IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

Case No: CA&R845/02

In the matter between:

JANNIE KLEINBOOI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PLASKET AJ:

[1] The appellant was charged with murder in the Regional Court sitting in Kirkwood. He tendered a plea of guilty to culpable homicide and this plea was accepted by the state. He was duly convicted on this charge. He was sentenced to seven years imprisonment and he now appeals against that sentence.

[2] The facts are that on 1 October 1995, at or near Mistkraal, Kirkwood, he negligently caused the death of Mieta Blaauw, the woman he lived with, by assaulting her with a stick. The reason for the attack on the deceased was this. She had left the common home on 29 September 1995, had undertaken to return later that day but had not, causing the appellant to break into his house in order to gain access to it. On the following day, he had found her drinking at the house of a friend and had joined them. After a while they left. He was angry because she had inconvenienced him and while they were walking home, she had insulted him. He took a stick and began to beat her all

over her body. When they reached their home, he again beat her when she again insulted him. They then went to sleep. On the following morning, when they woke up, he made some porridge for her, which she ate. They went back to sleep. He woke up again at about midday to find that she was dead.

[3] The post-mortem report indicates that the deceased was subjected to what can only be described as a savage and sustained assault. The cause of her death was recorded as 'subdurale bloeding'. It was noted that there were '[m]assiewe kneusing en skraap en skaafwonde oor hele liggaam'. The extent of the assault may be inferred from the following findings on the external appearance of the deceased's body and the condition of her limbs:

> 'Totaal gekneus mer linêre wonde wat ook skaaf en skraapwonde toon. Feitlik geen gesonde weefsel sigbaar nie – kneusings en letsels anterior en lateral van bene. Beide bo en onderarms totaal gekneus met skraap- en skaafwonde. Twee linêre kneusings op beide borste – horisontaal. Twee linêre kneusings op bulk. Kneus en skaafwonde beide wange. Drie kneus en skaafwonde op voorkop. Oor hele onderrug skraap en kneuswonde.'

[4] Mr Rugunanan, who appeared for the appellant argued that the magistrate had misdirected himself in failing to give due recognition to various mitigatory factors, such as the deceased failure to return home, the fact that she had insulted the appellant and the fact that, on discovering that the deceased was dead, the appellant handed himself in to the police. In addition, he argued that it appeared from the charge sheet that the appellant had been in custody for some three and a half years prior to his conviction and the magistrate had failed to take this into account in deciding to sentence the appellant to seven years imprisonment.

[5] I am of the view that the magistrate correctly took into account the seriousness of the offence and its particularly vicious nature. He also took into

account the personal circumstances of the appellant but, on balance, these factors were not all mitigatory in nature. I am also of the view that the factors such as the inconvenience caused to the appellant by the deceased's failure to return home when she said that she would, and what was termed her 'provocative' conduct that caused the appellant to lose his temper, cannot be said to have reduced the moral blamewothiness of the appellant to any marked degree. The magistrate did not misdirect himself in this respect.

[6] The only possible reference to the length of time the appellant may have been incarcerated as an awaiting trial prisoner is to be found on the charge sheet. The date of arrest is recorded as 1 October 1995, a cross next to the words 'in custody' is an indication that the appellant was not released on bail or on warning. The date of the appellant's first appearance in court is indicated as 20 April 1999 – some three and a half years after his arrest -- and the date of the plea and sentence appears to be 20 April 1999 as well. (Note the typed charge sheet – page I of the record -- has incorrectly reflected the date of plea and sentence as being 20 November 1999. The handwritten charge sheet is at page II of the record.)

[7] The first difficulty with the argument that three and a half years of awaiting trial incarceration must be taken into account for purposes of sentence is that these vague indications in the charge sheet do not constitute evidence and there is no guarantee that they are accurate. Indeed, it is highly unlikely that the appellant spent three and a half years in custody before his first appearance. An inquest appears to have been held before a decision was taken to charge the appellant so it is likely that, even after he handed himself in to the police, he would have been released because he would not have been charged while the inquest was pending. In any event, if the appellant had spent this long in custody, one would have expected the attorney representing him to have placed it on record. In these circumstances the necessary evidentiary foundation has not been laid for the argument that the

magistrate misdirected himself in failing to take into account the three and a half years.

[8] In the result, there is, in my view, no basis upon which this court is entitled to interfere with the magistrate's sentence. The appeal is accordingly dismissed.

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C Plasket

Acting Judge

I agree

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L Pillay

Acting Judge