THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 498/2015

In the matter between:

BUSHY VINCENT KEKANA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Kekana v The State* (498/2015) [2015] ZASCA 194 (1 December 2015)

Coram: Navsa, Cachalia, Shongwe, Tshiqi and Dambuza JJA

Heard: **11 November 2015**

Delivered: **1 December 2015**

Summary: Sentencing – Criminal Law Amendment Act 105 of 1997 – appellant aged between 16 and 18 years – sentence of life imprisonment imposed in relation to a conviction on each of two counts of murder – the fact that appellant was a child at the time of the commission of the offence ignored – material misdirection – sentence of 20 years' imprisonment substituted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Polson AJ, Ranchod J and Msimang AJ concurring, sitting as court of appeal):

(a) The appeal against each of the two life sentences is upheld.

(b) The order of the full court is set aside and the following order is substituted in its place:

'(i) the appeal against sentence by the first appellant is upheld only in relation to the sentences of life imprisonment imposed in respect of his conviction on counts 1 and 2.

(ii) the sentences of life imprisonment in respect of counts 1 and 2 are set aside and substituted with a sentence of 20 years' imprisonment, both counts being taken together for purposes of sentence.

(iii) all the other sentences are confirmed.

(iv) the order of the court below in respect of the first appellant is consequently substituted to read as follows:

"1. Accused 1 is sentenced as follows:

(a) On counts 1 and 2, taken together for the purposes of sentence, to 20 years' imprisonment.

(b) On count 3, to 15 years' imprisonment.

(c) On count 5, to 3 years' imprisonment.

(d) On count 6, to imprisonment for one year."

(e) It is ordered that the sentences on counts 3, 5 and 6 shall run concurrently with the sentence of 20 years' imprisonment in respect of counts 1 and 2.

(f) The effective sentence is thus one of 20 years' imprisonment."'

JUDGMENT

Tshiqi JA (Navsa, Cachalia, Shongwe and Dambuza JJA concurring)

[1] On 14 January 2005 Mr Aslam Muhamad and Mr Foster Mashimbye were gunned down during a robbery at their business, the Ga-Raoleka supermarket, Thabamoopo, Lebowakgomo. They died at the scene. During the robbery an undisclosed amount of cash was stolen. As the four suspects fled from the supermarket, they continued shooting indiscriminately. Mrs Raesibe Madimetja, who resided in the neighbourhood, was shot and wounded on her right thigh while she stood outside her home. The appellant, who was one of the four robbers, and Mr Brian Poho, who later became a state witness at the trial, were apprehended by members of the community on the scene, and handed over to the police. Two other suspects, who were accused 2 and 3, at the trial, were arrested afterwards.

[2] The three accused were arraigned in the circuit court of the Transvaal Provincial Division, Polokwane on two counts of murder, one of robbery with aggravating circumstances, attempted murder, and the unlawful possession of a firearm and ammunition. They were found guilty on all, except the attempted murder, charges.

[3] The two murder charges fell under Part 1 Schedule 1 of the Criminal Law Amendment Act 105 of 1997 (the Act), in view of the fact that they were perpetrated during the course of a robbery with aggravating circumstances. The three accused were sentenced to life imprisonment on each of the two murder charges, 15 years' imprisonment for the robbery with aggravating circumstances, and three years' imprisonment for the unlawful possession of a firearm, and one years' imprisonment for the unlawful possession of ammunition. It was ordered that the sentences in respect of the other counts run concurrently with the sentences imposed in respect of counts one and two. They were thus sentenced to an effective sentence of life imprisonment. Subsequently, they applied for and were granted leave to appeal to

the full court of the Gauteng Provincial Division of the High Court against their sentences.

[4] That court dismissed their appeals. The appellant, whose appeal is the only one before us, now appeals to this court against the full court's confirmation of his life sentence.

[5] Sentencing rests pre-eminently in the discretion of the trial court and an appeal court cannot, in the absence of a material misdirection by the trial court, interfere with the sentence only because it is not one that the court itself would have imposed.[1] To do so would amount to usurping the trial court's discretion[2] and it would erode the discretion entrusted to the trial court.[3] However, notwithstanding the absence of a material misdirection, an appeal court may be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and that which the appellate court would have imposed is so marked that it can properly be described as shockingly, startlingly or disturbingly inappropriate.[4]

[6] The only issue in this appeal is whether the effective life sentence imposed on the appellant, despite his youthfulness, is liable to be set aside. In this regard it appears that both the trial court and the full court were under the mistaken impression that the appellant had turned eighteen when the crimes were committed. They thus assumed that they were obliged to impose the maximum penalty of life imprisonment, unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. They held that there were no substantial and compelling circumstances.

