IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

25/10/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

25/10/2012 DATE SIGNATURE

Case No: A232/2012

Date heard: 1 October 2012

Date of judgment:

In the appeal between:-

MARIUS HALGRYN Appellant

and

THE STATE Respondent

JUDGMENT

HASSIM AJ

[1] The appellant was convicted by Seriti J (as he then was) on a count of murder[1] and a count of robbery with aggravating circumstances. On the count of murder he was sentenced to life imprisonment. On the count of robbery with aggravating circumstances he was sentenced to 15 years' imprisonment. The appellant appeals

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[1] The appellant pleaded guilty to murder. He pleaded not guilty to robbery with aggravating circumstances however pleaded guilty to theft. His plea in this regard was not accepted by the State.

against the conviction on the count of robbery with aggravating circumstances. He also appeals against the sentence imposed in respect of both convictions.

[2] The appellant was arraigned for trial before the North Gauteng High Court. He was indicted on two counts: One for the murder of Cecilia Hendrina Sieberhagen ("*the deceased*") on or about 10-11 April 2003. The other for robbery with aggravating circumstances (as contemplated in section 1 of the Criminal Procedure Act, Act 51 of 1977 ("*the CPA*") of her Honda Ballade motor vehicle with registration number JSV 101 GP ("*the vehicle*").

[3] The appellant sought the leave of the court *a quo* to appeal the conviction of robbery with aggravating circumstances as well as the sentences imposed in respect of both convictions. The court *a quo* refused the appellant leave to appeal. On 3 November 2010, on application to it, the Supreme Court of Appeal granted to the appellant leave to appeal to the full bench of this division.

[4] Prior to the appellant pleading, the defense had applied for an enquiry in sections 77 and 78 of the CPA. Consequent thereupon Els J (who was seized with the matter at the time) ordered the appellant's referral to Weskoppies Hospital (a psychiatric facility) in terms of sections 77(1) and 78 (2) for observation for a period of 30 days. The proceedings were postponed to 25 March 2004. The appellant remained in custody.

[5] On the resumption of proceedings on 25 March 2004 (before Seriti J as he then was) the appellant was represented by Mr Hugo and pleaded guilty to murder. However on the count of robbery with aggravating circumstances, he pleaded not guilty but instead pleaded guilty to theft. The plea on a lesser charge was not accepted by the State. Hence the court *a quo* entered a not guilty plea and the State proceeded

to prosecute count 2, namely robbery with aggravating circumstances. Apart from the evidence of a pathologist, the State called no other evidence and relied entirely on the admissions made by the appellant in terms of section 220 of the CPA. After the pathologist testified the State closed its case.

[6] The appellant, the defense's only witness, testified in his own defense. The charge of robbery with aggravating circumstances ultimately resolved into an enquiry into whether the murder was committed with robbery as the motive or whether the robbery was with the motive to flee the scene after the murder. As I see it, the question in the final analysis that decisively resolves the enquiry is when in time relative to the murder, did the appellant notice the keys to the vehicle lying on a small table[2] in the room where the murder was committed. The answer to this question neatly determines whether the intention to rob the deceased preceded the murder, or followed upon it.

[7] The appellant testified that he was employed by a company, DMI, a direct seller of convection ovens. My understanding is that such a salesperson would go from door-to-door to sell his wares. The appellant carried out such sales. He testified that he was acquainted with the deceased and her husband because he had sold to them (at their home) a convection oven.

[8] On the day in question the appellant called at the deceased's home in the early evening after he had called upon his other clients. According to him the visit was with the view to informing the deceased and her husband that he was no longer employed by DMI. He testified that he had wished to speak to both the deceased and her husband. However on his arrival the deceased told him that her husband was not home

[2] Referred to in evidence as "tafeltjie".

because he had left to do work somewhere outside of Pretoria. After he was told of the deceased's husband's absence he wished to leave but did not do so because the deceased asked him to inspect the oven that he had sold to her. She had said it was not working. The appellant attempted to establish the problem but was unsuccessful in doing so. Whereupon, he told the deceased to contact a lady in the employ of DMI who could assist her. He provided to the deceased the person's name and telephone number.

[9] The deceased then invited him to sit in the sitting room and offered to him a cup of coffee. The appellant accepted the invitation, to sit but declined the offer of coffee. At some point he rose from the seat with the purpose of leaving. However, he testified, that after he had risen and for no reason whatsoever, he grabbed the deceased by the neck. This caused her to faint, because, according to him she could not breathe. The deceased fell onto the small table and thereafter next to a cupboard.

[10] The appellant proceeded to the area in the sitting room where a number of sticks, (referred to as "walking sticks" in captions to some of the photographs that were exhibits before the court *a quo* referred to as kieries in the court *quo*), were standing. He took a kierie and struck the deceased with it repeatedly. Although he was not certain whether he kicked the deceased, he readily conceded that he might also have done so.

