27/11/12

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case no: A773/2010

In the matter between:

SMARTRYK ACKERMAN APPLICANT

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
27/11/2012
Date Signature

AND

THE STATE RESPONDENT

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JUDGMENT

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BAQWA J

[1] The appellant was convicted in the Regional Magistrate's Court Potchefstroom and sentenced to eight (8) years imprisonment three years of which were suspended.

[2] The charge was that on 6 October 2007near Plot 22, Mooibank the appellant had unlawfully and intentionally attempted to murder one Hannes De Villiers by stabbing him several times with a broken bottle.

[3] The court **a quo** granted him leave to appeal against both conviction and sentence on 31 March 2009.

[4] The background to this case is briefly as follows. The appellant stayed on a plot owned by the complainant and there had been some misunderstanding between them. On the day in question the altercation had become physical. The appellant initially attempted to butt complainant with his head and thereafter attempted to hit him with fists. When this line of attack was not successful he broke two beer bottles and thereafter stabbed the complainant on the neck. The complainant did not retaliate.

[5] Complainant suffered several open wounds on his neck. Thereafter the appellant refused to open the gate so that complainant could not immediately get help. When complainant eventually got into his motor vehicle the accused pulled out the keys and threw them away.

[6] It was part of the appellant's defence that he did not intend to stab the complainant with a bottle but to throw beer at him. Counsel for the appellant submits that complainant may have been hurt by mistake.

[7] In my view this submission is not borne out by the manner in which the attack on the complainant was mounted. The appellant was without doubt the aggressor and his actions were deliberate and incremental. Slashing at a person's throat with the sharp edges of a broken bottle can hardly be called a mistake. In fact complainant was during those moments literally staring death in the face.

[8] I am accordingly of the view that the state proved its case beyond reasonable doubt.

[9] Regarding sentence, the appellant was 34 years old when he committed the offence. He had two children to maintain. He was not formally employed though he worked as a subcontractor in the construction industry. His income was not properly placed on record. He was under the influence of alcohol when he committed the offence and he had spent a period of about a year in custody awaiting trial.

[10] it is trite law that in every appeal against sentence, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and that the court should be careful not to erode such discretion and should alter sentence in exceptional circumstances.

In **S v Salzwedel 1992(2) SACR 586(SCA)**
this principle was restated as follows:

*" An appeal court is entitled to interfere with a sentence imposed by trial court in a case where the sentence is "disturbingly inappropriate", or totally out of proportion to the gravity or magnitude of the offence or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably".*

[11] According medical evidence, the appellant nearly severed a major artery in complainant's neck. If he had managed to strike that artery, complainant would have bled to death even before reaching the doctor's surgery. That underlines the gravity or magnitude of the offence with which the appellant was charged. This was an aggravating factor which the court **a quo** could not ignore.

[12] The court had to weigh the aggravating factors against the personal circumstances of the appellant and I do not accept the appellant's submission that the trial court only paid lip service to the appellant's personal circumstances.

[13] The approach by a court of appeal when considering sentence is correctly summarised in

**S v Pieters 1987(3) SA 717 A**

Where it is stated as follows"

*"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers".*

This is the approach which this court has taken.

[14] In the result, I propose that the following order is made:

The appeal against both conviction and sentence is dismissed.

It is so ordered.

**S.A.M BAQWA**
**JUDGE OF THE HIGH COURT**

I agree.

**L.G NKOSI ~~THOMPSON~~** Thomas
**ACTING JUDGE OF THE HIGH COURT**