delivered

08/6/17

IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

SIGNATURE

CASE NO: A490/2016

DATE:

IN THE MATTER BETWEEN

C. L. M. APPELLANT

AND

THESTATE RESPONDENT

JUDGMENT

PRINSLOO, J

[1] On 3 April 2008 the appellant was convicted in this Court, sitting as the Circuit Local Division for the Northern Circuit District in Louis Trichardt/Makhado on the following counts:

Count 1: Count 2:

Count 3:

h t to steal and theft; attempted murder;

o housebreaking with the intent to steal and theft;

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Count 4: housebreaking with the intent to steal and attempted theft;

Count 5: housebreaking with the intent to commit robbery and robbery with aggravating circumstances;

Count 6: murder;

Count 7: murder;

Count 8: unlawful possession of ammunition;

Count 9: unlawful possession of a firearm.

[2] On 4 April 2008 the appellant was sentenced as follows:

Count 1: five years' imprisonment;

Count 2: fifteen years imprisonment;

Count 3: five years imprisonment;

Count 4: five years imprisonment;

Count 5: fifteen years imprisonment;

Count 6: life imprisonment;

Count 7: life imprisonment;

Count 8: five years imprisonment;

Count 9: five years imprisonment.

[3] Leave to appeal was refused by the learned trial Judge. On petition to the Supreme Court of Appeal, the appellant was granted leave to appeal to the Full Court of this Division only against the sentence(s) imposed.

[4] Before us in the appeal, Mr Marais appeared for the appellant and Mr Van der Merwe appeared for the state.

Some background notes about the offences committed

[5] The appellant was the second of two accused during the trial *a quo.*

[6] The appellant and accused 1 are half brothers and Zimbabweans. They were both convicted of the same offences and sentenced. The petition for leave to appeal to the Supreme Court of Appeal of the half brother, accused 1, was refused both in respect of convictions and sentences. As I mentioned, in respect of the present appellant, leave was only granted to appeal against the sentences.

[7] For illustrative purposes, it is useful to quote extracts from the various charges as they were formulated:

Count 1:

> "In that upon or about 21 September 2004 and at or near Ultimate Guest House, Blue Gum Sport, in the district of Makhado, the accused did unlawfully and with the intent to steal break open and enter into the house of
>
> H. B. and C. M. B.
>
> and did then and there wrongfully and intentionally steal the following items, to wit ..."

Then follows a list of fourteen valuable items including a 7.65mm calibre Harington and Richardson semi-automatic pistol number 1517 and magazine, as well as 100x9mm calibre rounds of ammunition and 50x7.65 calibre rounds of ammunition, alleged to be the property or in the legal possession of the B. couple.

Count 2:

"In that upon or about 7 October 2004 and at or near HANGKLIP PLANTATION in the district of MAKHADO the accused did unlawfully assault

PHEANESMALULEKE

by hitting him with a stick and shooting him with a firearm, with intent to murder him."

Count 3:

"In that upon or about 7 October 2004 and at or near HANGKLIP PLANTATION in the district of MAKHADO the accused did unlawfully and with the intent to steal, break open and enter the house of

JACQUILENE BARBARA VAN GRAAN and

DAWID BENJAMIN VAN GRAAN

and did then and there wrongfully and intentionally steal the following items, to wit ..."

Then follows a list of eighteen valuable items including a .357 Magnum calibre Ruger Model Police Service-Six revolver (number 158-03845), alleged to be the property or in the legal possession of the Van Graan couple.

Count 4:

"In that upon or about 19 October 2004 and at or near MOUNTAIN VIEW HOTEL in the district of MAKHADO, the accused did unlawfully and with the intent to steal break open and enter an office in the Mountain View Hotel of

C. H. and H. M. **H.**

and did then and there wrongfully and intentionally attempt to steal money from a safe, the property or in the lawful possession of (the H. couple)."

Count 5:

"In that upon or about 19 October 2004 and at or near MOUNTAIN VIEW HOTEL in the district of MAKHADO, the accused did unlawfully and with the intent to commit robbery, break open and enter the house of

C. H. and H. M. H.

and did then and there assault (the H. couple) by shooting them with a firearm and take by force and violence out of their possession to wit ..."

Then follows fifteen listed valuable items including an unknown amount of cash, jewellery and other items. Aggravating circumstances are alleged, including the use of a firearm.

Count 6:

"In that upon or about 19 October 2004 and at or near MOUNTAIN VIEW HOTEL in the district of MAK.RADO the accused did unlawfully and intentionally kill

C. H.

a male person."

Count 7:

"In that upon or about 19 October 2004 and at or near MOUNTAIN VIEW HOTEL in the district of MAKHADO the accused did unlawfully and intentionally kill

H. M. **H.**

a female person."

[8] Counts 8 and 9 deal with the unlawful possession of 10x9mm calibre live rounds, lx.357 Magnum calibre live rounds and 10x7.65 calibre live rounds as well as the possession of the two firearms I already mentioned namely the .357 Magnum calibre Ruger Model Police Service Six revolver, and the 7.65mm calibre Harington and Richardson semi-automatic pistol and magazine.

