IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A12/2010

In the appeal of:

WAYNE WERNE MARTIN Appellant

vs

THE STATE Respondent

JUDGMENT: 14 MAY 2010

NGEWU, AJ:

[1] The appellant was convicted of one count of murder in the regional court, Wynberg, on 16 September 2009 and was sentenced to 15 years' imprisonment. With the leave of the Court ***a quo*** he now appeals against the sentence only.

[2] The charge incorporated the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) which provide that:-

"51(1) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in;

(a) *"Part II of Schedule 2, in the case of -*

(i) a first offender, to imprisonment for a period of not less than 15 years;

(ii) a second offender of any such offences, to imprisonment for a period of not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less that 25 years.

...

Provided that the maximum term in imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more that five years.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of

Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

[3] The trial magistrate found there to be no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence and imposed the prescribed minimum period of 15 years imprisonment.

[4] The facts which led to the appellant's conviction can be briefly summarized as follows:-

> Appellant and the deceased were live-in partners and had three minor children. They did not have a good relationship and the deceased would always have blue eyes from being assaulted by appellant. She also had a lot of scars on her face. On the day in question they were chatting, braaing and drinking at their home with one Joseph Phillips, a family friend, who had been with them for the better part of the day. The appellant asked him if he wanted to see magic. He then took a bottle of thinners, which he had bought earlier in the day, and lit it with his cigarette lighter. He then ran and sprayed it over the deceased's head, face and clothing.

She was on her way to the loo when the incident happened. She ran into the toilet screaming for help. The appellant did not assist the deceased nor the two minor children who were present, the eldest of whom witnessed the incident. Joseph and the neighbours rendered the necessary assistance to the deceased and the minor children. They called an ambulance. Joseph, the appellant and the deceased were not drunk. Appellant knew what he was doing.

The deceased suffered severe burn wounds on her whole body and all her clothes got burnt on her. She remained naked. The thinners plastic bottle was stuck on her body. The lounge, bathroom, geyser, table and the carpet in the lounge caught fire and the house was full of smoke. When the paramedics arrived the appellant was the first person to run to them for help showing his burnt hands to the exclusion of the deceased who then lay on the ground with serious injuries.

Deceased was worried about her children and wanted to know if they had not been burnt. She told everybody at the scene that the appellant had burnt her. Every end of the month, the 25th, the appellant would fight with the deceased. He once hit her with a hammer and her mother's portrait on her head and she never

reported him to the police. Deceased was not a violent person and had not provoked the appellant on the day of the incident. On the 25th of May 2007 the appellant had attempted to burn the deceased.

[5] The Court rejected the appellant's version which amounted to a bare denial of all the allegations against him.

[6] The grounds of appeal raised boil down to the following:-

(i) The trial magistrate failed to consider the relevant circumstances in determining whether or not substantial and compelling circumstances exist and thus did not exercise her discretion properly or judicially.

(ii) The court ***a quo*** failed to attach weight to or identify the mitigating factors relating to circumstances surrounding the commission of the offence, namely that:

(a) Appellant had been shot previously and had a serious medical condition requiring further medical intervention and treatment. This had an adverse influence on the quality of his life in prison.

(b) The court ***a quo*** failed to take cognizance of the fact that the State's version, painting a dark picture of the Appellant, was based on hearsay evidence.

(c) Appellant and deceased had a dysfunctional and unstable relationship which most likely contributed to the appellant's actions.

(d) Liquor consumption and excessive drinking played a role in the commission of the offence.

(e) Removal of the appellant for a substantial period from society deprived the minor children of a father and someone who contributed to their material needs.

(f) Society not only demands that serious crimes be punished, but also that the mitigating and personal circumstances of the appellant be properly considered when a sentence is imposed.

The cumulative consideration of the above constitutes substantial and compelling circumstances warranting a lesser sentence.

[7] The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated

by irregularity or misdirection or is disturbingly inappropriate. (**See: DPP Kwazulu Natal V P 2006(1) SACR 243 SCA.)**

[8] In **S v Malgas** (above) the position was amplified as follows:

"*A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, 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'. It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it 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 may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.... The tests for interference with sentences on*

appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for the appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised. The epithets ('shocking', 'startling', 'disturbingly inappropriate' and the like) that have been employed to drive that point home should not simply be appropriated indiscriminately for use in a situation which is very different."

[9] It is trite that the Act demands the imposition of the prescribed minimum sentence unless the Court is satisfied in a particular case that there are substantial and compelling circumstances that justify the imposition of a lesser sentence. It is the duty of the sentencing Courts to determine whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not only pay lip-service to, the Legislatures' view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of a specific kind are committed. (See **S v Vilakazi 2009(1) SACR 552 SCA**).

