

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

**IN DIE NOORD GAUTENG HOË HOF, PRETORIA
(REPUBLIEK VAN SUID-AFRIKA)**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<p>08/08/14</p> <p><i>[Signature]</i></p>	

Case number: A258/2014

Datum: August 2014

13/8/2014

In the matter between:

MIGUEL MASHABA

Appellant

and

THE STATE

Respondent

Judgment

MUSHASHA AJ:

1. This is an appeal against the sentence imposed by a regional court magistrate. The Appellant was charged with and convicted of one count of murder and was sentenced to fifteen years imprisonment.

Leave to appeal against the sentence was granted by the court below.

2. The facts may be summarized as follows.

- On the 25th of December 2011, Christmas day, the appellant and his girlfriend were attending a party at a friend's house at Khama extension.
- Raymond Zithe (the deceased) was also present. The deceased and the appellant were drinking beers. The Appellant started fighting with his girlfriend and the girlfriend ran to where the deceased and others were seated. The deceased reprimanded the appellant and asked him to refrain from assaulting his girlfriend.
- At the time, the appellant had concealed a hammer under his clothes. As deceased was trying to make peace between the appellant and his girlfriend, the appellant then struck the deceased with the hammer on the back of his neck. The deceased fell to the ground. The deceased was ferried to the nearby clinic whereafter he was transferred to a hospital. The deceased died some 5 days after the incident.
- According to the medical evidence deceased died as a result of pneumonia due to cervical neck injury.

- The defence did not dispute the cause of death. However the appellant contended that he had a fight with deceased during which the deceased fell onto some bricks and that in all probability the injuries the deceased sustained were as a result thereof.
- The court below made a factual finding that there had not been a fight between the deceased and the appellant and that the deceased had died as a result of pneumonia due to cervical neck injury after being struck with a hammer.

3. It is trite that the powers to interfere on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

See: S.V. Kekana 2013(1) SACR 101(SCA) at p 105.

4. Upon reading the trial courts record I could find no basis for interfering with the trial's court finding regarding the cause of injuries.
5. Regarding the question of sentence, the murder falls within the minimum sentencing regime to wit section 51 (2) (a) (i) of the

Criminal Law Amendment Act 105 of 1997. In terms of this Act, the prescribed minimum sentence for a first offender is 15 years. A trial Court may impose a lesser sentence, should it be established that there exists substantial and compelling circumstances justifying such lesser sentence.

6. It was submitted to us by Counsel for the appellant that the following are mitigating factors in favor of the appellant which collectively considered constitute substantial and compelling circumstances:

6.1 The appellant was a first time offender;

6.2 The appellant was incarcerated for more than one (1) year awaiting finalization of the case. Counsel referred us to *S vs Radebe and Another* 2013 (2) SACR 165 (SCA);

6.3 The appellant was a breadwinner;

6.4 The appellant was probably under the influence of liquor after consuming liquor at the party;

6.5 The crime was committed at the spur of the moment when appellant was engaged in a fight with his girlfriend;

6.6 There are prospects of rehabilitation. Appellant's Counsel referred to the case of Director of Public Prosecutions, High

Court, Pretoria vs Thusi and Others 2012 (1) SACR 42
(SCA).

7. Upon reading the judgment on sentence by the Magistrate is the trial Court, I got the impression that the facts set out above were given adequate weight in determining the existence of substantial and compelling circumstances.
8. In S vs Madikane 2011 (2) SACR 11 (ECG), the Court held “where a Court has convicted an accused for which a minimum sentence has been prescribed in section 51 of the Criminal Law Amendment Act 105 of 1997, the Court is required to impose the sentence that is prescribed unless substantial and compelling circumstances as contemplated by section 51 (3) of the Act are present and justify a less severe sentence. Such circumstances may comprise any of the factors that Courts traditionally take into account as mitigating and may be the cumulative effect of a number of such factors...”
9. It is my view that all circumstances set out in paragraph 9.1 to 9.6 above (even when collectively considered) do not constitute substantial and compelling circumstances warranting departure from the imposition of the minimum sentence of 15 years,

particularly taking into account the following aggravating circumstances:

9.1 The appellant was at all relevant times prepared to act violently. He had armed himself with the dangerous weapon to wit a hammer which he concealed under his clothing;

9.2 With the dangerous weapon he directed a blow at a very vulnerable part of the deceased's body (the neck);

9.3 The appellant waited until the deceased had turn his back on him before attacking him and had time to choose where on the body of the deceased he wanted to strike the deceased with the hammer;

9.4 The deceased and the appellant had no quarrel. All the deceased did was admonish the appellant not to attack a defenceless woman; and

9.5 The appellant did not express any sense of remorse, but instead presented an exculpatory version.

10. In imposing sentence consideration should be given to the gravity of the offense and the legitimate expectations of the society that serious crimes, should be seriously punished.

11. Upon evaluation of all the circumstances of this case I am of the view that the sentence of 15 years imprisonment imposed by the trial Court cannot be faulted.

12. It follows then that the appeal against the sentence of 15 years cannot succeed.

In the result I propose the following order:

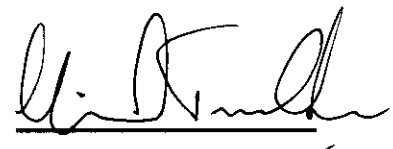
That the appeal be dismissed and the conviction and sentence imposed by the court below be confirmed.



M. J. MUSHASHA

ACTING JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

I AGREE AND IT IS SO ORDERED



N. B. TUCHTEN

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION