REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 513 / 03

In the matter between

JAN HENDRIK BRANDT **APPELLANT**

and

THE STATE **RESPONDENT**

Coram : CAMERON, MTHIYANE, BRAND JJA, PATEL and PONNAN AJJA

Date of hearing : 9 NOVEMBER 2004

Date of delivery : 30 NOVEMBER 2004

SUMMARY

Sentence – s51(3)(b) of the Criminal Law Amendment Act 105 of 1997 interpreted – suitability of imprisonment for life as a sentencing option for child offenders considered.

J U D G M E N T

PONNAN AJA:

[1] The principal issue in this appeal is a sentence of life imprisonment imposed on the appellant for a murder he committed when he was 17 years and 7 months old. This brings into question the application of the minimum sentence legislation to offenders under 18. High courts have given conflicting decisions on this issue, which the appeal requires us to resolve.

[2] The appellant was convicted, pursuant to his plea of guilty, by Sandi AJ in the High Court at Grahamstown of three charges: murder, robbery with aggravating circumstances and attempted robbery. Applying the minimum sentencing legislation (Criminal Law Amendment Act 105 of 1997) without regard to the appellant's age, the trial judge sentenced him to life imprisonment. An appeal against sentence to a full court, with the trial court's leave, was dismissed. The members of the court differed on the interpretation of the minimum sentencing legislation and its application to the appellant's case. This further appeal is with the special leave of this Court.

[3] At his trial the appellant entered a lengthy plea explanation that indicated that before the events in issue he became a member of a satanic coven in Port Elizabeth. On 12 June 2000 he hitch-hiked to his parents' home in Hofmeyr, journeying with the express purpose of killing

his parents. That, he had been told by members of the satanic sect, would elevate him to the status of a high priest within the coven. For that purpose he had purchased a knife in Cradock for the sum of R45,00. When he arrived at his parental home, however, he was unable to go through with the deed. He then sought refuge in brandy and dagga. Realising that he required money and a motor vehicle to return to Port Elizabeth, he decided to rob the deceased, a 75 year old female neighbour. He called on the deceased (who was known to him and his family and who was alone at the time) on the pretext that he had been sent by his parents to borrow recipes. He claimed – an account the trial court rightly rejected – that to appease members of his coven (who according to him would have been disgruntled by the abandonment of his plan to kill his parents) he then decided to kill the deceased instead. He dealt the deceased a single, fatal blow to her neck with the knife that he had purchased, and then stage-managed the scene to create the impression that she had committed suicide. To calm himself he smoked more dagga and consumed more brandy. He then removed a portable radio, the deceased's car keys and the sum of R300,00. He went to the garage only to discover that the deceased's car was not there. He was arrested on 28 July 2000 and had been in custody for approximately seven months when he was convicted.

[4] Central to the appeal is the construction to be placed on s51 of the Criminal Law Amendment Act 105 of 1997 ('the Act'), which provides:

> '**51 Minimum sentences for certain serious offences**
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> (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –
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> *(a)* if it has convicted a person of an offence referred to in Part I of Schedule 2; or
>
> *(b)* If the matter has been referred to it under s 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,
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> sentence the person to imprisonment for life.
>
> (2) Notwithstanding any other law but subject of subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in –
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> *(a)* Part II of Schedule 2, sentence the person, in the case of –
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> (i) a first offender, to imprisonment for a period not less than 15 years;
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> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
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> *(b)* Part III of Schedule 2, sentence the person, in the case of –
>
> (i) a first offender, to imprisonment for a period not less than ten years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, sentence the person, in the case of –

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than ten years

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) *(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

.....

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.'

[5] Applying s51(3)(a) only, Sandi AJ asked himself whether 'substantial and compelling circumstances' were present, and concluded that there were none. He therefore imposed the statutorily prescribed

minimum sentence of life imprisonment for the murder. Taking the second and third charges as one for the purposes of sentence, he sentenced the appellant to imprisonment for a minimum term of 15 years. Sandi AJ granted the appellant leave to appeal against sentence to the full court of the Eastern Cape Division. The majority of the court (Liebenberg J, Parker AJ concurring) considered the application of s51(3)(b), but concluded that although, since the appellant's age had been overlooked in the trial court, it was entitled to impose sentence afresh, the sentence of life imprisonment was appropriate. In dismissing the appeal, the majority held that the interpretation of s51(3)(b) by Cachalia J (Blieden J and Jordaan AJ concurring) in *S v Nkosi* 2002 (1) SACR 135 (W) was wrong and declined to follow it. In his dissent Pillay J followed *Nkosi*.

[6] At the hearing of the appeal, Mr Pretorius on behalf of the appellant, somewhat surprisingly, disavowed reliance on *Nkosi* or for that matter the minority judgment of Pillay J in the court *a quo*. Instead he favoured the construction placed on s51 by Liebenberg J. Further support for such an interpretation, he submitted, was to be found in the later judgment of *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1 (T). *Makwetsja,* a full bench decision of the Transvaal Provincial Division, declined to follow *Nkosi* and also the

approach adopted by Van Heerden J in *S v Blaauw* 2001 (2) SACR 255 (C).

[7] In *Blaauw,* Van Heerden J suggested that a Court was not obliged in terms of s51(3)(b) to impose the minimum sentence on a child who at the time of the commission of the offence was 16 or 17 years old unless the State satisfied the Court that the circumstances justified the imposition of such a sentence. In *Nkosi* (at 141 g-j), Cachalia J held:

'The distinction between s51(3)(a) and s51(3)(b) lies in the nature of the discretion that a court has when considering the positions of the two classes of offender. In the former case a Court should *ordinarily* impose the prescribed sentence unless there is some weighty justification for the imposition of a lesser sentence. The Legislature has therefore limited the discretion of a Court to depart from the minimum sentence (see *S v Malgas* (supra para [25]…)). In the latter case there is no reference at all to *substantial and compelling circumstances*. The express wording of the section only requires a Court to justify a decision to impose the prescribed sentence by entering its reasons on the record. It does not limit a Court's discretion to impose an appropriate sentence on this class of offender'.

[8] *Makwetsja*, like the majority in the court *a quo*, declined to subscribe to the interpretation of the section advanced in *Blaauw* and *Nkosi*. The reasons advanced in each instance for not doing so may be summarised as follows: Whilst the statutorily prescribed minimum sentence should be imposed on offenders between the ages of 16 and 18 only in extreme cases, that did not mean that the Legislature did not

intend those sentences to apply to all offenders above the age of 16 years. If the legislature did not in fact intend the minimum sentences to apply to child offenders aged 16 and 17 it would have explicitly excluded that category of offender as it had children below the age of 16 (s51(6)). Section 51(1) decrees that the minimum sentence must be imposed, subject to ss3(a) and (b). Youthfulness *per se* would ordinarily constitute a substantial and compelling circumstance. If a sentencing court intends to impose the prescribed minimum then s51(3)(b) envisages that it set out clearly its reasons for doing so. The scheme of the section serves to remind a sentencing court to make 'doubly sure' that a youthful offender, who has to be sentenced with caution, is deserving of the prescribed minimum.

[9] The minimum sentencing legislation must be read in the light of the values enshrined in the Constitution and interpreted in a manner that respects those values. Section 51 distinguishes between adult offenders and child offenders. Section 28 of the Constitution defines a child as a person under the age of 18 years. Two categories of child offenders are envisaged by the Act: first, those below the age of 16; and, second, those between the ages of 16 and 18. The section does not apply at all to a child who was under the age of 16 years at the time of the commission of the offence (s51(6)). For adult offenders, the legislature has ordained life imprisonment or one of other prescribed

minimum sentences unless substantial and compelling circumstances are found to exist (s51(1) read with s51(3)(a)).