[7] The record shows that appellant was 17 years and some 10 months old at the time, having been born in March 1987.He thus had to be sentenced in terms of

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[1] *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.
[2] Ibid para 12.
[3] *S v Rabie* 1975 (4) SA 855 (A).
[4] *S v Malgas* (above) para 12.

s 51(1) read with s 51(3)*(b)* of the Act. Section 51(3)*(b)*, which is applicable to children between the ages of 16 and 18. In sentencing the appellant as if he had already attained the age of eighteen at the time of the commission of the offence, both courts ignored the provisions of the subsection and thus misdirected themselves materially. This court must therefore consider the sentence afresh.

[8] The seriousness of the crimes cannot be understated. The appellant and his co-accused committed two callous murders during a daring robbery. After shooting the two deceased the appellant and his co-accused fled, shooting indiscriminately in total disregard for the safety of people in the vicinity. Ms Madimetja was seriously injured during the incident.

[9] The appellant played a leading and active role before and during the commission of the offence. The group met at his home to plan the robbery before departing to the crime scene. He was in possession of a firearm, was first to enter the supermarket, and fired shots whilst fleeing the scene. But for the fact that he ran out of ammunition, more people could have been injured or killed. He was still in possession of the firearm when he was arrested. I accept the trial court's observation that his actions could not be described as those of someone who was under the influence of his older co-accused.

[10] But our courts are enjoined by the Constitution to take the youthfulness of an accused as a factor in mitigation of sentence.[5] They are required to always bear in mind that such offenders are in fact young and may be rehabilitated and become responsible members of the community in future.[6] Their participation in crimes may well stem from immature judgment, from as yet unformed character, from youthful vulnerability to error and impulse.[7]

[11] It is of course worrisome that some of the most gruesome and horrific crimes are perpetrated by youth, but in spite of that reality, a presiding officer faced with the

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[5] Section 28(1)(*g*) of the Constitution of the Republic of South Africa, 1996.
[6] In *Centre for Child Law v Minister of Justice and Constitutional Development & others (NICRO as amicus curiae)* 2009 (2) SACR 477 (CC) paras 28-31 and 63.
[7] *Ibid* para 3.

sentencing of a young offender must be guided by certain principles including the principle of proportionality, the best interests of the child, adherence to recognised international law principles, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time[8] having a greater emphasis on the rehabilitation as mentioned above. These principles have now been incorporated in the Child Justice Act 25 of 2008, which came into operation on 1 April 2010. For child offenders between the ages of 14 and 18, the maximum term of imprisonment is now 25 years.

[12] In addition to his age the appellant had spent two years and eight months in custody before he was sentenced. This must be taken into account in arriving at an appropriate sentence. In all the circumstances a term of 20 years' imprisonment is appropriate.

[13] In the result:

(a) The appeal against each of the two life sentences is upheld.

(b) The order of the full court is set aside and the following order is substituted in its place:

'(i) the appeal against sentence by the first appellant is upheld only in relation to the sentences of life imprisonment imposed in respect of his conviction on counts 1 and 2.

(ii) the sentences of life imprisonment in respect of counts 1 and 2 are set aside and substituted with a sentence of 20 years' imprisonment, both counts being taken together for purposes of sentence.

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(iv) the order of the court below in respect of the first appellant is consequently substituted to read as follows:

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(c) On count 5, to 3 years' imprisonment.

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[8] *S v B* 2006 (1) SACR 311 (SCA) para 24.

(d) On count 6, to imprisonment for one year."

(e) It is ordered that the sentences on counts 3, 5 and 6 shall run concurrently with the sentence of 20 years' imprisonment in respect of counts 1 and 2.

(f) The effective sentence is thus one of 20 years' imprisonment."'

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For Appellant:	L M Manzini Instructed by: Justice Centre, Pretoria Justice Centre, Bloemfontein
For Respondent:	S R Sibara Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein