IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A703/2007

DATE: 9 MAY 2008

In the matter between:

MICHAEL VUYO MAZWI Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

[1] The appellant was found guilty in the Wynberg Regional Court on 14 October 2003 on one count of murder and one count of contravening section 2(1) of Act 71 of 1968 by being in possession of a dangerous weapon, namely a knife. The two counts were taken together for the purposes of sentence and the appellant was sentenced to 15 years' imprisonment. With the leave of the magistrate he now appeals against sentence.

[2] The deceased was one Christopher Wildschutt. He was stabbed to death at Heinz Park on 6 October 2002. On the evidence led by the State it appeared that appellant,

who harbored a grudge against the deceased, attacked him without provocation in broad daylight. The deceased had been holding his infant child when appellant stole up on him and began stabbing him from behind. The deceased then laid the infant down but, according to the only witness to the crime, a 10 year old boy, appellant continued his attack upon the deceased, who was at all times unarmed. Shortly afterwards he collapsed and died later that night.

[3] A postmortem report revealed the cause of death to be stab wounds to the back and that the deceased had sustained six stab wounds in all, two of them over the left upper arm. Of the remaining four wounds to the back, three of them severed or penetrated the aorta, left renal vein and right kidney respectively.

[4] Appellant admitted killing the deceased and indeed initially sought to plead guilty. He was legally represented however and his plea was changed to one of not guilty. His defence was one of self-defence in that he claimed that the deceased had attacked him with a knife which he had wrested from him and used to stab the deceased who would not release him from his grip. The magistrate rightly rejected the appellant's defence.

What did emerge from his evidence and that of several State witnesses, however, was that some time before the incident, the exact lapse of time not being clear but being in the region of two months, the deceased had stabbed the appellant in the neck. Quite clearly, this previous incident played a role in appellant's attack upon the deceased.

[5] The magistrate found that the aggravating circumstances were such that they outweighed appellant's favourable personal circumstances to the extent that he could not find any substantial or compelling circumstances as envisaged in section 51(3)(a) of Act 105 of 1997. Accordingly, he sentenced appellant to the prescribed minimum term of 15 years' imprisonment.

[6] It appears from the record that the appellant's representative conceded that there were no substantial and compelling circumstances which would justify the Court imposing a lesser sentence. I consider that this concession was too readily made. Appellant was a first offender, 43 years old and the father of five children aged between 13 and 2 years of age. At the time of sentence his wife was about to give birth to his sixth

child. Appellant was in regular employment as a tiler earning R450 per week and was the sole breadwinner.

[7] The magistrate took these personal circumstances into account but failed to mention that appellant had initially sought to plead guilty and had never denied killing the deceased. He also made no mention, and thus appeared to take no account of the fact that the fatal attack had obviously been as a result of bad blood between the two men arising out of the previous incident when the deceased had stabbed appellant in the neck. Unfortunately, even appellant's legal representative paid no attention to this factor at the time of sentencing.

[8] In my view, these latter factors coupled with the accused's personal circumstances and the fact that he was a first offender at a relatively advanced age are cumulatively sufficient to constitute substantial and compelling circumstances and thus to justify a departure from the prescribed minimum sentence. As was stated in S v Malgas 2001(1) SACR at 471f-g:

> "All factors traditionally taken into account in sentencing, whether or not they diminish moral guilt, continue to play a role, none is excluded from the outset from consideration in the sentencing

process. The ultimate impact of all the circumstances relevant to the sentencing must be measured against the composite yardstick substantial and compelling and must be such as to cumulatively justify a departure from the standard response that the Legislature has ordained".

[9] In my view, notwithstanding the aggravating features in this matter which the magistrate correctly emphasised, namely the unprovoked, deadly and sustained attack upon the unsuspecting deceased as he was holding his child, there were substantial and compelling circumstances present. In my view, the magistrate erred in not taking into account the two factors which I have mentioned and in not finding that these, together with the appellant's personal circumstances and his clean record, amounted to substantial and compelling circumstances.

[10] I am further of the view that such errors and failure to make the finding amounted to a misdirection on the part of the magistrate in sentencing appellant. It follows then that this Court is free to sentence the appellant afresh. Notwithstanding the appellant's favourable personal circumstances and the other factors which count in his favour, it is clear that the only appropriate sentence is

one of long term imprisonment. Only such a sentence serves the purposes of sentencing, namely retribution, prevention, deterrence and rehabilitation whilst at the same time emphasising the sanctity of life.

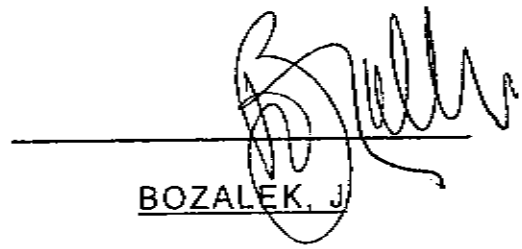
[11] Taking all relevant factors into account I consider that an appropriate sentence would be one of 12 years' imprisonment. I see no reason to interfere with the magistrate's approach to sentencing on count 2 which was to take it and count 1 together for the purposes of sentence.

[12] In the result I would allow the appeal and substitute the sentence imposed by the magistrate with one of 12 years' imprisonment.

IRISH, AJ: I agree.

IRISH, AJ

BOZALEK, J: The appeal against sentence is allowed. The sentence of 15 years' imprisonment is set aside. Counts 1 and 2 are taken together for the purposes of sentence and the appellant is sentenced to 12 years' imprisonment effective from the original date of sentencing.



BOZALEK, J