

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A44/2012

In the appeal between:

ISHMAEL MKHEPHENI ZULU

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* MOLOI, J

JUDGMENT:

MOLOI, J

HEARD ON:

28 MAY 2012

DELIVERED ON:

31 MAY 2012

[1] This is an appeal against the sentence imposed by the Regional Court Magistrate in Welkom on 9 November 2010.

[2] The appellant was charged with one count of murder in that on or about 19 February 2009 at or near Thabong, Welkom he unlawfully and intentionally killed one Steven Oujaki Lekitlane by shooting him. He had pleaded not guilty but was duly convicted.

[3] On passing sentence the magistrate correctly found that the substantial and compelling circumstances were present and that those would permit him to deviate from imposing the prescribed minimum sentence of fifteen (15) years imprisonment under the provisions of section 51(2) of the Criminal Law (Amended) Act No 105 of 1997. He, however, imposed the sentence of fifteen (15) years imprisonment and suspended a period of seven (7) years imprisonment conditionally for a period of five (5) years.

[4] The factors revealed by the evidence were that the appellant was 73 years old when the offence was committed; he was a first offender; he had been in custody for a period of nineteen (19) months on the date of his sentencing, bail having been refused; he had killed his grandson of 21 years of age; the grandson (deceased) had at a stage stolen a motor vehicle that was in the custody of the appellant; he accommodated and maintained the deceased together with the deceased's mother who have since passed away; the appellant was employed by the municipality for 25 years; the appellant had fired four (4)

shots at the deceased; caused his death and the appellant, in reply to a question posed by the magistrate, stated he felt bad about the incident.

- [5] A few aspects of the magistrate's comments on sentencing deserve scrutiny. Firstly, the magistrate commented that the fact that the appellant was in custody for 19 months preceding the sentencing was of no consequence as he could have applied for bail. The magistrate ignored the record reflecting that bail was refused. The magistrate consequently ignored the principle enunciated in **S v STEPHEN AND ANOTHER** 1994 (2) SACR 163 (w) at E – G where Schultz, J said: "Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length ..."

Secondly, the magistrate placed too much great emphasis on the fact that the appellant fired four shots at the deceased. According to him, this was indicative of the determination of the appellant to end the deceased's life. The magistrate, however, took no effort to determine which of the four shots was fatal. It could just as well have been the very first one rendering the other three shots

superfluous in the causation of the deceased's death.

[6] It is unfortunate that the appellant did not testify and the evidence did not show why this incident happened. What is, however, clear is that the appellant looked after the deceased and maintained him and that the deceased was taunting the appellant by stealing the vehicle in his possession (apparently the employer's vehicle). Something the court is not privy to must have happened to cause this unfortunate incident but the court is not prepared to speculate what it was.

[7] In the circumstances the court is of the view that the magistrate misdirected himself when imposing the sentence he did and that this court will be well within its rights to interfere with the sentence imposed. Taking into account the multiple fact of awaiting trial incarceration, the appellant's personal circumstances, particularly his advanced age, I am of the view that sentence imposed by the magistrate should be interfered with.

[8] In the premises, the following order is made:

- 8.1 The conviction on a charge of murder is confirmed.
- 8.2 The sentence of fifteen (15) years imprisonment of which seven (7) years imprisonment is suspended for five (5) years conditionally is set aside.
- 8.3 The appellant is sentenced to a period of ten (10) years imprisonment of which seven (7) years imprisonment is suspended for a period of five (5) years on condition that the appellant is not convicted of a charge of murder or assault with intent to do grievous bodily harm committed during the period of suspension.
- 8.4 The sentence in 8.3 above is ante-dated to 19 November 2010.

K. J. MOLOI, J

I concur and it is so ordered.

C. H. G. VAN DER MERWE, J

On behalf of the appellant: Adv. G.T. Langenhoven
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the respondent: Adv. C. F. Steyn
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

/EB