

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

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

Appeal no: 08/05
On roll : 14 /05/ 2007
Date delivered: 18/05/2007

In the appeal of :

FREDDIE OLYN

APPELLANT

and

THE STATE

RESPONDENT

Coram: Kgomo JP et Tlaletsi J

JUDGMENT ON APPEAL

Tlaletsi J

1. The appellant was on 8 December 2001 convicted on a charge of murder by the Regional Court sitting at Upington. He was sentenced to 15 years imprisonment in terms of the provisions of the Criminal Law Amendment Act 105 of 1997. He was legally represented. He is appealing against his sentence with leave of the court *a quo*.

2. The grounds of appeal are that the sentence imposed is shockingly inappropriate and that the court *aquo* erred by not finding that there are substantial and compelling circumstances that warranted the imposition of a sentence which is less than the minimum sentence prescribed by the Criminal Law Amendment Act 105 of 1997.
3. The brief factual background is that the first state witness, an 18 year old girl, walked past near where the Appellant was seated. The Appellant, unprovoked, remarked that she is getting fat. She replied that it is not his food that is making her fat. The Appellant took out a knife and chased her. She ran into her grandmother's premises and made a report to the deceased. The deceased, a 20 year old man, went to the Appellant accompanied by the witness and asked him why he was chasing her with a knife. He did not respond. As the deceased turned away to leave, the appellant attacked him from behind with a knife and fatally stabbed him on the neck. The wound was 4.5 cm wide and 7cm deep. The knife cut through the deceased's artery and the trachea. The public prosecutor who appeared for the state should be commended for sticking to his guns by rejecting a plea of guilty to Culpable Homicide, which was based on false facts. The conviction on a charge of murder is in order.
4. The Appellant's personal circumstances are that he was 30 years old at the time of sentence, not married and had no dependants. He never attended school. He was at the time of his arrest a labourer at an abattoir earning R125-00 per week. He was under the influence of liquor at the

time of the incident. He had two previous convictions one of which was assault committed on 19 February 1999 for which he was sentenced to R150-00 fine or 50 days imprisonment which was wholly suspended for 3 years on some conditions.

5. The Regional Magistrate took account, *inter alia*, of the prevalence of the offence in the area, that the Appellant was reasonably under the influence of alcohol, the seriousness of the offence, the fact that it was a senseless and unprovoked attack. He further found that there were no substantial and compelling circumstances that warranted a departure from the prescribed minimum sentence. In recognition of the fact that Applicant had already served 10 months awaiting trial, the magistrate remarked that he shall not add 5 years imprisonment to the minimum prescribed sentence which he was any way empowered to do. The Regional Magistrate thereafter concluded with the following remarks:

“Aan die einde van die dag kan ek vir u net een straf oplê tensy die hof het bevind dat daar geen dwingende en wesenlike versagtende omstandighede bestaan nie en dit is die minimum voorgeskrewe tydperk van gevangenisstraf. Gevolglik in terme van artikel 51(2)(a1) Van Wet 105 van 1997, dit is dan die wet wat die minimum vonnise voorskryf, lê ek vir u die minimum straf op, wat ek verplig is om op te lê, en dit is 15 jaar tronk straf. Verstaan u dit so.”

6. I am not of the view that the Regional Magistrate committed any irregularity or misdirection in considering factors relevant to sentencing. Mr Cloete, who appeared on behalf of the Appellant, was also unable to direct us to any misdirection or irregularity. One should bear in mind that

the Appellant, by virtue of his experience at the abattoir, knew very well that a knife is a dangerous weapon capable of causing death, especially on the dangerous area around the neck. Aggravating in this case, is that he was under no attack or threat of violence and stabbed the deceased when he had turned away from him not expecting any attack, thereby giving him no option of ducking or defending himself. He also showed no remorse.

7. The sentence imposed is not shockingly excessive and there is no marked disparity between the sentence of 15 years and that this court would under the circumstances have imposed. The nearest misdirection that I could come to is the fact that the Regional Magistrate incorrectly believed that the sentence of 15 years imprisonment is a prescribed sentence and not necessarily the minimum sentence that the court could impose. This misdirection only worked to the Appellant's advantage. A sentence in excess of 15 years imprisonment would have in my view not been inappropriate. The appeal should therefore not succeed.

ORDER

In the result I make the following order:

The appeal against sentence is dismissed and the sentence imposed by the Regional Magistrate is confirmed.

TLALETSI LP

Judge of the High Court

Northern Cape Division

I concur.

KGOMO FD

Judge President of the High Court

Northern Cape Division

On behalf of the Appellant	:	Adv. Cloete
Instructed by	:	Legal Aid Board, Kimberley
On behalf of the Respondent	:	Adv. Birch
Instructed by	:	Office of the D P P, Kimberley.