



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: CA 18/2018

In the matter between:

LESEJANE JACOB

Appellant

And

THE STATE

Respondent

DJAJE J, NOBANDA AJ

JUDGMENT

DJAJE J

Introduction

[1] The Appellant was arraigned in the Regional Court sitting in Madikwe and was convicted of murder, three counts of assault with intent to do grievous bodily harm and one count of attempted murder. He was sentenced as follows:

- Count 1 Murder – fifteen years imprisonment;
- Count 2 Assault with intent to do grievous bodily harm – six months imprisonment;
- Count 3 Assault with intent to do grievous bodily harm – three years imprisonment;
- Count 4 Assault with intent to do grievous bodily harm – three years imprisonment;
- Count 5 Attempted Murder – six years imprisonment.

It was ordered that sentences in count 2, 3 and 4 were to run concurrently. Effectively, the Appellant was sentenced to 24 years imprisonment. He now appeals against sentence only, having been granted leave to do so by this court.

Factual Background

[2] In count 1 it was alleged that the Appellant on **13 December 2009**, killed Badirile Morakile by stabbing him with a knife. In count 2 he was alleged to have assaulted Pauline Morakile by slapping her with an open hand and kicking her. In count 3 that he stabbed Morning Morakile with a knife. The allegation in count 4 was that the Appellant stabbed William Motlapeng with a knife. Lastly, in count 5 that the Appellant attempted to kill Joseph Phage by stabbing him with a knife. The incidents in all the five counts happened on the same day at a party in Pella village.

[3] The evidence before the court *a quo* can be summarised as follows: It all started when the Appellant assaulted the complainant in count 2 (“Pauline”), by slapping and kicking her. The deceased in count 1, was Pauline’s father and he enquired from the Appellant the reason

for him assaulting her daughter. The appellant then stabbed him with a knife. The complainants in count 3, 4 and 5 were present at the scene. They saw the assault on Pauline and the stabbing of the deceased. When they tried to intervene, they were also stabbed by the Appellant. The deceased died as a result of being stabbed by the Appellant. The other complainants only sustained injuries.

[4] The Appellant testified and admitted that on the day in question, he was at the party in Pella and met Pauline. He assaulted her after she insulted him. Thereafter, the deceased arrived and took Pauline home. He followed them and on the way he noticed a group of people following him. At the deceased's house, the group attacked him and when the deceased tried to grab him, he took out his knife and stabbed him in self-defence. Thereafter, he started to waive his knife randomly so as to get out of the group that encircled him. He does not know how many people he stabbed, as he acted in self-defence to ward off the group of people from attacking him.

[5] In convicting the Appellant, the court *a quo* found that the state succeeded in proving the guilt of the Appellant beyond reasonable doubt.

AD SENTENCE

Submissions

[6] It was argued on behalf of the Appellant that the court *a quo*, in sentencing, failed to adequately take into consideration the personal circumstances of the Appellant. Further, that the court *a quo* erred

in imposing a cumulative sentence of twenty four years imprisonment, which is shockingly inappropriate, when there were compelling and substantial circumstances, warranting deviation from the prescribed minimum sentence of fifteen years imprisonment imposed for count 1 relating to murder.

- [7] In contention, the Respondent argued that the trial court correctly found that there were no compelling and substantial circumstances justifying deviation from the prescribed minimum sentence of fifteen years. Further, that the aggravating factors far outweigh the mitigating factors, in that, the Appellant on the day of the incident, was so aggressive that he killed the deceased for intervening in a matter affecting his daughter. The Respondent argued that this was an indication that the Appellant had no respect for his elders and for human life. However, the Respondent conceded that the court *a quo* erred in not blending mercy, in its sentence, by not ordering all the sentences to run concurrently with the sentence of murder, as all the offences were as a result of one continuous act.

Law

- [8] In **S v Bogaards 2013 (1) SACR 1 (CC)** the Constitutional Court held:

“[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the

sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another”

- [9] In the matter of **Marota v The State (300/15) [2015] ZASCA 130 (28 September 2015)** Petse JA stated as follows:

“The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This requires that a sentencing court should have regard to, inter alia, the peculiar facts of each case, the nature of the crime and the personal circumstances of the offender. (See eg: S v Zinn 1969 (2) SA 537 (A) at 540G). Accordingly, a court of appeal will interfere with the exercise of such discretion only on limited grounds.”

See also: S v Malgas 2001 (1) SACR 469 (SCA)

- [10] In the case of the **S v Vilakazi 2009 (1) SACR 552 (SCA)** Nugent JA said at par 15:

*“It is clear from the terms in which the test was framed in **Malgas** and endorsed in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the ‘offence’ in the context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)*

consist of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

*If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in **Malgas**, which said that the relevant provision in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify'...it."*

Analysis

[11] The following personal circumstances of the Appellant were highlighted at the time of sentence:

- He was a first offender;
- He was 50 years old at the time of the commission of the offence and unmarried;
- He was gainfully employed for over twenty years which employment he lost as a result of being arrested in this matter;
- He has two children who have both attained the age of majority;
- He was in custody awaiting trial for four months.

[12] Murder is regarded as a very serious offence as it affects the society at large. The deceased in this case was a father who was only trying to protect his daughter and to amicably resolve the impasse between the Appellant and his daughter. The Appellant at his age did not want to listen to anyone on that day and went on a rampage stabbing everyone who tried to intervene. There can be no

justification for acting in the manner that he did. The complainants in count 3, 4 and 5 all wanted to find out from the Appellant why he was assaulting the complainant in count 2 and stabbing the deceased. In return they were all stabbed for no apparent reason.

[13] The offence, the personal circumstances of the Appellant and the interest of society should be balanced in determining an appropriate sentence.

[14] As far as the sentence of fifteen years imprisonment is concerned, it is apparent that the learned Regional Magistrate found that there are no substantial and compelling circumstances present in this case which warrants a deviation from imposing the prescribed minimum sentence. I am of the view that the learned Regional Magistrate was correct in this regard. In the other counts, there is no reason for this court to interfere, as there was no misdirection. However looking at the circumstances of this case and how all the offences were committed, it is only fitting to conclude that all the offences were committed as a result of one continuous act and emanating from the assault of Pauline by the Appellant. As a result, this court is at liberty to interfere with the sentence imposed by the court *a quo* and order the sentences in count 2, 3, 4 and 5 to run concurrently with the sentence in count 1.

Order

[15] Consequently, the following order is made:

1. The appeal against the sentence is upheld;

2. The sentences imposed by the court *a quo* in count 2,3,4 and 5 are ordered to run concurrently with the sentence in count 1, with the effective term of fifteen years imprisonment.
3. The sentence is ante-dated to **28 September 2012**.

J T DJAJE
JUDGE OF THE HIGH COURT

I AGREE

L P NOBANDA
ACTING JUDGE OF THE HIGH COURT
APPEARANCES

DATE OF HEARING : **01 JUNE 2018**

DATE OF JUDGMENT : **21 JUNE 2018**

COUNSEL FOR THE APPELLANT : **MR GOONYANE**

COUNSEL FOR THE RESPONDENT : **ADV MUNERI**