

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A304/2004

DATE:

1 FEBRUARY 2008

5 In the matter between:

CINGICEBO SIBONGO

Appellant

and

THE STATE

Respondent

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J U D G M E N T

MOTALA, J:

15 [1] The appellant was charged in the Regional Court with
murder. He pleaded not guilty. He was found guilty.
The magistrate found that there were no substantial and
compelling circumstances justifying a departure from the
sentence of 15 years' imprisonment, the minimum
20 sentence prescribed for murder by Act 105 of 1997 ("the
Act"). He sentenced the appellant to 15 years'
imprisonment. Appellant appeals against the sentence
only.

[2] Counsel for the appellant has submitted that appellant did not receive a fair trial as the provisions of the Act were not pertinently brought to his attention. It has been said many times that as a general rule if the State intends to rely on the provisions of the Act, it should say so in the indictment (see for example S v Makatu 2006(2) SACR 582 at 586 paras 7 and 8). As stated by Lewis, JA in that matter, the rule is neither absolute nor inflexible.

10 [3] The appellant in this matter was legally represented. That fact may or may not, depending on the facts of each case, be sufficient to make it unnecessary for a court to draw the provisions of the Act to the attention of an accused person. Each case must be considered on its
15 own facts.

[4] In this matter, after conviction, the appellant's attorney asked for a postponement. He said he had to take instructions as to the "minimum judgments" – clearly he
20 meant minimum sentences. Obviously he was aware of the applicability of the Act and must have informed the appellant accordingly. In my view, the appellant had a fair trial.

[5] In his judgment on sentence the magistrate found that the murder of the deceased was planned. In my view, he erred in doing so. The evidence accepted by the magistrate was the following. The deceased and the appellant had an intimate relationship and that evening the deceased telephoned appellant and asked him on the way home to visit her where she was living. He came there several hours later. The deceased and the appellant then left together. The deceased told a witness she was going to appellant's home. Suddenly, for no apparent reason, the appellant repeatedly stabbed the deceased. When arrested a few hours later he was asleep with a knife under him.

15 In my view, on that evidence alone it cannot be said that the killing of the deceased was planned. The finding by the magistrate that the murder of the deceased was planned constitutes a misdirection and, in my view, we are accordingly at large in considering an appropriate sentence.

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[6] The appellant was 29 years old when sentenced. He has matriculated and he obtained the N6 diploma. He is a qualified electrician and was self-employed. He has no previous convictions.

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In considering whether or not the State had proved intent on the part of the appellant, the magistrate, after reference to intent in the form of *dolus eventualis*, said that the appellant "should have foreseen the possibility of death hovering in attendance". Although it is not clear, he does appear to have found that the accused acted with *dolus eventualis*. In my view, the fact that the appellant has no previous convictions, coupled with the finding of the magistrate that he acted with *dolus eventualis*, constitute substantial and compelling circumstances justifying a departure from the prescribed sentence.

[7] It is unfortunate that appellant did not disclose the true reason for his attack on the deceased. It is, however, clear from the evidence that he attacked the deceased in full view of the witness while the deceased was accompanying him willingly to his home, that he must have been in a rage. However, the seriousness of the offence and the interests of the community must be given due weight. Appellant repeatedly stabbed a defenceless woman with whom he had a long relationship. Violent attacks on women have reached epidemic proportions. A substantial period of imprisonment is the only appropriate sentence in this matter.

[8] I would:

(a) Uphold the appeal against sentence.

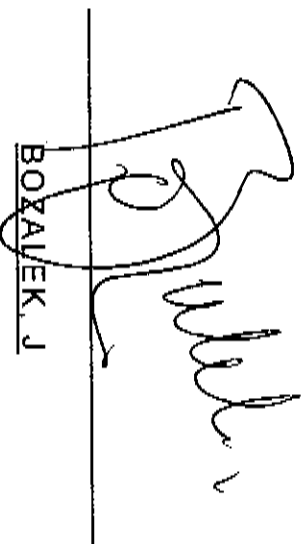
(b) Set aside the sentence of 15 years' imprisonment and substitute the following therefor:

"The accused is sentenced to 13 years' imprisonment".

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BOZALEK, J: I agree.

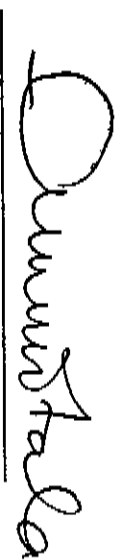
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BOZALEK, J

MOTALA, J: It is so ordered.

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MOTALA, J