[10] The notional starting point of the enquiry for the two categories of offenders to whom the Act does apply thus differs. For adult offenders the starting point is the minimum sentence prescribed by the legislature. That sentence, which is intended to be a severe and standardised one, may only be departed from if there is weighty justification therefor (*S v Malgas* 2001 (1) SACR 469 (SCA) para 25). It is for the adult offender to establish that substantial and compelling circumstances justifying a departure are present.

[11] For child offenders between the ages of 16 and 18, the sentencing court starts with a clean slate. Subject to the weighting effect of the statutorily prescribed minimum sentences, the sentencing court is free to impose such sentence as it would ordinarily have imposed. It may decide in the exercise of its sentencing discretion to impose the minimum sentence prescribed by s51(2) for an offence of the kind specified in Schedule 2. That a discretion to impose the minimum sentence does indeed exist is clear from the use of the words ‘decides’ and ‘decision’ in s51(3)(b). The sentencing court is called upon in the exercise of its discretion to make a decision as to whether or not to impose the minimum sentence prescribed by the Act. But it is not

obliged to impose the statutorily prescribed minimum sentence: and, if it does do so, it is required to enter its reasons for its decision on the record of the proceedings. (See *Sv Nkosi* supra at 141b-j; and *S v Blaauw* supra at 263e-264j.)

[12] The effect of the provision is thus that s51(3)(b) automatically gives the sentencing court the discretion that it acquires under s51(3)(a) only where it finds substantial and compelling circumstances. It follows that the 'substantial and compelling' formula finds no application to offenders between 16 and 18. A court is therefore generally free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18. As in a case where s51(3)(a) finds application, the court in arriving at an appropriate sentence must, however, not lose sight of the fact that offences of the kind specified in Schedule 2 of the Act have been singled out by the legislature for severe sentences. The gravity of the offence must accordingly receive recognition in the determination of an appropriate sentence.

[13] The Constitution, read with the various international instruments that have a bearing on the subject of the rights of young people in conflict with the law, furnishes the backdrop to this approach. Section 28(2) of the Constitution provides: '[A] child's best interests are of

paramount importance in every matter concerning the child'. That statement of general principle is the clearest indication that child offenders are deserving of special attention. More so, it would seem, in the sphere of sentencing. The ideal is that no child should ever be caged,[1] though in practice there will always be cases that are so serious that imprisonment would be the only appropriate punishment.[2]

[14] The recognition that children accused of committing offences should be treated differently to adults is now over a century old.[3] Historically, the South African justice system has never had a separate, self-contained and compartmentalised system for dealing with child offenders. Our justice system has generally treated child offenders as smaller versions of adult offenders.[4] In *S v Williams and others*[5] 1995 (3) SA 632 (CC) para 74 the Constitutional Court in abolishing whipping sounded 'a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system'.

[15] The traditional aims of punishment, particularly in respect of child offenders, therefore have to be re-appraised and developed to accord

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[1] Julia Sloth-Nielsen 'No child should be caged – closing doors on the detention of children' 1995 (8) *SACJ* 47.
[2] S S Terblanche *The Guide to Sentencing in South Africa* para 3.4.
[3] The Illinois Juvenile Court Act, which is widely credited as providing the first example of legislation establishing a separate juvenile justice system celebrated its centenary in 1999. See Prof Julia Sloth-Nielsen 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' 2001 (1) 5 *Law, Democracy & Development* 59.
[4] Ann Skelton 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' 1996 *Acta Juridica* 180.
[5] Also reported at 1995 (2) SACR 251 and 1995 7 BCLR 861.

with the spirit and purport of the Constitution. International documents on child justice emphasise the re-integration of the child into society. Indeed the aims of re-socialisation and re-education must now be regarded as complementary to the judicial aims of punishment applicable to adult offenders.[6] A child charged with an offence must be dealt with in a manner which takes into account his/her age, circumstances, maturity as well as intellectual and emotional capacity.

