

Reportable:	YES /
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Circulate to Judges:	YES /
NO	
Circulate to Magistrates:	
YES / NO	
Circulate to Regional Magistrates:	
YES / NO	

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

Case No: CA&R 113/07
 Heard: 04/02/2008
 Delivered: 08/02/2008

In the matter:

STEPHANUS LOUW

Applicant

and

THE STATE

Respondents

Coram: Bosielo AJP et Williams J

JUDGMENT ON APPEAL

BOSIELO AJP

- 1] On 26 July 2006 the appellant was convicted of the murder of one Denzil Van Wyk in the Regional Court, Kakamas. The appellant was sentenced to a term of imprisonment for 18 years, the regional magistrate having found that there were no substantial and compelling circumstances (sacc) to justify a lesser sentence. The appellant has now lodged an appeal against the sentence imposed on him after he had successfully petitioned the Judge-President of the Northern Cape Provincial Division.

- 2] It is clear from the Notice of Appeal filed by the appellant that the sentence imposed on him is placed under serious attack on various grounds. The main ground relied upon by the appellant is that the sentence is shockingly severe and thus disturbingly inappropriate. In support of this, the appellant avers that the regional magistrate erred or misdirected himself by inter alia, not properly considering or attaching appropriate value to various facts inter alia that the appellant is a first offender regarding crimes involving violence; that he is a sole breadwinner for his family; that there was a measure of provocation exacerbated by the

fact that he was under the influence of alcohol and further that the regional magistrate over-emphasized the seriousness of the offence and the interests of the community at the expense of the appellant's personal circumstances.

- 3] In argument before us, counsel for the appellant argued, quite forcefully, 'that the sentence of 18 years imprisonment', when viewed against the appellant's personal circumstances, the nature of the crime and the interests of society, is so disturbingly disproportionate that it amounts to an injustice.
- 4] Quite interestingly, counsel for the respondent, conceded that although the murder for which the accused was convicted is a serious one, particularly as there was *dolus directus*, the regional magistrate erred or misdirected himself by giving insufficient weight to the appellant's personal circumstances and in particular the circumstances under which this murder was committed. Mr Bagananeng submitted that, given the facts of this case and the appellant's personal circumstances, a sentence of imprisonment for twelve (12) years would be an appropriate sentence.
- 5] Based on the submissions made by the respective counsel there are two crisp legal questions which we have to decide, viz. firstly whether the regional magistrate erred in finding that there are no substantial and compelling circumstances (sacc) within the meaning ascribed to this phrase in **S v Malgas** 2001(1) SACR 469 (SCA) at page 477 para[a] read with page 482 para [E] to [I]; and whether, given the facts of this case, it can be said that a sentence of imprisonment for 18 years is so disproportionate to the crime, the appellant and the legitimate interests of society, to a point where it can be described as unjust. To my mind, in order to resolve this polemic, a proper consideration of the facts of this case is both imperative and inevitable. What follows is a brief resumé of the evidence.
- 6] It is rather sad that the three people who were involved in this sad saga were intimately known to one another and connected by some symbiotic relationship. It is common cause that the appellant is the step-father to one Sylvia Pretorius, (whom he received into his family and raised from the tender age of 6 years). At the time of this trial Sylvia was 22 years old. Sylvia on the other hand was a girlfriend to Denzil Van Wyk (the

deceased). Having found the deceased relaxing in a bedroom at the appellant's home with Sylvia, the appellant summarily ordered the deceased to leave his premises. In the process, the appellant hurled some insults and expletives at the deceased. In response, the deceased told the appellant that he would not leave as he had a girlfriend there with whom he had a child. This response seem to have angered the appellant who then left for the kitchen only to return a while later armed with a bread-knife. The appellant once again confronted the deceased and ordered him to leave his house. In return, the deceased repeated that he would not leave whereupon the appellant threatened to stab him with the knife. It is not in dispute that the deceased told the appellant to stab him as he threatened. Whilst this exchange of words continued, the appellant suddenly raised his hand and stabbed the deceased on his right eye. According to the accepted version, all three were seated on the bed when the appellant so stabbed the deceased. It was formally admitted by the appellant at the trial that this stab-wound is the sole cause of the death of the deceased.

- 7] After evaluation of the evidence, the regional magistrate found that the appellant murdered the deceased with *dolus directus*. Furthermore the regional magistrate found the following to be seriously aggravating: the fact that appellant went to fetch the knife from the kitchen; the fact that the deceased posed no danger to the appellant; the fact that the deceased was killed for a very flimsy reason (i.e. the fact he did not bring money for the maintenance of his child); the fact that by this murder the appellant robbed/deprived both Sylvia and her child of a lover and a father. In fact the regional magistrate found that the peculiar facts of this case justified him to invoke his residual punitive powers in terms of the provisions to Section 51(2) of the Act to justify the imposition of a further 3 years to the 15 years provided for as the minimum sentence.
- 8] In considering whether the sentence imposed on the appellant is appropriate or disturbingly inappropriate, I am forced by the facts of this case, to concede that the murder for which the appellant was convicted is clearly serious. Furthermore it is clear to me that the appellant deserved a severe sentence which will correctly reflect the seriousness of this offence and act as a deterrent. However, having perused the judgment on sentence, I am of the view that the regional magistrate misdirected himself on a number of important aspects regarding sentencing. Firstly it is

common cause that at the material time the appellant was under the influence of liquor; secondly it is common cause that the appellant was seriously angered by the presence of the deceased at his home; thirdly that when he ordered the deceased to leave, the deceased taunted him and told him that he will not leave; fourthly that even when he, armed with a knife, threatened to stab him, the deceased taunted and challenged him to stab him. In my view it is hardly surprising that, given the prevailing circumstances, the appellant lost his head and in the heat of anger stabbed the deceased. I believe that those of us who have had the experience of presiding over criminal trials, will understand that it is one of the inherent weaknesses or frailties of mankind to loose one's temper when one is exposed to a situation where one is taunted and one's authority in his home is challenged in a situation where one is under the influence of liquor. In my view, these circumstances constitute a cocktail for disaster.

