IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: A481/16

In the matter between:

JUWAINE BRUINTJIES **Appellant**

and

THE STATE **Respondent**

JUDGMENT

SAVAGE J:

[1] On 20 October 2015 the appellant, who was 16 years old at the date of commission of the offences, was convicted in the Parow Regional Court of one count of murder, two counts of attempted murder, one count of possession of an unlicensed firearm and one count of possession of ammunition.

[2] Following his conviction on all counts, on 8 December 2015 the appellant, who was by then 18 years old, was sentenced to an effective sentence of 19 years' imprisonment: 10 years for murder; 3 years each for two counts of attempted murder; 10 years for the unlawful possession of a firearm; and 3 years for the unlawful possession of ammunition. The conviction for

murder was ordered to run concurrently with the other sentences imposed.

[3] The matter was subject to automatic review in terms of section 85 of the Child Justice Act 75 of 2008 (CJA), read with Chapter 30 of the Criminal Procedure Act 51 of 1977 (CPA). The appellant also had an automatic right to appeal in terms of section 84(1)(a) of the CJA and could note an appeal without having to apply for leave in terms of section 309B of the CPA.

[4] The matter came before Kose AJ by way of automatic review who, on 9 February 2016, determined that the proceedings had been in accordance with justice. Subsequently, on 12 October 2016 the appellant lodged an appeal against sentence only.

[5] In light of the determination by Kose AJ, the Judge President of this division constituted a full bench to hear this appeal. Counsel were informed of this fact and invited to file further submissions prior to the hearing of the appeal as to the correctness (or otherwise) of the appellant's conviction, as submissions had only by that date been filed in respect of the appeal against sentence.

Appeal against conviction

[6] The evidence for the state before the trial court was that Ms Abigail Scheepers was standing at the gate of the tavern where the offences occurred in Bishop Lavis, Cape Town when the appellant came to the gate and wanted to enter the premises. He was informed that he was under

age but nevertheless proceeded to enter. Ms Scheepers heard shots go off and saw the appellant in possession of a firearm.

[7] Mr Emmanuel Scheepers saw the appellant shooting in the tavern and shouted out to him to stop. The appellant turned and fired a shot at Mr Scheepers which missed him. He then managed to grab the appellant and he and Mr Shaun Kock tried to wrestle the firearm from the appellant's hand. A further shot was fired by the appellant before he dropped the firearm during the tussle. Mr Kock picked it up and handed it over to a member of the public. Ms Scheepers denied that a person wearing a brown jacket had fled the scene.

[8] Ms Viola Dolphin was seated at the front table inside the tavern when she heard gunshots going off. She lay on the floor and when she felt pain she realised she had been shot. Ms Emily Scheepers was killed in the shooting. All state witnesses were adamant that the appellant was the only person shooting on the scene.

[9] The appellant's version was that he was standing in line to buy alcohol at the tavern when shots went off. He fell to the ground while others fled from the tavern. A man in a brown jacket ran out of the tavern and as he did he fell and lost his firearm, before standing up and running away. The appellant, who had been on the ground near to this man, was confronted as having been with the shooter.

[10] The trial court took account of the fact that the appellant was on his own version on the scene of the crimes but, according to him, was outside at the time of the shooting. The trial court found that his version failed to

explain why three state witnesses positively identified him as having been the shooter inside the tavern. The court also found his version that he lay on the ground when others were running away "*inherently improbable to the point of not believable*". The appellant was found to be an unimpressive witness in respect of whom nothing positive could be said and that he could "*lie with a straight face*". His evidence was found not to stand against that of the state witnesses in circumstances in which it appeared that he was deliberately attempting to conceal the identity of the person who was working with him. Consequently, the appellant was convicted on all counts.

[11] Counsel for the appellant contended that the trial court had materially misdirected itself in convicting the appellant, with undue weight given to the contradictory evidence of the state witnesses whose evidence was open to criticism. It was submitted that the appellant's version was reasonably possibly true and that the state had been unable to prove that the appellant was lying. With insufficient evidence before the trial court which proved beyond reasonable doubt that the appellant was guilty of the offences, the conviction cannot stand and, it was submitted, falls to be set aside.

[12] The state opposed the appeal against conviction contending that the conviction of the appellant was sound and based on a rational and thoughtful evaluation by the trial court of the facts before it. The eye witness accounts were, it was submitted, credible whose evidence was properly accepted, while the appellant's version was highly improbable.

The minor discrepancies in the evidence of the state witnesses were not of a material nature and did not warrant a different conclusion.

Appeal against sentence

[13] The trial court in sentencing the appellant took account of the severity of the offences committed by the appellant and had regard to s 69(1)(e) of the CJA which requires that imprisonment is "*a measure of last resort*". A long custodial sentence of an effective 19 years in prison was imposed given the seriousness of the appellant's brazen crimes in circumstances in which his motive went unexplained and his accomplice concealed.

