



Republic of South Africa

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

CASE No: A768/2010

In the matter between:

SONWABILE MVUMBI

Appellant

And

THE STATE

Respondent

JUDGMENT : 4 MAY 2011

MANTAME, AJ:

[1] This is an appeal against the sentence imposed on the Appellant by the Regional Magistrate Court Bellville. The Appellant was represented by Ms. Inge B M G Van der Westhuizen, while the state was represented by Ms. N Ajam.

[2] The Appellant was convicted in the Regional Court Bellville on a charge of murder and sentenced to 15 years imprisonment. On petition, he was granted

leave to appeal against his sentence alone.

[3] The common cause facts are that, on the 11 October 2008 at about 08:00 in Delft, Appellant stabbed one Sixolile Halo once with a knife on the anterior aspect of the chest extending deep into the chest cavity. The wound inflicted to Sixolile Halo caused the death of the deceased.

[4] The facts are that, on the night of the 11 October 2008 at about 08:00 on a Saturday, Mr Thandanani Siko, Appellant and the deceased were all together at Ravelle Street in Delft. Thandanani and the deceased met the Appellant on the street who apparently had something to drink.

[5] Thandanani made that conclusion simply because the Appellant was walking in a criss crossing fashion. As the deceased was in the middle, Appellant bumped into the deceased's way. The deceased tried to step out of the Appellant's way. Appellant asked them as to why they bumped him. When "they" are intoxicated "they" think that "they" are mad and he heard that "they" undermine people. It is not his fault that he went to the initiation school early. Thandanani and the deceased apologised to him when they realised that he was now serious. He proceeded to go to the shop and left the other two friends he was with outside the house. When he came back to the shop, these two friends were standing outside the house with the Appellant still talking about the same thing. When he tried to intervene, Appellant told him to back off.

[6] At that stage, Thandanani noticed that the Appellant had a knife in his hand

but it was not open. Subsequently thereafter, he noticed that the deceased was running away and he immediately picked up some bricks or stones. When he looked at the direction of the Appellant, the knife was already opened. The deceased threw the two bricks he had at his hand at the Appellant. When he retreated and kicked the Appellant, he fell on his back on the ground. His feet were in the air. He then brought his feet down and when he tried to straighten up, Appellant stabbed him. The deceased tried to take his top off to look at the wound, but fell on the ground. Mzwandile, the other friend, had already fled the scene as Appellant also chased him. By the time the deceased was stabbed Mzwandile was already at home.

[7] Appellant on the other hand, contended that he decided to walk to some man's house. As he was walking, the deceased came to his side to bump him. When he enquired as to what he was doing, deceased hurled abuse at him. The deceased and his friend then followed him home. It is not clear, as to, at what stage he decided to go back home. Thereafter, an argument ensued.

[8] A court of appeal cannot interfere with a sentence imposed by a lower court, unless there has been a misdirection by the court *a quo* or unless the sentence is shockingly inappropriate. The sentence in this case was imposed in terms of the minimum sentence legislation, and the main issue for determination in this case is therefore whether the court *a quo* was correct in finding that there were substantial and compelling circumstances present which would warrant a lesser sentence than the prescribed minimum sentence.

[9] On behalf of the Appellant it was argued that the court *a quo* erred in the following respects:

- a) It failed to consider the well known triad to be taken into account when sentencing.
- b) It did not consider the personal circumstances of the Appellant that would have constituted substantial and compelling circumstances such as his relative youth. He was 20 years when he committed the offence; that he had a minor child to financially support; that he was employed and had a stable work record; and finally the fact that he had no previous convictions.
- c) Deceased sustained a single stab wound. The attack took place during an altercation.
- d) That the court *a quo* failed to take into account evidence in mitigation led by the Appellant and which was corroborated by the correctional report and the testimony of his employer.
- e) That the court *a quo* did not have regard to the prospects of rehabilitation of the Appellant and did not take into account that the Appellant was a first offender, with no history of being violent, and whose employer put him in position of trust.
- f) In the circumstances, it was argued that the court *a quo* erred in

finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[10] In the case of **S v Malgas 2001 (1) SACR 469**, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. It is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those factors traditionally taken into account in sentencing - mitigating factors. These must be weighed together with aggravating factors. But none of those need be exceptional.

[11] It is trite law that 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 a trial court and then substitute the sentence simply because it prefers another result. But in my view, the Magistrate erred in not finding that cumulatively the factors set out above constituted substantial and compelling circumstances.

[12] Ms Ajam for the state was constrained to concede during her oral argument that those factors justify a departure from the prescribed minimum sentence.

[13] In the final analysis, the proper sentence is always the product of a balanced consideration of the personal circumstances, fairness to society and

should be blended with a measure of mercy.

[14] In the circumstances, this court is at large to impose a sentence which it deems appropriate. There is no doubt that the crime is a serious one. The deceased, for seemingly senseless reasons, lost his life. The community is crying out for the courts to do all it can to constrain the wave of violence which turns their lives into living hell.

[15] Considering all the factors mentioned above, I am of the view that an appropriate sentence will be one of 10 years imprisonment.

[16] In the circumstances I make the following order:-

The conviction is confirmed. The sentence is set aside and substituted with one of 10 years imprisonment.

I agree, it is so ordered



MANTAME, AJ



TRAVERSO, DJP