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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9530 / 2021

In the matter between:

Y[....] M[....]

Appellant

and

THE STATE

Respondent

Coram: Samela et Wille, JJ

Heard: (This matter was determined on the papers filed of record as at the 8th of October 2021).

Delivered: (This judgment was delivered electronically to the representatives of the parties on the 19th of October 2021).

JUDGMENT

WILLE, J: (SAMELA J, concurring)

INTRODUCTION

[1] This is an ‘automatic’ appeal directed against the sentences imposed upon the appellant by the lower court. I say automatic, because this appeal on sentence is before us in terms of section 84 (1) (b) of the Child Justice Act, 75 of 2008¹.

[2] The appellant was convicted on (2) counts of robbery with aggravating circumstances², (1) count of the unlawful possession of a firearm and (1) count of murder. The appellant pleaded no contest and pleaded guilty to the charges as formulated by the respondent. He was sentenced as follows: on the murder charge he was sentenced to (10) years imprisonment: on the (2) robbery charges he was sentenced (taken together for the purposes of sentence), to a period of (10) years imprisonment, (5) years of this sentence was ordered to be served concurrently with the (10) year sentence imposed on the murder charge.

¹ The ‘CJA’ (read with Section 309B of the Criminal Procedure Act, 51 of 1977 (the ‘CPA’) and Section 10 of the Judicial Matters Amendment Act 42 of 2013 (the “JMA”).

² As defined in Section 1 of the CPA.

[3] Finally he was sentenced to (4) years imprisonment in connection with the possession of an unlicensed fire-arm. This latter sentence was also ordered to run concurrently with the sentence of (10) years imposed on the murder conviction. The appellant was effectively sentenced to (15) years imprisonment.

GROUND OF APPEAL

[4] The grounds of appeal advanced on behalf of the appellant are the following, namely: that the sentence imposed was shockingly harsh and inappropriate: that due consideration was not given to the fact that the appellant was a 'minor' at the time of the commission of the offences and that the appellant was sacrificed at the altar of retribution, as opposed to that of rehabilitation.

THE RELEVANT FACTUAL MATRIX

[5] The appellant was arrested on the 6th of December 2018. He was convicted and sentenced on the 14th of August 2019. The offences were committed between the 3rd of December 2018 and the 5th of December 2018. The sentences imposed upon the offender were ante-dated to 5th of December 2018. The appellant was born on the 29th of May 2001. At the time when these offences were committed, the offender was (17) years and (6) months of age.

[6] The offender admitted the following namely: that on the 3rd of December 2018, he threatened a Mr Beneke with a knife: that he robbed the said Mr Beneke of his mobile phone: that on the same day he threatened a Mr Leotha with a knife: that he robbed the said Mr Leotha of his firearm³: that he was in unlawful possession of such firearm: that on the 5th of December 2018, he intentionally and unlawfully murdered a Mr Agnew by shooting him with the fire-arm that he had stolen from Mr Leotha and that he had no 'reason' or 'motive' for killing Mr Agnew. He also conceded, in connection with the robbery offences committed by him, that both these complainants were employed as security guards, at the relevant time.

[7] The content of the post-mortem report⁴ indicated, *inter alia*, no less than (4) gunshot wounds to the chest and neck area of the deceased in connection with the murder conviction. This report was entered into the record and admitted for the truth of the content thereof.

THE SOCIAL WORKER'S REPORT

[8] The offender was raised by his mother. A father figure to his upbringing and education was absent. The offender resided with his maternal grandmother. The area in which he grew up was saturated by and with unemployment, substance abuse and drug related activities. He failed to complete grade (9) at school. The offender denied that he belonged to a 'gang', but admitted that he was part of a group that enjoyed alcohol and smoked cannabis.

³ A semi-automatic 9mm parabellum firearm.

⁴ Entered into the record as an exhibit on a consensual basis.

[9] The offender has no previous convictions. He confirmed that he together with his friends ‘continuously’ robbed people of their belongings in the area. He admits that he shot and killed Mr Agnew while the latter was seated in his motor vehicle. He did regret the incident but ‘showed no visible emotion’ when reflecting upon this shooting incident of murder.

