FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. A125/2011

In the matter between:

JOSEPH KHULU Appellant

and

THE STATE Respondent

CORAM: JORDAAN,J *et* CHESIWE, AJ

JUDGMENT: CHESIWE, AJ

HEARD ON: 27 FEBRUARY 2012

DELIVERED ON: 8 MARCH 2012

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[1] The appellant in this matter was convicted in the Regional Court at Bloemfontein on a charge of murder, and was sentenced to the prescribed minimum sentence of 15 years imprisonment as ordained in section 51 of the Criminal Law Amendment Act, No 105 of 1997.

[2] Leave to appeal was granted by the trial court and the appeal

lies only against the sentence.

[3] The facts of the matter are briefly as follows:

The appellant, on the 1st July 2007 was at Tsino's Tavern in the Bloemfontein district. The appellant wrongfully and unlawfully murdered Itumeleng Daniel Komphiri by shooting him with an unlicensed firearm.

[4] During the trial appellant was represented by Mr Serame from the Legal Aid Board. The appellant pleaded not guilty and denied the allegations against him.

[5] Appellant appeals on the following grounds that:-

- the sentence is shockingly inappropriate;
- the trial court did not take the appellant's personal circumstances into account during sentencing;
- that the trial court misdirected itself by over-emphasising the interests of society and the seriousness of the crime.

[6] Advocate Kruger on behalf of the appellant in the Heads of Argument and oral arguments, submitted that the mitigating

factors in this case and the personal circumstances of the appellant, cumulatively amounted to compelling circumstances, which justifies the court to deviated from the prescribed minimum sentence. She further submitted that alcohol on the mentioned day played a major role, although no evidence was led at the trial court as to the amount/percentage of alcohol that the appellant took.

[7] Advocate Hoffman, on behalf of the respondent argued that the trial court did not misdirect itself and that the appeal court should not tamper with the sentence, as it is appropriate for the crime committed.

He argued that the alcohol did not play a major role as the time the deceased entered the tavern and the time the appellant spent in the tavern was very brief. He submitted that the fifteen years is appropriate and should remain as is.

[8] Advocate Hoffman submitted that the aggravating circumstances are of such a nature that the trial court had no choice, but to convict and sentence the appellant to fifteen

years.

The appellant had an unlicensed firearm, which he used to committed the offence. The crime in that area is prevalent. The appellant had previous convictions that are relevant in this matter.

[9] I am of the view that the court *a quo* came to an informed and reasoned decision on whether compelling and substantial circumstances were indeed present, such that he should deviate from the prescribed sentence. The appellant could not point at any misdirection in that regard. Neither could I.

[10] As the trial court correctly found section 51 of the Act has limited but not eliminated the courts discretion in imposing sentences in respect of offences referred to in Part II schedule 2 such as in this case.

The legislature has deliberately left it to the courts to decide whether circumstances of any particular case call for a departure from the prescribed sentence.

[11] In **S v MALGAS** 2001 (1) SACR 469 (SCA) at 471, clear guidelines have been set down and the Supreme Court of Appeal expressed itself as follows:

> "If the sentencing court on consideration of the circumstances of a particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[12] Murder is a very serious offence, especially as the deceased was not posing any threat to the appellant. Appellant shot the deceased at close range. The medical evidence found that:

> "Daar was 'n stropingsring teenwoordig. Daar was ook roetverkleuring en tatoëring rondom die ingangswond."

[13] The courts cannot ignore the frequency at which such crimes take place. The interests of the public must be protected. I am of the view that taking into consideration the principle, set out in the case of **S v MALGAS** *supra* such an appropriate sentence

for the offence committed is reasonable and is not harsh and inappropriate and nor did the trial court misdirect itself on any manner during sentence.

[14] It is trite law that the court of appeal may not interfere with the sentence and replace it with its own, unless it is justified to do so. See **S v OBISI** 2005 (2) SACR 35 (W) at 35 i – j. One of the instances is whether the trial court exercised its discretion improperly.

[15] In view of the aforesaid I am not persuaded that the court *a quo* misdirected itself or that the sentence is shockingly inappropriate.

[16] In the circumstances, I make the following order:

The appeal in respect of sentence is dismissed, and the conviction and sentence confirmed.

S. CHESIWE, AJ

I concur.

A. F. JORDAAN, J

On behalf of the applicant:	Me. S. Kruger Instructed by: Legal Aid BLOEMFONTEIN
On behalf of the respondent:	Adv. R Hoffman Instructed by: The Director Public Prosecutions BLOEMFONTEIN

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