

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: A106/2014

In the matter between:

JOHN DINTOE MAKAU

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* JORDAAN, J *et* WRIGHT, AJ

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 28 AUGUST 2014

[1] The appellant, as accused number 3, stood trial in this division together with two other accused. They were charged with robbery with aggravating circumstances as well as murder.

[2] After a full trial, the 3 accused, including the appellant, were convicted on both counts and the appellant was sentenced, on the charge of robbery with aggravating circumstances to 15 years imprisonment and on the charge of murder to life imprisonment. Both sentences were imposed in terms of the provisions of section 51 of Act 105 of 1997, providing for minimum sentences. The court *a quo* found no substantial

or compelling circumstances justifying a deviation from the prescribed minimum sentences.

- [3] As far as the convictions are concerned the appeal centres around the question whether the trial court was correct in accepting the evidence of the single eye witness, one Sewelo, and convicting the accused on the strength of such evidence. More particularly, the question arose as to the reliability of his observations made at the time and his identification of the accused, including the appellant.
- [4] According to his evidence he looked out of the window of his home towards where the incident took place and saw the three accused and a fourth person, which he did not recognise, busy attacking the deceased in the street right in front of his house. The area was well lit and he could see what happened, *inter alia* seeing all 4 of the attackers assaulting the deceased until the deceased was lying on the ground whereafter they searched his body and then went off leaving the deceased lying there. He described the clothes worn by the 3 accused but was not able to describe the clothes worn by the fourth attacker. It appeared from the evidence as a whole that his description of the clothes worn by the accused was indeed correct and the said clothes were found with the accused, including the appellant.

- [5] His evidence was corroborated to a large extent by other evidence, *inter alia* the fact that a cellphone belonging to the victim was found and was obviously in the possession of the second accused. The fact that the deceased's body was found at the spot where he saw the attack was also proven by other evidence. The shoes of the deceased, which were removed during or after the attack, were also pointed out by accused number 1 and retrieved. Most importantly, the fact that the body of the deceased was found at the scene of the attack is directly contradictory to the appellant's evidence that the deceased walked away from the scene after the alleged incident.
- [6] In view of all the above corroborating evidence, Mr Pretorius responsibly conceded that he did not have any valid grounds to criticise the finding of the trial court as far as the convictions were concerned. He was bound to concede that the convictions cannot be faulted and that the verdicts were correctly pronounced.
- [7] As far as the sentences are concerned, it appeared that the appellant was a man of 35 years of age who has attained grade 12 scholastically, his wife was deceased and he was suffering from HIV positive infection. He only did some part-time work previously and he was in custody awaiting trial for about 15 months. He had a long and extensive list of previous convictions ranging from 1990 up to 1998. Three of such convictions concerned theft, two of housebreaking

with intent to steal and theft or robbery and the last one a conviction of robbery committed during 1998 for which he was sentenced to 5 years imprisonment.

- [8] The court *a quo* found that there were insufficient mitigating circumstances to make any finding that there are substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. There is nothing substantially compelling in the personal circumstances of the appellant. The attack on the deceased was executed by a group of 4 people, acting with a common purpose. The deceased was brutally stabbed and murdered by the group including the appellant. Again, Mr Pretorius on behalf of the appellant was bound to concede that he cannot fault the finding of the trial court to the effect that there were insufficient reasons to deviate from the prescribed minimum sentence. I respectfully agree with the trial court's findings in this regard as well.
- [9] In the result the appeal against both convictions and sentences cannot succeed. I am of the view that the appeal against both convictions and sentences stands to be dismissed.

A. F. JORDAAN, J

I concur.

G. J. M. WRIGHT, AJ

I concur.

M. H. RAMPAL, AJP

The appeal against both convictions and sentences are dismissed.

On behalf of appellant: Mr. K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. M. Strauss
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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