

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

Case No: A594/2010

In the matter between:

MALUNGA MBUMA

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 18 FEBRUARY 2011

Allie, J

[1] The appellant, who was Accused No. 2 in the court *a quo*, was charged with murder in that it was alleged that he and his co-accused stabbed the deceased several times thereby causing his death.

[2] The appellant and his co-accused pleaded guilty to the charge and submitted a plea explanation in terms of Section 112(2) of the Criminal Procedure Act.

[3] Their plea explanations contained the following relevant submissions. He alleged that his co-accused had approached the deceased for a re-payment of money that he had lent to the deceased. The deceased allegedly said that he did not have the money to pay and walked away ignoring the appellant's co-accused. The appellant's co-accused then grabbed him by his collar and the deceased punched him. Thereafter a fight ensued. The deceased allegedly said that he was going to fetch his knife.

[4] The appellant and his co-accused went inside their home and while they were sitting inside, the deceased came storming into the house and proceeded to attack and stab the appellant first on his forehead and near his right eye. While attempting to ward off the attack by the deceased, the appellant's co-accused was stabbed by the deceased on his right upper arm and lower arm and his left pulse area. The appellant and his co-accused then went inside the bedroom and fetched knives to protect themselves. The deceased allegedly came into the room and the appellant and his co-accused proceeded to stab the deceased in the doorway of the room.

[5] In the plea explanation, the appellant goes on to state that they stabbed without looking where on his body they were stabbing the deceased. The appellant then admitted in his plea explanation that he foresaw the possibility that the deceased could succumb from the stab wounds but proceeded to stab him despite this knowledge.

[6] The appellant made certain formal admissions concerning the chain evidence relating to the post-mortem and the cause of death of the deceased.

[7] This then was the basis upon which the appellant was convicted on the charge of murder.

[8] The *court a quo* found that there were no substantial and compelling circumstances present to justify a deviation from the prescribed minimum sentence of 15 years direct imprisonment.

[9] The appellant now appeals against the sentence imposed.

[10] The *court a quo* further took into account the fact that the deceased initiated the aggression, that the appellant was a first offender and that he had pleaded guilty. The *court a quo* found that the appellant and his co-accused exceeded the bounds of self-defence.

[11] The medical evidence is that the deceased sustained at least 24 stab wounds some of which penetrated the body of the deceased from the back to the front.

[12] Both accused were fairly young at the time when the offence was committed. When regard is had to the fact that the appellant was indeed provoked by the deceased and that the deceased commenced stabbing at the appellant and his co-accused as well as the fact that the appellant is a first offender of 22 years old then ordinary mitigating factors are present. These mitigating factors could serve as substantial and compelling factors. In this regard see the case of **S v Malgas 2001(1) SACR 469 (SCA)** at 482 d - e:

"d The legislature has however 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 against it, this does not mean that all other considerations are to be ignored.

e All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish normal guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

f 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 cumulatively justify a departure from the standardised response that the legislature has ordained".

[13] In weighing up the mitigating factors which serve as substantial and compelling factors in this matter against the nature and circumstances of the offence and fact that the appellant was incarcerated already for approximately 4 years this court is indeed drawn to the conclusion that substantial and compelling circumstances exist to justify a deviation from the prescribed minimum sentence.

[14] Regard has to be had to the fact that the appellant had come to work in the city from a rural area and that he was from a disadvantaged background. He was clearly a person of meagre means trying to eke out a living.

[15] In the circumstances I am of the view that the sentence imposed does not fit the nature and circumstances surrounding the offence nor does it sufficiently take account of the personal circumstances of the appellant. The court *a quo* accordingly exercised its discretion unreasonably in the circumstances. This court is therefore at large to interfere with the sentence imposed. [see: **S v Rabie** 1975 (4) SA 855 (A) at 857 D – E and **S v Pieters** 1987 (3) SA 717 (A) at 727 F- H]

[16] I would accordingly set aside the sentence and impose a sentence of 8 years direct imprisonment 2 years of which are suspended for a period of 5 years on condition that the appellant is not convicted of murder or an attempt thereto committed during the period of suspension.

I agree



ALLIE, J



KOEN, AJ