THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no:
208/2011

In the matter between

BRIAN FREDERICKS **Appellant**

and

THE STATE
Respondent

Neutral citation: *Fredericks v S* (208/11) [2011] ZASCA 177
(29 September 2011)

Coram: **MTHIYANE, BOSIELO and SHONGWE JJA**

Heard: **15 September 2011**

Delivered: **29 September 2011**

Summary: Sentencing of a juvenile under the age of 16 years – Robbery with aggravating circumstances and rape – s 28 (1)(g) of the Constitution – trial court having misdirected itself materially – appeal court is at large to interfere with sentence.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Dlodlo and Yekiso JJ) sitting as court of appeal:

The appeal is upheld.

The sentence of the court a quo is set aside and replaced with the following:

1. 'On count 1: Robbery with aggravating circumstances, the accused is sentenced to 10 years' imprisonment.

   On count 3: Rape, the accused is sentenced to 12 years' imprisonment.

   It is ordered that the sentence in count 1 shall run concurrently with the sentence in count 3. The sentences are antedated to 13 December 2000 (effectively he will serve 12 years' imprisonment.) Such sentences are to be served at Drakenstein prison.'

JUDGMENT

SHONGWE JA (MTHIYANE, BOSIELO JJA concurring)

[1] This appeal is against sentence only. The appellant and his co-accused were convicted and sentenced by the Parrow regional court as follows: on count 1: Robbery with aggravating circumstances as contemplated in s 1 of the Criminal Procedure Act 51 of 1977 (firearm and knife used) to 15 years' imprisonment each, on count 2: Rape, (his co-accused only) to 10 years' imprisonment; and on count 3: Rape, to 10 years imprisonment each. Effectively the appellant was to serve a total of 25 years' imprisonment and his co-accused, 35 years' imprisonment. They appealed to the Western Cape High Court (Dlodlo J and Yekiso J concurring). Their appeal was dismissed and the sentences confirmed. Leave to appeal against sentence was granted by the high court in respect of the appellant only.

[2] The only issue before us is whether or not in the circumstances of this case, the trial and the court below misdirected themselves in imposing a lengthy custodial sentence on a juvenile who was 14 years and 10 months old at the time of the commission of the offences. This, notwithstanding, the provision of s 51(6) of the Criminal Law Amendment Act 105 of 1997 (the Act).

[3] In order to appreciate the reasoning and conclusion of both the trial court and high court, it is important to set out the background facts leading to the sentence. On 6 of July 1999, in the dead of night, the appellant and his co-accused entered the premises of the complainant, Mr Esterhuizen, with the intention of unlawfully breaking into the house and steal. They found Mr Esterhuizen outside the house, as the barking of the dogs had woken him. They produced a firearm and a knife. They forced Mr Esterhuizen back into the house. All the other occupants of the house, his wife and children, were awakened and bundled into one room and threatened with the firearm and knife. The appellant and his co-accused demanded money. Having failed to solicit money they demanded bank cards. The appellant took Mr Esterhuizen's bank cards and went to the bank to withdraw money, after having

forcefully obtained the pin code. His co-accused remained in the house while wielding the firearm. The appellant returned without the money. The two accused started removing the goods, as listed in the charge sheet. The value of the goods removed was estimated at R6220.00.

[4] While ransacking the house, the appellant raped one of the children, E, a 15 year old girl and later his co-accused also raped her. Later the co-accused raped the other child, L, 18 years of age. This whole episode took about six to seven hours. The appellant removed the stolen goods, while his co-accused remained in the house but left the house later. Apparently these goods were to be used to pay back a debt they owed a rival gang.

[5] The sentences imposed were challenged on various grounds, the most significant of which is that the trial court misdirected itself by failing to consider the cumulative effect of the sentences, given that the appellant was a juvenile offender aged 14 years and 10 months at the time of the commission of the offences and that an effective sentence of 25 years' imprisonment is shockingly inappropriate. To that maybe added that the applicability of the provisions of s 51(1) and (2) of the Act was raised for the first time during the sentencing stage. It was contended that failure to promptly and pertinently bring the provisions of the minimum sentence act to the attention of an accused person sooner than later may preclude the applicability thereof whilst s 51(6) of the Act prohibits the applicability thereof in respect of a child who was under the age of 16 years at the time of the commission of the offence in question. It was argued further that the trial court exaggerated the misdirection by erroneously finding that the appellant's case was a borderline case and that the trial court failed to consider the constitutional imperative that juveniles should be incarcerated as a measure of last resort and for the shortest possible time. (See s 28(1)(g) of the Constitution.) It was contended that the trial court failed to apply the principles applicable to sentencing of juveniles.

[6] The state conceded that the trial court failed to consider the cumulative effect of the sentence imposed on the appellant by not ordering the sentences to run concurrently. Both counsel for the appellant and the State were agreed that the trial court and the high court misdirected themselves materially justifying interference by this court.

[7] In addressing the concerns raised by the appellant against sentence, it is significant to note 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 and *S v Fazzie* 1964 (4) SA 673 (A). But where the trial court failed to exercise its discretion properly and

judicially or at all, and thereby committing a material misdirection, an appeal court will be at large to interfere with the sentence. Sentencing a 14 year old to 25 years' imprisonment is in the circumstances of this case and in my view, startlingly inappropriate. Moreover the appellant was not timeously informed in the charge sheet of the applicability of the minimum sentence legislation. It was only during the sentencing stage that the magistrate raised its applicability; (See *S v Legoa* 2003 (1) SACR 13 (SCA) para 27). *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12 reads:

'The following extract from the judgment of the Full Court in *S v Seleke en Andere* 1976 (1) SA 675 (T) at 682H was quoted with approval by Cameron JA (his translation from Afrikaans):
"To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge-sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed."

