IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A39/2016

DATE: 11 MARCH 2016

In the matter between:

APHIWE MATSHOBONGWANE APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

BOQWANA, J

The appellant was arraigned before the Cape Town Regional Court on one count of culpable homicide. On 14 August 2014 he pleaded guilty to the charge. A written statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977, ('the Criminal Procedure Act'), was handed up in court and read into the record. On 24 October 2014 the appellant was sentenced to eight years imprisonment of which three years were suspended for five years on certain conditions. His appeal lies against sentence having been granted leave on petition to this Court.

In his statement the appellant, in essence, admitted to having

stabbed Thandazile Molefe ('the deceased') with a knife thereby causing mortal damage to his subclavier artery. It is necessary to outline the statement and admissions made therein to give a picture of what actually transpired on that tragic day.

The appellant was a student at the Cape Peninsula University of Technology ('Technicon'). According to his statement, on 13 November 2013 he was walking to his room situated at the technicon when he heard music and jocularity coming from one of the rooms. He went towards this particular room and saw people standing outside singing and laughing. It became evident that these people were having a party. He recognised a number of people at the party. He walked into this room with the view to greeting a person he knew by the name of Festus. Upon his arrival he was confronted by one Sivuyile Sisonke ('Sivuyile') who asked him why he was there as the party was private.

He became disconcerted by Sivuyile's rude approach but replied mildly that he just wanted to greet his friend and would then leave. As he tried to pass Sivuyile, Sivuyile attacked him unceremoniously, smacking and shouting at him. He started to bleed from his nose. Sivuyile jerked him around with great force during this attack as a result he lost his footing falling on

the ground.

He was astonished by this but did not retaliate since he is not violent by nature and did not want to get involved in a fight. He instead decided to go home and sleep. When he arrived at his room he was drunk from partying earlier. As a result he did not think that it was possible to defend himself in that state of inebriation. His reflexes were dull due to intoxication. He state of drunkenness however did not affect his ability to distinguish between right and wrong.

He reached for his pocket so that he could put his wallet and cell phone on the bed but could not find them. When he retraced his steps he concluded that the missing items might have gotten lost during the attach Sivuyile. The wallet contained all the money he had until the end of the month.

He felt apprehensive about being attacked if he went to look for the wallet at the place where he was attacked by Sivuyile. He admitted that there was no imminent attack at that stage to his person. He however armed himself with a knife and went to look for his missing items downstairs [where he had a fight with Sivuyile]. He held the knife with his right hand hoping that its presence would deter any further attack upon his person. He searched the room from the outside and found

nothing. He then went inside the room. As he entered he notice Sivuyile and his focus was on Sivuyile, in case he attacked him again. He then asked for his wallet and phone. One girl told him that he had no wallet and a phone. He continued to search but was agitated by the attack on him as well as what he regarded as theft of his belonging. His attention was still on Sivuyile.

He noticed a shadow moving fast towards him, out of the corner of his eye. He then turned fast instinctively stabbing in the direction of the person approaching him from the couch. That person was the deceased. He stabbed the deceased once in the neck and saw blood spurting from his neck. He then ran outside where he stood frozen in horror.

He pointed out that the deceased was not involved in the earlier altercation between him and Sivuyile and there were no ill feelings between him and the deceased. He never regarded the deceased as a threat. His focus was on Sivuyile. He admitted that in stabbing the deceased he was neither in imminent danger of attack, nor did he objectively believe himself to be under attack or acting in private defence. He admitted that a reasonable man, in his position would have acted with more care in the same situation and would not have brandished the knife as he did. He admitted that in doing so

he acted negligently and without reasonable care and his actions were the legal and factual cause of the deceased's death. He further admitted that his actions were wrongful and punishable as he had no right to act in the manner he did.

Prior to sentencing, a probation officer's report was procured where interviews were conducted with both members of the appellant's and the deceased family and friends. The appellant was 25 years old second year information technology student at Cape Peninsula University of Technology when he was sentenced. He did part-time work with various employer while studying to support himself financially. He paid for his own accommodation. Prior to the incident he resided with a friend for approximately three months. He was described as a quiet and respectable person who was not violent and aggressive in nature. He was a social drinker and enjoyed clubbing and spending time with friends and family but after the case / incident he spends time alone. According to the probation officer, he showed remorse for his actions to the probation officer and indicated that neither he nor his family had approached the deceased's family as they were afraid about how the apology would be received.

