Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO: **CA&R128/2016**
DATE HEARD: **27/02/2017**
DATE DELIVERED: **03/03/2017**

In the matter between:

KORDOM, JACKSON Appellant

and

THE STATE Respondent

Coram: Olivier J *et* Snyders AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr Jackson Kordom, appeared in the Regional Court, Upington, on a charge of having unlawfully and intentionally killed Mr Jacob Green on the 3rd of October 2015. The appellant pleaded guilty to the charge and a statement by him in terms of section 112(2) of the **Criminal Procedure Act**[1] was presented to the court. The prosecution accepted the plea of guilty and the contents of the statement and the appellant was convicted accordingly. The Regional Magistrate found that there were no substantial and compelling circumstances which would justify a deviation from the prescribed sentence and sentenced the appellant to 15 years imprisonment. The appellant's application for leave to appeal against

[1] 51 of 1977

the sentence was unsuccessful, but leave was subsequently granted to him on petition.

[2.] Both parties' legal representatives referred to the trite test on appeal against sentence, namely that a sentence will only be interfered with where it is inappropriately harsh and/or the result of a material misdirection[2].

[3.] Where the sentence appealed against was imposed in circumstances where a prescribed sentence was applicable and where the issue of substantial and compelling circumstances was involved the approach on appeal will, however, be different. In **S v PB**[3] it was held "*that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not*"[4]. This approach was followed in **S v GK**[5], where it was held that "*The values of the Constitution are better served by an interpretation which does not fetter the appellate court when it comes to the question of the presence or absence of substantial and compelling circumstances. To allow an appellate court to make its own value judgment on appeal provides accused persons with greater safeguards against the imposition of disproportionate punishment*"[6].

[4.] The factual basis of the appellant's plea of guilty, which was accepted by the prosecution and on the basis of which the appellant was convicted, was briefly as follows:

4.1 During an altercation between the parents of the appellant the deceased entered the premises concerned from the street and stabbed the appellant's father in his face, close to his eye, with a broken bottle. The appellant then fetched a knife from a cupboard, presumably in the

[2] See **S v Shapiro** 1994 (1) SACR 112 (A) at 119j - 120c; **S v De Jager** 1965 (2) SA 616 (AD) at 628H – 629B
[3] 2013 (2) SACR 533 (SCA)
[4] *Ibid*, para [20]
[5] 2013 (2) SACR 505 (WCC)
[6] *Ibid*, para [7]

house, followed the deceased and, when he caught up with him, dealt him a fatal stab wound in his neck.

4.2 The appellant was under the influence of alcohol at the time of the incident.

4.3 He foresaw the possibility that his attack could cause the death of the deceased, but nevertheless inflicted the stab wound.

4.4 The appellant expressed his remorse and apologised to the court, the community and the family of the deceased.

[5.] From the contents of the post mortem report, which were admitted as correct, it appeared that the deceased had also sustained considerable blunt trauma, but it was not clarified when exactly that happened and who had inflicted those injuries. It must therefore be assumed that the appellant had not been involved in the infliction of those injuries. The stab wound which the appellant inflicted had in any event, according to the doctor who performed the autopsy, caused the death of the deceased.

[6.] The Regional Magistrate viewed the appellant's personal circumstances as mitigating. He was a 36 year old widower. His 4 year old child was being taken care of by somebody else at the time of sentence, but before his arrest he had contributed towards the maintenance of the child.

[7.] The Regional Magistrate regarded the appellant's plea of guilty as extenuating, especially when viewed against the background that he had already on a previous occasion expressed the desire to plead guilty.

[8.] The appellant did have several previous convictions, but none of them involved violence towards another person. The Regional Magistrate took into account

that the appellant was therefore a first offender as far as offences of this nature were concerned. The previous convictions ranged from 1995 to 2012 and involved malicious damage to property, stock theft, escaping from lawful custody and theft, and the appellant had never before been sentenced to unsuspended imprisonment.

[9.] The Regional Magistrate made no mention of the fact that the appellant had been under the influence of alcohol, or of the fact that the appellant had not inflicted the stab wound with the direct intention of killing the deceased, and apparently did not take these factors into account in considering whether there were substantial and compelling circumstances justifying a lesser sentence than 15 years imprisonment.

[10.] Ms Ilanga, counsel for the respondent, submitted that, because the appellant that had known what he was doing, alcohol could not have played any role in his actions. This approach is wrong. That the app, as it was put in **S v M**[7], may have "*had the volition to act*" and "*knew what he was about*", is not the test, but rather whether he may have been "*less in command of himself than he would have been if he had not been drinking*". In the same matter it was held[8] that "*Liquor can arouse senses and inhibit sensibilities. It is for the State to discount it as a mitigating factor, to show that it did not materially affect the appellant's behaviour*".

[11.] **S v Louw** (CA&R 113/07) [2008] ZANCHC 2 (8 February 2008) at para [9] Bosielo AJP (as he then was) had the following to say about the influence that alcohol could have on the issue of blameworthiness :

"*Regarding the effect of alcohol on people's behaviour there is more than enough empirical evidence, that alcohol adversely affects people's inhibitions and reaction. The problem of alcohol or intoxication is as old as mankind. As the learned Holmes JA aptly remarked in S v Ndlovu (2) 1965(4) SA 692 AD at p 695C:*

[7] 1994 (2) SACR 24 (A) at 30C-D
[8] At 29H

'Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do.'

