IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A148/2015

DATE: 16 SEPTEMBER 2015

In the matter between:

LORENZO VIRGIL CLOETE Appellant

And

THE STATE Respondent

J U D G M E N T

RILEY, AJ:

The appellant was charged with murder (read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997), in the Regional Court at Parow. According to the charge sheet the State alleged that the appellant had murdered the deceased by stabbing him with a knife. The appellant, who was legally represented in the Court *a quo*, pleaded not guilty and averred that he had acted in self defence.

On 28 August 2012, the appellant was convicted of murder and on the same day sentenced to 15 years imprisonment, the

court *a quo* having found that there was no substantial and compelling circumstances which warranted a deviation from the prescribed minimum sentence. On 12 November 2014 the appellant applied for condonation of the late application for leave to appeal and for leave to appeal against his sentence only. The trial magistrate had in the interim passed on and both applications were heard before another regional magistrate. Although the condonation application was successful, the appellant's application for leave to appeal against his sentence was refused. The appellant was granted leave to appeal against sentence on 23 March 2015 after successfully petitioning this court.

The facts sustaining the conviction are briefly as follows: On 5 February 2010 at about half past eight in the evening an argument arose between certain residents at Springbok Place, Elsies River. The deceased, who was not part of the argument, arrived at the scene whilst a certain Marlin was being chased by two others.

The deceased then ran after this group presumably to see if Marlin would be caught by his pursuers. When the deceased and the others ran past a park where the appellant and his friends were standing and drinking, the appellant then ran after the deceased. When he reached the deceased he then

stabbed the deceased from behind against the right side of his head. The appellant then left the scene. The deceased was taken from the scene by ambulance and died from the wound inflicted by the appellant. According to the report on the medico-legal post-mortem examination conducted on the deceased, the fatal stab wound is described as situated on the right fronto parieto temporal region. The wound measured 25 x 5mm and the wound track was directed medially and slightly inferiorly, passing through skin and subcutaneous tissue with a fracture of the skull at the right fronto perioto temporal region into the brain. The trial magistrate correctly rejected the appellant's version that he had acted in self defence and convicted him of murder of the deceased.

It is common cause that the appellant was 18 years old at the time that he committed the murder and 20 years old when the sentence was imposed upon him. In his judgment on sentence, the trial Magistrate stated the following:

> "Ek neem in ag dat u jonk was ten tye van die pleeg van die misdaad. Dit is seersekerlik 'n faktor wat belangrik is om in ag te neem en wat in die weegskaal gegooi moet word wanneer die Hof kyk na wat 'n gepaste vonnis is. Dit sal my nie verbygaan nie. Mens is nie daar om wraak te

> neem nie. ’n Hof is nie daar om wraak te neem of om ’n beskuldigde te knak nie. Dit is verseker ’n aspek wat die Hof deeglik moet in ag neem.”

Notwithstanding the trial magistrate’s remarks about the appellant’s youthfulness at the time of the commission of the offence, he concluded that insufficient substantial and compelling circumstances was present to depart from the prescribed minimum sentence and then sentenced the appellant to 15 years direct imprisonment. In this court it was submitted and contended on behalf of the appellant that the trial court had erred and misdirected itself in not finding that substantial and compelling circumstances were present cumulatively in that the appellant was 18 years old at the time of the commission of the offence.

Mr Raphels, after being questioned by my learned brother Binns-Ward J, conceded that what ought to have happened is that the trial magistrate ought to have requested a pre-sentence report in regard to the appellant’s personal circumstances before sentencing the appellant.

The attack by the appellant on the deceased was utterly callous. Our courts’ have repeatedly held that society demands that persons who make themselves guilty of crimes of

this nature must be severely dealt with.

In cases such as the present, the element of retribution and deterrence rather than the interest of the offender come to the fore in the assessment of an appropriate sentence. Our courts' have however also consistently emphasised the importance of obtaining a pre-sentence report in the case of juvenile offenders, even if the offender was over the age of 18 at the time of the commission of the offence. S v Van Rooyen 2002 (1) SACR 608 (C) at 611i-612b and S v Janson 1975 (1) SA 425 (A) at 426H-428A.

In dealing with juveniles or persons of relatively young age as in the present matter, courts' must "ensure that whatsoever sentence he or she decided to impose will promote the rehabilitation of that particular offender and have as its priority the reintegration of the youthful offender back into his or her family and of course the community". See S v Pulwane 2003 (1) SACR 631 (T) and Brand v S 2005 (2) All SA 1 (SCA); 2006 (1) SACR 311 (SCA) para 20.

