**IN THE HIGH COURT OF SOUTH AFRICA** **REPORTABLE**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 76/14

In the matter between:

**ANDILE MSHANA PAUL JUSTICE MTHETHWA** **APPELLANT**

**v**

**THE STATE** **RESPONDENT**

---

**APPEAL JUDGMENT**

---

**POYO DLWATI J (K PILLAY et VAHED JJ Concurring):**

[1] The appellant was charged and convicted of one count of murder (count 1) and one count of attempted murder (count 2). At the time of the commission of these offences the appellant was 16 years and 6 months old. On 31 January 2007 he was sentenced to 18 years imprisonment on count 1 and 8 years imprisonment on count 2. The sentences were ordered to run concurrently. They were also antedated to 20 April 2006, being the date when judgment on conviction was handed down by the trial court. The appellant appeals against sentence only, with leave of the *court a quo*.

[2] Two issues arise in this appeal. The first issue is whether the learned judge misdirected herself when she sentenced the appellant to 18 years imprisonment and believed that the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997(the Act) were applicable. The second issue is whether the learned judge erred in imposing eight years imprisonment in respect of count 2 whilst the prescribed

minimum sentence was 5 years without addressing any aggravating factors that persuaded her to impose a more severe sentence than the one prescribed.

[3] Mr Truter, on behalf of the State, conceded the appeal in respect of count 2. He submitted that the sentence was harsh in view of the fact that nothing extra ordinary existed in respect of the attempted murder. There were no aggravating factors pointed out by the learned judge *a quo* justifying the imposition of a more severe sentence than the one prescribed. In respect of count 1 he submitted that at the time that the sentence was imposed the learned judge *a quo* was entitled to impose life imprisonment and had therefore not erred in applying the provisions of section 51 of the Act but conceded that due to the subsequent amendment in legislation this court has to revisit the sentence. He however argued that notwithstanding the amendment the sentence of 18 years imprisonment was still appropriate for the offence committed by the appellant.

[4] Before its amendment in 2007 section 51(6) of the Act stated that the provisions of the section were not 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. I pause here to mention that the appellant was sixteen years and six months at the time of commission of the offences. The amended section 51 (6) of the Act provides that the provisions of section 51 do not apply in respect of an accused person who was under the age of 18 years at the time of commission of an offence. The provisions of the then section 51(6) were declared to be inconsistent with the constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence. See *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 CC at 504 para 78. This order was made to apply retrospectively in matters such as the appellant's one, where the appellant's leave to appeal application was still pending before the court a *quo*. Furthermore, the learned judge failed to give reasons as to why she imposed 8 years imprisonment on count 2 instead of the prescribed minimum of 5 years. Mr Khan, on behalf of the appellant, submitted that the sentence of 18 years imprisonment on a 16 year old child is shockingly harsh and disproportionate to the circumstances of this court. In light of the amendment in the legislation and the decision of the Constitutional Court in *Centre for Child Law* referred to *supra*, and the misdirection

on sentence in count 2, this court is entitled to interfere with the sentence. See *S v Rabie* 1975 (4) SA 857 (A) at 851 E.

[5] The evidence in mitigation reveals a childhood that is characterized by neglect and ineffective parenting. The appellant's mother abandoned him as a baby and he was brought up by his paternal grandmother. He has no significant relationship with his father. He began to mix with the wrong crowd at age 13 and in a way this led to the commission of this offence. One cannot underestimate the seriousness of the offence committed by the appellant and ignore the interests of society. However, the appellant was a child and should have been treated as such. He should not be treated as a young adult as it often happens in cases where children are involved. Our courts have been urged to impose imprisonment as a last resort when sentencing child offenders. This should be so as to prepare the child offender from the moment of entering into detention facility for his or her return to society. In my view the learned judge did not attach much weight to the youthfulness of the appellant. Furthermore the prospect of rehabilitation is one of the considerations which play a role in the imposition of sentence, see *S v Sikhipha* 2006 (2) SACR 439 (SCA) at 445 para 18 and *S v Nkomo* 2007(2) SACR 198 (SCA) at 205 para 21. As held in Child Law Centre supra at paragraph 35, child offenders may be uniquely capable of rehabilitation. In my view, the youthfulness of the appellant and the fact that he was a first offender demonstrate that there are real prospects of rehabilitation. In my view a lesser period of imprisonment than the one imposed by the court *a quo* is warranted.

[6] Accordingly, I make the following order:

The appeal against sentence is upheld. The sentence imposed by the court a quo is set aside and substituted with the following sentence.

"(a) On count 1 the accused is sentenced to 12 years' imprisonment;

(b) On count 2 the accused is sentenced to 5 years' imprisonment. The sentence on count 2 is to run concurrently with the sentence on count

1. The sentences are ante dated to 20 April 2006."

_____

**POYO DLWATI J**

_____

**VAHED J**

_____

**K PILLAY J**

**APPEARANCES**

| | |
|---|---|
| For appellant: | Mr I R Khan<br>Instructed by Pietermaritzburg Justice Centre (legal Aid)<br>033 394 2190 |
| For the State: | Mr Truter<br>Instructed by The Director of Public Prosecutions (PMB)<br>033 845 4400 |
| Date of Appeal: | 26 January 2015 |
| Date of Judgment: | 16 February 2015 |