IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 19/11/2007
Case number: A993/07

UNREPORTABLE

SIPHO ALFRED MFAMISENI YENDE Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 15 March 2000, the appellant, who was then 15 years old, fatally stabbed Natasje van der Merwe, who was 12 years old, by stabbing her once in the heart. The attack took place in the street when the deceased was returning home after running an errand. The appellant was not able to explain why he did this save for saying that the deceased had sworn at him and called him a kaffir and he had become angry. He stabbed the deceased with a knife which he had found in the veldt. The appellant and the deceased did not know one another or have anything to do with each other. The crime was not premeditated.

[2] A bystander arrested the appellant at the scene and on 20 September 2000 the appellant was charged with murder in the Standerton regional court. The appellant who was represented by an attorney pleaded guilty and his attorney handed in a statement in terms of section 112(2) of Act 51 of 1977 ('the Act'). By agreement the prosecution and the defence handed in various documents including the medico-legal post mortem examination report and a statement made by the appellant.

[3] The appellant's section 112 statement contains only the essential details and nothing about the circumstances giving rise to the murder. The post-mortem report confirms the cause of death to be a stab wound in the heart.

[4] After hearing evidence in mitigation and obtaining pre-sentencing reports, on 29 November 2000 the regional magistrate sentenced the appellant to 15 years imprisonment in terms of section 276(1)(b) of the Act. The court ordered that the appellant serve the sentence in the Barberton Juvenile Prison.

[5] The appellant commenced serving his sentence on 29 November 2000 and has now served almost 7 years of his sentence. The appellant unsuccessfully sought leave to appeal on 20 May 2005 and then filed a petition for leave to appeal in terms of section 309C of the Act. On 11 October 2007 the petition was presented to two judges of this division

who considered that leave should be granted in respect of sentence only. They were concerned about the delay if the matter was heard in the ordinary course and considered setting aside the sentence on review in terms of section 304(4) of the Act. The judges requested the Director of Public Prosecutions to comment on whether the matter should be dealt with in this manner. When it became apparent that the hearing of the appeal could be expedited and the appeal enrolled for hearing on 19 November 2007 the judges granted leave to appeal against sentence.

[6] This is tragic case and required careful consideration by the regional court. It was clearly a serious matter in which the community has a great interest and the personal circumstances of the appellant required the most anxious consideration. It is well established that juvenile offenders are treated differently from adult offenders to ensure that, as far as possible, they do not emerge from prison as hardened criminals and are able to be reintegrated with society. It has long been recognised that a juvenile by reason of immaturity, very often does not have the insight, self-control and discernment to restrain himself from committing crime - see for example S *v Willemse en Andere* 1988 (3) SA 836 (A) at 846H-847C; S *v Lehnberg en 'n Ander* 1975 (4) SA 553 (A) at 561A; S *v Nkosi* 2002 (2) SACR 94 (T) at 96h-97b.

[7] In S *v* Z *en Vier Ander Sake* 1999 (1) SACR 427 (E) the court laid down a number of guidelines to be followed in the sentencing of

juvenile offenders (440i-441 g). In S *v* ***Peterson en 'n Ander*** **2001 (1) SACR 16 (SCA)** at para 23 the Supreme Court of Appeal expressly endorsed guidelines 3 and 4:

> '3. The court must act dynamically to obtain full particulars about the accused's personality and personal circumstances. Where necessary the court must obtain a pre-sentence report from a probation officer and/or a correctional officer. Such a report is necessary where the accused has committed a serious offence, or where he has previous convictions. It is inappropriate to impose a sentence of imprisonment, including suspended imprisonment, unless such a pre-sentence report has been obtained.
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> 4. The court must exercise its wide discretion sympathetically and imaginatively, to determine a sentence which is suited to the accused, in the light of his personal circumstances and of the crime of which he stands convicted. This entails, firstly, the determination of the most appropriate form of punishment and, secondly, the adaptation of that punishment to suit the needs of the particular accused'.

[8] In two recent judgments the Supreme Court of Appeal has dealt with the proper approach to the sentencing of juveniles. In S *v B* **2006 (1) SACR 311 (SCA),** after considering the requirements imposed by section 28(1)(g) of the Constitution and four International Law Instruments, the court pointed out that

(1) the principle that detention is a matter of last resort (and for the shortest appropriate period of time) is the ***leitmotief*** of juvenile justice reform (para 18);

(2) the overriding message of the international instruments as well as the Constitution is that child offenders should not be deprived of their liberty, except as a matter of last resort and, where incarceration must occur, the sentence must be individualised with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society (para 19);

(3) in sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles, including: the principle of proportionality; the best interests of the child; and the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time (para 20).

