

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: CA & R 139/2016
Heard on: 13/03/2017
Delivered on: 07 April 2017**

In the matter between:

L. M.

APPELLANT

And

THE STATE

RESPONDENT

Coram: Pakati J et Mamosebo J

JUDGMENT: APPEAL ON SENTENCE

MAMOSEBO J

- [1] The appellant was convicted of murder (*dolus eventualis*) read with s 51 (2) of the Criminal Law Amendment Act, 105 of 1997, by the Regional Magistrate, Mr View at Keimoes. He was sentenced to Nine (9) years imprisonment, two (2) years of which were suspended for five (5) years, on condition that the appellant was not convicted of murder and/or assault

with intent to cause grievous bodily harm committed during the period of suspension. The Magistrate further ordered that the sentence be antedated to 25 December 2015, the date of the commission of the offence since the appellant was in custody pending finalisation of the matter. This was done pursuant to s 77 (5) of the Child Justice Act¹.

[2] The Regional Magistrate refused the application by the appellant for leave to appeal. The Magistrate was unaware that applying for leave was unnecessary because the appellant was 17 years old when trial commenced on 07 July 2016 and was born on [...] 1998. In terms of s 84 (b) of the Child Justice Act² he had an automatic right of appeal. The Magistrate should have just explained to the appellant that he may appeal directly to the High Court against the imposed sentence if he wished to do so or if so advised by his legal representative. The appellant was represented by Adv Victor on instructions of the Legal Aid South Africa who ought also to have ensured that this unnecessary step was avoided.

[3] S 77 (5) of the Child Justice Act³ provides:
“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.”

[4] The basis for the appeal, as argued by Adv Nel, counsel for the appellant, was that the Regional Magistrate erred in rejecting the first two recommendations by the social worker. It was also contended that the sentence imposed was grossly excessive and amounted to a misdirection in:

¹ No 75 of 2008

² No 75 of 2008

³ No 75 of 2008

- 4.1 failing to consider the sentencing options applicable to a child offender;
- 4.2 failing to follow the constitutional approach in sentencing a child offender;
- 4.3 failing to follow the principle that imprisonment must be the last resort and for the shortest period of time;
- 4.4 failing to apply the constitutional principles, the trial court therefore inaccurately set the moral blameworthiness bar too high; and
- 4.5 incorrectly rejecting the recommendations of the social worker pertaining to a suitable sentence.

[5] These are the events that led to the charge as contained in his guilty plea. The appellant went to Coenie's shop to purchase cigarettes on 25 December 2015 (a Christmas Day). While leaving the shop he noticed the deceased's girlfriend, Leonore. He claims that he and the deceased were friends. He enquired from Leonore if she saw Kylo, the deceased's nephew. He requested Leonore to inform Kylo that he wanted his cap back. The deceased showed up and enquired what the appellant wanted from Leonore. He gave a response. The deceased pressed his palm against the appellant's face and pushed him with both his hands on his chest. The appellant fell to the ground. When he stood up the deceased wanted to push him again but the appellant drew a knife which he produced from his trousers and stabbed the deceased. The appellant claimed that he was under the influence of alcohol but could nevertheless appreciate what was happening around him during the time of the incident.

- [6] The chief post-mortem findings carried out on the body of the deceased by Dr Lemainé Fouché, a Pathologist, are the following:

The body of a coloured adult male with a penetrating stab wound to the left side of the chest. There is damage to the heart. There is blood in both thoracic cavities. The brain is macroscopically swollen with flattening of the gyri. Both lungs are pale and have a collapsed appearance. Both kidneys are swollen.

- [7] Consequent upon the appellant's conviction a pre-sentence report was obtained from Ms KM Bezuidenhout, a social worker. Borrowing from the words used by Ponnar AJA in **Brandt v S**⁴ the evidence in mitigation of the case *in casu* reveals a childhood characterised by neglect, ill-discipline and ineffective parenting. The appellant was raised in an atmosphere of social and emotional deprivation. Alcohol and substance abuse were the order of the day.

