IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A505/11

DATE: 2 December 2011

In the matter between:

THOBELANI DAYENI Applicant

and

THE STATE Respondent

JUDGMENT

BINNS-WARD, J

In this matter the appellant, who was convicted on his plea of guilty to murder in the Regional Court, comes on appeal to this Court with the leave of the court *a quo* against the sentence of 12 years imprisonment imposed on him by that court.

It is unnecessary to set out in any detail the pertinent facts related to the conviction. They are, to the extent that they are available, set out in the appellant's plea statement in terms of Section 112 of the Criminal Procedure Act, which was read into the record. The offence consisted of an assault by the appellant on the deceased by hitting her on the head with a hammer. It was accepted by the State in the court below that

the assault had occurred in circumstances of provocation by the complainant, who was accepted for the purposes of the plea statement to have been at the time in a state of some intoxication.

The medical evidence was consistent with two blunt trauma injuries having been inflicted to the deceased's head. In my view the appellant can consider himself fortunate the State was in the circumstances willing to accept that the assault occurred with legal rather than direct intent to kill. The consequences of striking anyone on the head twice with a hammer would be evident to anyone as likely to cause, at the very least, very serious injury, if not death.

The court *a quo* found substantial and compelling reasons to depart from the minimum sentence, and undertook a comprehensive review of the relevant circumstances pertaining to the question of sentence. It is not clearly apparent from the judgment which of those particular circumstances weighed with the Court in determining the existence of substantial and compelling circumstances, but I would be prepared to hold that the situation of provocation attending the commission of the offence, coupled with the fact that the appellant was a first offender probably justified the court *a quo's* conclusion in that regard.

Having found substantial and compelling circumstances the court *a quo* was, of course, at large to depart from the prescribed provisions in regard to sentence in terms of Act 105 of 1997.

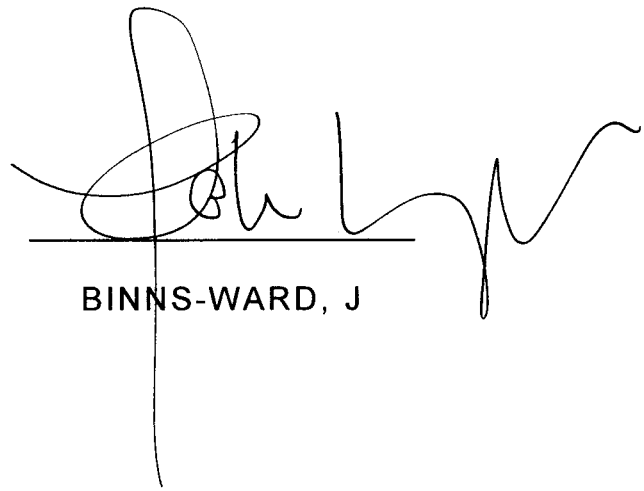
The Court had before it the evidence of a probation officer, which informed the Court in great detail as to the appellant's background circumstances. Suffice it to say that the anecdotal evidence contained therein is suggestive of the fact the appellant might well be of a violent character. It would appear from the information provided by the probation officer that he was the subject of a court interdict in respect of family related violence, or threatened violence.

The sentence imposed of 12 years is a severe one, but the offence in respect of which it was imposed is a serious one. I can find no misdirection on the part of the court *a quo* in respect of the imposition of sentence. It is well established that merely because this Court might have imposed a different sentence is not sufficient reason to interfere. Certainly I do not regard the sentence of 12 years imprisonment imposed as so startlingly disproportionate to any sentence I might have been inclined to impose so as to indicate a misdirection by the Regional Court magistrate.

/DS

In the circumstances I would be disposed to DISMISS THE APPEAL.

It is so ordered.



BINNS-WARD, J

I agree,

McDOUGALL, AJ

/DS