The deceased's family on the other hand were unhappy about the fact that the appellant was convicted of culpable homicide

and not murder. They were hurt by the fact that they had invested a lot in the future of the deceased who was in his final year of business studies. He was a member of the SRC and his death occurred just before his graduation. They had high expectations that he would provide for the family after finishing his studies. He possessed great leadership qualifies and his family will never be able to replace him. His family was described as being too distraught to even attend court proceedings. The probation officer recommended that the appellant be sentenced in terms of Section 276(1)(i) of the Criminal Procedure Act. She was of the view that the appellant could be rehabilitated if exposed to correct programs after serving a short term imprisonment sentence.

The magistrate was impressed by the thoroughness of the probation officer's report but he disagreed with her recommended sentence. He was of the view that the sentence involving a term of imprisonment was the most suitable which balanced all the interests. He intimated that he would make the term as short as possible in order to allow the appellant to build his life again.

The grounds of appeal submitted on behalf of the appellant are briefly that: The sentence imposed by the magistrate was shockingly inappropriate warranting the interference of this

Court; the magistrate over-emphasized the seriousness of the offence and under-emphasized the interest of the appellant; the nub of the criticism against the magistrate is that he failed to take into account the appellant's degree of blameworthiness and focusing on the seriousness of the crime and impermissibly relying on the case of S v Philander 2012(1) SACR 582 ECG; he failed to have proper regard to the probation officer's report and other case law which was more aligned to the facts of this case which imposes a sentence lesser than the one he imposed; a proper consideration of the appellant's personal circumstances and his conduct blended with a measure of mercy would require this Court to intervene and impose a lesser sentence.

It is trite law that the imposition of sentence is the prerogative of the trial Court and that the exercise of its discretion is not interfered with merely because an Appellate Court would have imposed a sentence it preferred. The approach by an Appellate Court in an appeal on sentence was outlined in the case of S v Malgas 2001(1) SACR 469 SCA at 478 D-E 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..."

The Court went on further to state at page 478I to 479A that:

"...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 is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised..."

The disparity between the sentence imposed by the trial Court and that this Court would have imposed must be sufficient so as to warrant interference by this Court.

Ms Erasmus who appeared for the appellant referred us to the decision of S v Naidoo & Others 2003(1) SACR 347 SCA at 361h to 362e where the Court sought to distinguish between different circumstances in which a crime of culpable homicide may be committed. The one end of the spectrum, as set out in *Naidoo* was where a momentary lapse of concentration results

in tragedy. In that situation neither the lapse nor failure to foresee the consequence is deliberate. The other end is the type of case where the accused has deliberately assaulted the deceased but has not been convicted of murder because the State failed to prove the case beyond reasonable doubt. The Court held that no one would quarrel with the custodial sentence in the latter case. As to the former it held that the Court has a duty to strive to find a balance between a sentence that:

> "will not appear to rate the loss of a life with all the attendant trauma to those whom the deceased was near and dear as not too serious against, on the other, the need to calibrate the degree to which the accused's conduct deviated from the standard of care expected of a reasonable person and if it is found to be slight, also to reflect that adequately in the sentence to be imposed."

This is however inherently difficult. See Naidoo *supra* at paragraphs 45 and 46.

Ms Erasmus also referred us to different case law in order to highlight how courts have treated the issue of sentencing in cases of culpable homicide. While it is useful to look at previous cases as a guideline in sentencing, it must not be

forgotten that each case presents peculiar circumstances. A number of these cases which I have perused do highlight the fact that punishment should acknowledge the sanctity of human life but at the same time the court should strive to achieve the balance enunciated by Marais, JA Naidoo *supra*:

The varying nature of sentences imposed in cases of culpable homicide is indicative of the differing nature of the circumstances in each case. For instance, in S v Crossbeck 2008(2) SACR 317 SCA the majority decision rejected a submission from the State that section 276(1)(i) had to follow after it replaced a conviction of murder with that of culpable homicide. In that case an appellant accidentally killed people whilst shooting at animals. The Court found that a custodial sentence was called for and imposed five years of which two years were suspended. In certain cases courts have imposed suspended sentences whilst in some correctional supervision has been found to be appropriate.

It is submitted by Ms Erasmus that the case of S v Philander *supra* that the magistrate referred to in his judgment fell to the more serious end of the culpa spectrum and it was impermissible for the magistrate to rely on it. That judgment involved a case of sustained assault of a wife by husband leading to her death. In that case the Court found that the

degree of blameworthiness exhibited by the accused was by no means slight. The accused sentenced to seven years imprisonment. The magistrate in the present instance quoted paragraph 8 of the Philander judgment which, in my view is a restatement of what has been mentioned in many cases of culpable homicide. It simply refers to blameworthiness as a relevant factor and the seriousness of the offence.

Highlighting the seriousness of the offence did not mean that the magistrate considered that the appellant should be dealt with more severely than would otherwise be the case. The magistrate indicated that he was aware of the appellant's circumstances and that he would do everything in his power to ensure that the term of imprisonment was as short as possible.

