



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

**CASE NO: A146/2024
DIVISION 7**

In the matter between

GABRIEL GOLIATH

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT: 19 AUGUST 2024

VAN DEN BERG, AJ

1. The appellant was found guilty of murder on 5 September 2023 and sentenced to 16 years direct imprisonment by the Oudtshoorn Regional Court on 7 September 2023. He was represented throughout the trial. On 2 November 2023, the Court a quo refused the appellant's application for leave to appeal against the conviction and sentence.

2. The appellant's petition in respect of the finding of guilt was dismissed on 9 May 2024 by Justice Fortuin and Justice Cloete, with leave granted only against the sentence. The appeal before the Court concerns solely the imposed sentence.
3. The appellant contends that the Court a quo was incorrect in finding that no substantial and compelling circumstances exist to deviate from the minimum prescribed sentence. On appeal, it is submitted that the Court a quo did not warn the appellant that it intended to impose a sentence higher than the minimum prescribed sentence.
4. The main charge against the appellant read as follows:

"Murder (read with the provisions of section 51(1) plus (2), 52 of the Criminal Law Amendment Act 105 of 1997), read with section 127 of Act 51 of 1977:

*In that upon (or about) the 07.12.2017 and at (or near) **REGGIE OLIPHANT STREET OUDTSHOORN** in the REGIONAL DIVISION OF THE WESTERN CAPE, the accused did unlawfully and intentionally kill **BRANWILL MAY** a male person, by **STABBING WITH A KNIFE.**"*

5. After the Court heard evidence regarding aggravating and mitigating circumstances, the appellant was sentenced to sixteen (16) years imprisonment, and in terms of section 103 of the Firearms Control Act 60 of 2000, he was declared unfit to possess a firearm.

THE CRIME

6. The appellant pleaded not guilty but admitted being responsible for the stabbing and killing of the deceased. The appellant contended that he and the deceased quarrelled and that he accidentally stabbed the deceased during their altercation. The appellant alleged that the deceased had stabbed him. However, no corroborating evidence was presented to substantiate any injuries sustained by the appellant, nor were any injuries observed by the arresting police officers.
7. According to the medical evidence presented, the deceased's neck was cut, and the throat displayed a 25 cm long wound. The depth and length of the wound indicated that force was applied and that it was not self-inflicted.
8. The Court rejected the appellant's version that he turned the deceased's arm and that the deceased accidentally cut himself. The Court *a quo* accepted that it was not a premeditated murder but found the appellant guilty of murder on the basis of *dolus eventualis*.

THE APPELLANT'S PERSONAL CIRCUMSTANCES

9. The appellant was 26 years old at the date of the commission of the murder and 32 years old at the time of being sentenced. He completed Grade 10 and was in a relationship for three (3) years at the time of his sentencing. He had two (2) children aged 5 and 9 years old from a previous relationship. They reside with him and his partner, due to the children's mother being a drug user.

Sadly, the appellant is the minor children's caregiver. He and the children reside with his parents, and he was employed on a contract basis at the time of his conviction with the Oudtshoorn Municipality.

10. A prolonged time passed between the murder and the start of the trial due to the case being withdrawn, then struck off the Court roll, and only proceeding to trial in 2023.
11. The appellant has three (3) previous convictions, including a conviction of assault for grievous bodily harm in 2007, for which he received a suspended sentence. A second conviction for assault with the intention of causing grave bodily harm in 2010, for which he was sentenced to 12 (twelve) months direct imprisonment, of which six (6) months were suspended for five (5) years. In 2015, he paid an admission of guilt fine for trespassing.
12. The appellant was not found guilty of any other offences since his last offence in 2015 up and until being convicted of murder.

THE DECEASED'S FAMILY AND CIRCUMSTANCES

13. The deceased was married and the father of two (2) minor children. Although the family of the deceased is known to the appellant, the appellant has failed to express his regret for causing the death of the deceased.

14. The evidence by both the deceased's mother and his wife highlighted the irreparable tragic consequences of the deceased's untimely demise and the effect thereof on their lives. The appellant never took responsibility for his actions and stayed resolute in his account that he acted in self-defence.
15. The trauma and psychological impact the murder of the deceased had on the families, including the minor children, cannot be understated. It is even more tragic when one considers that the life of the deceased was erased after the appellant and he quarrelled over a mere R20,00.

