IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. CA&R 8/14
Date heard: 10.12.2014
Date handed down 13.02.2015

In the matter between:

BUYILE ZOZO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MALUSI AJ:

[1] The appellant was arraigned before the regional magistrate in Mdantsane on a charge of murder read with ss1 of the Criminal Law Amendment Act 105 of 1997 as amended (the Act). He was convicted as charged and sentenced to 20 years' imprisonment. He now appeals against both his conviction and sentence.

[2] It is necessary to set out the evidence led in the court *a quo* before considering the Regional Magistrate's reasons for the conviction and sentence. Most of the evidence is largely common cause or was not disputed.

[3] On Sunday the 11th November 2012 at about midday, the deceased *Mfezeko Qwala* was walking with his friend *Thando Kolisi* on a street in NU15, Mdantsane. As they passed the appellant's house, he came out and approached the deceased *Mfezeko Qwala*. *Kolisi* fell back slightly while the

appellant had a conversation with the deceased. Shortly thereafter the latter reported to him that the appellant had confronted the deceased about a window pane in the appellant's house which the deceased had allegedly broken some five months earlier. Apparently, the deceased had failed to pay for the replacement of the broken window pane.

[4] When the deceased and *Kolisi* resumed their journey they were joined by the deceased's son, *Sanda*. The appellant was walking ahead of them in the same direction. A knife fell from the appellant's pocket and the deceased picked it up. The deceased called out to the appellant and approached him handing over the knife. The deceased was at this stage walking slightly ahead of his two friends who had taken a moment to pass water.

[5] The appellant gave evidence that after handing him the knife, the deceased continued walking closely behind him. The deceased was saying he would never replace the window pane and was insulting the appellant. He testified that he was not certain if the deceased would attack him. He turned around and stabbed the deceased. The knife perforated the chest cavity and caused an incision on the heart and liver fatally wounding the deceased.

[6] The regional magistrate rejected the notion of self-defence and lack of intention to kill on the part of the appellant. I say notion for the reason that it was disclosed as the appellant's basis of defence in the explanation of plea by his attorney. Throughout his evidence the appellant never testified to any

facts proximating self-defence. The Regional Magistrate correctly convicted the appellant of murder as the evidence did not disclose any valid defence.

[7] The regional magistrate did not find any substantial and compelling circumstances to depart from the discretionary minimum sentence of 15 years imprisonment. In his view, deterrence of would be offenders required that the appellant be sentenced to a term of 20 years' imprisonment. His reasoning was that this particular offence was prevalent in the Mdantsane area when people are killed after petty disputes. He stated that a message needed to be conveyed to the community that this conduct was unacceptable and that harsh sentences would be imposed by the Court.

[8] It is trite that the approach on appeal to findings of fact by the trial Court in the absence of demonstrable and material misdirections by it, is that its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong[1]. It was said in *Hadebe* that the question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellant was established beyond reasonable doubt.

[9] The principles regarding sentence are clear. Punishment is pre-eminently a matter for the discretion of the trial Court. The appeal Court should be careful not to erode such discretion: sentence should only be altered if the discretion has not been judicially and properly exercised. The

[1] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f

test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate[2].

[10] Where a statutory discretionary minimum sentence is applicable, the trial Court is not at liberty to impose whatever sentence it considers appropriate upon a clean slate. The starting point has to be the discretionary minimum sentence because that is the sentence that should ordinarily be imposed, unless substantial and compelling circumstances exist that justify a deviation from it[3].

[11] *Mr Mpokela*, who appeared on behalf of the appellant, submitted rather shakily that the appellant lacked the intention to kill. I do not agree. The appellant stabbed the deceased with a dangerous instrument in a sensitive area of his body. He clearly had the direct intention to kill the deceased. The evidence did not disclose any basis for self-defence to be applicable. I am satisfied that the regional magistrate did not commit a misdirection in convicting the appellant.

[12] The regional magistrate found that no substantial and compelling circumstances existed to justify a departure from the prescribed minimum sentence. On the contrary, he was of the view that the discretionary minimum sentence was not sufficiently severe to convey the deterrence aspect of sentencing in these particular circumstances.

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[2] S v Sadler 2000 (1) SACR 331 (SCA) para [6]
[3] S v Malgas 2001 (2) SACR 1222 (SCA) para [8]

[13] I am of the view that the regional magistrate committed a material misdirection when he sentenced the appellant. Although it is permissible to consider the effect of the sentence on others a sentence should not be imposed mainly for the general deterrence of other would-be offenders and be grossly in excess of a fair sentence with respect to the facts of a particular case and the circumstances of the accused[4]. The regional magistrate did not have sufficient regard to the personal circumstances of the appellant and the objective factual circumstances of the commission of the offence. He focused too intently on deterring would be offenders almost as the sole object of sentencing the appellant. In doing so, I am of the view that he misdirected himself in sacrificing the appellant on the altar of deterrence[5]. He lost sight of the individualized nature of sentencing[6] .

[14] This Court is at large to consider the sentence afresh in view of the misdirection by the regional magistrate. I consider the following factors as cumulatively constituting substantial and compelling circumstances:

[14.1] The appellant had acted out of character as he reportedly was not known to have had a quarrel with anyone let alone as being violent.

[14.2] The appellant had consumed alcohol which affected him negatively and resulted in him being aggressive.

[14.3] The appellant had been provoked by the deceased who had insulted him by referring to the private parts of the appellant's mother.

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[4] S v Mhlakaza 1997 (1) SACR 515 (SCA) at 519j-520b

[5] S v Sobandla 1992 (2) SACR 613 (A) at

[6] S v Mako 2005 (2) SACR 223 para [10] and [11] (and the cases cited therein)

[14.4] The appellant acted on the spur of the moment and inflicted a single stab wound.

[15] I am of the view that the appropriate sentence is substantially less than that imposed by the regional magistrate. It is necessary to substitute the sentence imposed with what I consider to be an appropriate sentence.

[16] In the circumstances and for the above reasons I propose the following order:

(a) The appeal against conviction is dismissed.

(b) The appeal against the sentence is upheld.

(c) The sentence is set aside and there is substituted for it a sentence of 12 years' imprisonment.

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T. MALUSI
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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I.T STRETCH
JUDGE OF THE HIGH COURT

On behalf of the appellant	Mr N Mpokela Ntutu Mpokela Attorneys KING WILLIAMS TOWN
On behalf of the respondent Instructed by	Mr F Kruger The Director of Public Prosecutions BHISHO

Matter heard on 10 December 2014.
Judgment handed down on 13 February 2015.