

SOUTH AFRICA / JUDGMENT

Daids v S (A13/2020) [2020] ZAWCHC 172 (2 December 2020)

[2020] ZAWCHC 172

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers, Kusevitsky

CASE / FILE NUMBER

A13/2020

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HIGH

COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

High

Court Case No: A13/2020

Lower

Court Case No: GSH(5)156/18

DPP

Ref No: 10/2/5/1/3-88/20

TAURIEQ

DAVIDS

APPELLANT

and

THE

STATE

RESPONDENT

Coram:

Rogers & Kusevitsky JJ

Heard:

27

November 2020

Delivered:

2

December 2020

JUDGMENT

Rogers J (Kusevitsky J concurring):

- [1] The appellant was tried in the regional court on a charge of murder, convicted, and sentenced to 20 years' imprisonment. Judgment on conviction and sentence took place on 11 December 2019. With the leave of the magistrate, the appellant appeals against sentence only. He contends that the magistrate's decision to impose 20 years' imprisonment, rather than the minimum prescribed sentence of 15 years, was strikingly inappropriate and out of proportion to the totality of the facts in aggravation and mitigation.
- [2] The facts as found by the magistrate are these. The incident took place on 29 April 2018. The appellant, in the company of another man, approached the deceased as the latter and his friend Abdul were standing outside a shop. The deceased's father's house was about 30 m from the shop. The appellant, who was known to the deceased and his father (Mr Barnett), waved to the father as he walked towards the shop.
- [3] As the appellant and his companion were approaching the deceased, the latter told Abdul that they were members of the Funkys gang. The appellant confronted the deceased, and asked him and Abdul what they were doing there. Apparently before the deceased could respond, the appellant fired shots at the deceased and several more after he fell. The appellant's companion directed shots at Abdul. The shooting was witnessed by Mr Barnett. He and Abdul were the State's witnesses.
- [4] The post-mortem report revealed six gunshot entry wounds and a seventh tangential gunshot wound. Only one of the shots entered the front of the deceased's body (at his left collarbone). The remaining shots must have been fired while the deceased was running away or lying on the ground. The fatal shot was probably the one fired into the back of the deceased's head, lacerating the cerebellum and terminating in the left frontal lobe.
- [5] The appellant denied having been on the scene but his version was rejected as false beyond reasonable doubt. As I have said, the

magistrate convicted him on the murder charge. Inexplicably, the appellant did not face additional charges of unlicensed possession of a firearm and ammunition.

- [6] The murder charge was framed with reference to s 51(2) of Act 105 of

1997. Since the appellant was a first offender, the prescribed

minimum sentence was 15 years' imprisonment. The proviso to s 51(2) states that the maximum term of imprisonment that a regional court may impose under the section may not exceed the prescribed minimum sentence by more than five years.

- [7] No evidence was led in mitigation. The appellant's attorney made ex parte submissions. He told the magistrate that the appellant was currently 21 years old and that at the time of the murder he was 19. This was incorrect. The conviction and sentencing took place on 11 December
2019. The appellant testified in his defence on 28 November 2019. At the beginning of his evidence in chief he testified that he was 22 years old. This accords with the SAP 69 which was handed up by the State, which records the appellant's date of birth as 20 March
1997. It follows that the appellant had just turned 21 when he committed the murder and was 22 when convicted and sentenced.
- [8] Other personal circumstances pertaining to the appellant are the following. He left school during grade 10. He had a two-year-old child who lived with the mother. Before his arrest in May 2018 he worked for his uncle in the building industry, earning R1300 fortnightly. He was a first offender. He was in custody awaiting trial for one year and seven months.
- [9] In his sentencing remarks, the magistrate noted these personal circumstances. The magistrate stated, incorrectly (an error induced by the appellant's attorney), that the appellant had been 'very young, ... still a teenager' when he perpetrated the crime. The magistrate observed that, having left school during grade 10, the appellant was not illiterate, and had enjoyed some form of formal education. The magistrate acknowledged that the appellant had spent 'a long time' in custody awaiting finalisation of the case.
- [10] The magistrate said that despite the appellant's youthfulness, the gruesome nature of the offence did not show any immaturity. The appellant did not run away after firing the first shot. The magistrate was not convinced that the offence was motivated by immaturity. (To this the magistrate may have added that the appellant was already operating as an adult in gainful employment.)
- [11] Furthermore, the appellant was in truth 21 years old when he perpetrated the crime. This is not an age at which any presumption of immaturity can be made. In *Director of Public Prosecutions KZN v Ngcobo & others*
- [2009] 4 All SA 295 (SCA) the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court said that none of them demonstrated immaturity and that there was no evidence of peer pressure. In *S v Matyityi* 2011
- (1) SACR 40 (SCA) Ponnan JA was critical of a trial judge's use of the phrase 'relative youthfulness' without any attempt

at defining what exactly that meant in respect of the particular individual. The learned judge of appeal said that while someone under the age of 18 years could be regarded as naturally immature, the same does not hold true for an adult, and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.