In S v N and Another 2015 ZAWCHC 5, (9 January 2015), a recent judgment of this court Binns-Ward J (Bozalek J concurring), after a detailed and critical analysis of section 28 and 7 of the Constitution and the provisions of the Child

Justice Act 75 of 2008 stated at para 9 as follows:

> "The aforementioned provisions of the Child Justice Act confirm that there is no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood, but are still being processed through the criminal justice system when they turn 18. The Legislation is thus recognisably directed at promoting the spirit, purport and objects of section 28(1) and (2) of the Constitution. One need not go beyond the preamble of the Act to appreciate this. It does so by giving a generous and expansive effect to the Constitutional provisions and avoids any reading down of them that a misguidedly narrow application of the definition in section 28(3) of the Bill of Rights could bring about. The effect is manifest, for example by the provision that child offenders may be committed in terms of section 76 of the Act to compulsory residence in youth care centres until they attain the age of 21. The reasoning behind the approach evident in the wider application of the Child Justice Act is manifestly sound. It has an effect on the manner in which offenders falling

within its wider definition are processed through the criminal justice system from arrest or arraignment. Insofar as sentencing is concerned, it is incidentally in accordance with the Constitutional Court's application of section 28(1)(g) in Centre for Child Law and Mpofu in respects of persons who are over 18 when they come up for sentencing in respect of offences committed while they were still under that age.

[10] Children are deserving of different treatment from that given to adults by virtue of factors such as their physical and psychological immaturity which renders them more open to 'impetuous and ill-considered actions and decisions' and thus, in general less morally culpable for their wrong-doings than adults are. When a person commits an offence while under the age of 18 their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has resulted in their being adults when sentencing occurs. That would mean punishing them for what they had done as children as if it had been done when they were

> adults. That such an approach would impinge on the substance of the rights provided in terms of section 28 of the Constitution is axiomatic, or so I would have thought. The point is borne out by the striking down by the Constitutional Court in the Centre for Child Law of provisions which were directed at making the minimum sentencing regime prescribed in terms of the Criminal Law Amendment Act 105 of 1997 applicable to certain offences committed by persons when they were between the ages of 16 and 18 as being unjustifiably limiting of the rights in terms of section 28 of the Constitution. It is obvious that many of the persons affected would be over 18 by the time they came to be tried and sentenced."

Even though the appellant in this matter was 18 at the time of the commission of the offence, I am of the view that the principles outlined herein before remain influential. There can be no arbitrary end to childhood just because a person has turned 18. Although the appellant testified under oath, very little information was placed before the trial court about his personal circumstances, his background and in particular how he had become involved in crime.

What we do know is that the appellant lived with his mother at Elsies River. It is not clear whether he completed Grade 7 or Grade 8 at school nor is it clear why he left school. After leaving school the appellant worked, distributing pamphlets and later worked in construction for a few weeks. According to the SAP69(C)(the criminal record of the appellant), he had the following convictions; on 26 April 2006 he was convicted for illicit possession of drugs; the imposition of sentence was postponed for a period of 1 year and the appellant was unconditionally released in terms of section 297(1)(A)(2) of the Criminal Procedure Act 51 of 1977.

On 22 August 2006 he was convicted of theft. On this occasion the imposition of sentence was postponed for a period of 5 years and he was again unconditionally released. On 1 December 2008 he was convicted of assault and cautioned and discharged. On 27 October 2008 he was again convicted of theft and sentenced to 3 months imprisonment, which was suspended for 5 years on certain conditions and he was placed under supervision of a probation officer for a period of 1 year. It further appears that prior to the commencement of the murder trial and during 2010 appellant was sentenced to imprisonment for theft and assault with intent to do grievous bodily harm.

The information that was placed before the court by the appellant in this regard is however not clear and ought to have been properly clarified by evidence. A consideration of the appellant's evidence on sentence leaves one with more questions than answers. Even though sentencing is a vitally important component of the criminal trial, I agree with the view that it often is dealt with superficially and with too little care by both judicial officers and legal representatives for the prosecution and the accused.

In my view the present matter is a perfect example of a case where lack of proper attention was given to the issue of the determination of an appropriate sentence, particularly since the trial magistrate was required to give consideration to whether or not the prescribed minimum sentence should be imposed. The original sentencing court did not sufficiently appreciate that the appellant had just moved out of his childhood. This is not to say that the sentence imposed by the magistrate is necessarily inappropriate, but the full picture relating to the appellant's personal circumstances and background was not properly placed before the court. In my view a decision on whether or not substantial and compelling circumstances existed to justify a departure from the prescribed minimum sentence regime could only be made with more insight into the appellants' personal circumstances and

background.

Based on the principles as set out in the above mentioned cases, I am satisfied that the trial magistrate had misdirected himself and ought to have requested a probation officer's report of his own accord after convicting the appellant. In the circumstances I am of the view that the matter should be remitted to the trial court for consideration of sentence afresh after a proper investigation is done by a probation officer into the appellant's background, his involvement in crime and the prospects of his rehabilitation.

In the result I propose the following order:

(1) **THE APPEAL AGAINST SENTENCE IS UPHELD AND THE SENTENCE OF 15 YEARS IMPRISONMENT IMPOSED BY THE TRIAL COURT IS SET ASIDE.**

(2) **THE MATTER IS REMITTED TO THE TRIAL COURT FOR URGENT CONSIDERATION OF SENTENCE AFRESH IN ACCORDANCE WITH THE JUDGMENT OF THIS COURT.**

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RILEY, AJ

I agree and it is so ordered.

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BINNS-WARD, J