EVALUATION OF THE LAW REGARDING SENTENCING

16. The court must consider the seriousness of the offence, the personal circumstances of the accused, and the interests of society when determining the sentence. There must be compelling circumstances that warrant the deviation from the prescribed sentence.¹
17. In State v Kekana² The Supreme Court of Appeal held regarding the deviation from minimum sentences that, as a general proposition, an accused who wishes for a lesser sentence to be considered must set out the facts on which such a conclusion can be premised.

¹ State v Zinn 1969 (2) SA 537 (A) at 540G

² 2019 (1) SACR 1 (SCCA) at para 19

18. In the matter of **State v SMM 2013 Vol. 2, SACR 292 SCA** at paragraph 13 the following was stated:

"It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity."

19. Lastly, in **State v. Nkomo 2007 (2) SACR 198 SCA**, the Court reaffirmed:

"In Malgas, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response."

REGARDING THE PROPORTIONALITY OF THE SENTENCE IMPOSED

20. Sentencing is inherently within the discretion of a trial court. This Court's powers to interfere with the trial court's discretion in imposing sentence are limited unless the trial court's discretion was exercised wrongly. The essential enquiry in an appeal against a sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judicially. There must be either a material misdirection by the trial court or a gross disparity between the sentence which the appeal court would have imposed had it been the trial court. This Court can interfere with a trial court's sentence in a case where the sentence imposed was disturbingly inappropriate³.

21. At the conclusion of the sentencing proceedings, the prosecutor asked: "...*that the Court impose the prescribed minimum sentence of 15 years imprisonment.*"⁴. The Office of the Director of Public Prosecutions submitted that the appeal against the sentence should succeed and a term of fifteen years imprisonment be imposed.

22. The appellant has shown no real or true remorse, and although he is young, he was not a child or even a youth at the time of committing the murder. The Court *a quo* highlighted the circumstances throughout why a deviation for a sentence less than the prescribed minimum of 15 years was not justified.

³ S v Salzwedel and others 1999 (2) SACR 586 at 588A-B [also reported at [1999] JOL 5809 (A); [2000] 1 All SA 229 (A)]

⁴ Record of proceedings pp326, lin 14 to 19

23. However, neither the State nor the appellant's representatives presented evidence or argued circumstances why the increased jurisdiction was justified in sentencing the appellant to 16 years.
24. There are no substantial and compelling circumstances which may cumulatively justify a departure from the sentence prescribed by the Act.⁵ The Court *a quo*'s finding regarding the objectives of the sentence, including reformation, rehabilitation, prevention, and deterrence, was correctly considered by not deviating from imposing the prescribed minimum sentence.
25. However, the Court *a quo* did not allude to the possibility of imposing a sentence higher than the minimum prescribed sentence prior to giving judgment in sentencing the appellant. The prosecution did not ask for a longer period of imprisonment, while the appellant's representative attempted to persuade the Court to deviate from the minimum sentence.
26. The prescribed minimum sentence of 15 years undoubtedly reflects a comprehensive, correct and careful balance between the personal circumstances of the appellant, the seriousness of the offence and the interest of the victim's family and community. No amount of sentence will bring the life of the deceased back. The appellant should be confronted with the consequences of his crime and receive a sentence that will deter other people from committing similar offences.

⁵ S v Malgas 2001 (1) SACR 469 (SCA) para 25

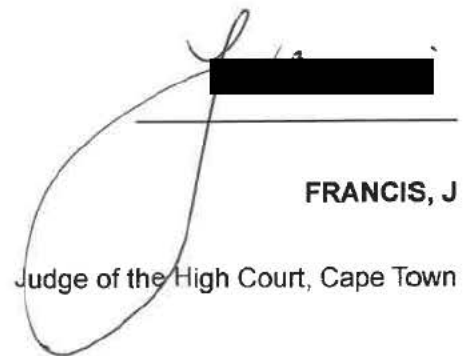
27. There is no gross disparity between the sentence which the appeal court would have imposed had it been the trial court and that imposed by the Court a quo. The sentence is not disturbingly inappropriate. However, the fact that the appellant was not given an opportunity to present a case regarding the imposition of a longer imprisonment term leaves one with a sense of unease. It transgresses the right to procedural fairness, and for this reason alone, the appeal should succeed.
28. In the result, the following order is proposed:
- [1] The appeal against the sentence is upheld.
 - [2] The sentence imposed by the trial Court is set aside and substituted with the following sentence:
 - (a) The appellant is sentenced to undergo fifteen (15) years imprisonment.
 - [3] The sentence is ante-dated to 7 September 2023.

10

VAN DEN BERG, AJ

Acting Judge of the High Court, Cape Town

I agree, and it is so ordered.


FRANCIS, J
Judge of the High Court, Cape Town