Confronted with a similar situation where intoxicating liquor featured prominently in the commission of murder, Holmes JA expressed the following salutary warning in S v Sigwahla 1967(4) SA 566 (AD at 571D-E:

'In considering the relevance of intoxicating liquor to extenuating circumstances the approach of a trial Court should be one of perceptive understanding of the accused's human frailties, balancing them against the evil of his deed.' "

[12.] The Regional Magistrate refused to accept that provocation played any role at all in the appellant's behaviour. The Regional Magistrate's reasoning in this regard was that the appellant had sufficient time and opportunity after the attack on his father, and in the process of fetching the knife and catching up with the deceased, to come to his senses and that the appellant had therefore consciously chosen to take the law into his own hands, rather than to lay a complaint against the deceased.

[13.] The problem is that it is not clear how much time had elapsed after the attack on the appellant's father before the appellant stabbed the deceased. It does not even appear whether the deceased had by then already left the premises of the appellant's parents. It is accordingly not clear exactly how much time the intoxicated and infuriated appellant really had to reflect and to come to his senses. This is an aspect which the Regional Magistrate had been fully entitled to clear up, even before conviction, and did not.

[14.] On all indications, however, the attack on the deceased must have taken place within a very short time after the attack on the appellant's father, because it

appears that people who had moved away from the premises of the appellant's parents, presumably when the deceased stabbed the appellant's father, were still in the immediate vicinity when the appellant caught up with the deceased, and they reacted by throwing stones at the appellant.

[15.] It is clear that there could not have been a "*considerable*" period of time[9] between the attack on the appellant's father and the appellant's attack on the deceased, and the circumstances under which the appellant stabbed the deceased could by no stretch of the imagination be described as peaceful[10].

[16.] In **S v Mngoma**[11], where four days had elapsed between the provoking incident and the crime, it was held[12] that "*This delayed reaction does not necessarily eliminate the effect of the provocation. But it waters it down considerably*". The Regional Magistrate was therefore in any event wrong in finding, in effect, that any delay at all would mean that the provocation could not have played any role in the subsequent attack.

[17.] There was no factual basis for a finding that the appellant had consciously chosen to take the law into his own hands, rather than following the route of laying a complaint against the deceased. Even if he had, however, been motivated by a desire to avenge the attack on his father, this may still have constituted a mitigating factor, once again depending on the time that had elapsed between the attack on his father and his attack on the deceased[13].

[18.] The Regional Magistrate laid much emphasis on the fact that the community had, after the appellant had stabbed the deceased, assaulted the appellant by throwing stones at him. Whether he was hit by the stones and whether the appellant was injured, was never cleared up. The appellant speculated that the deceased may have been struck by some of the stones.

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[9] Compare **S v Malejane** 1999 (1) SACR 279 (O) at 281
[10] Compare **S v Matjeke** 2016 JDR 1138 (GJ) p31
[11] 2009 (1) SACR 435 (E)
[12] *Ibid*, para [6]
[13] Compare **S v Dladla** 1980 (1) SA 149 (A) at 151B; **S v Mazibuko and Another** 1992 (2) SACR 491 (A) at 493a – b; **S v Mandela** 1992 (1) SACR 661 (A) at 664i

[19.] In my view the appellant's undisputed expression of remorse and his apology to *inter alia*, the family of the deceased, the influence of alcohol, the absence of a direct intention to kill, the role of the deceased's provoking behaviour and the absence of any history of physical violence on the part of the appellant towards other people constituted substantial and compelling circumstances which justified a lesser sentence than the prescribed 15 years imprisonment.

[20.] The prosecutor at the trial apparently agreed that there was room for a deviation from the prescribed sentence and at the time suggested a sentence of 12 years imprisonment. In considering a lesser sentence it is so that the "*bench mark*"[14] provided by the prescribed sentences must be kept in mind. Also, the sentence imposed should still make it clear that the courts will not countenance behaviour like this, even if preceded and provoked by a completely unjustified attack like the one that the deceased launched against the appellant's father. In my view an appropriate sentence in the circumstances would indeed be 12 years imprisonment, especially in view of the fact that this was not the appellant's first brush with the law. Although unrelated, the appellant's previous convictions suggest a lack of respect for the law and for the rights of others.

[21.] According to the covering sheet in this matter the appellant is in custody and it is therefore accepted that he has been serving the imposed imprisonment pending this appeal. It appears that he had not been held in custody pending his trial.

[22.] In the circumstances the following order is therefore made:

> **THE APPEAL SUCCEEDS AND THE SENTENCE OF 15 YEARS IMPRISONMENT IS SET ASIDE AND SUBSTITUTED WITH A SENTENCE OF 12 YEARS IMPRISONMENT, ANTEDATED TO 22 JUNE 2016**.

[14] Compare **Director of Public Prosecutions, Transvaal v Venter** 2009 (1) SACR 165 (SCA) para [53]

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

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J A SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	**MR A VAN TONDER** **(Kimberley Justice Centre)**
For the Respondent:	**ADV K ILANGA** **(Office of the Director of Public Prosecutions)**