IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A405/2007

DATE: 22 AUGUST 2008

In the matter between:

MARTIN BONDT APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

BOZALEK, J

The appellant was convicted of murder in the Bellville Regional Court on 14 July 2006 and sentenced to 15 years imprisonment.

He successfully petitioned this Court for leave to appeal against both conviction and sentence.

The appellant had pleaded not guilty, but made a variety of admissions, including that he stabbed the deceased, one Leonard Louw, who died as a result of the injury.

The only issue before the magistrate was whether the

appellant had acted in self-defence or not.

Apart from the various admissions made by the appellant and the contents of the post-mortem examination report, which likewise was admitted, the State's case consisted of two eye witnesses, a Mr Mark Joubert and the deceased's ten year old daughter.

Joubert testified that the appellant had been very drunk on the night in question, that he had been waving a knife around and that before the incident he had stated that he felt the urge to kill someone. The appellant then engaged the deceased in gangster language and when the deceased did not express any interest in continuing the conversation, had suddenly, without provocation, stabbed the deceased in his neck. The deceased fled to his house, emerging only to ask why the appellant had stabbed him. Shortly afterwards the deceased passed away. Joubert's attention had been momentarily distracted at the point when the appellant stabbed the deceased, but on hearing the sound of the fatal blow, he had turned his head and noted that the deceased was completely unarmed. There had been no prior struggle between the appellant and the deceased.

Joubert's evidence was corroborated in all material respects by that of the deceased's daughter, who whilst playing in the

street nearby, had witnessed the appellant stabbing her father.

The appellant testified that it was the deceased who had launched an unprovoked assault on him by attempting to stab him. In response he had seized the deceased's upraised arm with his left hand and extracted his own knife from his pocket. The deceased had struggled to free his arm and the appellant, in the process of trying to stab the deceased in his arm, had instead delivered a fatal blow to his throat and chest area.

The post-mortem report revealed that the cause of death was a single knife wound to the chest and neck.

Appellant's counsel, Mr Carnow, argued that the magistrate had erred in accepting the testimony of Joubert as credible and reliable and had failed to have regard to the material improbabilities therein. He offered no criticism of the child's corroborating evidence however, and in fact ignored it.

The magistrate carefully analysed all the evidence, in the process considering the probabilities as well. He found that the two State witnesses corroborated each other in material respects and were both good and credible witnesses.

He was critical of the appellant's evidence and rejected it as

false, not least because of the improbabilities it contained. The appellant was an extremely poor witness whose version of events was inherently improbable. He vacillated between stating that he was very drunk and could not remember important aspects of the events, on the one hand, and on the other doggedly insisting that his detailed account of how the deceased had been the aggressor was correct.

In my view, there is absolutely no merit to the appellant's appeal against his conviction.

In terms of the provisions of section 51 of Act 105 of 1997, read with part 2 of schedule 2, the appellant qualified for a minimum sentence of 15 years imprisonment. The magistrate found no substantial and compelling circumstances and imposed the minimum sentence.

On behalf of the appellant it was argued that the magistrate erred in finding that there were no such circumstances warranting a lesser sentence and, furthermore, that the sentence invokes a sense of shock.

At the time of the commission of the offence, the accused was 29 years of age, unmarried and had been released from prison three weeks previously. Although he had a half a dozen

previous convictions over the previous ten years, these were all for offences involving dishonesty and therefore his conviction of murder constitutes his first crime of violence.

The appellant did express remorse for having taken the deceased's life although this was somewhat diluted by his steadfast denial that he had been the unprovoked aggressor.

