IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A384/2007

In the matter between:

IVOR DESMOND OLIVER Appellant

And

THE STATE Respondent

JUDGMENT: 22 JANUARY 2008

VAN REENEN, J:

1] This is an appeal with leave granted by Traverso DJP on 7 February 2007 against the sentence imposed on the appellant by Nel J on 17 September 2001. By the time leave to appeal

was sought the learned trial judge had already retired.

2] The appellant (as the second accused) and Rizah Clayton (as the first accused) were arraigned before Nel, J and two assessors on two counts of murder (counts 1 and 2); five counts of attempted murder (counts 3, 4, 5, 6 and 7); possession of unlicensed fire-arms (count 8); and possession of ammunition without being in possession of a licensed fire-arm from which such ammunition could be discharged (count 9).

3] Except for counts 4 and 6 - on which they were acquitted - the appellant and his co-accused were found guilty on all of the aforementioned counts.

4] The appellant was sentenced to an effective period of imprisonment of 25 years and his co-accused to an effective period of 35 years.

5] In an appeal to a full bench of this court constituted of Hlophe, JP and Davis and Van Heerden JJ, the sentence of the appellant's co-accused was reduced to an effective period of 25 years' imprisonment.

6] In terms of a directive of the Registrar of this court the appellant's heads of argument had to be filed on or before 29 November 2007. As such heads were filed only on 3 December 2007 the appellant's attorney has brought an application for the condonation of the late filing thereof.

The condonation of procedural short-comings in the prosecution of an appeal is dependent on the exercise of a judicial discretion on the basis of all the relevant facts with a view to achieving fairness on the basis of a number of considerations including the degree of non-compliance and the applicant's prospect of success. Such factors are not considered independently but interrelated and are weighed, the one against the other.

The reasons for the delay with the filing of the heads of argument are that the appellant's present attorneys, for reasons beyond their control were at only a late stage notified of the set-down of the appeal by the previous legal representatives of the appellant as well as availability and other administrative problems experienced by the appellant's present counsel.

The outcome of the application for condonation will therefore depend upon an assessment of the explanation that has been placed before this court in conjunction with this court's assessment of the appellant's prospect of succeeding with the appeal.

7] The appellant's counsel in deference to the firmly established principle that a court of appeal will not interfere with the sentence imposed by a trial court unless it is strikingly or disturbingly inappropriate or tarnished by a material misdirection (See: **S v Malgas** 2001(1) SACR 469 SCA at 478 d - h) assailed the sentence imposed on the basis of certain enumerated factors which he submitted individually and cumulatively constitute misdirections which permit the reassessment of

the sentence imposed by the trial judge by this court.

8] Reduced to its bare essentials the trial court's sentence is assailed on the basis that the judgment on sentence does not contain any reference to the provisions of section 28 of the Constitution of the Republic of South Africa 1996 (the Constitution) which, together with international instruments from which it originated, have brought about significant changes to the sentencing regime concerning the incarceration of juveniles and furthermore does not manifest that such changes have been given any recognition or implemented.

9] Not every misdirection warrants interference with the sentence imposed by a trial court: it has to be a material i.e. which "according to

the dictates of justice" engenders a clear conviction that an error of such a nature, degree or seriousness has been committed that it shows directly or indirectly that the trial court failed to properly or reasonably exercise its discretion as regards sentencing (See: **S v Kibido** 1998(2) SACR 213 (SCA) at 216 h - j). It appears to be trite that a misdirection is material if the trial court has misconstrued the facts; has failed to take cognisance of factors that should have been taken into account; or it has over- or under-emphasised an accused's personal circumstances in relation to other relevant factors (See: **S v Brand** 1998(1) SACR 296 (C) at 303 e - j and the decided cases there referred to).