[14] The trial court noted that although the appellant was described by his grandparents as a non-violent person who was well-behaved and attended church with them, the evidence before the court concerning the his misconduct in the youth care facility into which he was placed, did not accord with his grandparent's description. Regard was had to the triad of factors to be considered by a court in sentencing, with account taken of the serious nature of the offences and the fact that the appellant had acted as an adult and showed no remorse for his criminal misconduct.

[15] On appeal it was submitted for the appellant that the trial court had misdirected itself in relation to sentence in not complying with the provisions of chapter 10 and ss 69(1)(a)-(e) and 69(4) of the CJA, by failing to consider sentencing options set out in ss 72-76 of the Act and not complying with the provisions of s 77(5). Counsel for the appellant submitted that in the circumstances the sentence imposed on the appellant was disturbingly inappropriate and warranted interference by

this Court given that he was a sixteen year old first offender at the time of the commission of the offences, who had completed grade 8, was unemployed and dependent on his grandparents.

[16] Although the state opposed the appeal against sentence, it conceded that the 19-year term of imprisonment imposed was inordinately harsh and warranted the interference of this Court. While it was contended that it was appropriate for the trial court to impose a long term of imprisonment given that from the facts his conduct was premeditated and he showed no remorse, it was material that the appellant was 16 years old when he committed the offences and was 18 when he was sentenced. The state conceded that a sentence was not imposed "*for the shortest appropriate period of time*" as required by the CJA and proposed that the sentence of 10 years' imprisonment each imposed in respect of counts 1 and 4 be ordered to run concurrently and that the sentences of three years imprisonment imposed in respect of counts 2, 3 and 5 be ordered to run concurrently. This would give the appellant an effective term of 13 years imprisonment.

Evaluation

[17] It falls to the state to prove its case against an accused beyond reasonable doubt. In doing so it is trite that the balance of evidence must weigh "*so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt*" (*S v Chabalala* 2003 (1) SACR 134 (SCA) at 139).

[18] Three state witnesses saw the appellant on the scene of the crimes in Bishop Lavis with a firearm, firing the shots which killed the deceased and

which attempted to kill two other people on the scene. The trial court approached the evidence as to the identification of the appellant with the appropriate caution required by *S v Mtethwa* 1972 (3) SA 766 (A). It applied its mind to whether the appellant's version - that he did not fire the shots which killed Ms Scheepers and attempted to cause the death of two others - was reasonably possibly true. Having regard to the evidence before it the trial court cannot be faulted for rejecting the appellant's version as inherently improbable and concluding that the state had proved the guilt of the appellant on all counts.

[19] It follows that there exists no basis to justify the interference by this Court with the trial court's conviction of the appellant on all counts. The appeal against conviction must accordingly fail.

[20] Turning to sentence, it is trite that sentencing '*is pre-eminently a matter for the discretion of the trial court*'. *S v Pillay* 1977 (4) SA 531 (A) at 534H–535A; *S v Fazzie* 1964 (4) SA 673 (A).

[21] Section 69(4) requires a child justice court when imposing a sentence involving imprisonment to take into account the seriousness of the offence with due regard to the harm done or risked through the events, and the culpability of the child in causing or risking harm; the protection of the community; the severity of the impact of the offence on the victim; the previous failure of the child to respond to non-residential alternatives, if applicable; and the desirability of keeping the child out of prison.

[22] Section 28(1)(g) of the Constitution provides that:

'*Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time …*'.

[23] As was stated in *S v N* 2008 (2) SACR 135 (SCA) at para 39, prison must be a last resort for a child offender and where unavoidable its form and duration should also be tempered on the basis that '(e)*very day he spent in prison should be because there is no alternative*'.

[24] In *S v CS* 2016 (1) SACR 584 (WCC) the Court emphasised that in sentencing a child the ordinary considerations relating to sentencing i.e. the nature of the crime committed, the personal circumstances of the offender and the interest of society are to be considered. At the same time regard must also be had to the aims of punishment: deterrence, rehabilitation, prevention and retribution. In addition, in accordance with s 69(1), the child is to be encouraged to understand the implications of, and be accountable for, the harm caused; the court must promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society; promote the reintegration of the child into the family and community; ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and use imprisonment only as a measure of last resort for the shortest appropriate period of time.

[25] In *S v Fredericks* 2012 (1) SACR 298 (SCA) at para 13 and 14 the trial court was found to have over-emphasised the seriousness of the offences

at the expense of the youthfulness of the offender in sentencing a 14 year old to 25 years' imprisonment, a sentence which was found to be '*disturbingly inappropriate*'. In addition, a misdirection was committed in failing to take into account the cumulative effect of the sentences or to order that the sentences imposed, or part thereof, run concurrently.

