

Reportable:	YES /
NO	
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: K/S 50/99
 Heard: 25/02/2008
 Delivered: 29/02/2008

In the appeal matter:

PIET IVAN KESIELWE

Applicant

and

THE STATE

Respondent

Coram: Bosielo AJP, Lacock J et Olivier J

JUDGMENT ON FULL BENCH APPEAL

BOSIELO AJP

- 1] On 8 March 2000, the appellant was convicted of murder and sentenced to imprisonment for 15 years by Steenkamp JP (as he then was) sitting in the High Court, Kimberley. This was after the court a quo had found that this case fell within the ambit of section 51(2)(a)(1) of the Criminal Law Amendment Act, 105 of 1997 and further that there were no substantial and compelling circumstances (sacc) to justify a lesser sentence.

- 2] I interpose to state that this appeal is against sentence only, the applicant having been granted leave to appeal against the sentence by Molwantwa AJ (as she then was).

- 3] In order to adjudicate this appeal properly it is, in my view, necessary to give a brief resumé of the facts of the case. From the admitted evidence, it is clear that on the night of 5 June 1999 the deceased was at a shebeen in Galeshewe with two of his friends, Tom and Kabelo, where they enjoyed some intoxicating liquor. Before they could leave the shebeen the

deceased bought four loose cigarettes. He gave two to Tom and retained the other two for himself. Tom then lit one cigarette which they all shared. Whilst the deceased was still smoking the appellant approached them. He then requested the deceased to allow him to smoke whereupon the deceased refused. This refusal seems to have irked and angered the appellant who mouthed some expletives to the deceased. When the deceased wanted to know what he meant, the appellant without much ado, produced a knife from his trouser's pocket and stabbed the deceased. As the deceased fled, the appellant pursued him and continued to stab him. According to Tom and Kabelo the deceased had no weapon and never fought with the appellant. The deceased was found some few minutes later inside his premises where he had died.

- 4] The report on the medico-legal post-mortem examination on the deceased which was prepared by Dr Els is of critical importance in shedding more light on the nature and seriousness of the injuries sustained by the deceased. According to this report, the deceased showed "twee steekwonde aan die linker nek waar die carotis en interne jugulare betrek word. `n Verdere steekwond deur die linker oor tot teen die linker mastoïed proses." The diagram attached to the report reveal two more stab wounds on the back and one just below the deceased's chest. To my mind, the medical report and the diagram attest to a wild and indiscriminate stabbing by the appellant on the deceased.
- 5] In his judgment on sentence, the judge in the court a quo remarked that even without the severe sentences peremptorily prescribed by the Criminal Law Amendment Act 105 of 1997, he would still, due to the patent gravity and seriousness of the offence, have imposed a sentence of imprisonment for 15 years. In describing this murder, the learned judge used epithets like "*`n lelike en afskuwelike moord.*" Speaking for myself, I have no quarrel with such a description. Undoubtedly, the murder of the deceased was both unnecessary and uncalled for. The deceased was killed for a mere cigarette. Simply for refusing to share a cigarette with the appellant, the appellant pursued him like an enraged bull and continued with his murderous attack. After the deceased had fallen to the ground probably due to the cumulative effect of the multiple stab-wounds, the appellant walked away nonchalantly, unmoved by the patent horror of his deeds. He offered no assistance to the helpless deceased whose life was busy ebbing away. To my mind this can only be described as being

brazen, cold, inhumane and callous.

- 6] At the hearing of this appeal, it became common cause that this appeal turned on two critical legal questions viz. firstly whether the trial court erred in accepting as a starting point that this murder attracted the provisions of the **Criminal Law Amendment Act, 105 of 1997** when no reference was made to the Act either in the indictment or during the trial and secondly whether the trial court erred in interpreting the phrase “*substantial and compelling circumstances*” as used in section 51(3) of the Act to mean “*exceptional circumstances*” and nothing less.

- 7] I now revert to the crisp legal questions raised in this appeal. In interpreting the phrase “compelling and substantial circumstances” (SACC), the trial judge relied on one of its own judgments. Although that judgment was not mentioned by name, diligent research revealed that it is **S v Boer** 2000(2) SACR 114 (NC) of p 123b where the learned judge stated that:

“Ek vereenselwig my verder met respek met die benadering in bogemelde sake dat gewone versagende omstandighede nie as wesentlik en dwingende omstandighede beskou kan word wat die oplê van 'n ligter as die voorgeskrewe vonnis regverdig nie.”

