

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 Nr: CA&R 126/2007

Case Heard: 01/09/2008

Date delivered: 05/09/2008

In the matter between:

Kgomotso Jimmy Grond

APPELLANT

and

The State

RESPONDENT

Coram: Majiedt J et Olivier J et Moloí AJ

JUDGMENT ON APPEAL

Olivier J:

1. The appellant appeared before Tlaetsi AJ (as he then was) on charges of theft (count 1), murder (count 2) and the illegal possession of a firearm and ammunition (respectively counts 3 and 4).
2. He was acquitted on count 1, but convicted on the charge of murder and sentenced to the prescribed term of 15 years imprisonment. He was also convicted on counts 3 and 4 (to which he had pleaded guilty) and sentenced to terms of 2 years

and 3 months imprisonment respectively, which were ordered to be served concurrently with the sentence on count 2.

3. His application for leave to appeal against the murder conviction and the sentence of 15 years failed, but on petition the Supreme Court of Appeal granted him leave to appeal to this Court against the sentence only.
4. The evidence against the accused was very briefly the following:
 - 4.1. On the night in question the appellant, his brother, mr L G Grond, mr Moeti Chakane (also known as "Junior"), the appellant's girlfriend, ms Tima Fredericks, and ms Arentcia Manase (also known as "Liefie") were in a tavern. Liquor was consumed, amongst others by the appellant and his brother.
 - 4.2. Although it is not clear how much alcohol the appellant had consumed in the course of that evening, it may be of some relevance that his brother admitted that they had already been under the influence of liquor when they arrived at the tavern. They continued their drinking spree there and by his brother's own admission he himself had become intoxicated to such an extent that he was falling asleep.
 - 4.3. The deceased and friends of his were also at the tavern. According to Manase the deceased had the habit of forcing himself upon women. She referred to an earlier incident when the deceased had

attempted to physically force a woman to accompany him and, when the appellant intervened, had assaulted him.

- 4.4. On the fateful night the same thing happened. The deceased would not take no for an answer, grabbed Manase's hand and tried to pull her with him from where she had been in the company of the appellant and his other friends.
- 4.5. The appellant intervened by pulling Manase back by her other hand. An argument ensued and the deceased put his hand into his pocket and fiddled with his hand in his pocket "*soos 'n man wat aan iets vat hier in sy sak*".
- 4.6. The appellant then produced a firearm and shot the deceased. The post-mortem report reflects the cause of death as "*GUNSHOT CHEST*".
- 4.7. The appellant then left the tavern. Outside in the rain he cried when he heard where the bullet had hit the deceased. He then tried to shoot himself, but was stopped by his brother and Chakane.
- 4.8. It is of some interest to consider how the appellant had come into possession of the firearm and the ammunition in it (the possession of which had led to his convictions on counts 3 and 4). The loaded firearm had been handed to him by Fredericks approximately two weeks before this incident. She

told him that she had picked it up and she left it in the appellant's possession on a temporary basis.

- 4.9. According to the appellant he had taken the firearm with him to the tavern because he intended returning it to Fredericks. This part of his version was never rejected. In my view it is also not necessary for present purposes to come to a final conclusion in this regard. It was never the State's case that the murder had been premeditated or that the firearm had been taken to the tavern with a view to a confrontation with the deceased or anybody else.
5. On behalf of the appellant it was submitted:
 - 5.1. that the trial Court had on the evidence erred in finding that there were no substantial and compelling circumstances as envisaged in section 51 of the Criminal Law Amendment Act, 105 of 1997; and
 - 5.2. that, in any event, the fact that the appellant "*op geen stadium tydens die verhoor gewaarsku was van verpligte vonnis wat deur Wet 105 van 1997 voorgeskryf word*" constituted sufficient substantial and compelling circumstances.

PRESCRIBED SENTENCE: NOTICE

6. It is trite that an accused should at the outset of a trial be furnished with not only full particulars of the charge/s against him, but also of any prescribed sentence/s that the State may

intend to rely upon (see **S v Seleke en Andere** 1976 (1) SA 675 (T), **S v Legoa** 2003 (1) SACR 13 (SCA) and **S v Makatu** 2006 (2) SACR 582 (SCA) para [3] – [7]).

7. This would for obvious reasons be “*highly desirable*” in the case of an undefended accused (see **S v Seleke en Andere, supra**, at 682), but the mere fact that an accused may have been legally represented have been held not to justify the conclusion, without more, that the failure to pertinently draw the application of minimum sentence legislation to the attention of the accused or the legal representative could not have prejudiced the accused (see **S v Mseleku** 2006 (2) SACR 574 (D) and **S v Tshabalala** 2008 (1) SACR 486 (T) para[13] – [15]).
8. A failure to inform the accused will, however, not necessarily lead to the conclusion that the trial had been unfair. The question will remain “*whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial*” (see **S v Ndlovu** 2003 (1) SACR 331 (SCA) at 337a).
9. Although the easiest and clearest way of informing an accused of the possible application of a prescribed sentence would be to mention that fact in the charge sheet or indictment, there is “*no general rule that the indictment must ‘recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it’*” (see **S v Legoa, supra**, at 22g-23f).
10. Where a failure to properly inform an accused in this regard would render it substantially unfair to invoke the applicable provisions, this would in itself constitute “*a substantial and*

compelling reason why the prescribed sentence ought not to have been imposed" (see **S v Ndlovu, supra**, par [14]).