- [8] This is what Ms Bezuidenhout recorded in the report:

“Volgens bronne is die beskuldigde ‘n baie gemaklike persoon in nugterskap. Hy is behulpsaam en het ‘n stil persoonlikheid. Hulle beleef hom as ‘n ander mens in dronkenskap. Hy word geweldig en wil nie gekeer of vermaan wees nie. Hy word gevolglik wreed kwaad en gee nie om, om die ander persoon lelik te beseer nie. Volgens bronne as hy in besope toestand is, sal hy altyd skerp voorwerpe gebruik om die ander seer te maak. Die beskuldigde kom gevolglik in opstand met gesag en het hy al sy pa en oom al aangerand. Vrese ontstaan omdat die beskuldigde altyd oor naweke met wapens beweeg.”

- [9] The community's view was recorded as follows:

⁴ Brandt v S [2005] 2 All SA 1 (SCA) at 9g-h

“Sommige gemeenskaplede het gevoel dat die beskuldigde vir hulle ‘n gevaar in die gebied inhou. Hulle noem dat dit nie die eerste keer is wat die beskuldigde iemand in die woonbuurt steek nie. Hy loop altyd gewapen rond. Hy is veral onkeerbaar waneer hy onder die invloed van alkohol is. Die beskuldigde is ‘n saggeaarde person as hy nugter is, maar is net die teenoorgestelde in dronkenskap. Volgens gemeenskapslede was die slagoffer nie ‘n bakleierige persoon nie, maar wel ‘n grappige persoon.”

[10] The following were highlighted as risk factors by the social worker which cannot be ignored:

- 10.1 The appellant is a 17 year old with unacceptable habits and behavioural patterns;
- 10.2 He abuses alcohol and dagga;
- 10.3 He exhibits destructive anger tendencies which lead to aggressive acts and require management;
- 10.4 He is a victim of domestic violence;
- 10.5 He befriends adults;
- 10.6 He does not accept and maintain a good value system and standard.

[11] The social worker commented as follows:

“Dit wil voorkom dat die beskuldigde baie gewildadig is waneer hy onder die invloed van alkohol is en ‘n gevaar vir die gemeenskap is. Dis juis hierdie element van onvoorspelbaarheid wat die beskuldigde ‘n gevaarlike persoon maak. Verder blyk dit dat die beskuldigde hom nie deur die gereg laat afskrik nie en sy woede/aggresiewe emosies positief kan kanaliseer nie.”

[12] The social worker recommended three sentencing options to the Magistrate:

12.1 A sentence of compulsory residence in a child and youth care centre at Bosasa Child and Youth Care Centre, Springbok, on condition that the appellant receive therapeutic programmes until the attainment of the age of 21 years; or

12.2 Correctional Supervision in terms of s 276 (1) (i)⁵ ; or

12.3 Direct imprisonment.

[13] Having taken the pre-sentence report into consideration the Magistrate rejected the first two options of compulsory residence and correctional supervision as recommended by the social worker and requested by the appellant's legal representative and imposed direct imprisonment with part of the sentence suspended as pointed out above.

[14] In *S v Malgas*⁶ the Supreme Court of appeal made the following pronouncements pertaining to the test for interference with a sentence on appeal:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh....However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence

⁵ the Criminal Procedure Act 51 of 1977

⁶ 2001 (1) SACR 469 (SCA) para 12 at 478d – g

imposed by the trial court... when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

- [15] The Magistrate considered the options of sentencing the appellant to the child care centres, Bosasa and Marcus Mbata. He first remarked about the concern that the appellant was sober when he was involved in a reported incident at Marcus Mbata and commented that it can happen at Bosasa as well. He also took into account the fact that the appellant is a violent person and has demonstrated his violence in his homestead by assaulting his own father and uncle. The Magistrate also raised a concern that the reaction of the appellant to produce and use a knife on a person who had just pushed him once and as he was about to push him again was stabbed, was excessive and disproportionate.
- [16] The appellant was not in a life-threatening situation that necessitated the production and use of a knife. The Magistrate nevertheless, took into account the fact that the deceased pushed the appellant as a measure of provocation which still did not warrant the act of stabbing. The Magistrate went on to deal with the pre-sentence report by highlighting several aspects contained therein. He also noted that the appellant “*word wreed kwaad*”. When the accused is in that angry state he does not care even if he were to injure the other person grievously. He always carries in his possession a sharp object or instrument.
- [17] The Magistrate took into account the views of the community as contained in the report. The community described the appellant as “*wreed*”. Bosman, Van der Merwe and Hiemstra, Tweekalige