In the seminal judgment of **S v Malgas** 2001(1) SACR 469 (SCA) at p477f – 478b the approach adumbrated above was discarded in the following terms:

“The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and

compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

[10] To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling."

- 8] Counsel for the respondent, Adv Birch conceded, in her Heads of Argument, that the trial judge erred in his interpretation of the phrase "substantial and compelling circumstances". With respect, I agree. It is clear that this misdirection ineluctably led the trial judge to the conclusion that, as the appellant's personal circumstances did not appear to him to be exceptional, they did not meet the test. Inevitably this led him to impose the minimum sentence of 15 years imprisonment which is prescribed by the Act.
- 9] However this is not the end of the enquiry. Having found that the trial judge misdirected himself on sentencing, the vexed question remains whether the misdirection is of such a serious or material nature that it vitiates the exercise of the sentencing discretion by the trial court. See **S v Malgas** (supra) at p 478e. If it does, then it follows that this court, sitting as a court of appeal, is free to interfere and consider sentence afresh. I am of the view that the misdirection committed by the trial judge is so fundamental and material that it militates against a proper and judicious exercise of his sentencing discretion. As a result, I hold the view that this court is free to consider the sentence afresh.
- 10] In para [3] and [4] above, I gave out a brief description of the circumstances under which this murder was committed. I also set out the nature and extent of the injuries inflicted on the deceased by the

appellant. As against that, I need to consider the appellant's personal circumstances. The appellant was 20 years old at the time of this offence; he was unmarried and had no children; he was gainfully employed and earned R 125-00 per week; the appellant had passed standard 7 at school; he is a first offender; he expressed remorse for his deeds; it was accepted that the appellant was under the influence of intoxicating liquor to a certain extent; he was found guilty of murder by *dolus eventualis* and not *dolus directus*.

11] As against the appellant's personal circumstances is the sad truth that the deceased, who incidentally was only 20 years old at the time, has lost his dear life. It is common cause that the deceased did nothing to provoke the appellant. The deceased was stabbed because he refused to share his cigarette with the appellant. Even during the attack, the deceased did not fight back. According to Tom and Kabelo the deceased had no weapon. When the appellant stabbed him, the deceased fled for his dear life. As the appellant was desperate to complete his mission he pursued the deceased and continued to stab him.

12] The impression one gets from the facts of the case is that the appellant is the kind of person who always gets what he wants. He brooks no dissension or opposition. If need be, the appellant would resort to violence to get what he wants. He is the kind of person who goes to a shebeen armed with a knife. The conclusion is inescapable that he took the knife along so that he could use it if the situation demands. All people who are imbued with a modicum of intelligence and common sense know that a knife is a potentially dangerous weapon. It is capable of producing fatal consequences. The appellant stabbed the deceased on a very vital part of a human body i.e. the neck. This severed an important artery on the neck which led to excessive bleeding. The appellant continued to stab the deceased further. It is clear to me that the appellant has no respect for human life. In this context, I have found the dictum by **Van Dijkhorst J** in **S v Maqwathi** 1985(4) SA 22 (TPD) at p25 to be particularly apt and apposite where he stated.

“Die howe mag nooit die indruk skep deur hulle vonnisse dat die menslike lewe in die oë van die reg goedkoop is nie. Ook moet dit aan daardie lede van die gemeenskap wat maar te geneig is om die geringste grief met 'n mes by te lê duidelik aan die verstand gebring word dat dit nie gedoog sal word nie.”

I am in respectful agreement with this *dictum*.

- 13] It was argued on appellant's behalf by Mr Van Tonder that the fact that he was under the influence of intoxicating liquor during the commission of the offence, should be considered as a strong mitigating fact. It is true and in fact life experience has taught us that intoxicating liquor has the effect of adversely affecting people's inhibitions and judgment. It is furthermore true that the problems attendant on intoxicating liquor are legion and as old as mankind. One would not be wrong to describe intoxication as one of mankind's inherent frailties. However, it is not in every instance that intoxication can be accepted as a strong mitigating factor. One needs to analyse the facts of each case clinically to determine how intoxication influenced the commission of an offence. In other cases, intoxication has been found to be an aggravating fact. As **Holmes JA** aptly remarked in **S v Ndlovu** 1965(4) SA 692 (AD) at p695C – E:

“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. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness (see sec. 350 of the Code) as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed.”

