

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

Circulate to Magistrates: Yes / No

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

Case no: **CA&R 64/06**

Date delivered: **00/08/2006**

In the matter of:

FRANCOIS FREEMAN

Appellant

v

THE STATE

Respondent

Coram: **Tlaletsi AJP et Mokgohloa AJ**

JUDGMENT ON APPEAL

Tlaletsi AJP:

1. The appellant was convicted on his written plea of guilty on a charge of murder at the Upington Regional Court on 13 March 2000. He was on the same day sentenced to undergo 15 years imprisonment in terms of Section 51(2)(a)(i) of Act 105 of 1997. He is now appealing against his sentence with the leave of the trial court.

2. His ground of appeal as contained in the Application for Leave to Appeal dated 21 December 2005 are that the sentence imposed is shockingly excessive and inappropriate seen in the light of the decision in ***S v Malgas*** which had not been decided at the time of his sentence.
3. The uncontested facts upon which the conviction is based as contained in the statement in terms of Section 112(b) of the Criminal Procedure Act 51 of 1977 are as follows. The appellant was busy doing his duties at the farm at which he was employed and resided. His concubine (the deceased) returned from town in the afternoon with wine. They both drank the liquor and they became embriated. One of the farm workers came to them. He told the accused that the farm owner is sending them to gather wood for him. The deceased would allow the appellant to go due to jealousy. An argument ensued. The deceased pushed the appellant from the empty tin of paint he was sitting on next to the fire and he fell over. She swore at him. He stood up and sat again on the tin. She at some stage during the shouting, told the appellant that he will see what will happen to him if he left. She went into the house. The appellant drew his knife and followed her into the house as he did not know what she was going to do in the house. As she formed back he stabbed her once on the left part of the chest. He was very angry.
4. The appellant's personal circumstances on record are that he

had three previous convictions. In 1987 he was convicted of theft and sentenced to 5 strokes with a light cane. In 1989 he was convicted of two counts of assault and was fined R 60-00 or thirty days imprisonment. In 1994 he was convicted of two counts of fraud and the two were taken together for purposes of sentence and was fined R 1 000-00 or one year imprisonment. He was 31 years old and had been staying with the deceased as husband and wife for about two and a half years. They both have a one and a half year old child. He also has an eleven year old child. He passed standard 5 at school. He was at the time of his arrest employed as a labourer. Himself and the deceased were both under the influence of liquor. The concentration of alcohol from the blood specimen taken from the deceased was 0.24g per 100 millilitres.

5. Sentencing is pre-eminently within the discretion of the trial court. An appellate court can only interfere in instances where there is material misdirection by the trial court which vitiates the exercise of its discretion, or in cases of marked disparity between the sentence imposed by the trial court and that which the appellate court would have imposed. (See: **S v Malgas** 2001(1) SACR 469 (SCA) at 478d-g; **S v M** 1982(1) SA 589(AD) at 592G-H).
6. In *casu* the trial Magistrate correctly found that the offence committed by the appellant complied with circumstances

described in Part 2 of Schedule 1 of the Criminal Law Amendment Act 105 of 1997. The court was entitled to impose minimum sentence of 15 years imprisonment if it is of the view that there are no substantial and compelling circumstances justifying the departure. The Regional Magistrate's approach in interpreting the Act is recorded as *inter alia* as follows:-

⁺gMnr Freeman as die Hof u vonnis dan moer die Hof sommer wegspring daarmee om dit uit te wys dat u nou een van daardie persone is wat getref is deur die sogenaamde verpligte minimum vonnise, Artikel 51 van Wet 105 van 1997 bepaal dat, as 'n persoon ouer as agtien jaar is en hy het 'n moord gepleeg na die 1ste Mei 1998 en hy word deur die Hof skuldig bevind aan die moord dan moet die Hof hom 'n minimum vonnis van vyftien jaar oplê, soos die Engelse sê finish en klaar, hierdie Hof het geen jurisdiksie nie, ek kan nie iets anderste vir u oplê nie met die beste wil ter wêreld en ek hoor wat u Regsvertegenwoordiger vir die Hof gevra het wat u aan hom oorgedra het vir 'n buite strafe k kan u niks anderste as vyftien jaar tronkstraf oplê nie, ek mag nie, daarvoor is die gesag duidelik dit is gykte reg nou in die Noord-Kaap ook ek het nie 'n keuse nie, waar die Hof darem vir u tegemoet kan kom, want in hierdie saak miskien kan ek dit miskien ook net dadelik uitwys is dit ook so dat daar geen dwingende of wesenlike omstandighede bestaan nie, u omstandighede is maar basies dieselfde as alle ander gevalle waar hierdie minimum verpligte vonnisse van toepassing is wat ek die afgelope tyd verhoor het en ek sal nou-nou daarby stilstaan. ”

⁺⁺gc U is vir all praktiese doeleindes 'n eerte oortreder wat geweldsoortredinge aanbetref, u het so 'n blaspie op u record, maar dit is so lank terug en dis so gering date k dit heeltemal buite berekening laat, drank het 'n rol gespeel u het boonop berou getoon, u kom skuldig pleit dit is alles versagende omstandighede, maar hierdie versagende omstandighede leger nie die minimum vonnis wat ek vir u moet oplê nie. Ek neem ook die belange van die gemeenskap in aanmerking, maar dit is nie eens iets waaraan ek my steur in hierdie geval nie, soos ek sê ek het nie 'n keuse nie daarom date k vir u netnou al gesê het ek hoor wat u Regsvertegenwoordiger vir die Hof vra dat ek vir u buite straf moet oorweeg, ek mag nie, die Wet sê ek moet vir u daardie straf oplê en ek kan nie daarvan afwyk nie, my hande is afgekap en dit is omdat mense nie wil hoor nie.”

7. It is indeed correct as Mr Barnard, on behalf of the respondent has submitted that this case was concluded before the decision of the Supreme Court of Appeal in *S v Malgas* (supra). The Magistrate relied on the decision of this division in *S v Boer en Andere* 2000(2) SACR 114 (NC) which approach has since been corrected in the *Malgas* decision (supra). To simplify matters, the Regional Magistrate's view that his hands have been chopped off, and sentencing discretion taken away, and that ordinary mitigating and aggravating, but something exceptional must be present to conclude that substantial and compelling circumstances exist, is in my view a misdirection. (See: ***S v Malgas*** (supra) at 481h – 482g).
8. Given the misdirection referred to in paragraph 7 above, this court to at large to reconsider the matter of sentence afresh. The fact that the appellant pleaded guilty, was provoked, was under the influence of liquor, that he acted on the spur of the moment, that his relevant previous conviction was relatively old, are to me strongly mitigation factors which cumulatively rank as substantial and compelling. However, this crime remains serious and the sentence to be imposed should be assessed paying due regard to the bench mark provided by the Legislature. In my view a sentence of 10 years would be appropriate.

In the result I make the following order:

1. The appeal against sentence succeeds and the sentence of 15 years imprisonment is set aside.
2. The appellant is sentence to 10 years imprisonment.
3. The sentence in (2) above is antedated to 13 February 2000.

L P TLALETSI
ACTING JUDGE PRESIDENT

I concur.

F E MOKGOHLOA
ACTING JUDGE

On behalf of the Appellant: **Adv B Segone**
(Legal Aid Board)

On behalf of the Respondent: **Adv T Barnard**
(Director of Public Procecutiions)