Woordeboek, Tafelberg Publishers, define “Wreed” as “cruel”, “inhuman”, “barbarous”, “ferocious”, “severe”, “unmerciful”, “unfeeling” and “pitiless”. These terms in my view are very strong terms. That is why the Magistrate even remarked: *“met alle respek aan u dan lyk dit op naweke sit ons met ‘n monster tipe hierso in Keimoes in waneer u ‘n dop gaan vat.”*

[18] In as much as the constitution of this country, the international instruments dealing with the rights of the children in conflict with the law, the Child Justice Act and our constitutional democracy respects and protects the rights of the child and would not sacrifice a child transgressor at the altar of deterrence, the opposite holds true here. I am of the view that the constitution also protects other children who may be at risk at the child care centres and would not want to expose them to a youth with violent tendencies. The child care centres are an environment where children in conflict with the law are accommodated in order to mitigate the harshness of a prison environment with all its adverse influences. They have an opportunity to rehabilitate and transform their young minds with the aim of being reintegrated back into the society. As much as the appellant’s counsel has dealt with the need to keep the appellant away from prison, he has avoided addressing the ferocious nature of the appellant.

[19] I am concerned about exposing other children to the appellant and sending him to Bosasa may yield that result. However, being in the juvenile section of prison, may still afford the appellant the opportunity to undergo the programmes he requires to improve his life and coping skills without jeopardising the lives of other child offenders in child care centres. Murder is a schedule 3 offence but a child under the age of 18

years cannot be sentenced to life imprisonment: However, murder remains a heinous crime.

- [20] Both counsel emphasised in their heads of argument that s 77 (1) (b)⁷ requires imprisonment to be imposed as a last resort and for the shortest period of time. The section stipulates:

“(1) A child justice court –

(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”.

This provision should not be read in isolation but rather in conjunction with subsection 3 which provides;

“(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.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment for a period not exceeding 25 years.”

- [21] The deceased was a 22 year old friend who died on the scene. The Magistrate has identified the existence of more aggravating factors as opposed to mitigating factors. The fact that the appellant pleaded guilty and was technically a first offender served in his favour. The trial court also took into consideration the circumstances surrounding the appellant’s upbringing which was characterised by domestic violence, abuse of alcohol and lack of self-control when the accused is under the influence of alcohol. The following were regarded as aggravating circumstances:

⁷ Child Justice Act, 75 of 2008

- 21.1 The prevalence of the offence of murder in Keimoes;
- 21.2 The fact that the appellant carried a knife with him and used it under circumstances which were not life-threatening;
- 21.3 The fact that over weekends the appellant is described as “wreed”.

[22] In ***Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and Re-Integration of Offenders, as Amicus Curiae)***⁸ Cameron JA, writing for the majority made the following remarks⁹ which are instructive:

“But while the Bill of Rights envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last resort, not a first, or even intermediate, resort; and when the child is detained, detention must be ‘only for the shortest appropriate period of time’. The principles of ‘last resort’ and ‘shortest appropriate period’ bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.”

[23] Having had regard to the sentence imposed by the Magistrate as well as the reasoning that informed the sentence, I am of the view that the Magistrate has not misdirected himself and the sentence is not shockingly inappropriate to warrant our interference. The prison authorities are

⁸ 2009 (2) SACR 477 (CC)

⁹ At para 31

however directed to afford the appellant programmes that will assist him with his anger management, life skills and re-integration into society.

[24] In the result, the following order is made:

The appeal on sentence is dismissed.

MAMOSEBO J
NORTHERN CAPE DIVISION

I concur

PAKATI J
NORTHERN CAPE DIVISION

For the appellant:	Adv V.Z Nel
Instructed by:	Legal Aid South Africa
For the respondents:	Adv N.A Mxabo
Instructed by:	Office of the DPP