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

CASE NO: A256/2015

In the matter between:

CLAYTON FILLIES **Applicant**

And

THE STATE **Respondent**

JUDGMENT DELIVERED ON 16 OCTOBER 2015

DONEN AJ

[1] The appellant was charged with murder in the Regional Court, Cape Town. He was convicted and sentenced to 12 years imprisonment of which two years were suspended for a period of five years. With the leave of the trial court he now appeals against the sentence.

[2] The offence occurred on 2 June 2012 near Zoar Vlei, Brooklyn. The appellant was 17 years old at the time. He turned 18 on

4 June 2012, two days after committing the offence. The appellant pleaded on 2 May 2013 and was sentenced on 17 July 2014.

[3] According to the charge sheet the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997 were applicable. Section 51(2) provided that, subject to sub-sections (3) and (6), a regional court was required to sentence a first offender convicted of murder (an offence referred to in Part II of Schedule 2) to imprisonment for a period of not less than 15 years. Sub-section 3(a) authorised the imposition of a lesser sentence where the court was satisfied that substantial and compelling circumstances justified it. Sub-section (6) provided that the provisions of s. 51 would not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the offence.

[4] On 15 July 2009 the Constitutional Court declared s.51(2) to be inconsistent with the Constitution and invalid to the extent that it applied to persons that were under 18 years of age at the time of the commission of the offence. Section 51(6) was similarly declared to be unconstitutional and was required to be read as though it provided that s.51 did not apply in respect of an

accused who was under the age of 18 years at the time of commission. A new section to this effect was substituted by Act No.42 of 2013. (See *Centre for the Child Law v Minister of Justice 2009 (2) SACR 477 (CC.)* The court held that if there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. Incarceration should be the sole appropriate option. If it is unavoidable the duration must also be tempered so as to ensure detention for the shortest possible period of time. An individually appropriate sentence is required. (*See paragraphs 31 and 32*.)

[5] Section 28(3) of the Constitution defines a child as meaning a person under the age of 18 years. Section 28(2) thereof provides that a child's best interests are of paramount importance in every matter concerning the child. Section 28(1)(g) provides that every child has the right not to be detained except as a measure of last resort in which case the child may be detained only for the shortest appropriate period of time. This last provision is echoed in s.77 of the Child Justice Act 75 of 2008 which provides that, when sentencing a child who is 14 years or older at the time of being sentenced, the court must only impose imprisonment as a measure of last resort for the shortest appropriate period of time. However, s.77(3) and

s.77(4), read with schedule 3 of the Act, authorise a child of 14 years or older to be sentenced to imprisonment for murder for a period not exceeding 25 years.

[6] Section 69(4) of the Act provides that when considering the imposition of a sentence involving imprisonment in terms of s.77, the Court must take the following factors into account, namely:

(a) the seriousness of the offence;

(b) the protection of the community;

(c) the severity of the impact of the offence on the victim;

(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and

(e) the desirability of keeping the child out of prison.

[7] The parameters within which the magistrate had to sentence appellant are apparent from all of the above.

[8] On behalf of the appellant Ms De Jongh admits that, given the circumstances of the case, it is a matter in which imprisonment is justified. However, she contends that the purposes of sentence including retribution, prevention and deterrence can be met with a shorter term of imprisonment. The sentence imposed was therefore not suitable. It over-emphasised retribution and general deterrence and ignored the importance of rehabilitation. It is further contended that the magistrate did not exercise her discretion judicially and fairly by investigating and attaching due weight to all the relevant factors. In particular reference is made to the age of the appellant at the time of the event. It is submitted that he should be regarded as a child even though he was 20 years old at the time he was sentenced. He was also a first offender and he was under the influence of drugs and alcohol during the time of the offence. It is also contended that he showed remorse by admitting his guilt during the sentencing proceedings.

[9] In sentencing the appellant the magistrate found that there were positive aspects in the appellant's make-up; including his age at the time of the offence; the fact that he admitted to the official who prepared his pre-sentencing report that he had committed the offence; and that he was a first offender. However, all of that

had to be weighed against what he had done and the interest of the community.

[10] The medical evidence showed that the deceased had been stabbed 33 times. The cause of death was a stab wound in the chest. This incised the left subclavian artery at its root. Among other wounds there was also a 15mm long stab wound present on the side of the deceased's neck below the angle of the mandible. It incised the right jugular vein, although there were indications that this was after death. There were eleven stab wounds on the abdomen, another five on the right side of the chest, four on the left arm among others. The attack was therefore exceptionally vicious and persistent. The magistrate accordingly found that corrective supervision as suggested in the pre-sentence report would over-emphasise appellant's personal circumstances. In my view this finding was correct.

[11] Although the appellant suggested to the official that the deceased had made improper sexual advances towards him, the appellant gave the court no explanation for this vicious attack. In fact he pleaded not guilty and raised an alibi. He testified in mitigation only to apologise to the family of the deceased. There are no direct evidential factors which can explain or mitigate the

appellant's behaviour. As appellant did not take the court into his confidence it can hardly be said that he showed remorse.

[12] A member of the neighbourhood Watch Block testified that, on 4 June 2012, the Watch were patrolling when they came across the appellant and two others. He was very nervous and they could see something was wrong. The appellant went into the reeds and shortly afterwards the Watch members thought they saw the reeds burning. The appellant came running out of the reeds. When the Watch investigated they found it was the body of the deceased that was burning. At that stage – when he evidently set fire to the body of the deceased – the appellant was 18 years old.

[13] The stepfather of the deceased testified as to the trauma and irreversible heartbreak that the murder had inflicted on him and the mother of the deceased.

[14] Upon a balance of the appellant's personal circumstances against the crime and the interest of the community the magistrate concluded that a reasonable term of imprisonment was the only suitable sentence. In her judgment the magistrate observed that the appellant would have choices in prison and

that there were many programmes available and sufficient time for him to rehabilitate himself.

[15] Upon a conspectus of her judgment it is clear that the magistrate imposed sentence individually and did not import legislative determination of what would be “appropriate”.

[16] The only circumstances in which this court of appeal may now interfere in the sentence passed is if there was a material misdirection by the trial court, or the disparity between the sentence of the trial court and the sentence which this Court would have imposed is so marked that it can properly be described as “*shocking, startlingly or disturbingly inappropriate*”. (*See S v L 2012 (2) SACR 399 WCC*.) No material misdirection by the trial court has been drawn to this court’s attention. Nor can it be said that the sentence imposed was startlingly inappropriate. The relevant principles set out by the Constitutional Court and the Child Justice Act were applied.

[17] Sentencing is about achieving a balance (or proportionality). The elements at play are the crime, the offender and the interests of society. The objects are prevention (society must be protected from those who harm it), retribution (placating

society's outrage at serious wrongdoing), reformation (unless this is clearly not likely) and deterrence (of others from committing the same offence and of the individual from acting in the same manner again). (*See S v RO & Another 2010 (2) SACR 248 SCA at para 30; and S v Van Loggerenberg 2012 (1) SACR 462 (GSJ) at para 6*.)

[18] In my view the sentence succeeded in achieving this balance. I would therefore dismiss the appeal against sentence.

DONEN AJ

I agree. The appeal is dismissed. The appellant's sentence is confirmed.

CLOETE J