However, potentially the strongest mitigating factor present in my view was the role that alcohol played in the commission of the offence. The State witness, Joubert, testified variously that the appellant had been "drasties onder die invloed van drank, baie dronk en smoordronk". The magistrate, who accepted Joubert's evidence in its totality, found, in sentencing the appellant, that the accused's state of drunkenness could not be regarded as a substantial and compelling circumstance for two reasons. Firstly, the appellant's legal representative had not contended that had it not been for the consumption of alcohol he would have conducted himself differently, and secondly, although the appellant had clearly been under the influence of alcohol, it was apparent that he had known what he was doing. In my view the magistrate's reasoning in this regard was flawed. What exactly was argued on behalf of appellant in regard to the role of alcohol was not recorded, but the magistrate should

not have regarded it as necessary for the appellant's counsel to have specifically argued that the excessive consumption of alcohol must have affected the appellant's conduct. In the circumstances of the matter that proposition was largely self-evident. In regard to the magistrate's second reason, there was never any suggestion that the appellant was so drunk that he did not know what he was doing. Had that been the case, a different defence would no doubt have been raised. Nor does the consumption of alcohol have to result in an accused no longer being in control of his or her actions before it can be raised as a mitigating factor.

It follows that the magistrate misdirected himself in his approach to the question of whether the accused's intoxicated state was a mitigating factor or not. The intake of alcohol or drugs is not necessarily a mitigating factor and would depend on the circumstances of the case. Generally, however, once a Court is satisfied that the offender was intoxicated, it will regard this as a mitigating factor, the reason for this being that liquor "can arouse senses and inhibit sensibilities", see S v Kwele, 1990(1) SACR 251 (A) at 25C to D. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender, and only then can his blameworthiness be regarded as diminished, S v M, 1994(2) SACR 24 (A) at 29H to I.

In my view there can be little doubt that the appellant's mental faculties were impaired by his excessive consumption of alcohol. His general drunkenness, aggressive behaviour with a knife and senseless attack on the deceased in a public place in full view of witnesses cannot reasonably support any other conclusion.

In S v Malgas, 2001(1) SACR 469, it was held that:-

> "The legislature has deliberately left it to the Courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions, this does not mean that all other considerations are to be ignored. All factors traditionally taken into account in sentencing, whether or not they diminish moral guilt, thus continue to play a role. None is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick "substantial and compelling" and must be such as to cumulatively justify a departure from the

standardised response that the legislature has ordained."

Apart from adopting an incorrect approach to the question of the appellant's intoxication, the magistrate also appeared to limit his inquiry as to whether there was substantial and compelling circumstances solely to that issue.

There are, however, in my view, other mitigating factors which play a role in the inquiry, notably the accused's expression of remorse and the fact that although he has previous convictions, the present one represents the first crime of violence of which he has been convicted.

By reason of the magistrate's misdirection in the above regards, this Court is entitled to consider sentence afresh.

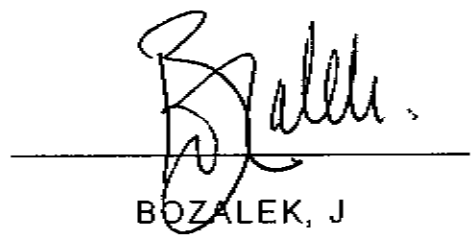
When regard is had to the triad of interests, the deadly and unprovoked assault upon the deceased and the appellant's expressed blood lust that night are clearly aggravating factors.

Nonetheless, I consider that the mitigating factors mentioned above, but principally the appellant's state of intoxication, are sufficient to constitute substantial and compelling circumstances and justify a departure from the standardised

minimum sentence laid down by the legislature.

However, the secondary consequence of the minimum sentence dispensation, taken together with the seriousness of the offence and the aggravating factors present, is that a substantial term of imprisonment is the only appropriate sentence in the present circumstances.

Having regard to all the relevant factors, I consider a term of imprisonment of 12 years is appropriate. I would, therefore, UPHOLD THE APPEAL AGAINST SENTENCE AND SUBSTITUTE A SENTENCE OF 12 YEARS IMPRISONMENT.



BOZALEK, J

I agree.

STEYN, A J

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The following order is made:-

1. The appeal against conviction is DISMISSED AND THE CONVICTION OF MURDER IS CONFIRMED.

2. The appeal against sentence is UPHELD AND THE SENTENCE OF 15 YEARS IS SET ASIDE AND REPLACED WITH A SENTENCE OF 12 YEARS IMPRISONMENT with effect from 14 July 2006.

3. The warning and declaration in terms of section 286 of Act 51 of 1977 and section 102 of Act 60 of 2000 respectively, REMAIN INTACT.

BOZALEK, J