

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A240/11

In the appeal between:-

DIPHAPANG PIET MOTLOUNG

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* MOCUMIE, J *et* JORDAAN, J

HEARD ON: 29 APRIL 2013

DELIVERED ON: 30 MAY 2013

MOCUMIE, J

[1] I have considered the judgment by Jordaan J. I however respectfully hold a different view as far as the cumulative effect of the sentence is concerned. I set out my reasons briefly in what follows.

[2] It is trite that, sentencing is pre-eminently within the discretion of a trial court. It will only be interfered with where the trial court has not exercised its discretion judicially. The test for interference is (a) whether the discretion of a trial court has been judicially and properly exercised and (b) whether the sentence imposed is vitiated by irregularity or

misdirection or is shockingly or disturbingly inappropriate.
(See **S v Rabie** 1975 4 SA 855 (A) at 857D - G.)

- [3] It is also trite that in imposing a sentence the sentencing court must take into account the seriousness of the offence, the interests of society and the personal circumstances of the accused. (**S v Zinn** 1969 (2) SA 537 (A).) A sentencing court is also bound to take into account the accused's age at the time of the commission of the offence.
- [4] In arriving at an appropriate sentence Holmes JA in **Rabie** above set out the guidelines which courts must consider and apply when considering appropriate sentence to impose. I will not repeat them. Suffice to highlight the following for purposes of this judgment:

- “(a) Punishment must fit the crime and the criminal. (See *R v Motsepe* 1923 TPD 380.)
- (b) The interests of society in punishment must be taken into account. (See *R v Karg* 1961(1) SA 231 AD at 236A-B; *S v Zinn* 1969 (2) SA 537 (AD) at 540G.)
- (c) *Then there is the consideration of mercy or compassion or plain humanity [or what is now, in the new democratic order known as ‘ubuntu’]. It has nothing to do with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers*

one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society. See S v Narker and Another, 1975 (1) SA 583 AD at 586D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it back for mercy's sake. This was also recognised in S v Roux 1975(3) SA 190 AD.

- (e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this country some 40 years ago, by BEYERS, JA; in Ex parte Minister of Justice: In re R v Berger and Another, 1936 A.D.334 at p.341:

'Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval.'

- [5] The above guidelines have been applied by our courts generally in respect of all offenders without particular reference to youthful offenders despite the Criminal Procedure Act of 1977 always having provided for a distinction between adults and youthful offenders when sentence is imposed under sections 276(1)(h); and 297(1).

- [6] Perhaps as a point of departure it is important to state that the Constitution of South Africa, 1996, has ushered in a new way of sentencing youthful offenders over and above what the Criminal Procedure Act provides. The Child Justice Act of

2008 has also introduced a deliberate process of dealing with youthful offenders to ensure that they are not treated like adults.

- [7] The traditional aims of punishment, '*deterrence; preventive, reformative and retributive*', have been affected by the Constitution of the Republic of South Africa, 1996, and, having regard to sections 28(1)(g) and 28(2) of the Constitution and the relevant international conventions, in every case involving a juvenile offender, the ambit and scope of sentencing had to be widened in order to give effect to the principle that a child offender was 'not to be detained, except as a measure of last resort' and, if detention of a child were unavoidable, it should be for 'only the shortest appropriate period of time'. Furthermore, if detention was warranted, the Court would have to give directions that the child be detained separately from persons over the age of 18. (**Director of Public Prosecutions, Kwazulu-Natal v P** 2006 (1) SACR 243 (SCA) at paragraphs [13] and [18] at 250h - 251b and 252h - 253b.)
- [8] The offences the appellant committed are serious and the interests of society need to be protected against offenders such as him. At the same time, the interests of society need to be balanced against that of the offender and the seriousness of the offence. The question is whether an effective 30 years imprisonment is disproportionate to the appellant's conduct and personal circumstances. The

appellant was 17 years and 7 months old at the time of the commission of the offences. He was single, with no dependants but attending school and in Grade 10. He had no previous convictions.

- [9] The court *a quo* found that the accused acted in pursuit of a common purpose in committing the three counts of murder and robbery in which a firearm was used. It further found that he did not plan these offences although he participated voluntarily in the commission of these heinous crimes,

“dit is onmoontlik om te se wat hy presies gedoen het... Van die beskuldigde kan gesê word dat sy rol minder leidend was as die van beskuldigde 4 en 5. Hy is nie gesien deur beskuldigde 1, 2 en 3 vanuit die stoor waar hulle was tydens van die voorval nie.”

- [10] I am mindful of the fact that the court *a quo* considered that the appellant was young at the time of the commission of these offences and hence imposed punishment with reference to section 77(4) read with 77(3) of the Child Justice Act, i.e. punishment ordained for youthful offenders. However, in my view, the court *a quo* placed strong emphasis on the interests of the society and the seriousness of the offence(s) with not as much as mentioning and giving consideration to the fact that at that age, despite his conduct in this case, he was not yet fully developed; he stood a chance of rehabilitating easily taking into account the support

structure he had at home; the fact that he realised that he had done something wrong and that he deserved to be punished and; the likelihood of being under the influence of drugs which surely must have influenced him to forget his sense of morality.

[11] Bosielo J, in **S v Phulwane and Others** 2003 (1) SACR 631 (T) aptly stated:

“[7] It is true that where a crime is serious and prevalent, particularly where it threatens the well-being of society, that courts should impose appropriate sentences. However, it remains a trite principle of sentencing that each case has to be decided on its own merits. It is also trite that direct imprisonment is not always the appropriate sentence. It is a patent and serious irregularity for a sentencing officer to ignore the personal circumstances of an accused when considering sentence. A sentencing officer must never allow the seriousness of the offence and the interests of the community to receive undue weight at the expense of the personal circumstances of the accused. This will inevitably lead to a sentence which is flawed...As the learned Cachalia J correctly remarked in *S v Nkosi* 2002 (1) SACR 135 (W) at 143b:

'The fine balance that needs to be struck between society's needs to punish crime while not overlooking the interests of a juvenile offender was emphasised by Botha JA in *S v Jansen and Another* 1975 (1) SA 425 (A) at 427 in fine - 428A in the following terms:

'The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a

distorted personality being eventually returned to society'."