10] Until the advent of the present constitutional dispensation criminal courts failed to treat the

sentencing of child offenders i.e. persons under the age of 18 years, as a separate and compartmentalised field of judicial activity (See: **Brandt v S** [2005] 2 All SA 1 SCA at paragraph 14). They, in applying the well-known three factors enumerated in S **v Zinn** 1969(2) SA 537 (A) and in pursuing the well-known traditional aims of punishment merely gave recognition to an offender's youthfulness as a weighty mitigating factor in the assessment of his or her moral culpability (See eg: S **v Lehnberg en 'n Ander** 1975(4) SA 553 (A)). That approach was predicated on an acknowledgement of the immaturity and vulnerability of juveniles to negative influences because of their impressionability as well as a recognition of the need for the expeditious rehabilitation and reintegration of such offenders into society.

11] Since the adoption of the Constitution the principles of sentencing which had until then underpinned the aforementioned traditional approach regarding the sentencing of youthful offenders needed to be adapted and applied in order to give effect to the sentencing regime encompassed therein, more particularly the provisions of section 28 which have their origins in those international instruments enumerated in **S v Nkosi** 2002(1) SACR 135 (W) at paragraph 13; **Brandt v S** (supra) at paragraph 15 and 16; and **Director of Public Prosecutions, Kwazulu-Natal v P** 2006(3) SA 515 (SCA) at paragraph 15).

12] In the last-mentioned case Mthiyane JA (at paragraph 18) came to the conclusion, on the basis of the provisions of section 28(1)(g) of the Constitution and international instruments, that

the ambit and scope of sentencing as regards of juvenile offenders require to be widened in order to give effect to the principles that juvenile offenders are "not to be detained except as a measure of last resort" and that if incarceration is unavoidable it should be "only for the shortest appropriate period of time" and that a child's best interests are of paramount importance in any matter concerning him or her,

13] Ponnan AJA in **Brandt's** case (at paragraphs 19 and 20) held that in the sentencing of juvenile offenders presiding officers should be guided by certain principles including the principle of proportionality; the best interests of the child; and the least possible restrictive deprivation of his or her liberty and then only as a measure of last resort and for the shortest possible period of time. Sachs J in **S v M** (Centre for Child Law

as Amicus Curiae) 2007(2) SACR 539 (CC) (at paragraph 33) came to the conclusion that the requirements of the Constitution as regards the sentencing of children necessitate "a degree of change in judicial mindset" directed at the paying of focussed and informed attention to the interests of the child at appropriate moments in the sentencing process with the object of ensuring that judicial officers are in a position to adequately balance all the varied interests that are involved. The learned judge (at paragraph 40) said that the real difficulty is how to appropriately and on a case-by-case basis balance the factors enumerated in **Zinn's** case (supra) without disregarding the peremptory provisions of section 28 of the Constitution and that it requires a nuanced weighing of all the interlinked factors in every case. The learned judge in that case - which

concerned the best interests of children in the context of the imposition of imprisonment on their primary care-giver – categorised the failure on the part of the lower court to have paid sufficient independent and informed attention to the impact on the children of incarcerating their primary care-giver, as required by section 28(2) read with section 28(1)(b) of the Constitution, as a misdirection of such severity that it was entitled to interfere with the sentence imposed by the court **a quo**.

14] It would appear that the basis on which the appellant's counsel assails the sentence imposed by the learned trial judge finds support in the Constitutional Court's approach in **S v M** (supra).

15] It appears from a careful perusal of the learned trial judge's judgment on sentence that there is absolutely no reference therein to the imperative provisions of section 28 of the Constitution. Nor is there any trace therein of an informed and nuanced weighing of all the interlinking factors of relevance to the sentencing process and indicative of a changed judicial mindset consonant with an awareness of or an application of the provisions of the Constitution regarding the sentencing of juveniles. What is of significance in that regard is that despite the social worker's recommendation that the appellant should be detained in facilities for juveniles because he was younger than 18 years at the time he was sentenced no directions were given that he be detained apart from persons older than that age. We in the circumstances are driven to

conclude that the learned trial judge committed a misdirection. In the circumstances this court is at large to consider what an appropriate sentence would be.

16] That enquiry is facilitated by the fact that there are no disputes of fact between counsel for the appellant and counsel for the state and that the latter has conceded - in our view fairly and correctly - that the sentence imposed by the trial judge should be reconsidered and reduced.

17] What an appropriate sentence will be in respect of the appellant must be determined with reference to his personal circumstances, the nature and seriousness of the offences of which he has been convicted and the interests of society as well as the imperative provisions of

the constitution as regards the sentencing of juvenile offenders.

What must however be borne in mind is that the provisions of the Constitution relating to the sentencing of juveniles are not absolute (See: **S v M** (supra) at paragraph 26; **Director of Public Prosecutions, KwaZulu-Natal v P** at paragraph 19) but subject to limitation in appropriate circumstances, such as where a presiding officer is satisfied that imprisonment is justifiable by "the seriousness of the offence, the protection of the community and the severity of the impact of the offence on the victim" (See: **S v Nkosi** (supra) at 147 d - e).

If regard is had to the appellant's personal circumstances; the seriousness of and the circumstances of the commission of the crimes of which he has been convicted - it was clearly a gang-related revenge killing; and the

interests of the community, the need for long-term incarceration in our view trumps the imperative provisions of section 28 of the Constitution. Accordingly the imposition of long-term imprisonment is called for in the appellant's case. The only question is what the duration thereof should be, bearing in mind that the provisions of section 28(1)(g) require that it should be for the shortest appropriate period of time.

18] Bearing in mind that those factors which justified that the appellant be treated more leniently than his co-accused such as that he was younger; is of a personality type making him more susceptible of yielding to peer pressure; and was found to be more suitable for rehabilitation still prevail, it appears to be self-evident that the appellant's period of

imprisonment needs to be less than the effective period of 25 years imposed on his co-accused on appeal to this court. The question that needs to be resolved is how much less?

19] Those factors which prompted the learned trial judge to sentence the appellant to a period of imprisonment which was 10 years less than the period imposed upon his co-accused still apply. It accordingly appears to be logical that the period of imprisonment which is to be imposed upon him should reflect a differentiation with that imposed in respect of his co-accused of roughly the same order. Having regard to that consideration and using the sentence imposed in respect of no less brutal offences in, for instance **S v Nkosi** as a rough guide, I incline to the view that the appropriate period the

appellant should spend in jail is an effective period of 18 years.

20] It follows from the aforegoing that the appellant has succeeded in showing a reasonable prospect of success on appeal and that, as the explanation proffered for the delay in filing the heads of argument are adequate, an order is granted in terms of prayer 1 of the notion of motion in the application for condonation.

21] Accordingly -

21.1] The application for the condonation of the late filing of the appellant's heads of argument is granted.

21.2] The appeal against the sentences imposed on the appellant succeeds and the following order is made

thereanent in substitution of the sentences imposed by the trial court:

"Klagte 1: 12 (twaalf) jaar gevangenisstraf

Klagte 2: 8 (agt) jaar gevangenisstraf

Klagte 3: 4 (vier) jaar gevangenisstraf

Klagte 5: 4 (vier) jaar gevangenisstraf

Klagte 7: 4 (vier) jaar gevangenisstraaf

Klagtes 8 en 9 word saamgeneem vir doeleindes van vonnis: (twee) jaar gevangenisstraf.

2 (twee) jaar van die gevangenisstraf wat op klagte 2 opgelê is en die geheel van die gevangenisstraf wat op klagtes 3, 5, 7, 8 en 9 opgelê is sal saamloop met die gevangenisstraf wat op klagte 1 opgelê is. 'n Totaal dus van 18 (agtien) jaar gevangenisstraf."

D. VAN REENEN

GRIESEL, J:

I agree.

B.M. GRIESEL

ZONDI, J:

I agree.

D.H. ZONDI