(IN THE NORTH GAUTENG HIGH COURT, PRETORIA)
(REPUBLIC OF SOUTH AFRICA) 14/3/14

A582

CASE NO: **A583/2013**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

14.03.14
DATE

SIGNATURE

In the matter between:

MESHACK THAPELO NCUBE **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGEMENT

TEFFO, J:

[1] The appellant was convicted in the regional Court sitting at Ventersdorp on 27 July 2012 for murder after pleading guilty and sentenced to 15 years imprisonment.

[2] He appeals against sentence with the leave of the court *a quo.*

[3] The facts in this matter are the following: on 6 December 2011 the appellant and the deceased who lived together as husband and wife were visiting friends in the township where they were drinking. The appellant then left and went home leaving the deceased behind. Later on he returned to the township to fetch the deceased. Upon arrival at their homestead a quarrel ensued and they started fighting. The appellant strangled the deceased on her neck and hit her with a fist on her face causing her to fall backwards as a result of which she hit her head on the floor. She bled excessively and this resulted in her death.

[4] The appellant bases his appeal on the fact that the sentence imposed by the court *a quo* is shockingly inappropriate; it is out of proportion to the totality of the accepted facts in mitigation; the sentence disregards the period which he spent in custody awaiting trial; the court *a quo erred* by not imposing a shorter term of imprisonment coupled with a further suspended sentence, in view of the following facts:- Absence of planning; the age and personal circumstances of the appellant; the rehabilitation element; the mitigating factors inherent in the facts proven. The court *a quo* overemphasised the following factors:- the seriousness of the offence; the interests of society; the prevalence of the offence; the deterrent effect of the sentence; the retributive element of sentencing.

[5] It is trite that, as, inter alia, held in S v Rabie 1975 (4) SA 855 (A) at 857 D- F that in every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-

"(a) *should be guided by the principle that punishment is 'pre-eminently a matter, for the discretion of the trial court, and*

(b) *should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised."*

[6] Counsel for the appellant submitted that: the fact that the appellant pleaded guilty is a sign of remorse; that the crime commited is a crime of passion; the appellant had consumed alcohol at the time; he used his fist to hit the deceased and did not use a weapon; that he has now served a period of 10 (ten) years imprisonment; that the crime was not planned.

[7] Counsel for the State submitted that:- the sentence imposed cannot be seen to be strikingly inappropriate in the light of the following aggravating circumstances:- the appellant has a previous conviction for the same offence; he behaved in a violent manner towards the deceased, a female person who was tiny and of small built compared to the body physique of the appellant. The nature of the injuries sustained by the deceased as noted in the post- mortem report, *viz*, several facial fractures, lacerations and abrasions, are of a serious nature.

[8] Counsel for the State further submitted that the court a quo considered all the factors mentioned *supra* and found them to be substantial and compelling circumstances justifying the imposition of a lesser sentence of fifteen (15) years imprisonment instead of twenty (20) years imprisonment.

[9] It is common cause between the parties that the appellant killed a woman with whom he had lived as husband and wife. This was a defenceless woman and she was killed in her homestead where she felt she was safe. It is immaterial whether a fist or a weapon was used in the killing of the deceased, the fact of the matter is that the deceased's life has been taken away. No one has the right to kill someone and the actions of the appellant were unwarranted. It is true that both the appellant and the deceased were under the influence of alcohol at the time but this does not justify what the appellant did. It is not clear from the record as to what prompted the appellant to do what he did except to say that he was drunk.

[10] It is clear from the record that the appellant is not a first offender. He has a string of previous convictions ranging from 1988 to 2002. Among these previous convictions, two of them committed in 1990 and 2002 are for assault and assault with the intent to do grievous bodily harm. Coupled with this, he has a previous conviction of murder which was committed in 1996.

[11] Counsel for the appellant submitted that although the appellant has a previous conviction of murder, a period of 10 (ten) years has lapsed and the appellant should have been treated as a first offender by the court *a quo*. He argued further that because of the presence of substantial and compelling circumstances, a sentence of less than 15 (fifteen) years imprisonment should have been imposed.

[12] I do not agree with the submission made by the appellant's counsel in this regard. In terms of the provisions of section 51(2)(a) of the Act 105 of 1997(" the Minimum Sentences Act") an accused person who has been convicted of murder and who is a first offender should be sentenced to a period of 15 (fifteen) years imprisonment where the court finds no substantial and compelling circumstances justifying it to impose a lesser sentence. Where the accused person is a second offender for murder and the court does not find substantial and compelling circumstances, the prescribed minimum sentence is 20 (twenty) years imprisonment.

The above subsection does not provide that where such a second offender was convicted of murder more than 10(ten) years ago, he should be treated as a first offender for the purpose of sentence. It simply refers to an accused person who is a second offender for murder. The appellant is a second offender for purposes of section 51(2)(a) of the Minimum Sentences Act. The prescribed minimum sentence in respect of this subsection is 20(twenty) years imprisonment where the court found no substantial and compelling circumstances. The court *a quo* correctly found that there are substantial and compelling circumstances justifying it to impose a lesser sentence than the prescribed sentence of 20(twenty) years imprisonment.

[13] It is my considered view that the court *a quo* applied its mind to the facts placed before it and took all factors into account when it passed sentence which include mainly the interests of society, the nature and the seriousness of the offence and the personal circumstances of the appellant. I find the reasons given for its finding that there are substantial and compelling circumstances justifying it to deviate from the minimum sentence of 20 (twenty) years imprisonment, reasonable.

[14] It is my view that the sentence imposed is proportionate to the offence. There was therefore no misdirection on the part of the court *a quo*.

[15] I accordingly cannot find any reason to interfere with the sentence that has been imposed by the court *a quo*.

[16] I therefore propose the following order:-

16.1 The appeal against sentence is refused.

M J TEFFO

JUDGE OF THE HIGH COURT

I agree

C PRETORIUS
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	M C NDALANE
INSTRUCTED BY	PRETORIA JUSTICE CENTRE
FOR THE STATE	M D MATJOKANA
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF HEARING	21 FEBRUARY 2014
DATE OF JUDGMENT	14 MARCH 2014