- [12] The magistrate pointed out that the appellant had maintained his innocence throughout. He gained the impression that the appellant had been smiling while giving evidence. The appellant expressed no remorse. The magistrate suspected that the appellant even felt proud of what he had done.
- [13] Turning to the offence, the magistrate rightly described the murder as gruesome. When the appellant waved at the deceased's father, he must already have had violence against the deceased in mind. The deceased was a former friend of his. He looked the deceased in the eye just before shooting him. His actions were 'really callous'. The appellant's conduct had the hallmarks of premeditation and displayed elements of common purpose. He had subjected Mr Barnett to the shock of seeing his son gunned down. The magistrate considered that his actions on the fateful day showed that despite his youthfulness he was 'indeed evil'.
- [14] The appellant's counsel pointed out that premeditation and common purpose were not alleged in the charge sheet. That is true. If these allegations had been pleaded, the appellant might well have been convicted on that basis, in which event he would have faced a prescribed minimum sentence of life imprisonment. The magistrate did not misapprehend the position. He knew that the applicable prescribed sentence was 15 years' imprisonment. This did not mean, however, that in assessing the seriousness of the offence he had to close his eyes to the realities of the crime. The elements of premeditation and common purpose to which the magistrate referred were part of those realities.
- [15] The magistrate also mentioned that within his area of jurisdiction the community was under siege from violent crime, committed with impunity and brazenness. Society expected adequate sentences to be imposed in order to send a message to other criminals. General deterrence was a relevant consideration. Society needed to have confidence in the criminal justice system.
- [16] All in all, the magistrate considered that the mitigating circumstances put forward in support of a downward deviation from the prescribed sentence paled into insignificance when measured against the aggravating features. The magistrate was totally unpersuaded that there were substantial and compelling circumstances to impose less than the prescribed sentence. On the contrary, he considered that the circumstances of the crime and the interests of society justified the heavier penalty which he imposed, namely 20 years' imprisonment.

- [17] It has been held by this court that the question whether there are ‘substantial and compelling circumstances’, within the meaning of s 51(3)(a), to impose a lesser sentence than the prescribed minimum is not a matter of sentencing discretion; it involves a value judgment on which an appellate court can substitute its own assessment for that of the lower court (S v GK 2013
- (2) SACR 505 (WCC) para 7).
- [18] The imposition of a sentence exceeding the prescribed minimum stands on a different footing. There is no requirement that there should be ‘substantial and compelling circumstances’ for a higher sentence. The proviso to s 51(2) preserves the trial court’s sentencing discretion, subject to the cap that the sentence may not exceed the prescribed sentence by more than five years.
- [19] This is not to say that the trial court can ignore the level at which the prescribed minimum sentence is set. The appellant’s counsel referred us to S v Msimango [2017] ZASCA 181; 2018 (1) SACR 276 paras 24-25 where the court emphasised that the imposition of a higher sentence should not be done ‘whimsically but on sound legal principle that can withstand scrutiny’. A magistrate had to give reasons for imposing a higher sentence, and the discretion had to be exercised judicially and on reasonable grounds.
- [20] This is all so, but if the magistrate exercises the discretion judicially and on reasonable grounds, an appellate court may not interfere merely because it might have exercised its discretion differently. The matter remains one of sentencing discretion.
- [21] The magistrate in this case gave reasons for his decision. He did not exercise his discretion whimsically but in a judicial manner and on reasonable grounds. The fact that we might have been inclined to give less weight to the aggravating features (I do not say that we would have) is irrelevant, unless we can find that the magistrate misdirected himself in some way. I cannot say that such was the position.
- [22] The following order is made:
- The appeal against sentence is dismissed.

Rogers J

Kusevitsky J

APPEARANCES

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For respondent

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