Regretably there is no clear evidence in *casu* regarding the extent of the appellant's intoxication and what role, if any, did intoxication play in the commission of this offence. It would therefore be wrong for this court to speculate on this aspect either in favour of or against the appellant.

- 14] Mr van Tonder argued that, because the indictment did not refer to the provisions of the Criminal Law Amendment Act, those provisions should not have been applied when sentence was considered. This is in my view an over-simplification of the legal position in this regard.

- [15] The facts of this case (and particularly the offence with which the appellant was charged) are completely distinguishable from those in **S v Ndlovu** 2003 (1) SACR 331 (SCA), on which Mr van Tonder relied in this regard.

Here the “ordinary” common law crime of murder attracted the prescribed sentence of 15 years imprisonment, and not some special or qualified form of murder.

- [16] Although it is obviously desirable that an accused should be alerted to the provisions of the Criminal Law Amendment Act at the earliest possible stage of a criminal trial *“This rule is clearly neither absolute nor inflexible”* (see **S v Makatu** 2006 (2) SACR 582 (SCA) at 587c). Even where this was not done, the basic question will still remain whether the accused had a fair trial and whether the accused suffered any resultant prejudice (see **S v Cunningham** 2004 (2) SACR 16 (E) at 19b-c).

- [17] The appellant had been legally represented. He also pleaded not guilty and therefore exercised his right to put the prosecution to the proof of the offence. In my view the appellant was not prejudiced by the omission in the indictment and mr van Tonder did not argue to the contrary.

- [18] Although I could not find a formal notice of appeal in the record it is quite clear that, when application was made for leave to appeal, this argument was never advanced.

- [19] I am of the view that, even if it were to be assumed that the provisions of the Criminal Law Amendment Act should not be applied in this matter, a sentence of 15 years imprisonment would nonetheless be the only appropriate sentence. It is therefore not necessary to arrive at a final conclusion in this regard.

- 20] Given the peculiar circumstances of this case, in particular, the brazen and callous manner in which the deceased was killed, I find that the personal circumstances of the appellant pale into insignificance when weighed against the nature and gravity of this offence. Without doubt, any form of murder is a serious offence as it has the inexorable result of depriving another person of his life. What compounds this murder is that the deceased died for his own cigarette. Undoubtedly, the appellant has shown himself to be a danger to society. He is a man who roams about

armed with a knife which he does not hesitate to use with disastrous and fatal consequences at the slightest irritation. He deserves to be taken out of circulation for a very long term for the protection of society. The right to life is a universal and fundamental right entrenched in our Bill of Rights. No-one has the right to take another person's life. Those who roam about with knives and use them to kill other people like appellant must face the full might of the law. Our courts cannot afford to create the impression that they do not view murder as a serious offence, lest the public gets the impression that the courts regard human life as being cheap. This will inevitably lead to the public losing their confidence in the criminal justice system and resorting to self-help.

- 21] I have carefully considered and reappraised the entire spectrum of all the facts constituting mitigating circumstances. Having given this matter careful and anxious consideration, I am of the view that a sentence of imprisonment for 15 years is neither shockingly inappropriate nor disturbingly disproportionate to the offence for which appellant is convicted. Speaking for myself, I find that a sentence of imprisonment for 15 years is both fair and appropriate as it balances the interests of the appellant against those of the public whilst correctly reflecting the seriousness of the offence.

In the result, the appeal against the sentence succeeds. The sentence imposed by the trial judge is set aside and replaced with the following: "The appellant is sentenced to a term of imprisonment for 15 years which is antedated to 8 March 2000".

L O BOSIELO
ACTING JUDGE PRESIDENT
Northern Cape Division

I agree

H J LACOCK

JUDGE
Northern Cape Division

I agree

C J OLIVIER
JUDGE
Northern Cape Division

<u>On behalf of the Applicant:</u>	Adv. A. VAN TONDER
Instructed by:	KIMBERLEY JUSTICE CENTRE
<u>On behalf of the Respondent:</u>	Adv. T. BIRCH
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