in the regional court, Welkom and sentenced to 15 years' imprisonment.
- [2] On 10 May 2018 the trial court granted the appellant leave to appeal against the imposed sentence. The appellant's grounds of appeal are summarized as follows:
1. The term of 15 years' imprisonment is shockingly inappropriate;
 2. The court erred in finding that no substantial and compelling circumstances existed.
- [3] In amplification of the grounds of appeal, it was submitted on behalf of the appellant that the following circumstances were sufficient for the court to deviate from the prescribed sentence:
1. Both the deceased and the appellant consumed alcohol on the day of the incident;
 2. There was provocation as there was an altercation between the parties and that the murder was therefore not planned;
 3. The abovementioned factors, together with the appellant's personal circumstances, cumulatively as well as individually, were sufficient for a court to deviate from the sentence it imposed;
 4. Even though the appellant had a previous conviction for assault with intent to commit grievous bodily harm, it was committed 3 years ago during March 2009.
- [4] The appellant's personal circumstances were crafted as follows:
1. His was 29 years old, worked as a farm hand and earned an income of R 1 500.00 per month;

2. He highest scholastic qualification is standard 10;
3. He was married with 2 children, aged 5 and 3 years;
4. His wife was unemployed and he was the sole breadwinner;
6. He had previous a conviction of assault with intent to do grievous bodily harm and was sentenced to 6 months' imprisonment during 2012;
7. Both the deceased and the appellant consumed alcohol on the day of the incident.

[5] The state opposed the application and submitted that the appellant's personal circumstances, whether individually or cumulatively taken, did not constitute compelling and substantial circumstances to enable the court to deviate from the prescribed minimum sentence. It is trite to law that the appeal court will only interfere with sentence if it is of the opinion that such sentence is unreasonable, unjust or that the trial court had misdirected itself.

[6] Relying on **State vs. Malgas**¹, the state submitted that a court exercising appeal jurisdiction, cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. The appellant's conduct of stabbing the deceased was uncalled for and unjustified as indicated by the appellant's own concession.

[7] In its judgment, the trial court stated that sentences listed in the minimum sentence legislation should not be departed from for

¹ 2001 (1) SACR 469 (SCA)

flimsy reasons. The factors that were traditionally relevant to sentencing still played a role. The cumulative effect of the said factors must be such that they constitute substantial and compelling circumstances to justify a departure from the prescribed sentences. The court then proceeded to tabulate the traditional factors that it took into account.

- [8] The trial court found that there was evidence which indicated that both the deceased and the appellant belonged to rival gangs which fought each other on a regular basis. On the day in question, the appellant and the deceased had consumed liquor at the tavern. The deceased had left the tavern complaining that a member of the opposing gang had taken his beer. The appellant followed the deceased outside the tavern while the appellant had a knife in his possession. The deceased got hold of a knife, they then approached each other and the appellant ultimately stabbed the deceased. Both had ample time to walk away from the situation but both failed to do so with fatal results.

- [9] Ms Kruger, on behalf of the appellant, referred me to **State vs. PB²** where it was stated:

“The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefor that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

² 2013 (2) SACR 533 SCA para 20

The thrust of the argument that the court should have deviated from the imposition of the prescribed sentences is based on two factors, namely, that both the deceased and the appellant had consumed alcohol and that there was provocation.

[10] Parts of the appellant's testimony in chief read as follows³:

"Were you under the influence of liquor on that particular day sir? ---Your Worship I was not that drunk Your Worship.

So, was it necessary for you to stab the deceased? --- It was not necessary.

Who do you say that, you say to the Court that it was not necessary, why do you say that, sir was it necessary for you to stab the deceased on that particular day?--- It was not necessary.

Why did you stab him? --- I was defending myself Your Worship because I realised he will end up stabbing me.

You defended yourself? --- Yes.

You stabbed him because of what sir, just tell the Court, sir at that point when you stabbed him, why did you stab him? --- I saw him Your Worship having a knife Your Worship stabbing me.

Between the two of you who stabbed first? --- I am the one who stabbed first because I blocked.

Then you saw necessary for you to stab two times? --- It was not necessary because I saw (indistinct) to stab this person.

Sir why did you stab the deceased, it is simple, what was he doing that made you stab him sir? --- He was robbing my friend Your Worship.

Sir leave the robbing, we are now with the deceased, the two of you, what was he doing sir? --- For me to stab him Your Worship is he started stabbing me.

Meaning you saw that this person is fighting, is that correct? I saw him fighting me.

Because he stabbed you? – Yes."

³ Page 61 line 24

[11] During cross-examination, the appellant contradicted himself to such an extent that nowhere on the evidence can it be said that he was provoked during the incident. It is therefore evident that on his own version, he was the aggressor nor was it necessary for him to stab the deceased.

[12] I am consequently of the view that the trial court was correct in finding that there were no substantial and compelling circumstance that justified the deviation from the imposition of the prescribed minimum period of imprisonment. Furthermore, I find that there was no misdirection or irregularity on the part of the trial court for this court to interfere with the sentence imposed and that the proceedings were in accordance with justice.

[13] The following order is made:

Order:

1. The appeal against sentence is dismissed.
2. The sentence is confirmed.

MHLAMBI, J

I concur,

MOLITSOANE, J

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