I agree with Ms Erasmus that the accused's degree of blameworthiness is relevant in determining which sentence is appropriate in these circumstances. It would have indeed been helpful if the magistrate had demonstrated that the degree of culpability was considered in his sentence in judgment. The non-mentioning of that issue however does not necessarily mean it was not considered. At the end of the day the question that must be asked by this Court is whether the alleged failure by the magistrate amounted to misdirection which led to the imposition of a sentence that is so strikingly

inappropriate that it induced a sense of shock. In other words, if the magistrate had properly considered the degree of blameworthiness exhibited by the appellant during the incident, he would have found an appropriate sentence to be lesser than the one he imposed.

It was held by Holmes, JA in S v Ntshiza 1970(4) All SA 12A at 19:

> "In cases of *culpa,* in considering the accused's blameworthiness for the purpose of sentence, one takes into account, *inter alia,* the degree of his lack of care which depends largely on the degree of foreseeability, just as in considering blameworthiness in a case of *dolus eventualis,* one bears in mind, *inter alia,* the degree of the foreseen possibility of resulting death - its remoteness or proximity, see S v de Bruin en Andere, 1968(4) SA 498 (AD) at pg 511 C-E. As to foreseeability in the present case, a knife is obviously a dangerous weapon to wield it in the circumstances of close (indistinct) the position in this case clearly spelt potential danger to Wilfred, even though the blow was directed at Peter. In my view, foreseeability of possible injury and resultant death to Wilfred was such as to render this case of negligence of a high order..."

The Ntshiza decision *supra,* involved the wielding of a knife, where the appellant aimed a blow with a pocket knife at Peter who had provoked him. At that stage Wilfred who was standing very close to him moved forward slightly to intervene and the stab landed on Wilfred's chest. Wilfred fell on the ground and later died because the wound entered his heart. The appellant in that case was charged with murder. He pleaded guilty of culpable homicide and was convicted as such. The appellate division found five years imprisonment to be an appropriate sentence reducing it from 10 years and eight strokes that were imposed by the trial court.

The present case is that of a young man who was involved in a brawl with Sivuyile and not with the deceased and no weapon was used to attack him. He left the fight to go to his room, but when he came back he did so with a knife in hand and wielded a knife in a room with people. Sivuyile was not the only person present. He held the knife in his right hand, hoping that its presence would negate any further attack to his person by Sivuyile. The appellant states that his attention was focused on Sivuyile the whole time. He however goes on to state that: "Out of the corner of my eye I noticed a shadow moving fast towards me and I turned fast instinctively stabbing in the direction of the person approaching me from the couch,

the deceased, Thandazile Molefe." He does not say that he thought he was being attacked by the person approaching him or by Sivuyile, which would invariably trigger his instinctive actions. To the contrary, he states that he did not think he was in danger.

It appears that he did not just "accidentally wield a knife" in the direction of the shadow he saw, to ward off the attack, he instinctively 'stabbed towards the direction of the 'person who approached' from the couch, whom he does not say he believed to be Sivuyile nor or to be the person attacking him. Therefore he knew that a person was approaching and he stabbed (instinctively) towards the direction of that person and did not take necessary care and regard to the other people, including the deceased. His action clearly spelt potential danger to other people and the deceased. The real reason for stabbing in that direction is not clearly explained.

It cannot be said in my view that the degree of *culpa* was so slight that it fell within the band of momentarily lapse type of cases. Here there was a deliberate act of carrying a knife in a room with people and a deliberate act of stabbing in the direction of a person approaching from the coach, albeit being described as being instinctive.

The appellant pleaded guilty, and is contrite about what he did to the deceased. He is a first offender, youthful and a productive member of the community. Provocation may well have affected his judgment of taking care in regard to the deceased. Nevertheless, reviewing all the considerations, both mitigating and aggravating and balancing the interests mentioned by Marais, JA in Naidoo *supra,* I do not consider the effective sentence of five years imprisonment imposed by the magistrate to be so shockingly inappropriate so as to warrant interference by this Court.

While it may appear that he magistrate failed to consider the degree of culpability in his judgment and over-emphasized the seriousness of the offence, the cumulative consideration of all the relevant factors indicate that the kind of sentence imposed by the magistrate is not one that can be characterised as being so far removed to what this Court considers as appropriate.

In the circumstances I am not convinced that the Magistrate exercised his discretion improperly even if he imposed a sentence that this Court would not have preferred. In the result the appeal should fail.

I would accordingly make the following order:

The APPEAL IS DISMISSED and the CONVICTION AND SENTENCE CONFIRMED.

BOQWANA, J

I agree.

KOEN, AJ