[10] Nugent JA in **S v Vilakazi**, above, cited with approval the following principle as laid down in **S v Malgas** (above) as the

'determinative test' for when the prescribed sentence may be departed from:

> ***"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence".***

[11] Marais, JA in **S v Malgas** (above) stated the position to be thus:-

> ***"Court's are required to approach the imposition of sentence conscious that the Legislature has ordained the particular prescribed period of imprisonment as the sentence that should ordinarily be imposed, for listed crimes in specific circumstances, in the absence of weighty justification. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisonment of first offenders, personal doubts as to efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded".***

[12] Substantial and compelling circumstances are not exceptional in the sense of seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender. See **S v Malgas** (above).

[13] The accepted facts of the present case revealed the following aggravating factors:-

(a) The deceased had not provoked the assault.

(b) She was assaulted in the comfort of her own home by her live-in partner.

(c) She did not expect that she would be set alight and was going to the loo unsuspecting at the time of the incident.

(d) Her child witnessed the incident. She was affected and severely traumatized by the incident and had to undergo counseling at the state's expense.

(e) The deceased had endured abuse at the instance of the appellant.

(f) Appellant was fully aware of what he was doing and was not drunk.

(g) The offence was premeditated and planned as appellant had promised to show John Phillips magic even at the time he set the deceased alight.

(h) Deceased suffered severe burnt wounds and remained in hospital for a while before she died.

(i) Appellant did nothing to rescue the deceased, who was screaming for help, nor their minor children.

(j) Despite the serious condition of the deceased, appellant sought to be attended to first by the paramedics. He showed no remorse for his conduct.

[14] The following were mitigating factors:-

(a) The appellant is a first offender for murder.

(b) The trial court convicted him on *dolus eventualis* as a form of intention.

(c) The appellant was shot after the incident and still had a bullet lodged in his body.

(d) He tore his knee ligaments.

[15] It is clear that the aggravating factors far outweigh the mitigating factors.

[16] It had always been within the appellant's knowledge that he had three minor children with the deceased whose life he terminated in the most gruesome manner. I am bound to acknowledge the impact the appellant's incarceration will have on the children, but at the same time I can not ignore the reality that the appellant himself cared less about the children and made one of them witness the murder of their mother. They will live with that traumatic scar for the rest of their lives. The appellant's

conduct is not consistent with that of a parent who has his children's best interests at heart. If anything, those children need to be protected from him. Moreover, the evidence established that the children were distributed amongst the relatives who now provide them with the necessary care. Appellant's conduct was not in the best interests of the children.

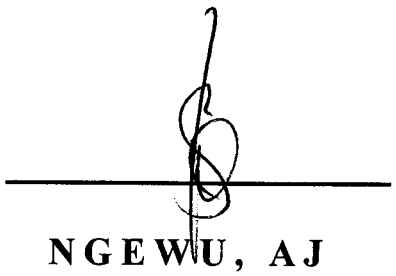
[17] Save that the appellant was a breadwinner, there was no evidence established or suggested that the appellant was a primary care-giver for these children. He deprived them of the special parental care, love and comfort that they enjoyed from their mother. He further violated their right to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma. The gravity of the offence clearly calls for a custodial sentence that would isolate the appellant from the children to enable them to recover from the trauma and lead happy and productive lives. It would be unjust to permit the appellant to avoid appropriate punishment by sheltering behind children and escape the consequences of his conduct.

[18] That the appellant had been shot after the incident had little or no bearing on the case at hand. The majority of South African prisons offer medical assistance to prisoners free of charge. The allegations that the

state's version, painting a darker picture of the appellant, was based on hearsay evidence, does not advance the appellant's case either. Equally non-meritorious are the grounds that liquor consumption played a role in the commission of the offence, and that the parties' dysfunctional and unstable relationship contributed to the appellant's actions. Such is not borne out by the evidence and need no further address herein.

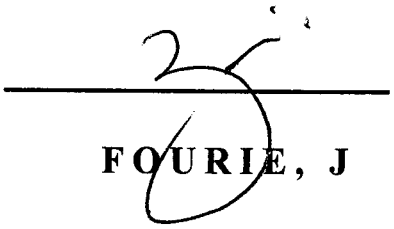
[19] With all the above being borne in mind, I am of the firm view that there is no merit in all the grounds of appeal raised. The cumulative impact of all circumstances relevant to sentencing does not justify a departure from the standardized option ordained by the legislature. The court was duty bound to take into consideration the fact that the offence of murder has been singled out for a severe punishment. The appellant was fortunate enough to be convicted of murder under Part II of Schedule 2 despite the evidence establishing premeditated or planned murder. The sentence imposed on the appellant was the minimum and not the maximum prescribed, a fact beneficial to the appellant.

[20] In the circumstances, I find that there was no material misdirection by the trial court. The sentence imposed is not disproportionate at all. I would dismiss the appeal and confirm the sentence.



NGEWU, AJ

I agree, and it is so ordered.



FOURIE, J