



**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

Appeal No: A228/17

In the appeal of:

OLIPHANT NTOYANA

Appellant

and

THE STATE

Respondent

HEARD ON: 11 DECEMBER 2017

CORAM: MATHEBULA, J *et* MURRAY, AJ

JUDGMENT BY: MURRAY AJ

DELIVERED ON: 8 MARCH 2018

- [1] The Appellant appeals against the Sentence imposed on him by Regional Court Magistrate B T Ludidi on 23 September 2014. He was convicted on Count 1 of Culpable Homicide and sentenced to 12 years' imprisonment, and on Count 2 of Attempted Murder and sentenced to 8 years' imprisonment. The court *a quo* did not order the sentences to run concurrently.
- [2] The State indicated that it did not support the imposed sentence and submitted that the appeal against sentence should be upheld. Mr P L van der Merwe appeared for the Appellant and Adv C Z Nameka for the State.
- [3] The Appellant was charged with Murder (read with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997) in that on or about 6 November 2010 at Masilo, Theunissen he unlawfully and intentionally killed **Mathe Martha Putswenyane** by stabbing her with a knife or similar object (Count 1), but was instead convicted of Culpable Homicide. He was, furthermore, charged with Attempted Murder in that on the same date also at Masilo, Theunissen, he unlawfully and intentionally attempted to kill **Mohapi Ntuleng** by stabbing him with a knife (Count 2), and was convicted accordingly.
- [4] The Appellant was arrested on 6 November 2010, first appeared in the Regional Court Theunissen on 28 April 2011, went on trial on

25 October 2011 and was finally convicted and sentenced on 23 September 2014.

- [5] The Appellant insisted on conducting his own defence and refused the assistance of the various attorneys from Legal Aid South Africa who were present in Court and ready to assist him at any given time during the trial. He also refused the assistance of assessors. Since he was not legally represented, the Court *a quo* with commendable patience explained to him his legal rights and the implications of the different steps throughout the trial, including the possibility of being convicted on one of the competent verdicts of Culpable Homicide or Attempted Murder.
- [6] The Appellant pleaded not guilty to both charges and did not provide a plea explanation.
- [7] The first witness was the victim of the attempted murder, M F Ntuleng, who worked as a security guard at the Blue Moon Tavern where the offences were committed. He testified that the Appellant and two other persons, Doza and Bennet, during the evening of 6 November 2010 tried to enter the tavern. When he searched them, he found an Okapi knife in the Appellant's possession, a 'press-button' knife ('flick-knife') in Doza's possession, and a pair of scissors in Bennet's possession. He confiscated the weapons and

the three entered the tavern where they bought a quart of Black Label beer which they came and drank outside.

- [8] When they left, Ntuleng refused to allow the Appellant to take the empty beer bottle with him, but did return their weapons to the three of them. A short while later they were back and refused to allow Ntuleng to search them again. The Appellant opened the Okapi knife and threatened to stab Ntuleng. Ntuleng saw Bennet handing the Appellant a pair of wrapped scissors. The Appellant held them in his right hand while he threatened Ntuleng.
- [9] A female security guard, Motsidisi, stepped between them in an attempt to stop the Appellant from stabbing Ntuleng who was carrying a crate of beer into the tavern. The Appellant pushed the person between him and Ntuleng out of the way and managed to stab Ntuleng in his left side on his ribs, inflicting an open wound which had to be closed with four stitches and which landed Ntuleng in the hospital. When the Appellant tried to stab Ntuleng with the scissors for a second time, the latter leaned against a pillar, and instead of stabbing him, the Appellant fatally stabbed Ms Putswenyane who passed away that same evening. Ntuleng witnessed and described the second stabbing.
- [10] The pathologist, Dr Nieuwoudt, testified that the Appellant struck Ms Putswenyane in the right upper arm with the 24cm scissors

with such force that it left a 44 cm long open wound which extended upwards deep into her upper arm, cutting both the brachial artery and the vein which carried the main blood supply to the arm. That led to excessive blood loss and her death of exsanguination, and resulted in the Appellant's conviction of Culpable Homicide instead of Murder.

[11] I am satisfied that the trial was properly conducted, that the Appellant was properly assisted by the Presiding Officer and that the convictions were in accordance with the facts and in accordance with justice. The convictions are therefore confirmed.

[12] The Appellant admitted several previous convictions for crimes involving violence. His application for leave to appeal against both conviction and sentence was dismissed on 12 July 2016. A petition for leave to appeal against his sentence only was granted 26 April 2017, however.

[13] The grounds on which the Appellant relies for the appeal are:

13.1 That the Court *a quo* erred in overemphasising the gravity of the offence and the interest of the community at the expense of the Appellant's personal circumstances;

13.2 That the Court *a quo* failed to properly take into account the mitigation factors while overemphasising the aggravating circumstances;

13.3 That the sentence is shockingly inappropriate and induces a sense of shock; and

13.4 That the Court erred in not ordering the sentences on Counts 1 and 2 to run concurrently.

[14] It is trite law that punishment is pre-eminently a matter for discretion of the trial court and that a Court of Appeal should be careful not to erode such discretion (**S v Rabie**¹). In **S v Bogaards**² the Constitutional Court described a Court of Appeal's power to interfere with sentences imposed by Lower Courts as follows:

"It can only do so where there has been an irregularity that results in the failure of justice; the Court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable Court could have imposed it."

¹ 1975 (4) SA 855 (A) at 857 D - E

² 2013 (1) SACR 1 (CC) [2012] (12) BCLR 1261; [2012] ZACC (23) at [41]

[15] This was echoed in **S v Van Wyk and Another**³ where the Supreme Court of Appeal stated that it has held that it would interfere with sentences imposed by a Trial Court only where the degree of disparity between the sentence imposed by the Trial Court and the sentence the Appeals Court would have imposed was such that interference was competent and required. But then, the Court cautioned, the Appellate Court needed to have a definite view as to what sentence it would have imposed, even if it is only able to identify a particular range within which it would have imposed sentence.⁴

[16] In his Heads of Argument, Mr Van der Merwe submitted that the minimum sentence for Murder is 15 years' imprisonment whereas the Court *a quo* found a 12-year sentence appropriate for Culpable homicide, which reasoning appears to be flawed, especially in view thereof that the Appellant had already spent four years awaiting trial.

[17] I agree with Adv Nameka for the State that the varying nature of sentences imposed in cases of culpable homicide is indicative of the differing nature of the circumstances in each case and that the Appellant's degree of blameworthiness is relevant in determining which sentence is appropriate in these circumstances, as

³ 2015 (1) SACR 584 (SCA) at [31] – [32]

⁴ S v Monyani and Others 2008 (1) SACR 543 (SCA) at [23] and [26]

explained in **S v Mtshiza**⁵. (See also **S v Machemo**⁶, **S v Nkuna**⁷).

[18] In my view the present case is indeed one in which there is a sufficient degree of disparity between the sentence which the Court *a quo* imposed and the one that this Court of Appeal would have imposed, to justify interference. When regard is had to all the facts of the present case, the sentence of 12 years' imprisonment for a negligent act with an accidentally fatal result, compared to the 8 years' imprisonment imposed for the Attempted Murder which the Appellant committed intentionally, is highly questionable.

[19] The Court *a quo* provided no reasons for the disparity in the two sentences in this case. And as was stated in **S v Madikane**⁸ and also in **Itani Thomas Mudau v S**⁹:

"However, in my view the learned Judge plainly over-emphasized the retributive aspects of punishment at the expense of the other considerations and thus failed to strike an appropriate balance. Moreover, he imposed a very disparate sentence in respect of similar offences without furnishing any reason for the difference. Absent of such explanation for the disparity, a sentence appears to be ill-considered and arbitrary."

⁵ 1970 (4) ALL SA 12 (A) at [19]

⁶ [2008] JOL 22159 (ZH)

⁷ [2008] JOL 22048 (T)

⁸ 2011 (2) SACR 11 (ECG)

⁹ (419/12) [2011] ZASCA 191 (30 November 2012)

- [20] There is no evidence that the Appellant had any intention to harm Ms Putswnayane, although of course he created a dangerous situation by striking at Ntuleng with a 24cm long sharp pair of scissors in the crowded tavern where he should have foreseen that he might hit and cause harm to someone other than Ntuleng, and wherein lies his negligence. Having due regard to his moral blameworthiness in that accidental killing of an innocent bystander in my view 8 year's imprisonment would be a fitting punishment for the negligent killing of Ms Putswenyane. It would be long enough not to be trivial and an insult to her family or the community, yet reasonable enough to still allow the Appellant to be reintegrated into society once he has served his term. In my view therefore a sentence of 8 years' imprisonment for the conviction on Culpable Homicide would be appropriate, proportionate, and just in the circumstances of this case and would also remove the unexplained disparity between the two sentences.
- [21] That, of course, brings us to the Court *a quo*'s decision not to order concurrency of the two sentences. Mr Van der Merwe submitted that the Court *a quo* erred in not ordering the sentences to run concurrently since the crimes were closely related in time and place and flowed from the same action. I agree. The cumulative effect of an effective 20 years' imprisonment is simply so disproportionate as to be unreasonable enough to justify

interference by this Court. (**S v Jimenez**¹⁰ and **S v De Jager and Another**¹¹).

[22] It is trite law that the sentence of an accused person must be balanced between the interests of society, the offence and the personal circumstances of the accused (**S v Banda and Others**¹²). That requires a careful weighing up of the mitigating circumstances of the case against the aggravating factors. The Trial Court is expected not to just list the factors but to discuss the weight he assigns to each in order to justify his decision to impose a given sentence.

[23] The Court *a quo* took into account as mitigating factors the following personal circumstances of the Appellant: that the Appellant was 47 years old and had minor children who are staying with their respective mothers; that the Appellant was a breadwinner; and that the Appellant spent four years in custody awaiting finalisation of the trial.

[24] The Court *a quo* also took into consideration the following aggravating circumstances: the numerous previous convictions of the Appellant; the interests of the community; and the seriousness of the offence.

¹⁰ 2003 (1) SACR 507 (SCA) at 517 g-h

¹¹ 1965 (2) SACR 616 (A) at 629

¹² 1991 (2) SA 352 (BGD) at 355 A

- [25] The Court *a quo* did not, however, explain what weight it attached to the various factors and how those factors enabled him to arrive at the two sentences that he imposed, which does not assist this Court of Appeal in assessing the Court *a quo*'s reasoning. It did state, though, that in imposing sentence the number of previous convictions, even though not taken into account for sentencing, were an indication that the Accused did not learn from the fact that he had been convicted and sentenced by the Court.
- [26] The Court *a quo* stated, furthermore, that the offences committed by the Accused are prevalent in that division and that the community expects the Court to impose sentences that promote respect for the law and reflect the seriousness of the offences committed, and that one of its duties in the imposition of sentence is to protect the society against the Accused and other potential offenders.
- [27] The Court *a quo* correctly held that in the circumstances direct imprisonment would be appropriate, just and proper and explicitly stated that it aimed in passing the sentences that it did, at ensuring that the Accused will not commit similar offences in future and that they would serve to teach the Accused and other offenders to respect the rights of fellow human beings in future.

[28] Mr van der Merwe, on the other hand, averred that the effective sentence was so disproportionate because the Court *a quo* erred in not attaching due weight to the following two mitigating factors:

28.1 That the Appellant had spent four years awaiting trial where the delay was not due to his fault. He relied, in this regard, on **S v Stephen and Another**¹³ where Schultz J held that:

“Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length.”

28.2 That the Appellant had been a productive member of society who was maintaining himself and his children before he was arrested in this matter.

[29] Although I agree that the lengthy period spent in custody awaiting finalisation of the trial is a mitigating factor, I respectfully agree with Satchwell J in **S v Mahlangu and Others**¹⁴ that the hardship suffered due to that fact is but one of the relevant factors the combined impact of which the Court *a quo* had to take into consideration to determine an appropriate sentence. I agree that being incarcerated is a great hardship, especially “where one is not a serving prisoner but awaiting trial”, but I agree, too, that one should not blindly apply arithmetical equivalents to assume, for instance, that a 4-year awaiting trial period equals an 8-year sentenced prison

¹³ 1994 (2) SASV 163 (W) at 168 E – G; S v Nkomonde 1993 (2) SASV 597 (W)

¹⁴ 2012 (2) SACR 373 (GSJ) at 376

term since “one does not know all the factors peculiar to each awaiting-trial period”.

[30] The State conceded that the cumulative sentence in this matter is severe and shockingly inappropriate, warranting the interference of this Court. Adv Nameka conceded, furthermore, that the Court *a quo* over-emphasized the seriousness of the offence and under-emphasized the interests of the Appellant, and that the disparity between the sentence imposed by the Trial Court and that which a reasonable Court would have imposed was sufficient to warrant interference by the Court of Appeal.

[31] In argument the State submitted that the sentence for culpable homicide should be reduced to 8 years to match the sentence of 8 years for attempted murder and that these sentences should be ordered to run concurrently and should be antedated to provide for the four years that the Appellant had already spent in prison awaiting trial.

[32] I agree with Mr Van der Merwe and with Ms Nameka that a sentence of 12 years' imprisonment for culpable homicide is excessive, especially when compared to the 8 years imposed for attempted murder. In reducing the 12 year sentence to one of 8 years the degree of moral blameworthiness of the Appellant

regarding the death of Ms Putswenyane is placed in the proper perspective.

[33] I also agree that the Court *a quo* should have ordered the sentences on Counts 1 and 2 to run concurrently, especially in view thereof that they stemmed from the same conduct and occurred within seconds of each other. By antedating the sentence to 12 July 2016, the date on which the Appellant's appeal against his sentence was dismissed, provision is made for the lengthy period which the Appellant has spent in custody already.

[34] WHEREFORE the following order is made:

1. The convictions are confirmed.
2. The appeal against sentence is upheld.
3. The sentence of 12 years' imprisonment on Count 1 is set aside and substituted with the following:

"The Appellant is sentenced to 8 (eight) years' imprisonment on Count 1."

4. The sentence of 8 (eight) years' imprisonment on Count 2 is confirmed.
5. The sentences imposed on Count 1 and Count 2 are to be served concurrently and are to be antedated to 12 July 2016.


H. MURRAY, AJ

I concur and it is so ordered.


M. A. MATHEBULA, J

On behalf of the Appellant:

Mr P L van der Merwe
instructed by:
Bloemfontein Justice Centre
2nd Floor – Southern Life Building
41 Charlotte Maxeke Street
BLOEMFONTEIN

On behalf of the Respondent:

Adv C Z Nameka
Office of the Director of Public
Prosecutions : Free State
BLOEMFONTEIN