- 9] Regarding the effect of alcohol on people's behaviour there is more than enough empirical evidence, that alcohol adversely affects people's inhibitions and reaction. The problem of alcohol or intoxication is as old as mankind. As the learned **Holmes JA** aptly remarked in **S v Ndlovu** (2) 1965(4) SA 692 AD at p 695C:

"Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do."

Confronted with a similar situation where intoxicating liquor featured prominently in the commission of murder, **Holmes JA** expressed the following salutary warning in **S v Sigwahla** 1967(4) SA 566 (AD at 571D-E:

"In considering the relevance of intoxicating liquor to extenuating circumstances the approach of a trial Court should be one of perceptive understanding of the accused's human frailties, balancing them against the evil of his deed."

Having read the judgment of the regional magistrate, I have no doubt that he erred seriously in this regard. The regional magistrate simply paid no heed at all to the dangerous cocktail of provocation, anger compounded by intoxication which afflicted the appellant at this time.

- 10] In addition hereto, I find that the appellant had impressive and compelling personal circumstances, which, regrettably the regional magistrate accorded very little weight. *Inter alia*, the appellant was 39 years old at the time; he has been married for 16 years; had 3 children of his own with

his wife; added to these; are Sylvia and her brother Willem who were his step-children but whom he had raised as his own children; he was gainfully employed where he earned R850-00 per month; he had passed Standard 7 at school; he was a first offender regarding any offence involving violence and had been in custody for ten(10) months awaiting trial. In my view, all these facts taken together are so weighty and persuasive as to amount to substantial and compelling circumstances to warrant a lesser sentence than the minimum sentence prescribed by the Act. It follows logically that I find that there is absolutely no justification for the regional magistrate to have invoked his residual powers to add a further three(3) years to the fifteen (15) years prescribed by the Act. Having said so, it follows that the regional magistrate erred or misdirected himself in considering an appropriate sentence. As a result, we are therefore free or at large to consider the sentence afresh.

- 11] In reconsidering sentence I have found that much-needed guiding light in the eloquent if not poignant dictum in **S v J 1975(3) SA 146** at page 159F where **M.T. Steyn J** stated the following.

“Die Hof is nie 'n pynbank nie. Dit is nie 'n instrument van pyniging waarop 'n beskuldigde gebreek moet word omdat hy 'n weersinwekkende misdaad gepleeg het nie. Die Hof is die instrument waardeur die samelewing handel beide om homself te beveilig sowel as om die beskuldigde, indien moontlik, deur middel van straf te red as mens en te verbeter wanneer hy homself so gedra het dat hy die samelewing onwettiglik leed en skade aangedoen het.”

- 12] The circumstances of this case are without doubt extremely sad and tragic. In as much as they evoke anger at the deeds committed by the appellant, they also evoke a measure of compassion and pity for the appellant. What is clear is that the appellant will be haunted by the results of his foolish action for the rest of his life. The memory of the events of the day will weigh heavily with him everyday of his life. This is one heavy load that he cannot share with anybody. I have no doubt in my mind that the appellant deserves to be sent to jail for this crime. Any other sentence would have the effect of trivialising the life of the deceased. However, any sentence to be imposed on the appellant, without destroying him unnecessarily, should be such that it reflects that delicate balance between him, the appellant, the crime for which he is convicted and the interests of society whilst at the same time is blended with mercy.

- 13] There is no suggestion that that the appellant has a propensity to commit

crimes involving violence. It cannot therefore be said that the appellant is such a serious danger to society that he has to be taken out of circulation for a very long time. I hold the view that the appellant should be given the kind of sentence which, whilst it effectively punishes him for his deeds, it will at the same time serve as an incentive to him to rehabilitate himself with the real hope that one day, he will leave the prison door behind him, well reformed to resume his rightful position in society to lead a normal life of a law-abiding citizen and contribute positively to the national project of transforming our society and building the nation.

- 14] Having given this matter anxious consideration, I am of the view that the appeal against sentence must prevail.

In the result, I make the following order.

1. The appeal against the sentence of 18 years imprisonment succeeds.
2. The sentence of imprisonment for 18 years is set aside and replaced with a sentence of imprisonment of 15 years, with 5 years thereof suspended for 5 years on condition that the accused is not convicted of any offence involving violence committed during the period of suspension. This sentence is **antedated to 27 July 2006.**

L O BOSIELO
ACTING JUDGE PRESIDENT
Northern Cape Division

I concur

C C WILLIAMS
JUDGE
Northern Cape Division

<u>On behalf of the Applicant:</u>	Adv. P J CLOETE
Instructed by:	KIMBERLEY JUSTICE CENTRE
<u>On behalf of the Respondent:</u>	Adv. W BAGANANENG
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