

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A614/2006

DATE:

7 MARCH 2008

5 In the matter between:

SIBONGILE BOTSO

Appellant

and

THE STATE

Respondent

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J U D G M E N TCROWE, AJ:

[1] On 21 May 2004 the appellant, as accused number 2, and  
15 his co-accused Umzekelo Notje(?) as accused number 1,  
were both convicted of the murder of one Xolani Memani  
under case number SH1/58/03 in the Regional Court,  
Bellville. The trial Court found that the death of the  
deceased was caused by the appellant and his co-  
20 accused acting jointly. The trial Court did not  
impose the minimum sentence of 15 years prescribed for  
first offenders who commit this offence in circumstances  
other than those referred to in Part 1 of Schedule 2 of Act  
105 of 1997.

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SP

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[2] Having regard to the factors which a court must consider at the time of sentence, including that the appellant and his co-accused had spent almost two years in custody awaiting trial, it found substantial and compelling circumstances to exist justifying the imposition of a lesser sentence. In the exercise of its sentencing discretion it reduced the minimum sentence “met die tydperk wat julle reeds in hegtenis is” and imposed a sentence of 13 years’ imprisonment on both the appellant and his co-accused. It also declared them both unfit to possess a firearm in terms of section 12 of Act 75 of 1969. Appellant appeals against sentence only having been granted leave to do so on petition to this Court in terms of section 309(C) of Act 51 of 1977.

[3] Advocate Marco for appellant submits that this sentence is unduly harsh and startlingly inappropriate in the circumstances. In this regard she relied on the following *dicta* in connection with the correct Appellate approach to the question of sentence in the case of S v Malgas 2001(1) SACR at 469 and 478f-h:

“Even in the absence of material misdirection, an Appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of

the trial court and the sentence which the Appellate Court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.

5 It must be emphasised that in the latter situation the Appellate Court may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court, or because it prefers it to that sentence. It  
10 may only do so where the difference is so substantial that it attracts epithets of the kind I have mentioned".

[4] In considering sentence, the triad of factors referred to in  
15 S v Zinn 1969(2) SA at 537 (A) at 540G, namely the crime, the offender and the interests of society, must be carefully considered as well as the specific interests of the victim as referred to in S v Isaacs 2002(1) SACR 176  
20 (C). Ms Marco submits that the trial Court did not properly take into account the role appellant played in the offence. The fact that he was intoxicated, the role of his co-accused, that he was also stabbed and that there was no premeditation. I do not share that view as it is  
25 clear that the trial Court did have proper regard thereto.

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[5] I am, however, of the view that the sentence of the trial Court is so markedly disparate from that which I would have passed as to be startlingly inappropriate and that this Court is therefore justified in interfering with the sentence imposed. In this regard I consider that the trial Court was correct in finding substantial and compelling circumstances exist which justify the imposition of a lesser sentence. However, I am of the view that the imposition of a sentence of 13 years' effective imprisonment in this matter over-emphasises the penal and retributive aspects of punishment at the expense of the interests of the appellant and represents punishing him "to the point of being broken" with no blend of mercy as contemplated in S v Macko 2005(2) SACR 223 (E).

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[6] In my view, the fact that the appellant is a first offender, the lack of premeditation, as well as the circumstances of the crime and the role played by the various protagonists therein and the victim, are such that the objective punishment will be better served by suspending a substantial portion of the sentence imposed by the trial Court so that the appellant will still have to serve a long and arduous term of effective imprisonment but will be able, provided he avoids future violent conduct, to avoid a further substantial period of imprisonment.

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[7] In the result I would make the following order:

1. The appeal succeeds.
2. The sentence imposed upon the appellant by the trial Court is altered to read:  
“Thirteen years’ imprisonment three years whereof are suspended for five years on condition that accused 2 is not found guilty of murder, culpable homicide (involving any physical attack of another person) and assault with the intent to do grievous bodily harm committed during the period of suspension.
3. The accused is declared unfit to possess a firearm in terms of section 12 of Act 75 of 1969”.
4. It is directed that the substituted sentence imposed upon the appellant today shall be considered to have been imposed on the date of the original sentence namely 21 May 2004.

[7] In the course of this appeal it has become apparent that the appellant’s co-accused, Umzekelo Notje (accused number 1 at the trial) has not appealed against his sentence. After careful consideration I have come to the conclusion that one cannot differentiate between the circumstances of the appellant and Umzekelo Notje and accordingly that it would not be in the interests of justice

to allow the sentence of Umzekelo Notje to stand while interfering with the sentence of the appellant as set forth above.

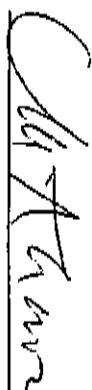
5 [8] In the circumstances and in the exercise of this Court's review powers I would interfere with the sentence imposed on Umzekelo Notje as follows:

1. The sentence imposed upon Umzekelo Notje by the trial Court is altered to read:

10 "Thirteen years' imprisonment, three years whereof are suspended for five years on condition that accused number 1 is not found guilty of murder, culpable homicide (involving any physical attack of another person) and  
15 assault with the intent to do grievous bodily harm committed during the period of suspension.

2. You are declared unfit to possess a firearm in terms of section 12 of Act 75 of 1969".

20 3. It is directed that the substituted sentence imposed upon accused number 1 today shall be considered to have been imposed on the date of the original sentence namely 21 May 2004.



CROWE, AJ

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VAN REENEN, J. I agree and it is ordered accordingly.

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VAN REENEN, J