IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Coram: Meer J, Henney J et Klopper AJ

Case No: A505/15

In the matter between:

[C…….] [D…….] [S……] First Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 9 MARCH 2016

HENNEY J

[1] The appellant is a child offender who was 15 years old at the time of the commission of the offences with which this appeal is concerned. He was convicted on 29 June 2015 by the Regional Court sitting at Parow on the following charges: murder; possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000, in that he possessed a 9mm semi-automatic firearm; and of contravening section

90 of the Firearms Control Act 60 of 2000, in that he was in possession of 9 rounds of 9mm ammunition.

[2] On 30 July 2015, he was sentenced to 10 years' imprisonment on the murder charge, 3 years' imprisonment for possession of a firearm and 1 year imprisonment on the possession of ammunition charge. The court ordered the sentences imposed on counts 2 and 3 to run concurrently with the sentence imposed on count 1.

[3] This matter was subject to an automatic review in terms of the provisions of section 85 of the Child Justice Act 75 of 2008 ("CJA") read with Chapter 30 of the Criminal Procedure Act 51 of 1977 ("CPA"). The matter was transmitted for review on 17 August 2015 and served before *Maartens AJ*.

[4] The appellant also had an automatic right to appeal in terms of section 84 (1)(a) of the CJA due to the fact that he was under the age of 16 years at the time of the commission of the offence and could note an appeal without having to apply for leave in terms of Section 309B of the CPA. This appeal was lodged with the Clerk of the Court on 14 August 2015.

[5] In terms of section 85(2) of the CJA, the matter should therefore not have been transmitted for review by the Regional Magistrate or Clerk of the Court because according

to this provision, if an appeal has been noted in terms of section 84 the matter should not be sent on review.

[6] On 7 September 2015, *Maartens AJ* in any event made a determination that the proceedings were in accordance with justice. This court is now seized with the appeal.

[7] In the light of the determination made by *Maartens AJ,* the Judge President of this division constituted a full bench to hear this appeal. Counsel appearing for the appellant conceded that the Regional Magistrate correctly convicted the accused. The appeal is therefore solely directed at sentence. The presiding Judge requested the parties to address the court during the hearing of the appeal on the following issues:

> *"1. Whether the court in sentencing the appellant had complied with the provisions of Chapter 10 of the Child Justice Act, and in particular, if there was compliance with s69(1)(a-e) and s69(4);*
> *2. Whether the court a quo considered the sentencing options as set out in s72, 73, 74 and 76 of the CJA;*
> *3. Whether the provisions of s77(5) of the CJA. are peremptory and if so, whether the court a quo complied therewith."*

The Facts on which the conviction is based

[8] On the morning of 6 June 2014 at approximately 8h00, Jean Hokim who is the sister of the appellant's grandmother was walking down Rachel Street in Elsies River. A person driving a motor bike ("the deceased") drove towards and past her. She heard someone say, "he must be shot". She turned around, and saw the appellant and accused no.2 in the Court a quo, standing in front of the driver who was seated on the

motor bike. She was about 8 metres away from them at the time. Next, she saw the appellant draw a gun and shoot the deceased. She could not say how many shots he fired at the deceased. The deceased fell to the ground. Ms Holkim ran home. There she heard that the person on the motor bike who was known as "Chessie" had died.

Grounds of appeal against sentence

[9] The ground of appeal is that the sentence of 10 years' direct imprisonment was harsh, given the fact that the appellant was 15 years old when he committed the offence and 17 years old when he was sentenced.

Discussion

[10] The provisions of the Child Justice Act are clearly applicable to the appellant. In terms of section 4 of the CJA, the appellant is a person in the Republic who committed an offence when he was 10 years or older, but under the age of 18 years when he was arrested and brought before court for this offence.

[11] Any court that imposes a sentence upon a child offender must sentence such child offender in terms of the provisions of Chapter 10 of the CJA. Section 68 states: "*A child justice court must after, convicting a child, impose a sentence in accordance with this Chapter*".

In *S v LM* 2013 (1) SACR 188 (WCC), this court at paras 18 – 19 held the following:

"[18] An important deviation from the provisions of the CPA is contained in ch 10, which deals with the sentencing of a child in terms of the CJA, s 68. A child justice court is obliged to impose a sentence in accordance with ch 10. Only where the CJA expressly empowers a court to do so, may a child be sentenced in accordance with the provisions of the CPA.

[19] It is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA. […]"

[12] When a court sentences a child, the objectives of sentencing and factors that it must consider are set out at section 69 of the CJA.

