IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A250/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

11 JANUARY 2022
DATE

[redacted]
SIGNATURE

In the matter between:

TSHEPO COMFORT NZINDE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

[1] The appellant was initially charged with murder but pleaded guilty in the Regional Court sitting at Soshanguve on a count of culpable homicide. He was sentenced on 26 June 2019 to 10 years imprisonment, of which 4 years was suspended for a period of 5 years, on condition that he was not found guilty of culpable homicide or assault during the period of his suspension. The appellant appeals his sentence with leave of the Court *a quo*.

BACKGROUND

[2] The respondent accepted the contents of a statement narrating the facts leading up to the appellant's plea of guilt, made and admitted in terms of section 112 of the Criminal Procedure Act 51 of 1977 ("the Act"). This statement was admitted as Exhibit A. The appellant admitted that he wrongfully and negligently caused the death of the deceased. On 6 May 2018 at about 10h00, and on his way to his residence, the appellant met the deceased who was also on his way to where he lived, pushing a trolley containing a variety of vegetables. The appellant offered to assist the deceased, and the deceased allowed him to. A quarrel between the two ensued the appellant struck the deceased on the head, the deceased fell down and bled. The appellant transported the deceased to a clinic to be treated and he was pronounced dead on arrival. The appellant stated that when he threw the brick at the deceased there was no threat to his life.

[3] Before sentence the Learned Magistrate was given a Pre-Sentencing report and a Victim Assessment report, which were admitted as Exhibit B and C and these reports form part of the appeal record. Although the former report recommended a term of imprisonment, it was the legal representative of the appellant who suggested a shorter term of imprisonment coupled with correctional supervision in terms of section 276(1)(i) in terms of the Act. As I see it the court *a quo* did not mention the

possibility of correctional supervision and counsel for the appellant except for making mentioned thereof, did not deal with it.

THE LAW

[4] The appellant did not testify in mitigation, however, the learned Magistrate considered the personal circumstances of the appellant which were mentioned in the pre-sentencing report and in the heads of argument of his counsel. The appellant was a 19 year old first offender. He dropped out of school at grade 8 and he lived with his mother on whom he was dependent as he was unemployed. He admitted to abuse drugs, a habit he tried to discard, and this aspect was touched upon when sentencing was considered by the trial court. It was also mentioned that he sought help for the deceased after the assault and confessed to the police and had expressed remorse. It was contended by counsel for the appellant that the only issue for consideration in this appeal was the proportionality of his sentence. It was contended that the conduct of the appellant occurred when he was under the influence of liquor and, that he had been involved in an argument over payment for pushing the trolley of the deceased. Counsel for the respondent contended that the conduct and explanation of the appellant did not translate to a genuine remorse and, that the seriousness of his conduct far outweighed the personal or mitigatory circumstances of the appellant.

[5] It is trite that a court of appeal would not ordinarily interfere with a sentence imposed by a trial court unless, it finds that there was a material misdirection on the part of such court. Further, a court of appeal would interfere with such sentence imposed in the absence of material misdirection, if it finds that it would be justified to do so and if it appears that there is a disparity between the sentence imposed, with such sentence as would have been imposed had the court of appeal been the trial court and, where the said sentence was found to be shocking, startling or disturbingly inappropriate, *S v Malgas* 2001(1) SACR 469 (SCA) at 478 C-H.

[6] Since the appellant pleaded guilty, the trial court is dutybound, when determining sentence to also consider the circumstances under which the assault took place. This is to be done within the confines of the plea explanation and the answers given to the court, if any, in seeking clarity on the explanations given for the offence. The learned Magistrate echoed the sentiment stated in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA), that sentencing in the circumstances of this case was a difficult task, especially where he had to balance the interests of the society and those of the aggrieved family and those interests of the accused person in considering a sentence that was fair.