[9] It is useful, also for illustrative purposes, to quote the summary of substantial facts in terms of section 144(3)(a) of Act SI of 1977:

"1. On 21 September 2004 the accused and Mr J. M. C. (my note: the evidence indicates that the two accused, during this reign of terror, shared a room with C. and that he took part in some of the atrocities. He did not feature in the appeal before us) gained entry into the house of Hester and C. M. B. by breaking open the burglar bars and the window. They stole the items mentioned in count 1 including a 7.65mm calibre Harington and Richardson semi-automatic pistol number 1517 (and magazine) which was pointed out by accused number 1 to the police after Mr and Ms H. were murdered at Mountain View Hotel on 19 October 2004.

2. On 7 October 2004 the accused and Mr J. M. C. (I will refer to him only as C.) attacked an employee of Ms Jacquilene Barbara van Graan (the complainant mentioned in count 3) namely Pheanes Maluleke (the complainant mentioned m count 2) at his shack on the premises of his employer. He was beaten with a stick by the accused and shot with a firearm.

3. The accused and (C.) broke into the house of Mr and Ms Van Graan and stole the items mentioned in count 3 including the .357 Magnum calibre Ruger Model ... which was also pointed out by accused number 1 after the incident at Mountain View Hotel.

4. The two deceased mentioned in counts 6 and 7 were the proprietors of Mountain View Hotel outside the town of Makhado.

5. They and their two children went to sleep in their house situated on the premises of the abovementioned hotel the night of 19 October 2004 when the two accused and (C.) opened the window of this house, shot the deceased on their double bed and raided the house.

6. They removed the items mentioned in count 5 and also tried to steal money from a safe in an office of the hotel after removing the window-pane from the window-frame of this building. They then fled from the scene.

7. The daughter of the deceased, T. H. (12 years of age) were *(sic)* met by this gruesome scene when she went to her parents' room the following morning.

8. The two accused and (C.) acted with a common purpose in the perpetration of these crimes.

9. The cause of death of C. H. is described in the post mortem report as: '(L)OWER ASPECT OF SKULL-FRACTURE PERFORATION OF BRAIN STEM SUBDURAL HAEMORRHAGE',
whereas the cause of death of H. M. H. is described as: 'FRACTURE OF THE SKULL-SUBDURAL HAEMORRHAGE'."

[10] The appellant (and accused number 1) showed absolutely no remorse for their actions during the trial. They both pleaded not guilty to all the charges and exercised their right to silence, without disclosing the basis of a defence. They both testified in their own defence, claiming that they had been assaulted by the police and in the result, they made confessions and pointed out places linking them to the crimes under duress. This evidence was, correctly, rejected by the learned trial Judge.

[11] It is important, for present purposes, to add that the appellant was convicted of housebreaking with the intent to steal and theft in January 2005, after the atrocities forming the subject of the present appeal were committed, and sentenced to twenty

four months imprisonment. This is not the end of the story: the appellant was again convicted on two counts of housebreaking with the intent to steal and theft on 12 September 2005 and sentenced to four years imprisonment. Regrettably, the SAP.69 which was handed in does not reveal whether the crimes were committed before or after the crimes forming the subject of this case.

The true basis of this appeal: the age of the appellant at the time of the commission of the crimes

[12] It was common cause before us, and during the trial, that the appellant was born on […] 1987. He was therefore 17 years and 1 month old at the time when the first crime was committed on 21 September 2004, and about a month older when the last of the crimes, the killing of the H. couple, took place on 19 October 2004.

[13] The charge-sheet, in respect of count *5* (robbery with aggravating circumstances), count 6 (the murder of Mr H.) and count 7 (the murder of Ms H.) stipulates that the charges are to be read with the provisions of section 51 of the Criminal Law Amendment Act, Act 105 of 1997 ("the Act").

[14] I add, for the sake of detail, that in respect of counts 8 and 9, unlawful possession of ammunition and firearms, the charge-sheet is silent on the applicability of the Act, although, in a proper case, the prescribed minimum sentences can also come into play given certain provisions in Part II and Part III of the Act. In our debate with Mr Marais for the appellant, he indicated that the appellant was not pursuing such an argument in respect of the convictions in terms of counts 8 and 9 and the two five year sentences imposed in respect of each of those counts.

[15] At the time of the commission of the crimes at issue, section 51(3) of the Act provided as follows:

> "(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."

[16] Section 51(6) of the Act provided:

> "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."

[17] During the trial, and when imposing sentence, the learned Judge duly took cognisance of these provisions and also recorded that the charge-sheet, in counts 5, 6 and 7 clearly refers to section 51 of the Act. The learned Judge also recognised that "accused 2 (the appellant) was under the age of 18, but over the age of 16".

[18] After duly considering all the relevant factors, including the personal circumstances of the appellant, the learned Judge indicated that "for the purposes of section 51(3) the Court finds that there are no substantial and compelling circumstances whatsoever or rather all the factors are aggravating".

