IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA & R 59/2018
Date Heard: 22 AUGUST 2018
Date Delivered: 9 October 2018

In the matter between:

LIONEL PETRUS CLAASEN **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

DAWOOD J

1. The Appellant herein appeals against the sentence of 15 years imprisonment that was imposed upon him in respect of his conviction on a count of murder pursuant to his plea of guilty.
2. The Appellant *inter alia* in his section 112 (2), statement that was read into the record, stated (as translated by me):
   a) That he unlawfully and intentionally killed the deceased.
   b) That he knew the deceased because the deceased had previously assaulted his father.

c) That on the day in question he saw the deceased push his father against the fence and assault his father.
d) That he admits that he was home and he grabbed a knife and ran towards his father.
e) That he admits that he was *very upset and angry* because the *deceased was assaulting his father*.
f) That he *wanted to scare the deceased and get him to leave his father and did not intend to kill the deceased.*
g) He closed his eyes and stabbed the deceased *once* with the knife.
h) He accepts that although it was *not his direct intention* to kill the deceased he *foresaw* the *possibility* that if he *stabbed* the deceased he could *bring about his death* and therefore his intention was one of *dolus eventualis*.

3. The state accepted his plea of guilty.
4. The Magistrate found him guilty and convicted him on the basis of the plea tendered.
5. The Appellant had unrelated previous convictions of possession of drugs.
6. In sentencing the Appellant the learned Magistrate *inter alia* (as translated by me):
   a) Correctly found that section 51 (2) *(A)* of Act 115 of 1997 was applicable and that a minimum sentence of 15 years imprisonment was applicable in the absence of substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.
   b) Considered that the Appellant was 28 years of age, unmarried but in a live in relationship and that there is one minor child born of the relationship who was 2 years and 7 months at the time.

c) Took into account that the Appellant was gainfully employed and earning R2600-00 per month and was the sole bread winner.
d) Considered that the Appellant was in custody from the date of his arrest in January.
e) Had regard to the fact that the accused admitted committing the offence from the beginning.
f) Further had regard to the fact that the *Appellant had pleaded guilty* and *demonstrated remorse.*
g) Considered that the Appellant is a first offender in respect of an offence involving violence.
h) Stated that the Appellant's mitigating circumstances counts as mitigating factors in his favour.
i) Found that there was however nothing unique in the personal circumstances that qualified as substantial and compelling circumstances.
j) Stated that the fact that the Appellant was a first offender is not a substantial and compelling circumstance in light of the fact that the Act itself makes provision for this.
k) Stated that the interest of society must also be taken into account by the court.
l) Found that in considering the seriousness and the prevalence of violent offences, specifically murder, that occurs on a daily basis in that area, society considers these offences in a serious light and demand that persons who are found guilty of these offences receive heavy sentences but also demand that his personal circumstances are given due consideration.
m) Found that the community is in the main concerned with the deterrent aspect to prevent like-minded offenders from committing such offences.

n) Found that what is required is a balancing of all the interests without over or under emphasizing any aspect.

o) Further found that the Appellant was convicted of one of the most serious offences where his action had led to the death of another person.

p) Took cognizance of the fact that it was argued on behalf of the Appellant, that in light of the actions of the deceased that led to the commission of the offence, the court should impose a long term of imprisonment, but less than the minimum sentence of 15 years.

q) Stated that the peculiar circumstances of the case always play an important role in determining the appropriate sentence.

r) Stated that a great deal was made of the fact that the actions of the deceased constituted provocation that led to the commission of the offence.

s) Stated that the deceased was an ambulance driver and seemingly a loved person in society.

t) Found that the case was attended by the deceased colleagues and received a great deal of publicity and it is always heart sore that a person who was a good citizen loses his life in such a manner.

u) Took into account that the deceased was a father of 6 children who now have to grow up without a father as a result of the actions of the Appellant.

v) Also considered that the deceased was the breadwinner of the children as well as his parents.

w) Found that the deceased had on the day in question upon seeing the Appellant's father stopped his vehicle and went to the Appellant's father.

x) Found that he did not consider this to mean that the deceased was not a good worker because this did not interfere with his normal work nor was it stated that he was on his way to any emergency at the time.

y) Stated that he is not justifying the actions of the deceased for a single minute.

z) Stated further that the deceased approached a father pushed him against a fence and slapped him.

aa) Stated that the Appellant saw this from a distance and was upset, as a child, that his father was being assaulted in this manner.

bb) Stated that the Appellant was not a youngster or an underage son who witnessed an assault upon his father that disturbed him terribly.

cc) Found that the Appellant is a fully grown man of 28 years.

dd) Found that according to him there were so many other manners to approach the situation, there was *no reason* whatsoever for the *Appellant to arm himself with a knife and run to the scene with the only option available to him being that of stabbing the deceased with the knife.*

ee) Found that the fact that the Appellant closed his eyes is irrelevant since one can kill someone with your eyes closed and it was very clear that on the *day in question the Appellant's intention was to kill the deceased.*

ff) Found that as a 28 year old the Appellant could have gone to the scene and requested the deceased to leave his father and if the deceased did not, he could have wrestled with him.

gg) Found that the Appellant was a big adult man who could have, if necessary physically got the deceased away from his father.

hh) Found that there was *absolutely no reason* for the *Appellant to arm himself with a knife* and *go to the scene and stab the deceased.*

ii) Found that the Appellant's father's life was clearly not in danger.

jj) Found that it was clear *that the Appellant decided to use a knife* that is why he *grabbed the knife* and *went to the scene* and the *first thing he* did at the *scene was stab the deceased without even talking*. It is *clear that that was the Appellant's intention on the day in question.*

kk) Accordingly found in his opinion that these circumstances were not substantial and compelling circumstances.

ll) Further found that on a consideration of the totality of the circumstances that had been placed before him, there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentence.

mm) The Appellant was accordingly sentenced to 15 years imprisonment in terms of section 51 (2) *(A)* of Act 105 of 1997 and declared unfit to possess a firearm in terms of section 103 (1) of Act 2000.

7. It is established law that an appeal court does not have unfettered power to interfere with the sentence imposed by a trial court. This is because the trial court exercises a strict or narrow discretion in respect of sentencing, and an Appellate court would accordingly only interfere if there has been a misdirection or the sentence imposed by the trial court and that which the appellate court would have imposed is so disparate that the only inference is that the trial court did not exercise its sentencing discretion properly[1].

8. In *Dyakophu*[2] it was emphasised that:

> "…Binns-Ward J in *S v Tafeni*, the learned judge said that while the *determination of an appropriate sentence* entails the *exercise of a judicial discretion* in the *narrow or strict* sense, when *deciding the question as to whether or not substantial and compelling circumstance exist*, the trial court *exercises a wider discretion.* The latter

[1] *S v Monyane and Others* 2008 (1) SACR 543 (SCA); see also *S v Shapiro* 1994 (1) SACR 112 (A) at 119 j – 120 C; *Blank v The State* 1995 (1) SACR 62 (A) and *S v Malgas* 2001 (1) SACR 469 (SCA).
[2] *Dyakophu v The State* (ECG) unreported case no CA257/2017 of 6 June 2018 at para 10, 11 and 12

issue is accordingly *subjected to much greater scrutiny by an appellate court*, in order to determine whether the *reasons provided* for the finding are *supported by the evidence*. That issue must nevertheless be considered with "*due heed to the discretionary nature of the decision by the lower court, even if in the wide sense of the concept*". An appellate court's *power to interfere with a trial court's finding regarding the existence of* substantial and compelling circumstances is *accordingly not limited only to cases where there has been a misdirection or failure to exercise the sentencing discretion properly*. (My emphasis.)

"Our law recognises the fundamental difference between the exercise of a strict or narrow discretion as opposed to a wider one, and the approach that an appellate court must adopt to adjudicate challenges to either. (See in this regard the authorities cited in S v Tafeni (supra). When exercising a narrow discretion to determine an appropriate sentence, the trial court is required to weigh up a number of possible sentencing options. In choosing a particular sentence it is exercising a strict discretion which can only be interfered with in the abovementioned limited circumstances. The determination regarding the existence or absence of substantial and compelling circumstances is, however, essentially a factual enquiry which is either right or wrong. It is for this reason that a trial court's finding in this regard must be subjected to more exacting scrutiny, and the power of an appellate to interfere cannot be limited to those grounds that apply to the consideration of an appropriate sentence. I am accordingly in respectful agreement with the views expressed by Binns-Ward J in S v Tafeni (supra). (My emphasis.)

"where the sentence appealed against was imposed in circumstances where a prescribed sentence was applicable and where the issue of substantial and compelling circumstances was involved the approach on appeal will, however, be different". [Footnotes omitted.]

"The approach which a trial court must adopt when determining the issue of whether substantial and compelling circumstances are present in a particular case is well established in our law. They can be summarised as follows:

a) *the factors which traditionally play a role in sentencing namely, the personal circumstances of the accused, the nature and severity of the crime, and the interests of society continue to play a role;*
b) *the prescribed minimum sentences must be used as point of departure in all cases where they are of application and should not be departed from lightly or for flimsy reasons;*
c) *the ultimate question is, whether having regard to the above-mentioned triad of factors, the imposition of the minimum sentence would be so disproportionate, that it would result in an injustice, in which event the court must impose a lighter sentence. (S v Malgas 2001 (1) SACR 490; S v Vilakazi 2009 (1) SACR 552 (SCA)".*

9. In *S v PB*[3] it was held…"[*T*]*hat a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not".*
10. This approach was followed in *S v GK*[4] where it was held that:

> "The values of the Constitution are better served by an interpretation which does not fetter the appellate court when it comes to the question of the presence of substantial and compelling circumstances.
>
> To allow an appellate court to make its own value judgment on appeal provides accused persons with greater safeguards against the imposition of disproportionate punishment."

11. It is accordingly evident that this Court similarly needs to approach the matter taking due cognizance of whether or not the facts which were considered by the sentencing court are substantial and compelling or not and whether the factually inquiry was right or wrong.

[3] 2013 (2) SACR 533 (SCA) at para 20.
[4] 2013 (2) SACR 505 WCC at para 7.

12. The facts of this case demonstrate:

a) That the Appellant's intention, as expressed in his plea explanation on the day in question was to scare the deceased and get him to leave his father.
b) That he had no direct intention to kill the deceased.
c) That he was upset and angry.
d) That his father, having regard to the argument presented by his legal representative, was a small man who did not have proper use of one hand and accordingly could be considered frail and defenseless.
e) That the Appellant stabbed the deceased once.
f) That the Appellant did not run after the deceased when the deceased ran off towards the ambulance but remained with his father, having regard to what was placed before the Magistrate in argument, thus confirming that his intention was to get the deceased away from his father.
g) The learned magistrate accordingly in light of the facts presented to him and accepted by him erred in finding that the appellant's intention on the day in question was to kill the deceased as this is in direct conflict with his plea explanation. There was no *dolus directus* involved.
h) The intention was in the form of *dolus eventualis* as accepted and not, as found by the Magistrate, that the Appellant formed the intention to kill or even stab the deceased when he picked up the knife and went to the scene, but rather to scare the deceased into leaving his father as illustrated in his plea explanation.
i) The Learned Magistrate accordingly was wrong in finding, after accepting the plea explanation, that the intention of the Appellant when he grabbed the knife was to stab the deceased as opposed to wanting to scare him off.
j) A great deal of speculation can be advanced as to whether or not the Appellant could have known that the deceased was unarmed and accordingly

no threat to the life of the Appellant's father or whether or not that thought even crossed the Appellant's mind when he grabbed the knife and ran to the scene, angry and upset and wanting to rescue his father.

k) It is correct that an adult would certainly be expected to be more able to resist the impulse to attack the perpetrator and exact revenge and to deal with the situation rationally and reasonably and within the prescripts of the law.

l) However one cannot lose sight of the fact that this was an emotionally charged situation and whilst the gravity and seriousness of the offence can never be undermined and whilst one condemns the actions of the Appellant in the strongest possible terms one has to have regard to the circumstances under which it was committed and this cannot pale into insignificance but must be given due consideration.

m) The taking of the law into your own hands and attacking an unarmed man with a knife is reprehensible whatever the underlying cause or reason or provocation for the attack.

n) The Appellant's, albeit excessive and inexcusable criminal act in the circumstances, were motivated by being upset and enraged by an attack on his defenceless, frail old father being assaulted by the deceased.

o) In *S v Kordom*[5] Olivier J stated at paragraph 17:

> "There was no factual basis for a finding that the Appellant had consciously chosen to take the law into his own hands, rather than following the route of laying a complaint against the deceased. Even if he had, however, been motivated by a desire to avenge the attack on his father, this may still have constituted a mitigating factor…".

[5] 2018 (1) SACR 173 (NCK).

p) The counsel for the state attempted to distinguish this case from that of *Kordom, supra*.

q) In *Kordom* the accused was convicted in the Regional Court on his plea of murder, in that he stabbed the deceased who had a short while earlier stabbed his father in the face with a broken bottle. The fatal stab wound was in the deceased's neck. The appellant had after the attack on his father, fetched a knife and proceeded to the deceased whereafter he inflicted the fatal wound.

r) In this case although no weapon was used by the deceased the assault was in progress and the Appellant's intention, as accepted, was to scare the deceased away.

s) The Appellant's intention was to protect his father as can be seen from the fact that after stabbing the deceased and upon him running away he did not pursue the deceased but remained with his father. The principle applied in *Kordom*'s case is accordingly equally applicable in this case.

t) There was, as already iindicated, no factual basis for a finding that the Appellant had consciously chosen to take the law into his own hands by grabbing the knife and running towards the deceased.

u) On the contrary the uncontroverted and accepted evidence of the Appellant was that he had wanted to scare the deceased.

v) The Appellants undisputed expression of remorse, the absence of a direct intention to kill, the role of the deceased's provoking behavior in respect of the attack on the appellant's defenceless father and the absence of any history of physical violence on the part of the Appellant in addition to the usual mitigating factors pertaining to his prospects of rehabilitation, his age, the fact that he was the sole breadwinner and had been gainfully employed cumulatively viewed do in fact constitute substantial and compelling

circumstances warranting a departure from the prescribed minimum sentence and the Magistrate's finding of fact contrary to this was accordingly wrong in this case.

w) The learned Magistrate erred in his factual findings, particularly with regard to the nature of the intention present when the offence was committed.

x) This court is accordingly entitled to interfere with the sentence and impose a sentence that it considers appropriate in the circumstances.

y) In considering an appropriate sentence the court has to in addition to the mitigating circumstances of the Appellant, also to consider the gravity of the offence, the fact that the Appellant has deprived the deceased's family of a son, a father, a partner, a breadwinner and deprived his collegues of a useful citizen who served his community well and made a valuable contribution to the upliftment of the community.

z) In considering a lesser sentence the court must bear in mind that the legislature has ordained these minimum sentences having due regard to the needs of society.

aa) In *S v Jimenez*[6] Lewis AJA directed as follows:

> "There is no doubt that in the exercise of the sentencing discretion a court should have regard to public policy and the public interest. The expression of policy in a statute – as in the Criminal Law Amendment Act is most certainly a factor that should be taken into account. Indeed, that statute shows the disquiet experienced by the public, represented through the Legislature at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised".

[6] 2003(1) SACR 507 (SCA) at page 512 F – I.

bb) The sentence imposed should still make it clear that the courts will not countenance behavior like this, even if preceded and provoked by a completely unjustified attack like the one that the deceased launched against the Appellant's father.

cc) The sentence imposed also has to ensure that like minded offences are deterred from resorting to taking the law into their own hands instead of calling the law enforcement agencies and allowing the law to run its course.

dd) A clear message has to be sent out that the court will not countenance such action.

13. In my view an appropriate sentence in the circumstances of this case having regard to all the relevant factors mitigating and aggravating as well as the relevant authorities would be 12 (twelve) years imprisonment.

14. I accordingly make the following order:

a) The Appeal succeeds.

b) The sentence of 15 (Fifteen) years imprisonment is set aside and substituted with a sentence of 12 (twelve) years imprisonment ante-dated to 7th of April 2016.

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F. B. A DAWOOD

JUDGE OF THE HIGH COURT

I agree,

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N GQAMANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the appellant: Adv. Charles

Instructed by the Legal Aid South Africa

Counsel for the respondent: Adv. Sinclair

Instructed by the Director of Public Prosecutions, Grahamstown