[7] In *S v Nxumalo* 1982 (3)SA 856 (AG) at 861G-862A the following was stated:

> *" It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability and blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly of the accused's negligence has resulted in serious injury to others or loss of life, such consequence will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise be imposed. It is here that the deterrent purpose in sentencing comes to the fore. Nevertheless, this factor, though relevant and important, should not be overemphasised or be allowed to obscure the true nature and the extent of the accused's culpability. As always in cases of sentencing, where different and sometimes warring factors come into play; it is necessary to strike a balance which will do justice to both the accused himself and the interests of the Society.*

[8] Counsel for the appellant compared the sentences imposed in *S v Botha* 2019 (1) SACR 127 (SCA) and S v van Schalkwyk 2015 (2) SACR 334 (SCA). In both matters the appellants were initially charged and convicted of murder and on appeal to the Supreme Court of Appeal the appeals on conviction and sentence were upheld and substituted with convictions on culpable homicide and a reduction of the sentences imposed. In the former matter the sentence was reduced from twelve (12) to three (3) years imprisonment in terms of section 276 (1)(i) of the Criminal Procedure Act. In the latter matter the sentence was reduced from eight (8) to six (6) years imprisonment.

[9] In Botha *supra* the court found that the appellant:

> *"….she must have foreseen the possibility that by direction the knife towards the deceased's upper body, she might injure or kill her …..There was no evidence that she had deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence showed that she had simply turned around while sitting, and directed a stabbing movement towards the deceased's upper body. This suggested that her conduct was not an impulsive reaction to the attack inflicted upon her. The state did not prove all the elements of murder…"*

[10] As stated by counsel for the respondent, the offence of culpable homicide is a serious offence and, as stated in both Nxumalo and Botha *supra* the consequences to the negligent conduct are serious especially if it results in injury of death of another person. In considering sentence in it is useful to reiterate the version of the appellant.

> *"A quarrel ensued between the deceased and I when I requested that he give*

me something for the effort of pushing the trolley. The deceased swore at me and threatened to beat me up. I was angry when I went to fetch the said spade. As I was about to leave the premises with the spade my mother took it from me .....I followed the deceased. <u>When he saw me he picked up a brick. I also picked up a half brick and threw it at him....and realized that I struck him on the head.....I also admit that I was negligent when I caused the injury as I should have foreseen that throwing a half brick towards a vital part of the body, like the head, may cause death like it actually did "</u> (my underlining)

[11] In my view the incident was initiated by the appellant which resulted in a reaction from the deceased and an unnecessary resort to an assault on the deceased by the appellant. The deceased did not ask to be assisted and the appellant was unreasonable in asking for some token of gratitude for assisting the deceased push his trolley of vegetables. In expressing his remorse, and together with a concession made in his plea, the appellant stated that he should have left the deceased to go about his business, despite his threats and insults. Although he did not foresee that death would ensue, a brick is a hard object and assaulting another person therewith was serious. As stated, the trial court was bound by the plea it accepted on culpable homicide. I am therefore in agreement with counsel for the appellant that having regard to the cases dealt with above the sentence of the appellant is not proportional to the offence he was convicted of.

[12] In this matter the presentencing report did not investigate into the possibility nor give recommendations for correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act. Counsel for the applicant was correct in mentioning that it was a suggested submission at the trial but this was not dealt with further. The learned magistrate did not exercise any discretion to consider same as a sentencing option. Counsel also did not pursue the issue in her heads of argument. I am of the view that the appeal should be upheld and the sentence be reduced, however, having regard to the victim impact and sentencing report I am of the view that correctional

supervision is not in this instance a sentencing option.

[13] In the result the following order is granted:

1. The appeal on sentence is upheld;
2. The sentence imposed by the trial court is set aside and substituted with the following sentence:
   2.1 The appellant is sentenced to 6 (six) years imprisonment whereof 3 (three) years is suspended for a period 5 years on condition that the appellant is not found guilty of an offence of which violence is an element.
   2.2 The above sentence is antedated to 5 June 2019.

[redacted]

TLHAPI VV
(JUDGE OF THE HIGH COURT)

I agree,

[redacted]

BALOYI-MBEMBELE M C
(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**14 OCTOBER 2021**
JUDGMENT RESERVED ON	:	**14 OCTOBER 2021**
ATTORNEYS FOR THE APPELLANT	:	**LEGAL-AID OF SOUTH AFRICA**
ATTORNEYS FOR THE RESPONDENT:		**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**