[12] Further at para [8] he stated:

"In **S v Z en Vier Andere Sake** 1999 (1) SACR 427 (E) at 430f the learned Erasmus J correctly observed as follows:

'Besondere omstandighede geld by die bestrawwing van jeugdige oortreders, juis vanweë die feit van hul jonkheid. Die jeug is kenlik van kosbarewaarde vir die gemeenskap – soos weerspieël word in art 28 van die Grondwet. Hulle is ons toekoms. Verbandhoudend hiermee is die feit dat jeugdiges se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard meervatbaar vir beïnvloeding, ten goede sowel as ten kwade. ... Dit is derhalwe die dure plig van elke persoon en instansie gemoeid met jeugdiges, ook dan die howe, om te poog om jeugdige oortreders vir die geleedere van wetsgehoorsames te win.'"

[13] In my view, apart from the negative elements highlighted in the paragraphs of the presentence report referred to in the judgment of the court *a quo*, the presentence report on the other hand in fact depicts a young man who associated with older boys; used drugs and acted contrary to his well upbringing; one who realised his mistake and accepted that he deserved to be punished, be it late at the end of the trial. He, like many youngsters of his age group "is meer buigsaam as volwassenes en dus uiteraard meer vatbaar vir beïnvloeding, ten goede sowel as ten kwade". (**S v Z en Vier Andere** above.)

- [14] The correct approach regarding considerations to be taken into account before passing sentence was stated by Corbett JA in **Rabie** above at 866A-C where he emphasised that:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him[or her] to achieve that delicate balance between the crime, the criminal and the interests of society which his[or her] task and the objects of punishment demand of him[or her]. Nor should he [or her] strive after severity.”

- [15] Looked against the heinous crimes the appellant committed, 30 years imprisonment may look appropriate but it is severe for a youthful offender with no previous criminal records and lacks mercy and compassion which *‘has nothing in common with maudlin sympathy for the accused’*. The effective sentence imposed makes no room for any opportunity for the appellant to rehabilitate and mend his ways. In my view, without attempting to usurp the function of the sentencing court *a quo* as warned by the Appellate Division in **R v Dhlumayo and Another** 1948 (2) SA 677 (A), the court *a quo* approached the matter in ‘anger’ i.e. considering the gruesome manner in which the deceased were murdered, did not blend its sentence with mercy taking into account the appellant’s personal circumstances and chances of rehabilitation, resulting in its failure to strike that delicate balance between the crime, the criminal and the interests of society.

- [16] The Child Justice Act prescribes, in section 77(4) that a child convicted of these serious crimes should be sentenced to a term of imprisonment not exceeding 25 years imprisonment. Surely, this must mean that the appellant should not and cannot be imprisoned for more than 25 years. Otherwise, the very objective of the Child Justice Act is rendered negatory. By imposing 30 years imprisonment the Court *a quo* in fact exceeded the prescribed sentence in terms of s77 (4). This cannot be correct.
- [17] The Child Justice Act read in conjunction with the Constitution is aimed at giving children a chance at rehabilitation lest we place 'adults heads on young shoulders' which is a serious burden which no immature young person in the appellant's situation can be made to bear. This Court has a responsibility to protect society on the one hand and on the other hand to uphold the spirit of the Constitution, the Child Justice Act and international conventions which South Africa has ratified in sentencing children differently from adults. It is a difficult and delicate task but one that has to be done and can only yield a balance an appropriate sentencing of children. This does not mean that the interests of society in these circumstances would not be taken into account. To the contrary even society expects courts not only to impose balanced sentences but to show in their sentences that they have given due and deliberate consideration to the fact that children do not need to be broken but to be built and rehabilitated because at some point they will have to return to the very same society but rehabilitated and better people.

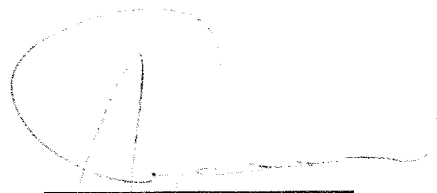
- [18] The sentiments of an old decision of S v J 1975 (3) SA 146 (O) still resonate well today whereat Steyn J stated:

“Die Hof is nie 'n pynbank nie . Dit is nie 'n instrument van pyniging waarop 'n beskuldigde gebreek moet word omdat hy 'n weersinwekkende misdaad gepleeg het nie . Die Hof is die instrument waardeur die samelewing handel beide om homself te beveilig sowel as om die beskuldigde, indien moontlik, deur middel van straf te red as mens en te verbeter wanneer hy homself so gedra het dat hy die samelewing onwettiglik leed en skade aangedoen het.”

(See also2) SACR 477 (CC).)

- [19] The sentence imposed, effective 30 years imprisonment, does not properly strike the balance between society's need for an effective form of custodial punishment and the need for the child to be imprisoned for the 'shortest appropriate period of time'. The child's 'best interests' were not taken into account. The sentence left the child with no prospect or hope that he may one day be released to become a productive member of society.

- [20] Having come to the conclusion I have come to above, I am of the view that the appeal should succeed. The sentence imposed be set aside and substituted with that of an effective term of 20 (twenty) years imprisonment.



B.C. MOCUMIE, J

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