[13] A child justice court must also in terms of section 71(1) request a pre-sentence report prepared by a probation officer unless the child has been convicted of a Schedule 1 offence, or where the requiring of such a report would cause undue delay. This has been complied with. The court a quo did request and was furnished with a pre-sentence report as well as a Victim Impact statement.

[14] The sentencing options available to a child justice court are set out in Part 2 of Chapter 10, sections 72 – 79, which include a sentence of imprisonment which may be imposed in terms of the provisions of s 77.

[15] It goes without saying that Judicial Officers must apply the provisions of the CJA relating to sentencing. They cannot proceed as if the Act does not exist. One of the purposes of the Act as set out in the preamble, is to establish a criminal justice system for

children, who are in conflict with the law, in accordance with the values underpinning the constitution. In *S v RS and Others* 2012 (2) SACR 160 (WCC) at para 30 *Moses AJ* held the following:

> *"[30] The legislature has therefore in unequivocal terms incorporated those principles, guidelines and considerations, as developed by our highest courts in the case law referred to above, in this Act, and has elevated those, in the context of our juvenile justice system, to having legal force and effect. Non-compliance therewith will henceforth not only be irregular, but also unlawful, in violation of the principle of legality."*

[16] The Act also has as one of its objects, to create incrementally where appropriate, special mechanism processes or procedures for children in conflict with the law that in broad terms takes into account *inter alia*:

- The past and sometimes unduly harsh measures taken against some of those children;

- The long term benefits of a less rigid criminal justice process that suits these needs of children in conflict with the law, in appropriate cases and wide range of appropriate sentencing options specifically suited to children.

[17] In applying to the CJA a court must also adhere to ordinary considerations relating to sentencing, such as the triad[1] and the aims of punishment (deterrence, rehabilitation, prevention and retribution). A Child Justice Court should also consider the objectives[2] namely, it should firstly encourage the child to understand the implications of, and be accountable for the harm caused. Secondly, it should promote an individualized response

[1] See *S v Zinn* 1969 (2) SA 537 (A) at 540 G where the court held that the triad consists of "the crime, the offender and the interests of society".
[2] Section 69 (1) of the CJA.

which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society. Thirdly, it should promote the reintegration of the child into the family and community. Fourthly, it should ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Lastly, the Court should use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

[18] A court should during the sentencing stage consider and address each of these objectives, as set out in s 69(1).

[19] In terms of the provisions of s 69 (4), a Child Justice Court, when imposing a sentence involving imprisonment, must take the following factors into account:

1) The seriousness of the offence with due regard to - the harm done or risked through the offence, and the culpability of the child in causing or risking the harm;

2) The protection of the community;

3) The severity of the impact of the offence on the victim;

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

5) The desirability of keeping the child out of prison.

Section 77 of the CJA states:

> "(1) *A child justice court—*

(a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and

(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.

(2) …

(3) A child who is 14 years or older at the time of being sentenced for the offence, and in respect of whom subsection (2) does not apply, may only be sentenced to imprisonment, if the child is convicted of an offence referred to in—

(a) Schedule 3[3];

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment; or

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276(1)(i) of the Criminal Procedure Act.

(5) A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by take into account the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed." (EMPHASIS ADDED)

[20] It is accepted that the sentencing court should clearly state and motivate how it arrived at a decision to impose a sentence of imprisonment, and whether it has exhausted the other sentencing options prescribed at Chapter 10 of the CJA, and why such were not appropriate.

As *Cameron JA* (as he then was) held in *S v N* 2008 (2) SACR 135 (SCA) at para 39:

> *"[…] Prison must therefore be a last resort. This bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative."*

[3] Murder is a Schedule 3 offence in terms of item 3 of the Schedule. Possession of firearms and ammunitions is also a Schedule 3 offence in terms of item 17 of the Schedule.

The constitution in terms of s 28 (1)(g) states that every child has the right "*not to be detained except as a measure of last resort*".

[21] The court *a quo* referred to and tried to strike a balance between the circumstances of the appellant, the nature of the offence and the interests of society. However, it did not, as required, state whether it considered other sentencing options as set out in s 69. Having said this, I note that the main charge of murder on which the appellant was convicted is without a doubt a very serious offence, given the manner in which it was committed. It can be inferred that there was some planning involved. The deceased was defenseless and vulnerable when he was shot at close range by the appellant and there was no way to defend himself. This was nothing less than cold blooded murder. The attack on the deceased appeared to be unprovoked. The appellant has shown no remorse and refused to take responsibility for his actions.