[10] The ‘domino effect’ of the murder of Mr Agnew was set out in the social worker’s report. Briefly the following bears mentioning: that Mrs Agnew was emotionally destroyed by the loss of her husband: that as a result she suffers from eating and sleeping disorders: that she suffers from depression: that they as a family are struggling to cope both emotionally and financially with their loss and, that she has been admitted to a mental health care facility for in-patient treatment.

[11] In summary, the social worker recommended that the court of first instance take into account the enormous impact and trauma suffered by the concerned families of the victim and the devastating impact on the immediate community due to the crimes committed by the offender.

DISCUSSION

[12] It is trite law that in sentencing, the punishment should fit the crime, as well as the offender, be fair to both society and the offender, and be blended with a measure of mercy.⁵ In *S*

⁵ *S v Rabie* 1975(4) 855 (AD) at 862 G.

*v Masda*⁶, in referring to the case of *S v Mhlakaza and Another*⁷, Saldulker AJA (as he then was), eloquently remarked as follows:

‘A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court’s duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public’

[13] In *S v Rabie*⁸, the philosophies and principles applicable in an appeal against sentence were set out by Holmes JA, namely, that in every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode such discretion. Hence the further principle that the sentence should only be altered if the discretion has not been *‘judicially and properly exercised’*.

[14] In *S v Anderson*⁹, in dealing with the applicable legal principles as to attempt to guide the court when requested to amend a sentence imposed by a trial court, Rumpff JA, affirmed as follows:

⁶ 2010 (2) SACR 311 (SCA) at 315.

⁷ 1997 (1) SACR 515 (SCA) at 315.

⁸ *S v Rabie* 1975(4) 855 (AD) at 862 G.

⁹ 1964 (3) SA 494 (AD) at 495 D-H.

'These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice requires it'

[15] Moreover, as held in *Malgas*¹⁰, a court of appeal is enjoined to consider all other circumstances bearing down on this question, to enable it to properly assess the trial court's finding and to determine the proportionality of the sentences imposed upon the offender. The constitutional court¹¹, has described an appeal court's discretion to interfere with a sentence only: when there has been an irregularity that results in a failure of justice: or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated: or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[16] From the record of the proceedings in the court *a quo*, it is clear that the appellant to some extent planned these crimes. The record does not reflect any suggestion that the appellant showed any form of genuine remorse at all. Regrettably, he does not exhibit any real insight into the seriousness of the crimes committed by him. This, in turn goes to the issue of his moral blameworthiness.

[17] The court *a quo* considered both the mitigating and the aggravating factors in connection with these offences and referred to these clearly in the judgment on sentence. In addition, the court *a quo* highlighted the violence and the threat of violence that was used against both the

¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA).

¹¹ *S v Boggards* 2013 (1) SACR (CC) at [4].

complainants by the appellant and that the appellant could have injured the complainants. Moreover, it was accentuated that this type of crime was prevalent in the area of the jurisdiction of the lower court.

[18] It is so that child offenders deserve to be treated differently from adult offenders. The appropriate sentencing principles are now set out in the CJA¹², and what this really means is that the sentences that were imposed upon the offender in this case, first and foremost, must have been in proportion to the seriousness of the crimes he committed.

[19] The court of first instance, was very much alive to the content of the probation officers report and took this into account when it imposed the sentences upon the offender. The sentences imposed upon the appellant in connection with the crime of robbery with aggravating circumstances, in these peculiar circumstances, must accordingly in some measure, also reflect a censure to this conduct and behaviour. The victims of these crimes were respectively, robbed of a mobile phone and a firearm. These items are not and were not necessities.

[20] Taking into account which has been stated above, I am unable to unearth any misdirection or irregularity on the part of the court *a quo* when it imposed the sentences upon the offender in this matter. I also find no room to interfere with the sentences imposed in this matter. Accordingly, in all the circumstances, I propose that the following order is granted, namely:

¹² Sections 69(1) and (2).

1. That the appeal in connection with the sentences imposed upon the appellant is dismissed.
2. That the convictions and sentences imposed upon the appellant, are hereby confirmed.

E. D. WILLE

(Judge of the High Court)

I agree and, it is so ordered:

M. I. SAMELA

(Judge of the High Court)