

**IN THE HIGH COURT OF SOUTH AFRICA  
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

CASE NO: 77/08

In the matter between:

**JAN MASIRE**

**APPELLANT**

**and**

**THE STATE**

**RESPONDET**

**CRIMINAL APPEAL MOGOENG**

**JP & KGOELE AJ**

**JUDGMENT**

**KGOELE AJ:**

[1] The appellant was sentenced to fifteen (15) years of imprisonment after being convicted of murder falling under Part II of Schedule 2 of the Criminal Law, [Amendment](#) Act 105 of 1997. He now appeals against sentence only.

## **B    BACKGROUND**

[2] The summary of the evidence before the trial court that on the 28<sup>th</sup> day of January 2002. Appellant and the deceased had an argument about a game of pool at a Tavern A fight ensued between them. The deceased chased the Appellant when he ran out of the Tavern. The deceased was armed with a broken bottle when he so chased the Appellant. Appellant was not armed. When the deceased caught up with the Appellant he stabbed him with the said broken bottle just above the eye. Whilst the other witnesses in this matter were busy intervening, the Appellant managed to take broken bottle from the deceased and stabbed him with on the neck. The deceased died as a result of the excessive bleeding emanating from the stab wound on the neck.

[3] Appellant was consequently convicted by the trial court. The trial court made a finding that no substantial and compelling circumstances existed that warranted it to depart from imposing the minimum sentence prescribed on this offence the Appellant was convicted of when it considered the sentence.

## **C    SUBMISSIONS**

[4] The Appellant submits that the trial court misdirected itself when it made a finding that there were no substantial and compelling circumstances that warranted it to depart from imposing the minimum sentence prescribed on the charge the Appellant was convicted of.

[5] In support of this submission the Appellant maintain that his personal circumstances which served before the trial court, together with the circumstances under which the offence was committed, cumulatively constitutes enough compelling and substantial circumstances which warrants the court to depart from imposing fifteen years imprisonment His personal circumstances are that:

- > He is a first offender at the age of thirty years.
- > He is a family man.
- > He is gainfully employed and a bread winner.

[6] In as far as the circumstances of the commission of the offence are concerned Appellant submitted that:

- > The deceased was the initial aggressor.
- > The Appellant ran away from the deceased.
  - > The deceased stabbed the Appellant on the face first and then, he, the Appellant retaliated.
  - > The Appellant retaliated using the same bottle that the deceased stabbed him with.

[7] **Advocate Makhaga**, on behalf of the Respondent did not hesitate during arguments to concede that the abovementioned sequence of events clearly indicate that the Appellant's action were on the day in question proceeded by provocation on the part of the deceased and therefore, constituted strong mitigating factors in favour of the Appellant. He referred the court to a case of **S v Mokonto 19741 ( ) SA 319 (A)** where it was held:

*"The reason why provocation is regarded a ground for the mitigation of sentence is that a crime committed impulsively is morally less blameworthy than one committed with premeditation."*

[8] The seminal judgment on how courts should deal with "substantial and compelling circumstances" is found in the case of **S v Malgas 2001 (1) SACR 466 (SCA); 2001 (2) SA 1222 (SCA)**. The gist of the Malgas case is that specified sentences should not be departed from flimsily and lightly. However if the circumstances of the case are that it calls for a departure, the court should weigh all considerations traditionally relevant to sentencing. Mitigating and aggravating circumstances had to be weighed against each other.

[9] In my view, the circumstances surrounding the commission of the offence mentioned above, renders the conduct of the Appellant morally less blameworthy. The circumstances therefore serve as mitigatory factors in favour of Appellant.

[10] I fully agree with the submission by both the Appellant and the Respondent that the personal circumstances of the Appellant, together with the circumstances under which the offence was committed, cumulatively taken constitutes substantial and compelling circumstances that within the provisions of the Act. This is an instance in which departure from the prescribed sentences would have been justified. Therefore come to the conclusion that there was a misdirection on the part the trial court.

[11] Sentence is primarily in the discretion of the trial court and a court of

appeal will not lightly interfere with a sentence imposed by the trial court. Only where it is clear that the sentence imposed on him on the **15<sup>th</sup> December 2008** as at the time of hearing the appeal. This is another factor that this Court will take into consideration in coming to an appropriate sentence to impose. This period served, is enough To satisfy the consideration of retribution, deterrence and rehabilitation on the Appellant. Notwithstanding the seriousness of the offence, there is nothing to indicate that the Appellant is danger to the society. There is therefore no need to protect the society by imprisoning him to a lengthy term. I am of the opinion that any further need for retribution, deterrence and rehabilitation, if any, can equally be served by suspending part of the sentence this Court will impose.

[14] Consequently the following order is made:

14.1 The appeal by the Appellant against sentence is upheld.

14.2 The sentence imposed by the trial court is set aside and is substituted with the following:

"Ten (10) years imprisonment half o f which is ~~sus~~suspended for a period of five (5) years or condition that the accused is not found guilty of murder and assault committed during the period of suspension." The sentence is antedated to the 15<sup>th</sup> December 2003.

14.3 The Appellant is released with immediate effect.

discretion of the trial court was not exercised judiciously or reasonably will the court of appeal be entitled to interfere. In the *Malgas* case quoted above, it was further held:

*"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 K To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of the discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as shocking, 'startling' or disturbingly inappropriate".*

[12] This court is therefore entitled to interfere with the sentence imposed by the trial court as there was a material misdirection on the part of the trial court when it considered the sentence it imposed on the Appellant.

[13] According to the record of proceedings the Appellant had already served four (4) years and eleven (11) months of the

**A M KGOELE**  
**ACTING JUDGE OF THE HIGH COURT**

I agree

**M T R MOGOENG**  
**JUDGE PRESIDENT**

DATE OF HEARING

: 28 NOVEMBER 2008

DATE OF JUDGEMENT

: 24 DECEMBER 2008

COUNSEL FOR APPLICANT

: ADV KUAPANE

COUNSEL FOR RESPONDENTS

: ADV MAKHAGA