

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC40/2017

THE STATE

And

PHUMZILE MABOPE

Accused

Coram: **Chetty J**

Heard: **17 September 2018**

Delivered: **20 September 2018**

JUDGMENT

Chetty J:

[1] The accused was born on 31 March 1999, and is now nineteen (19) years of age. He had a rudimentary education of one year leaving school at age nine (9)

whilst in grade 2. His fleeting scholastic career was characterised by truancy and experimentation with drugs and alcohol. His documented criminal proclivity commenced on 20 December 2014 when he committed the first housebreaking with intent to steal and theft offence. On 25 October 2015 he committed another similar offence, on 13 November 2015 a further one, on 5 December 2015, yet another and on 4 July 2016, the trend continued. From January 2017 when the first housebreaking of the New Year was committed until 24 February 2017 he committed no fewer than nine (9) offences (counts 3 to 11) until his arrest on 3 March 2017.

[2] The foregoing convictions, documented in his SAP69's and the judgment in *casu* however, merely traverse the latter period of his adolescent life. His brushes with the law commenced at a very young age when his alcoholic parents virtually abandoned him and his siblings to fend for and feed themselves. The pre-sentence report, exhibit "G" compiled by the probation officer Ms *Hini* catalogues the shameful neglect which the accused's parents visited upon their children. I have no doubt that the accused's initial ascent into crimes of theft and housebreaking with intent to steal was actuated by the deprivation experienced in his household. Exhibit "G" details the accused's criminal conduct prior to 2014, his placement in the Erica Place of Safety and categorisation as a child in need of care. The envisaged children's court enquiry however failed to materialise by reason of the accused's abscondment, his parent's complete indifference and the dim prospect for his rehabilitation was forever lost. Ms *Hini's* report is an exemplary one and I commend her for the extraordinary effort and care in producing it.

[3] Whilst I have great sympathy for the accused and accept that his foray in criminality was initially actuated by necessity, it is apparent from his later misdemeanours that success in minor thefts propelled him to commit further crimes

of ever increasing gravity. In his plea explanation he acknowledged breaking into a multitude of premises and stealing goods of substantial values. Those offences, delineated in the indictment, were, on the probabilities, clearly not fuelled by hunger but by an appetite to appropriate items of value to feed his drug and alcohol dependency.

[4] The complainants in the various counts all suffered financial loss by reason of the accused's crime spree. The victim impact assessment reports, exhibits "H" and "J", document the anguish and loss suffered by the victims and their families and their rightful indignation of what befell them must be accorded due weight. Some of them have been forced to relocate to safer pastures whilst others continue to suffer the trauma of the violation of their homes.

[5] The one inexcusable feature of this case however is the indescribable horror of what befell the deceased, Mrs *Vermaak*. She was, as adverted to earlier, ninety-five (95) years of age. By his own admission, the accused assaulted her with the direct intent to kill her. Given her physique, she presented no threat to him and he could have stolen her goods and departed. But he chose not to do so. Instead he raped her, a nonagenarian in the sanctity of her own home. Such socially deviant behaviour can never be attributed to a deprived social economic background and cannot be countenanced.

[6] In her submissions before me, Ms *Coertzen* was constrained to concede that a custodial sentence was imperatively called for but implored me to temper its duration. The indictment precognised the accused that upon conviction the state

sought a sentence pursuant to the provisions of sec 77 of the ***Child Justice Act***¹. It provides, under the rubric “***Sentence of Imprisonment***”, -

“(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 may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

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

(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 take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

(6) . . .”

¹ Act No, 75 of 2008

[7] It is not in issue that murder and rape are offences listed in Schedule 3 of the Act and consequently attract a maximum sentence of twenty-five (25) years imprisonment. The question which arises for decision is the appropriateness of such a punishment. Implicit in the submissions advanced in mitigation is the plaintive cry for mercy. A sentencing court must forever be mindful of that consideration but, as Holmes JA remarked in **S v Rabie**²

"... with particular reference to the concept of mercy -

- (i) It is a balanced and humane state of thought.
- (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
- (iii) It has nothing in common with maudlin sympathy for the accused.
- (iv) It recognises that fair punishment may sometimes have to be robust.
- (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
- (vi) The measure of the scope of mercy depends upon the circumstances of each case."

[8] The circumstances of this case however militate against the imposition of any lesser sentence. The accused is sentenced as follows –

Count 1: Housebreaking with intent to steal and theft – 3 years imprisonment;

Count 2: Housebreaking with intent to steal and theft - 3 years imprisonment;

² 1975 (4) SA 855 (A) at 862D-F

- Count 3: Housebreaking with intent to steal and theft – 3 years imprisonment;
- Count 4: Housebreaking with intent to steal and theft – 3 years imprisonment;
- Count 5: Robbery – 5 years imprisonment;
- Count 6: Housebreaking with intent to steal and theft – 3 years imprisonment;
- Count 7: Theft – 2 years imprisonment;
- Count 8: Housebreaking with intent to steal and theft – 3 years imprisonment;
- Count 9: Rape – 25 years imprisonment;
- Count 10: Murder – 25 years imprisonment;
- Count 11: Housebreaking with intent to steal and theft – 3 years imprisonment

It is ordered that the sentences imposed on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 run concurrently with the sentence imposed on count 10.

D. CHETTY

JUDGE OF THE HIGH COURT

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