[16] International law has ushered in what has been described as a 'revolution' for the administration of child justice.[7] Four key international instruments that deal with children in conflict with the law are the United Nations Convention on the Rights of the Child (CRC),[8] and three sets of non-binding rules: the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines);[9] the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);[10] and, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL's).[11] The provisions of these international instruments are supplemented, closer to home, by the

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[6] Julia Sloth-Nielsen 'Child Justice and Law Reform' in C J Davel *Introduction to Child Law in South Africa* para 22.9.
[7] Davel op cit para 22.1.2.
[8] The United Nations Convention on the Rights of the Child (Resolution 44/25) was adopted by the UN General Assembly on 20 November 1989 and ratified by the South African Parliament on 16 June 1995 whereafter the formal instrument of ratification was deposited with the Secretary–General of the UN on 30 June 1995 and has been in force in South Africa since 30 July 1995. (See Skelton *op cit Acta Juridica* at 180.)
[9] Resolution 45/112 adopted by the UN General Assembly on 14 December 1990.
[10] Resolution 40/33 adopted by the UN General Assembly on 29 November 1985.
[11] Resolution 45/113 adopted by the UN General Assembly on 14 December 1990.

African Charter on the Rights and Welfare of the Child.[12] The principles fundamental to these instruments have found articulation in our Constitution.

[17] The rules and guidelines set out in these international instruments are detailed and provide specific suggestions for the realisation of the broad goals that it embodies. Since its introduction the CRC has become the international benchmark against which legislation and policies can be measured. Traditional theories of juvenile justice now have a new 'framework within which to situate juvenile justice: a children's rights model'.[13]

[18] The principle that detention is a matter of last resort (and for the shortest appropriate period of time) is the *leitmotif* of juvenile justice reform.[14] Those principles are articulated in international law[15] and are enshrined in s28(1)(g) of the Constitution which reads: '[E]very child has the right not to be detained except as a measure of last resort, in which case ..... the child may be detained only for the shortest appropriate period of time, ...'.

[19] Guiding principles must therefore include the need for proportionality (see *S v Kwalase* 2000 (2) SACR 135 (C)). The

[12] The Charter was ratified by the South African Parliament on 18 November 1999.
[13] Sloth-Nielsen op cit *Law, Democracy and Development* at 66.
[14] Sloth-Nielsen op cit *Law, Democracy and Development* 78.
[15] Article 37(b) of the CFC; Beijing Rule 17.1

overriding message of the international instruments as well as of the Constitution is that child offenders should not be deprived of their liberty except as a measure 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.

[20] 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. Adherence to recognised international law principles, must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders.

[21] The Project Committee of the South African Law Commission on Juvenile Justice (Project 106) has since 1997 produced an issue paper,[16] a discussion paper,[17] and, finally a report[18] and a Bill on juvenile justice which was released on 8 August 2000.[19] The Child Justice Bill, which was introduced in Parliament on 3 August 2002 and debated

[16] South African Law Commission Issue Paper Number 9 (1996).
[17] Discussion Paper Number 79 (1998).
[18] Report on Juvenile Justice (2000).
[19] Sloth-Nielson op cit *Law, Democracy and Development* at 72.

during 2003, *inter alia* prohibits the sentence of life imprisonment for children who commit offences whilst under the age of 18.

[22] This background reinforces the interpretation given to s51(3)(b) above. If the notional starting point for the category of offender envisaged in ss3(b) is that the minimum prescribed sentence is applicable, as the majority in the court *a quo* and the full bench in *Makwetsja* suggest, then imprisonment (the prescribed sentence) would be the first resort for children aged 16 and 17 years in respect of offences covered by the Act instead of the last resort. It is true that the full court in *Makwetsja* emphasised that on its interpretation the legislature sought to make 'doubly certain' that the sentencing court found the prescribed minimum sentence appropriate, and suggested that a court would 'readily' conclude that the youth of an offender between 16 and 18 was in itself a substantial and compelling circumstance (para 47). Nevertheless, on the approach of the majority in the court *a quo* and of the Transvaal Provincial Division in *Makwetsja*, a sentencing court would be unable to depart from the statutorily prescribed minimum *unless* the child offender establishes the existence of substantial and compelling circumstances. To this extent the offender under 18 would be burdened in the same way as an offender over 18. This would infringe the principle that imprisonment as a sentencing option should be used for child offenders as a last resort and only for the shortest appropriate