[8] Sentencing is clearly the most difficult part of criminal proceedings. It involves a careful and dispassionate consideration of balancing the gravity of the offence, the interests of society and the personal circumstances of the offender (See *S v Zinn* 1969 (2) SA 537 (A) at 540G) not forgetting, the interest of the victim. It becomes more onerous where a child is the offender and the offence is a very serious one. In the present case the robbery involves the use of a firearm and a knife whilst the rape is of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult – when a juvenile has to be sentenced for having committed a very serious crime like in this case. Whilst the gravity of the offences call loudly for severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one

cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes. The court in *S v Jansen* 1975 (1) SA 425 (A) at 427H-428A expressed itself as follows:

'In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of the 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 or more distorted personality being eventually returned to society.'

It is trite that the purpose of sentence is to deter the would be offenders, to punish the offender and to prevent re-occurrence. In the case of a juvenile, rehabilitation seems to be emphasized more. (See *S v B* 2006 (1) SACR 311 (SCA) para 19 – 20).

[9] In the present case, the trial court and high court overlooked the provisions of s 51(6) of the Act which reads:

'This section does not apply in respect of an accused person who is under the age of 16 years at the time of the commission of an offence contemplated in Subsection (1) and (2).'

The trial court repeatedly mentioned during sentencing that the appellant was 16 years old, which was not accurate. This error was made despite the fact that the probation officer's report pertinently mentioned that the appellant was born on 8 September 1984 which made him 14 years and 10 months old at the time of the commission of the offence. This fact alone should have prevented the trial court from applying the provisions of the minimum sentence legislation. It is a material misdirection; the appellant could not have been a borderline case.

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

'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 of time, …'

Failure to give effect to the above constitutional imperative renders such omission a material misdirection by a presiding officer. Botha JA in S *v Jansen* (1) at 427H-428A – said:

'To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases (S v Adams, 1971 (4) SA 125 (C), and S v Yibe, 1964 (3) SA 502 (E)).

[11] The attention given to a child when considering sentence is not done in a vacuum. The seriousness of the offence, its impact on the victims and the interests of the broader society must be taken into consideration. The law does not prohibit incarceration of children. However, s 28 (1)(g) provides that the child 'may be detained only for the shortest appropriate period of time'. Undoubtedly the use of 'may' suggests that where circumstances demand incarceration as the only

appropriate sentence, it can be imposed.

[12] In *Brandt v S* [2005] 2 All SA 1 (SCA) Ponnan JA referred extensively to international law principles and the South African Law Commission Report on Juvenile Justice (Project 106). These principles reiterate that proportionality is a consideration and 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 individualized with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society' In *S v Williams* 1995 (7) BCLR 861 (CC) it was suggested that South Africa's child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards. Concepts such as resocialization and re-education when dealing with sentencing of children, were suggested to be regarded as complementary to the traditional aims of punishment relating to adults.

[13] The appellant, as indicated above was 14 years old at the time of the commission of the offences. He was considered a first offender, although he had been convicted of escaping, when he ran away from lawful custody after being arrested in the present case. A probation officer's report was handed in, but it paints a completely different picture of him. The principal of the reformatory school where he was held described him as a model student whose behaviour and academic achievements are positive. This is in stark contrast to his entire behaviour during the commission of these offences. The only factor in his favour is the fact that he was 14 years old when he committed these offences. The motive for the breaking in was

more of personal and financial satisfaction than of necessity. The trial court, however did consider the interests of society and the seriousness of the offences. The trial court attached very little or no value to his personal circumstance. It appears to me that the trial court over-emphasised the seriousness of the offences at the expense of his youthfulness. It concluded by saying:

'Ek het reeds gesê dat die Hof gaan die erns van die oortredings beklemtoon'.
It went on to say that these days most of the offences appearing in court books are committed by youths and that the appellant did not behave with immaturity on the day the offences were committed.

[14] The trial court further misdirected itself by failing to take the cumulative effect of the sentences into account and thus resulting in it failing to order the sentences or part thereof to run concurrently. All the offences were committed in one house and in one night. Considering the seriousness of the offences, the cumulative effect and the fact that the appellant and his co-accused pre-planned the breaking in, I am of the view that a custodial sentence is the only appropriate sentence in the circumstances of this case. However a sentence of imprisonment for 25 years for a 14 year old first offender appears to me to be shockingly and disturbingly inappropriate. The disparity in this sentence as compared to the sentence which I would have imposed if I had sat as the trial court is so striking that I feel impelled to interfere with the sentence. In view of the period already served by the appellant it is necessary to shorten the period of imprisonment to give effect to s 28(1)(g) of the Constitution. This sentence also has to take due account of the fact that the appellant has by now paid for his sins.

[15] In conclusion, I find that the trial court and high court misdirected themselves by imposing a lengthy sentence of imprisonment ignoring that the appellant was a child at the time of the commission of the offences. This court is therefore at large to consider the sentence afresh and impose what it considers to be an appropriate sentence.

[16] In the result the appeal is upheld. The sentence of the court a quo is set aside and replaced with the following:

1. 'On count 1: Robbery with aggravating circumstances, the accused is sentenced to 10 years' imprisonment.

On count 3: Rape, the accused is sentenced to 12 years' imprisonment.
It is ordered that the sentence in count 1 shall run concurrently with the one in count 3. The sentences are antedated to 13 December 2000 (effectively he will serve 12 years imprisonment.) Such sentences are to be served at Drakenstein prison.'

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J B Z SHONGWE

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	P J Burgers
Instructed by:	Legal Aid Board, Cape Town; Legal Aid Board, Bloemfontein.
FOR RESPONDENT:	P van Wyk
Instructed by:	The Director of Public Prosecutions, Cape Town; The Director of Public Prosecutions, Bloemfontein.