

SOUTH AFRICA / JUDGMENT

## M v S (A136/2017) [2017] ZAFSHC 199 (7 September 2017) [2017] ZAFSHC 199

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Lefenya

CASE / FILE NUMBER

A136/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A136/2017

In

the Appeal between:

Z.

M.

Appellant

and

THE

STATE

Respondent

CORAM:

REINDERS, J et LEFENYA, A

HEARD

ON:

28 AUGUST 2017

**JUDGMENT**

BY: LEFENYA,AJ

DELIVERED ON: 7 SEPTEMBER 2017

I.

**INTRODUCTION.**

- [1] The appellant Mr. M. was convicted of murder in the Regional Court sitting in Petrusburg on 20 July 2016. The court found that the appellant on 13 February 2016 inflicted a fatal wound by stabbing the deceased with a knife in his neck during a fight which occurred at a tavern. The learned magistrate in handing down judgment was satisfied that the appellant, on his own admission, had exceeded the boundries of self-defence.
- [2] In coming to a just sentence, the magistrate took into account the personal circumstances of the appellant, and in deviating from imposing the prescribed minimum sentence of 15 years imprisonment found as follows:

" The only substantial and compelling circumstance in this case is the fact that the accused is still, was still young on the time of the commission of the offence being 18 years old. However the court will also take into consideration all the other factors that are normally taken into account as mitigating factors such as the fact that the accused is a first offender, the fact that the accused has been honest about what happened on the [indistinct], that alcohol and drugs played a role in the commission of the offence by the accused, that the incident occurred at the spur of the moment, not planned. The accused has been in custody since the 13 February 2016 as an awaiting trial prisoner. Be that as it may the personal, the mitigating factors are far outweighed by the seriousness of the offence."

- [3] Having found this, the court sentenced the accused to 13 years imprisonment. The appellant now appeals against the sentence.

Application for leave to appeal was granted by the Regional Magistrate.

- [4] The state initially in the papers opposed this appeal but after arguments by the appellant's counsel the state conceded.

**II. APPELLANT'S ARGUMENT.**

- [5] It was argued for the appellant that the sentence is inappropriate and that the Regional Magistrate overemphasized the seriousness of the offence and interest of the society. According to the defense, had the court, among others considered the fact that deceased was stabbed only once and also that he was a first offender as compelling and substantial factors it could have imposed even a lesser sentence.

III.

### REASONS.

- [6] The learned magistrate correctly found that accused's age was a compelling and substantial factor to be considered and deviated from imposing the prescribed minimum sentence. The deviation from 15 years imprisonment to 13 years was in my opinion very slight.
- [7] This court should be cautious and not alter sentences for flimsy reasons and is mindful of the fact that the court of appeal should not easily interfere with the sentence of the trial court, as sentencing is in the discretion of the trial court.

See: *S.v. Mnyakeni* 2013 JDR 1400 (GNP); *S.*

*v.* *Giannoulis* 1975 (4) SA 867 (A).

- [8] However a court of appeal can interfere and alter the sentence if the discretion was not judicially and properly exercised and the sentence was inappropriate.

See: *S. V. Mnyakeni* *supra* at page 32.

- [9] The question is was age the only factor that the trial court could have taken into account, and if there were other factors would it have considered even a lighter sentence.
- [10] In my view, over and above the factor of youthfulness the court a quo could have also taken the following into account:

### IV. NATURE OF THE OFFENCE.

- [11] The court cannot overemphasize the seriousness of the offence of murder, because life is one of the most precious rights one can have. Once life is lost it can never be regained.
- [12] The defense argued the court should have taken into consideration the fact that the deceased was stabbed only once.
- [13] Indeed the fact that accused stabbed the deceased once does not alter the result of death, but by stabbing the deceased once, one can measure the degree of aggression and find it to have been lesser.
- [14] In its judgment the court a quo also found that accused exceeded the boundaries of self-defense. Therefore these 2 factors could have been taken into account when sentencing the appellant.

### V. FIRST OFFENDER.

- [15] Though the legislator when ordaining minimum sentences considered the factor of being a first offender and one can argue that it is part and parcel of the charge, I however agree with the defence in its reference to the case of *S. v Woods* 1973 (4) SA 95 RA which states that the sentencing court should never overlook the effect of imprisonment on first offenders.

- [16] I am therefore of the view that as the trial court correctly found age to be a compelling and substantial factor it could have also taken the fact that appellant is a first offender into account.

#### VI. ALCOHOL AND DRUGS.

- [17] It is not in dispute that the appellant at the time of the commission of the offence had been drinking and that he is someone who uses drugs. If one takes this into consideration and the appellant's immaturity then it is correct to say his judgment was clouded.

#### VII. MERCY.

- [18] The element of mercy is the cornerstone of every sentencing court. Sentences should reflect mercy at all times. There are of course some cases where the courts have to be harsher in sentencing and not show mercy but given the circumstances of the accused in this case, it is one of the cases where sentence should be seen to have been blended with mercy. Even on a lesser sentence the element of rehabilitation could still be achieved.

#### VIII. FINDING.

- [19] Though the courts would be reluctant to interfere with the sentencing discretion of the court a quo, this court finds that in light of the above mentioned the court a quo erred in stating that only the youth of the appellant was a substantial and compelling factor and not taking all the factors as alluded to above cumulatively as substantial and compelling to warrant an even greater deviation from the prescribed minimum sentence.
- [20] Furthermore this court finds the sentence imposed is inappropriate to the offender and disproportionate to the offence.
- [21] Therefore from the above mentioned aspects and as counsel for the state conceded it is clear there is a need for this court to intervene.
- [22] The defense in its heads of argument asked this court to consider a sentence of imprisonment between eight (8) and ten (10) years.

#### IX. ORDER.

- [23] Accordingly the following orders are made;

1. The appeal succeeds.
2. The sentence of thirteen (13) years imprisonment is set aside and replaced with the following:

"Nine

- (9) years imprisonment."

3. The sentence must be deemed to have been imposed on 20 July 2016.

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BR LEFENYA, AJ

I concur.

C REINDERS, J

On behalf of the appellant: Mr. D. Reyneke

Instructed by:

Justice Centre

Bloemfontein

On behalf of the Respondent: Adv Sekoena

Instructed by:

Director of Public Prosecutions

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