[26] As in *Fredericks*, in the current matter all offences were committed in one place over the course of a limited period of time and one spree of criminal misconduct. There can be no doubt that given the grave nature of the offences committed, their cumulative effect insofar as there were three victims on the same scene and the absence of any explanation as to the motive, nor any sign of remorse shown, a custodial sentence is the only appropriate sentence in the circumstances of the matter.

[27] However, an effective sentence of 19 years imprisonment for a first offender who was 16 years old at the date of commission of the offences appears to me to be startlingly inappropriate. In imposing such sentence it also does not appear that appropriate regard was had, as required by s 77(5) of the CJA, to fact that the term of imprisonment imposed is to be antedated by the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

[28] Inordinately long periods of imprisonment have not been embraced by our courts, even for adult offenders. This is more acutely so in the case of a child offender even where a serious crime has been committed. In *S v Skenjana* 1985 (3) SA 51 (A) at 55C-D the court noted that it was not '*in the public interest that potentially valuable human material should be*

seriously damaged by long incarceration'. The caution was sounded in *S v Khumalo and another* 1984 (3) SA 327 (A) at 331 that '*unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner';* and that it is not the purpose of incarceration to have offenders *'visited with punishments to the point of being broken.' S v Sparks and Another* 1972 (3) SA 396 (A) at 410G.

[29] In *S v Dlamini & another* [2012] ZASCA 207 (November 2012) at para 14 the court stated that where '*the cumulative effect of the sentence imposed is so inappropriate…this court is permitted to intervene and substitute its discretion for that of the trial court'*. This was so even though the crime in that matter was clearly was one of the worst kinds of house robberies and it was recognised must have been '*a particularly brutalizing experience'* for the victim.

[30] The cumulative effect of the sentence imposed on the child offender in this matter, in spite of the gravely serious nature of the crimes committed, is unduly harsh. An effective period of imprisonment of 19 years is excessively long having regard to the fact that the appellant was a 16 year old first offender at the time the crimes were committed. It does not reflect an appropriate regard to the imposition of a sentence for the shortest appropriate time and in my mind visits a punishment on the appellant which is so long for a young person that it does little to allow the offender to keep the hope of a different life, outside of a world of crime, alive.

[31] Furthermore, although the appellant was charged (in count 4) with having been possession of a semi-automatic pistol, the state failed to prove the

nature of the firearm and he was thus correctly convicted of possession of an unlicensed firearm only. Consequently, the sentence imposed on this count of 10 years imprisonment is unduly harsh.

[32] For these reasons it is appropriate for this Court intervene and to substitute its discretion for that of the trial court insofar as count 4 as well as the period of concurrency of the sentences imposed on the appellant is concerned.

[33] In the circumstances, it is appropriate that the sentence of ten (10) years imprisonment imposed in respect of count 4 be set aside and substituted with five (5) years imprisonment. In addition, counts 1 and 4 should be ordered to run concurrently, and two years of the three year sentences imposed in respect of counts 2, 3 and 5 should also be ordered to run concurrently with the sentences imposed in counts 1 and 4. This has the result that an effective term of 13 years imprisonment is imposed on the appellant. Such reduced period of imprisonment, in my mind, gives effect to s 28(1)(g) of the Constitution, has regard to the period spent in custody and reflects the appropriate mercy while not ignoring the seriousness of the heinous crimes committed.

Order

[34] In the result, I propose an order as follows:

1. The appeal against conviction fails.

2. The appeal against sentence is upheld only to the following extent:

"1. The sentence of ten (10) years' imprisonment imposed in respect of count 4 (unlawful possession of firearm) is set aside and substituted with a sentence of five (5) years imprisonment.

2. The sentence imposed in count 4 (5 years imprisonment) and two (2) years of each of the three (3) year terms of imprisonment imposed in respect of count 2 (attempted murder), count 3 (attempted murder) and count 5 (unlawful possession of ammunition) respectively, shall run concurrently with the sentence of ten (10) years' imprisonment imposed in count 1 (murder).

3. The accused is sentenced to an effective thirteen (13) year term of imprisonment.

4. The sentences imposed in respect of all counts are antedated to 8 December 2015 (bring the date of imposition of sentence by the trial court) in terms of s 282 of Act 51 of 1977."

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SAVAGE J

I agree and it is so ordered.

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SALDANHA J

I agree.

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CLOETE J

Counsel for the Appellant	:	Adv. H Carstens
Counsel for Respondent	:	Adv. L A Friester-Sampson
Date of hearing	:	17 February 2017

Date of judgment : 23 February 2017