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|------------------------------------|-----------------|
| Reportable:                        | <u>YES</u> / NO |
| Circulate to Judges:               | <u>YES</u> / NO |
| Circulate to Magistrates:          | YES / <u>NO</u> |
| Circulate to Regional Magistrates: | <u>YES</u> / NO |

**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 21/2014**  
DATE HEARD: **05/09/2016**  
DATE DELIVERED: **09/09/2016**

In the matter between:

**E. E.** Appellant

and

**THE STATE** Respondent

*Coram:* Williams J et Erasmus AJ

**JUDGMENT**

**Erasmus AJ**

- [1] The appellant, Mr E. E., was convicted in the Regional Court, Calvinia, on a count of murder on 21 October 2010. The charge invoked the provisions of section 51(2) of the Criminal Law Amendment Act<sup>1</sup> (“the Act”), which prescribes a sentence of 15 years imprisonment for first offenders in respect of murder, as intended in Part I of Schedule 2 to the Act.
- [2] The appellant was 16 years old at the time of the commission of the crime and 17 years when sentenced.
- [3] Having found a prescribed minimum sentence legislation to be applicable and applying the principles laid down in *S v Malgas*<sup>2</sup>, the learned Regional Magistrate found substantial and compelling circumstances to be present, justifying a deviation from the minimum sentence of 15 years imprisonment. The appellant was sentenced to 7 (SEVEN) years imprisonment.
- [4] It is common cause between the appellant and the respondent that the learned Regional Magistrate, Ms Z Mbalo, misdirected herself in applying the provisions of section 51 of the Act. The appellant was a minor when he committed the offence. Despite referring to **S v B**<sup>3</sup>, she interpreted the decision incorrectly and found the minimum sentence legislation to be applicable. This is clearly wrong as the provisions of section 51(1) and 51(2) of the Act were declared unconstitutional in so far as it applies to children under the age of

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<sup>1</sup> 105 of 1997

<sup>2</sup> 2001 (1) SACR 469 (SCA)

<sup>3</sup> 2006 (1) SACR 311( SCA)

18 years at the time of the commission of such an offence.<sup>4</sup> The misdirection of the court *a quo* is material and is such that it vitiates the sentence and entitles us to consider sentence afresh.<sup>5</sup>

[5] As correctly submitted by Mr. Nel, on behalf of the appellant, sentencing had further to be approached within the ambit and objectives of the Child Justice Act, No. 75 of 2008 (“the CJA”). The CJA in essence amplifies the Constitutional principle that the best interests of a child implicated in such a crime are of paramount importance.<sup>6</sup> Although imprisonment can be imposed in terms of the CJA, it can and should only be imposed as a last resort and for the shortest possible period of time.

[6] When imposing sentence afresh due consideration should be given to the provisions of the CJA and as such we are compelled to impose imprisonment for the shortest possible period of time.

[7] The probation officer who had investigated the personal circumstances of the appellant and compiled a pre-sentence report recommended a sentence of correctional supervision and imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, No. 51 of 1977 (“the CPA”). The court *a quo* however rejected this sentencing option as it would have trivialized the offence in *casu*.

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<sup>4</sup> **Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-integration of Offenders as Amicus Curiae)** 2009(2) SACR 477 (CC)

<sup>5</sup> See **S v Fazzie and Others** 1964(4) SA 673 (A) at 684A-B

<sup>6</sup> Section 28 of the Constitution of the Republic of South Africa

- [8] A sentence of correctional supervision and imprisonment in terms of section 276(1)(i) of the CPA might have been more appropriate as the appellant would have been 17 years when he commenced serving his sentence and it would have provided opportunities for intervention programmes during incarceration, giving effect to the objectives of the CJA.
- [9] The appellant was released on bail pending the appeal and has not commenced serving his sentence. He is now 23 years old. The delays between the imposition of sentence in January 2011 and the finalization of the appeal are regrettable. This delay has, to some extent, compromised the re-consideration of sentence in this instance.<sup>7</sup> What might have been an appropriate sentence then, warranting the imposition of imprisonment in terms of section 276(1)(i), is not necessarily a suitable sentence now. In **S v Japhta**<sup>8</sup> it was stated:

*“Ordinarily, of course, only facts known to the court at the time of sentencing should be taken into account. But the rule is not invariable. Where there are exceptional or peculiar circumstances that occur after sentence is imposed it is possible to take these factors into account and for a court on appeal to alter the sentence imposed originally where this is justified.”*

- [10] The attack on the deceased, committed with a knife that the appellant had fetched, was unprovoked. The seriousness of the offence in this instance warranted the imposition of imprisonment,

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<sup>7</sup> See also **S v Karolia** 2006 (2) SACR 75 (SCA); **S v Van Deventer and Another** 2012 (2) SACR 263 (WCC).

<sup>8</sup> 2010 (1) SACR 136 (SCA) ([2010] 1 All SA 403 at para [15])

despite the appellant's tender age of 16 years at the time of the commission of the offence. The appellant's age, coupled with the fact that he was a first offender required the sentence of 7 (SEVEN) years' imprisonment should be tempered by suspending a portion of the sentence. This would also give effect to the objectives of the CJA which had applied at the time of his sentencing and which had not been taken into account during sentencing.

Wherefore we make the following order:

- 1 THE APPEAL AGAINST THE SENTENCE SUCCEEDS;**
- 2 THE SENTENCE OF 7 (SEVEN) YEARS IMPRISONMENT IS SET ASIDE AND REPLACED WITH THE FOLLOWING:**

**"THE ACCUSED IS SENTENCED TO 7 (SEVEN) YEARS IMPRISONMENT OF WHICH 3 (THREE) YEARS ARE SUSPENDED FOR 5 (FIVE) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF MURDER OR ANY OFFENCE INVOLVING THE INFLICTION OF GRIEVOUS BODILY HARM ON THE PERSON OF ANOTHER COMMITTED DURING THE PERIOD OF SUSPENSION AND FOR WHICH THE ACCUSED WAS SENTENCED TO IMPRISONMENT WITHOUT THE OPTION OF A FINE"**

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**SL ERASMUS  
ACTING JUDGE  
NORTHERN CAPE DIVISION**

I concur.

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**CC WILLIAMS**  
**JUDGE**  
**NORTHERN CAPE DIVISION**

**For the Appellant: Adv. V Z Nel**  
**Legal Aid South Africa**

**For the Respondent: Adv K M Kgatwe**  
**Office of the Director of Public Prosecutions**