[19] On the strength of these conclusions, the learned Judge imposed the minimum sentence (fifteen years) in respect of the robbery (count 5) and life imprisonment in respect of the murder convictions relevant to counts 6 and 7.

[20] The only personal circumstances considered in respect of the appellant included his age, and that he was never in employment and has no form of schooling.

[21] The learned Judge also took into account the 2005 convictions and sentences imposed, in January and September of that year, as "three previous convictions". Because of the absence of information as to when these crimes were committed, it may be that the learned Judge misdirected himself in this regard.

[22] The main thrust of the appeal against the sentence imposed, is based on the judgment in *Centre For Child Law v Minister of Justice and Constitutional Development and Others (National Institute For Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)* 2009(2) SACR 477 (CC) where it was found that the provisions in the Act still making the minimum sentence regime applicable to offenders between 16 and 18 years were inconsistent with the Constitution and invalid.

[23] The order of the Constitutional Court, appearing in paragraph [78] of that judgment, at 504b-f reads as follows:

> [11]The declarations of invalidity granted by the North Gauteng High Court, Pretoria (case number 11214/2008) dated 4 November 2008 are set aside, and substituted by the following order:
>
> (a) It is declared that section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, are 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.
>
> (b) It is declared that:
>
> (i) section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid; and
>
> (ii) to remedy the defect, section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is to read as though it provides as follows:
>
> 'This section does not apply in respect of an accused person who was under the age of 18 years at the time of the comm1ss1on of an offence contemplated in subsections (1) or (2).'

(c) It is declared that section 51(5)(b) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007 is inconsistent with the Constitution and invalid."

[24] After an amendment in terms of section 26 of Act 42 of 2013, section 51(6) of the Act now provides:

"This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2)."

[25] Paragraph 2 of the order at 504 of Centre for Child Law, *supra*, at 504g-i provides:

"In terms of section 172(1)(b) of the Constitution, the order in paragraph 1 above shall not invalidate any sentence imposed for scheduled offences in terms of section 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, on persons who were younger than 18 and older than 16 at the time of the commission of the act that constitutes the offence, unless either an appeal from, or a review of, the relevant sentence is pending, or the time for noting of an appeal has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a competent Court."

[26] In this case, as I indicated at the outset, sentence was imposed on 4 April 2008. This was before the judgment in *Centre for Child Law*, which was handed down in July

2009. Of course, the relevant offences were committed even earlier, in September and October 2004.

[27] Before us, it was common cause that the circumstances of this case, in so far as they apply to the appeal proceedings launched by the appellant, fall inside the ambit of paragraph 2 of the order of the Constitutional Court so that the appeal against sentence ought to be considered in terms of the amended wording of section 51(6) of the Act.

[28] From the aforegoing, it follows that the minimum sentence regime cannot be applied against the appellant, given his age at the time of the commission of the offences.

Considering an appropriate sentence

[29] Before us, both counsel agreed that, in the circumstances, the sentences imposed in respect of counts 5, 6 and 7 fall to be interfered with.

[30] Mr Marais proposed that the sentence in respect of count 5, the armed robbery, should be reduced to twelve years imprisonment and the two life sentences in respect of counts 6 and 7 should be reduced to eighteen years each.

[31] Mr Van der Merwe did not argue with the proposal with regard to the sentence in respect of count 5, but submitted that the sentence in respect of the murder convictions should be reduced from life imprisonment to twenty two years imprisonment in respect of each of those convictions.

[32] Given the circumstances of the case, the horrific nature of the offences, the number of offences committed, the complete lack of remorse exhibited by the appellant and the fact that he was found to have presented a false version to the Court, it seems to me that a sentence of twenty two years in respect of the murder convictions would be more appropriate.

The order

[33] I make the following order:

1. The appeal against the sentences imposed in respect of counts 1, 2, 3, 4, 8 and 9 is dismissed, and those sentences are confirmed.
2. The appeal against the sentences in respect of counts 5, 6 and 7 is upheld and those sentences are set aside and replaced with the following:

   Count 5 - twelve years imprisonment.

   Count 6 - twenty two years imprisonment.

   Count 7 - twenty two years imprisonment.
3. It is ordered that all the sentences imposed in respect of the nine counts are to be served concurrently with the sentence imposed in respect of count 6, resulting in an effective prison sentence of twenty two years.
4. In terms of section 282 of the Criminal Procedure Act, Act 51 of 1977, the sentences are ante-dated to 4 April 2008.

A490/2016

W R C PRINSLOO

I agree

JUDGE OF THE GAUTENG DIVISION, PRETORIA

T M MAKGOKA

I agree

JUDGE OF THE GAUTENG DIVISION, PRETORIA

JWLOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 28 APRIL 2017
FOR THE APPELLANT: JP MARAIS
INSTRUCTED BY: LEGAL AID SOUTH AFRICA
FOR THE RESPONDENT: F WV AN DER MERWE
INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS