

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A50/11

In the appeal between:-

MOILOA THUPUDI

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE *et* MOCUMIE, JJ

HEARD ON:

20 FEBRUARY 2012

DELIVERED ON:

23 FEBRUARY 2012

MOCUMIE, J

[1] This is an appeal against sentence from the Regional Court, Welkom with leave of the court *a quo*. The appellant was charged with murder read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997. He was convicted as charged on 10 March 2006 and was sentenced to fifteen years imprisonment on the same day,

[2] The salient facts of this case are as follows. The accused

and the deceased were with other patrons at a tavern in Thabong, Welkom on the night of 2 May 2005. The deceased assaulted the appellant with open hands and continued to harass him during the night to the point that a fight broke out between them. During the fight the appellant stabbed the deceased with a knife once on the shoulder. The deceased died as a result of the stab wound.

[3] The appellant's defence was that of private defence. He alleged that the deceased was armed and wanted to stab him. He stabbed the deceased before the latter could stab him. The trial court, on the basis of the evidence presented, correctly rejected the appellant's defence and found him guilty as charged.

[4] In her judgment at p. 116 line 13 – 16 the magistrate held:

“Therefore the only reasonable inference that can be drawn from the proven facts, is that the accused had the direct intention to kill the deceased whether in the form of dolus directus or dolus eventualis.”

[5] It is correct as submitted on behalf of the appellant and

conceded by the State that the trial court erred by finding these two forms of intention to have been proven by the State. The State suggested that this was what generally known as the proverbial “*lapsus linguae/slip of the tongue.*” It seems that there is no need to belabour this point except to say that in looking at the circumstances of the case, there is no evidence that the appellant had the direct intention to cause death i.e. looking at the area on which the deceased was stabbed and the number of times he was stabbed. The only inference that can be drawn is that the appellant is guilty of murder with *dolus eventualis*.

[6] This, however, cannot justify any interference with the conviction, suffice to correct the verdict to read “guilty as charged: with *dolus eventualis*”, in which instance then the conviction ought to stand.

[7] The appellant was 20 years at the time of the commission of the offence. He has two previous convictions: one of robbery for which he was sentenced to three months on 30 August 2002 and one of theft for which he was sentenced to six months imprisonment on 9 December 2012. The only one

which may be relevant in that it has an element of violence is that of robbery committed during 2002. But this was committed when the appellant was at least 15 years of age as the State correctly pointed out which can be safely ignored. The appellant was a second year student at a Technical College. At the time of the conviction and sentence his girlfriend was pregnant with their child. As the evidence indicated he does not drink alcohol or at least he was not under the influence of alcohol on this fateful night which shows that he is a good person who can do without drugs and their negative effects on society in general.

[8] It was submitted on behalf of the appellant, that all these factors taken cumulatively were compelling and substantial circumstances which justified the imposition of a lesser sentence than the prescribed fifteen years. The State conceded that much. I agree with both counsel.

[9] The appellant was convicted and sentenced on 10 March 2006. He has to date already served five years of the fifteen years imposed. In my view, as suggested by the State and accepted on behalf of the appellant, a term of imprisonment

of eight years will be appropriate and just in the circumstances.

[10] In the light of the conclusion I have come to in the above paragraph, the appeal ought to succeed.

[11] In the circumstances the following order is made:

ORDER:

1. The appeal on sentence succeeds.
2. The sentence of the Regional Court dated 10 March 2006 is set aside and substituted with the following:

“The accused is sentenced to 8 (eight) years imprisonment”.
3. In terms of section 282 of the Criminal Procedure Act sentence is antedated to 10 March 2006.

B.C. MOCUMIE, J

I concur.

C.H.G. VAN DER MERWE, J

On behalf of appellant:

Adv. J.S. Makhene

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent:

Adv. J.H.S. Hiemstra SC

Instructed by:

Director Public Prosecutions

BLOEMFONTEIN

BCM/sp