In *Director* of *Public Prosecutions, Kwazulu-Natal* *v P* **2006 (1) SACR 243 (SCA)** the court said

> '[14] With the advent of the Constitution the principles of sentencing which underpin the traditional approach must, where a child offender is concerned, be adapted and applied to fit with in with the sentencing regime enshrined

in the Constitution, and in keeping with the international instruments which lay "emphasis on ***reintegration*** of the child into society". The general principle governing the sentencing of juvenile offenders is set out in s28(1)(g) of the Constitution. The section reads:

"Every child has the right

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

,,,

[9] It is clear that the personal circumstances of the child offender always require the most careful consideration in relation to the circumstances of the offence and the interests of society.

[10] The appellant was born on 1 April 1986 and was therefore 15 years old at the time of the crime. The appellant seems to have suffered some kind of head injury when very small and he has learning difficulties. At the time of the offence he was in grade 2 and clearly was intellectually impaired. He attended a special school in Soweto before his mother moved to Volksrust. At home the appellant was not a difficult child. Although there was no father present he lived in harmony with the other members of the household. The family was actively religious. At

school the appellant was quiet, respectful and reserved and he presented no behavioural problems. He helped the teachers, was co operative and did not bully the other younger smaller children. The crime was completely unexpected and shocked the teachers at the school. The appellant had no previous convictions and the crime appears to be an isolated incident. The appellant appears to have lost control of himself with tragic consequences. He cannot satisfactorily explain why he lost control of himself. The pre-sentencing reports indicate a need for the appellant to be exposed to intensive therapy to determine the extent of his problem and give him the necessary treatment.

[11] This summary of the appellant's personal circumstances describes a youthful person, lacking the insight, self-control and discernment necessary to restrain himself.

[12] The Director of Public Prosecutions does not support the sentence imposed and submits that it should be set aside. The Director's view is that the regional court failed to deal objectively with the appellant as a juvenile offender and to have proper regard to his age, lack of maturity and his intellectual capacity. The Director has also referred to the regional magistrate's misdirections on the facts. The Director of Public Prosecutions contends that this led to the regional court imposing a sentence that is startlingly inappropriate. The Director submits that the 7 years imprisonment which the appellant has already served is far in

excess of what the court should have imposed and this court should now set aside the sentence and replace it with a sentence of 7 years backdated to 29 November 2000.

[13] I agree that the sentence imposed was startlingly inappropriate. A sentence of 15 years imprisonment in the circumstances of this crime justifies a finding that the court did not exercise its discretion reasonably - S *v* ***Salzwedel and Others*** **1999 (2) SACR 586 (SCA)** para 10. In my view a different type of sentence was called for, one that would emphasise the seriousness of the crime while making allowance for the appellant's personal circumstances. The sentence imposed on appeal in ***Director*** **of** ***Public Prosecutions, Kwazulu Natal v P supra*** offers useful guidelines - see para 28. An appropriate sentence would have been 4 years imprisonment wholly suspended on appropriate conditions coupled with 2 years correctional supervision so that the appellant could continue to attend school while receiving the necessary therapy. The report in terms of section 276A(1) recommended correctional supervision as an option but was clearly concerned about the deceased's father's reaction and the reaction of the community at large. That was not a consideration which should have prevented the regional magistrate from imposing a proper sentence.

[14] Nevertheless it must be accepted that imposing a further sentence at this stage will be futile as the appellant has already served a sentence in excess of what should have been imposed.

[15] Accordingly, the appeal against sentence is upheld and the sentence of 15 (fifteen) years imprisonment is replaced with a sentence of 7 (seven) years imprisonment. In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence of 7 years imprisonment be deemed to have been imposed on 29 November 2000 and it is further ordered that the appellant be released immediately.

B.R. <u>SOUTHWOOD</u>
JUDGE OF THE HIGH COURT

I agree

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E. BERTELSMANN
JUDGE OF THE HIGH COURT

CASE NO: A893/07

HEARD ON: 19 November 2007

FOR THE APPELLANT: In person

FOR THE RESPONDENT: Adv. S. Mahomed

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 19 November 2007