11. In the present matter the indictment contained no reference to the provisions of Act 105 of 1997.
12. The appellant had, however, been represented by experienced counsel and it appears that, in addressing the trial Court on sentence, his own counsel "*submitted that count number 2 ... falls within Section 51 Act 105 of 1997*".
13. I think it is clear that his counsel had been aware of the applicability of these provisions. There is no indication that he was caught unawares at any stage. The **Tshabalala** case, on which Mr Fourie relied on behalf of the appellant, is clearly distinguishable, because in that matter it was not clear whether the appellant's legal representative in the Court **a quo** had dealt with the provisions of the Act when she addressed the Court on sentence (before the prosecutor did so – see **section 274(2)** of the **Criminal Procedure Act**).
14. The absence of a pertinent notification was not raised as a ground of appeal when leave to appeal against the sentence was applied for. This appears quite clearly from, **inter alia**, para [7] of the judgment in the application for leave to appeal.
15. The failure to mention the applicable provisions in the indictment cannot on any basis in this case be said to have rendered the trial, or the employment and application of those provisions, substantially unfair and would therefore seem to have been raised rather opportunistically.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

16. It is trite that a Court of appeal does not have an unfettered discretion to interfere with the sentence of a trial Court. It will only do so where the sentence is shockingly inappropriate or where a substantial misdirection occurred in the consideration and imposition of the sentence (see **S v Shaik and Others** 2008 (1) SACR 1 (CC) par [72]).
17. In my view the trial Court erred in not finding that there were, on a consideration of all the evidence, substantial and compelling circumstances which would have justified a lesser sentence.
18. As far as the appellant's personal circumstances are concerned, the appellant committed the crime at the relatively youthful age of 23 years. Although he had three previous convictions involving dishonesty, he had no previous convictions involving physical violence.
19. The immense impact the events of that evening had on the appellant as a person is borne out by the evidence that, when he realised that he had killed the deceased, he wept and even tried to commit suicide.
20. This brings me to the circumstances of the crime itself. In the judgment on sentence it was described as "*a very serious offence*". It goes without saying that the taking of another person's life is always a serious offence. I cannot, however,

agree with the remark in the judgment on the application for leave to appeal that the "*deceased was shot in cold blood*".

21. There was no evidence, or even suggestion, that the shooting had been planned. In fact, the express finding was made that "*this was not a planned murder. It may have happened on the spur of the moment*".
22. The appellant had in all probability been under the influence of liquor.
23. The deceased once again imposed himself upon a member of the appellant's party. When the appellant intervened the deceased once again was not prepared to back off. Instead he insulted the appellant and argued with him; all of this against the background of the previous occasion, when it ended in an assault on the appellant. In my view the deceased's behaviour constituted extreme provocation.
24. Although the trial Court apparently rejected the appellant's evidence that the deceased had actually produced a knife and had tried to stab the appellant, it was found that the deceased "*did put his hand in his pocket and tried to, and fiddled (indistinct)*".
25. In view of what had happened to the appellant on the previous occasion when he tried to prevent the deceased from dragging somebody with him, it is not difficult to imagine what must have gone through the mind of the appellant when he saw the deceased putting his hand into his pocket.

26. To have shot the deceased under these circumstances would have exceeded the bounds of self-defence, but could quite clearly not be labelled a cold blooded murder. To the contrary, the fact that a life had been taken in exceeding the bounds of self-defence is normally seen in a less serious light than where there had been no attack or perceived attack on the part of the deceased (see **S v Jack** 1982 (4) SA 736 (A) at 743B-C and **S v Sephuti** 1985 (1) SA 9 (A) at 19C-D).
27. The trial Court seems to have come to the conclusion that the mitigating circumstances were by far outweighed by the aggravating circumstances, but failed to mention even a single aggravating factor. In my view quite the contrary is true. Whatever aggravating factor there may have been, was by far and overwhelmingly outweighed by the mitigating factors already mentioned.
28. In the circumstances the imposition of a term of 15 years imprisonment does indeed strike me as shockingly inappropriate. I think that a substantially shorter term of incarceration would be appropriate.
29. The trial Court found that the "*accused is a young man and given a chance, he can still be rehabilitated*". In my view it would have been appropriate to suspend part of the term of imprisonment on appropriate conditions.
30. I would therefore make the following order:

The appeal succeeds and the sentence of 15 years imprisonment is set aside and substituted with the following sentence, which is antedated to 30 April 2003:

12 years imprisonment, of which 4 years are suspended for a period of 5 years on condition that the accused is not convicted of murder, attempted murder, assault with intent to commit grievous bodily harm or culpable homicide involving an assault, committed during the period of suspension and in respect of which a sentence of unsuspended imprisonment of more than 1 year without the option of a fine is imposed.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree:

**S A MAJIEDT
JUDGE
NORTHERN CAPE DIVISION**

I agree:

K J MOLOI
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff: Adv T Fourie
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For the Respondent: Adv D P Olivier
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