

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)**

**Case Nr: K/S 58/08
Delivered: 04-02-09**

In the matter between:

STATE

VERSUS

FREDDIE BOITUMELO NYATHI

SENTENCE

Tlaletsi J:

Introduction

In determining an appropriate sentence, I am enjoined to be guided by the principles relevant to sentencing.

1. The objective and purpose of punishment are deterrence, prevention, reformation and retribution.

1.1 By deterrence the aim is to discourage the specific offender of would be offenders from committing similar crime.

- 1.2 Prevention is to protect the public from further criminal conduct by the accused.
 - 1.3 Reformation is to rehabilitate the offender where possible by education or other correctional treatment in the most effective way.
 - 1.4 Retribution is to impose a sentence which reflects the seriousness of the offence in order to promote respect for the law and proper punishment for the accused.
2. The triad enunciated in **S v Zinn** 1969(2) SA 537 (A) at 540 G and subsequent decisions remains instructive to this Court. This consists of the crime, the offender and the interest of the society. What must be added to the triad as an independent element or be emphasized as part of the interests of the society is the interests of the victim.
 3. A Court should strike a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of other elements.

To achieve this counterbalance a court must evaluate and balance evenly the nature and the circumstances of the offence; the characteristics of the offender and his circumstances and the impact of the crime on the victim and the community, its welfare and concern.

4. The offender

The following are your personal circumstances which have been placed on record from the bar by your counsel:

You were born on 20 May 1988. This means you are 20 years old. You attended school until last year when you were doing standard 9. You are not married and have no children or dependants. You are serving a sentence of 4 months imposed during December 2008. You have previous convictions which you admitted. On 16/5/2005 you were convicted of theft and the imposition of sentence was postponed for a period of three years. On 13/2/2006 you were convicted of housebreaking with intent to steal and theft and once again the imposition of sentence was suspended for a period of three years. On 19/4/2006 you were again convicted of the offence of Housebreaking with intent to steal and theft and the imposition of sentence was again on this occasion postponed for a period of three years. The condition, as was the position in the other previous convictions, was that you should present yourself to court in case you are called to do so. On 8 May 2006 you were convicted of theft and again as in the previous occasions, the imposition of sentence was postponed for three years on the same conditions. This offence was committed on 23 December 2005. For the purpose of this trial, I will not regard these previous convictions as relevant as they were not involving violence directed at a person. However, what is a fact is that you are not a first offender in the general sense. It is also evident that there were attempts to try and give you a chance to mend your ways by keeping you out of jail. It appears these attempts did not bear any fruits.

5. The offence

It is common cause that the offence for which the accused has been convicted is of a very serious nature. This murder can be categorized as one of the brutal and cold blooded ones. The deceased, a helpless girl sustained twelve stab wounds. This country is suffering from an epidemic of violence which cannot be tolerated. The society is outraged when a crime of this nature is committed and expect the Courts to take action. The fact that you had a love relationship with the deceased and that she was now with another man, gave you no right to act selfishly and terminate her life in such a brutal manner. Your unwarranted jealousy deprived her of her life. Like all other women she had the right to live. I will however accept that there was a measure of provocation in that the deceased phoned you and apologized and when you were with her to try and resolve the problem this other man came and she ordered you to leave. I repeat that it is by no means justified.

6. Interests of the community

A Court fulfils an important function in applying the law in the society. It has a duty to maintain Law and Order. As it operates in society, its decisions have an impact in the individuals' ordinary daily lives. The Court must promote respect for the law, and in doing so reflect the seriousness of the offence and provide just punishment for the offender. The Court must also take the personal circumstances of the offender into consideration. The feelings, requirements and protection of the society against the accused or would be offenders must be taken into account. Failure to do so may result in lawlessness, disrespect for the rule of law, self help and vigilantism. Be that as it may, the interests of the society should not be over

emphasized to the detriment of the personal factors of the offender. Due weight must be given to all the elements. However, a Court must be constantly vigilant against the easy way out by simply joining the ranks of the mob and impose the sentence which the crowds in the streets are creaming for, without properly consulting its own calm judgment and experience. (See: **S v O** 2003(2) SACR 147(C) at 150 G-H). The Court should also blend its sentence with a measure of mercy. **Homes JA** remarked as follows in **S v Harrison** 1970(3) SA 684 (AD) at 686 A: "*Justice must be done; but mercy, not a sledgehammer, is its concomitant.*"

Act 105 of 1997

Criminal Law Amendment Act 105 of 1997 makes provision for minimum sentences for certain serious offences. This is intended to serve as a deterrent and also to ensure some measure of consistency as far as sentences for similar offences are concerned. For this kind of murder there is a prescribed minimum sentence of not less than 15 years for a first offender to murder.

The Court should only depart from the prescribed minimum sentences where it finds that there are substantial and compelling circumstances. The approach that the Court should adopt is properly captured in the case of **S v Homareda** 1999(2) SACR 319 (W) at 325 -326a.

1. The starting point is that the prescribed minimum sentence must be imposed.

2. It is only if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, that it may do so.
3. In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts. This Court is required to look at all factors, mitigating and aggravating and consider them cumulatively.
4. If the Court concludes in a particular case that the minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate, bearing in mind that the legislature perceives the necessity for sentences emphasizing the deterrent component, but equally bearing in mind that this does not necessarily lead to an automatic increase of sentences previously imposed, it is entitled to impose a lesser sentence. I must at all times be mindful of the binding principles enunciated in **S v Malgas** 2001(1) SACR 469 (SCA) (2001(2) SA 122) at para [25] at 481f-482g) (SACR) and 1235E – 123E (SA). These principles need no repetition in this judgment. Needless to state that specified sentences are not to be departed from lightly and for flimsy reasons and that this crime has been singled out for sever punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.

The fact that you are of a youth full age, and that there is a degree of provocation brings me to the conclusion that the imposition of a prescribed minimum sentence would cause an injustice to you. These factors therefore qualify as substantial and compelling to me to depart from imposing the prescribed minimum sentence.

However, a length term of imprisonment is unavoidable. I hope that you will reflect seriously on your life and try to be a better person. This is the only chance that you get in your life. I urge you to take an advantage of this opportunity and subject yourself to meaningful rehabilitation. Your failure to do so will van its own adverse consequences. This should be a lesson to other who would be offenders of your age group that crime does not pay.

L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearance:

For the State: Ms Louw

Instructed by: Director of Public Prosecutions

For the Accused: Mr Cloete

Instructed by: Kimberley Justice Centre