[22] Given these facts, it would not have been entirely inappropriate to impose a sentence of imprisonment like the Regional Magistrate did. Of all the matters the Court was required to consider under the CJA, it failed to consider whether, given the seriousness of the offence, a sentence of direct imprisonment as a measure of last resort would be the only appropriate sentence. The Regional Magistrate did not consider the desirability of keeping the appellant out of prison. Furthermore, there is no indication as to why he did not consider other sentencing options as set out in Chapter 10. He also failed to motivate why the sentence of 10 years' imprisonment was considered to be the shortest appropriate sentence.

[23] In terms of s 77 (5) a Child Justice Court must take into consideration the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed. The Regional Magistrate failed to take this into account. This period amounted to 9 months and 24 days, if one has regard to the record.

[24] In view of all of the above, the sentencing of the appellant was not in accordance with the provisions of the CJA, and stands to be interfered with on appeal and substituted with an appropriate sentence.

[25] There is in my view sufficient evidence to enable this Court to do so. In sentencing the Appellant I take cognizance of the following: (1) Having regard to the provisions of s 69, it is clear that the appellant has refused to accept responsibility for his actions. According to the probation officer, the appellant told her that he cannot be remorseful for something he did not do. (2)Furthermore, according to the social worker at Horizon, the place of safety where he was incarcerated while awaiting trial, the appellant did not attend school regularly and often played truant, co-operating only after intervention by a third party. This is relevant to other sentencing options as set out in Part 2 of Chapter 10.

[26] The attitude of the appellant in my view militates against his reintegration into society. This is clearly not a case where a community based sentence or a sentence of correctional supervision would be appropriate. A fine would also be totally inappropriate.

[27] Mr Solomons for the appellant, submitted that consideration should also be given to a sentence of compulsory residence in a child and youth care centre. His past experience at such a centre coupled with the seriousness of the offence, his lack of remorse and accountability, militate strongly in my view, against a sentence of compulsory residence in a child and youth care centre. Furthermore, given the fact that in terms of s 76(2) a child can only be sentenced to compulsory residence in a youth care centre for a period not exceeding 5 years, or for a period which may not exceed the date on which the child in question turns 21 years of age, which ever date is the earliest, such a sentence would in my view be too lenient in all the circumstances.

[28] In my view this crime is particularly serious and requires that retribution and deterrence should come to the fore and that the rehabilitation of the offender should play a lesser role. In *S v Swart* 2004 (2) SACR 370 (SCA) at para 12, *Nugent JA* held:

> *"[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role. Moreover, as pointed out in S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222) in para [25] at 482f (SACR) and 1236E (SA), where a court finds that it is not bound to impose a prescribed sentence 'the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided'."*

[29] This position was followed in the matter of *S v Senatsi and Another* 2006 (2) SACR 291 (SCA) at para 7 where *Mthiyane JA* held:

> *"[7] Counsel for the State submitted, correctly in my view, that the trial Judge was entitled to give due weight to the deterrent and retributive effects of punishment. He was not obliged to give equal weight to each of the elements of punishment. In this regard the following remarks of Nugent JA in S v Swart are applicable:*
> *'What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstance. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'*
> *In the present matter the relative youth of the appellants must give way to the deterrent and retributive effects of punishment. The aggravating features of the case justify such an approach. This is one of those cases where any law-abiding and self-respecting citizen would be repelled by the conduct of the appellants. They took advantage of a man whose only sin was to offer them work. The punishment meted out by the trial Judge fits the particular circumstances of this case and there is no basis for us to interfere."*

[30] Given the circumstances of this case, and after giving due weight to the elements of retribution and deterrence, it would be appropriate in my view that a sentence of direct imprisonment should be imposed as a measure of last resort. I am also of the view that the sentence of 10 years imposed by the Regional Magistrate is not the shortest appropriate sentence, coupled with the fact that the court *a quo* also failed to take into account the fact that the appellant was in custody for 9 months and 24 days prior to being sentenced.

[31] In light of all of the above, I come to the view that the shortest appropriate sentence, given the seriousness of the offence, the interests of society as well as the fact that the appellant is still a young person, would be direct imprisonment for a period of 8 years.

[32] I would therefore make the following order:

1. The appeal against sentence succeeds.

2. The sentence of 10 years imprisonment is set aside and replaced with the following sentence:
"8 years imprisonment".

3. The sentence is antedated to 30 July 2015.

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HENNEY, J
Judge of the High Court

I agree.

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MEER, J
Judge of the High Court

I agree, it is so ordered.

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KLOPPER, AJ

Acting Judge of the High Court