period of time[20] (see *V v United Kingdom* 30 E.H.R.R. 121 para 118). It would also conflict with the by now well-established sentencing principles of proportionality and individualisation (see *S v Kwalase* at 139 e-I; *V v United Kingdom* para 123 and 126).

[23] From this point of view the approach adopted in *Nkosi* and *Blaauw* is preferable. I would however qualify what was said in those judgments by adding that the fact that the legislature has ordained the minimum sentences (*S v Malgas* 2001 (1) SACR 469 (SCA) para 25) must receive recognition in determining the actual sentence. So qualified, the reasoning in *Blaauw* and *Nkosi* in my view accords generally with internationally recognised trends and constitutionally acceptable principles relating to the sentencing of child offenders. Importantly it ensures that the duty remains on the prosecution – where it ought to in the case of child offenders – to persuade a sentencing court that the minimum sentence should be imposed.

[24] To summarise:

(a) The legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court which is without more free to depart from the prescribed minimum sentence.

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[20] Ann Skelton 'Juvenile justice reform: children's rights and responsibilities versus crime control' in CJ Davel *Children's Rights in a Transitional Society* (1999) 88 at 99-100.

(b) In consequence the sentencing court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence.

(c) The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because s51(3)(a) finds no application to him or her.

(d) By contrast with the class of offender under 16, however, the statutory scheme requires that the sentencing court should take into account the fact that the legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting factor in the sentencing process.

(e) It follows on this approach that where the provisions of s51(2) apply the regional court retains its competence to finalise the matter contrary to the conclusion in *Makwetsja.*

[25] Returning to the facts of the present appeal: the evidence in mitigation 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 and clashes with the law were commonplace at an early age, followed inevitably by admission to a place of safety and an industrial school. Two attempts at suicide followed. Little wonder then that Satanism and its ritualistic practices appeared attractive to his still impressionable, immature mind. The tale is woeful. It is of a child failed

by his parents (both of whom appear to be low-functioning individuals), his community and society generally: one that is not entirely uncommon in this country.

[26] On the other hand, the offence itself is particularly heinous. The deceased, a defenceless elderly lady, was murdered in the sanctity of her home by the appellant who entered under some false pretext in order to perpetrate a robbery. The trial court, as also the court *a quo*, held that the appellant's motive in killing the deceased was to avoid detection, as he was known to her. In that conclusion neither can be faulted. These are all strongly aggravating factors. To his credit, in pleading guilty the appellant expressed contrition and remorse. Against the enormity of the crime and the public interest in an appropriately severe punishment, must be weighed the personal circumstances of the appellant that are strongly mitigating. Given the appellant's relative youthfulness rehabilitation remains a real prospect even after a fairly long period of imprisonment. In my view, taking all this into account, and not losing from sight that the legislature has ordained that the ordinarily appropriate sentence for murder is life imprisonment, a term of 18 years' imprisonment is appropriate.

[27] In the result the appeal against sentence succeeds to the extent that:

(a) the sentence of life imprisonment on count 1 is set aside;

(b) there is substituted for it a sentence of imprisonment for a term of 18 years;

(c) the sentence of 15 years' imprisonment on counts 2 and 3 will run concurrently with the sentence of 18 years on count 1.

V M PONNAN
ACTING JUDGE OF APPEAL

CONCUR:

CAMERON JA
MTHIYANE JA
BRAND JA
PATEL AJA