[11] His testified that the first time (in relation to when the murder was committed) he noticed the key to a vehicle lying on a small table standing in the middle of the sitting room was after he had assaulted the deceased. According to him he took the key to the vehicle. He looked for keys to the garage door, which he found.

[12] He took the vehicle out of the garage and drove off with it. In his evidence in chief the appellant was asked why he took the vehicle. He answered that he took the vehicle because he got a fright and wished to flee the scene. He said that it was only after he had driven the vehicle for approximately a week that he decided to keep it. He testified that he did not change the vehicle's registration plate.

[13] The vehicle was recovered in his possession by the police sometime after the murder; and he was arrested. His response to a question by his counsel as to why he attacked the deceased he said he could not offer an explanation therefore. In this regard he testified as follows:

> *"... ek het daar gesit en ons het gesels en toe ek opstaan, ek het net skielik kwaad geword. Ek het hierdie woede in my gehad en dit is toe ek haar om die nek gegryp het."*

[14] He testified that the deceased had not done anything to evoke this anger and he could not explain why he became enraged. After assaulting the deceased, he replaced the kierie.

[15] Under cross examination the appellant testified that after the deceased had invited him to sit but before he did so he saw the vehicle's keys lying on the small table. He knew that the keys were to a Honda Ballade. Not seeing a key to the garage door, he looked for it after he had assaulted on the deceased.

[16] He also testified that he desired the deceased dead. He could however not say why. The appellant denied that he killed the deceased with the view to robbing her. He conceded that when he became determined to kill the deceased, he knew that the keys to the vehicle lay on the table.

[17] According to the appellant the deceased remained conscious after she had been struck with the kierrie. He then proceeded to kick her in the back. His reason for doing so he said was to get rid of her.

[18] After he had kicked the deceased he immediately took the key to the vehicle, opened the garage door (with the key) and drove off with the vehicle.

[19] According to him he decided to take the vehicle only when he saw the keys on the table (which under cross-examination he testified was before he sat down in the sitting room). The appellant denied that he killed the deceased with a view to committing robbery.

[20] The trial judge rejected the appellant's version that he took the vehicle with the purpose of fleeing the scene and with no other in mind, as being improbable. Bearing in mind that the accused did not abandon the vehicle after leaving the scene but kept it and drove around with it for a number of days until he was arrested with the vehicle in his possession, the trial court cannot be faulted in this regard. In my view the trial court correctly found that the only inference that could be drawn from the available evidence is that the accused had killed the deceased in order to commit robbery. The trial court also rejected the accused's version that he killed the deceased without any reason therefor. The court *a quo* rejected the reason given by the appellant for taking the vehicle as being false and convicted the appellant of robbery with aggravating circumstances and murder on the basis of his guilty plea.

[21] On the charge of murder the accused was sentenced to life imprisonment and on the count of robbery with aggravating circumstances he was sentenced to 15 years' imprisonment. The trial judge ordered that the sentence on count 2 (namely robbery

with aggravating circumstances) run currently with the sentence on count 1 (namely murder).

[22] The appellant appeals to this court against the conviction of robbery with aggravating circumstances and against the sentence imposed on the counts of both murder and robbery.

[23] I am in agreement with the trial court's findings on the appellant's guilt in respect of the charge of robbery with aggravating circumstances. I am satisfied that the State proved this charge beyond reasonable doubt, especially in light of the appellant's concession under cross examination that he saw the key to the vehicle prior to attacking the deceased.

[24] I am satisfied that the trial court correctly rejected the appellant's version as to why he took the vehicle. If indeed the appellant's intention had been to flee the scene of the crime, he would have abandoned the vehicle once he had made his getaway. He did not do so. To the contrary, he kept the vehicle and treated it as if it belonged to him. The vehicle was recovered in the appellant's possession a number of days after the murder.

[25] In my view, the trial court was correct in the finding that the only inference to be drawn from the available evidence is that the accused killed the deceased in order to commit robbery. In my view the trial court also correctly rejected the appellant's version that he killed the deceased without any reason therefor as being false.

[26] If the appellant's intention was not to commit robbery, why would he kill the deceased who was aged approximately sixty five for no reason. After all the three psychiatrists who had observed the appellant for purposes of an observation and reporting, as contemplated in sections 77, 78 and 79 of the CPA, were of the opinion

that the appellant was not suffering from a mental disorder or mental defect that affected his ability to distinguish between the rightfulness or the wrong of his actions when he committed the two offences.

[27] In my view this must mean that the appellant's version that he killed the appellant for no reason other than being filled with rage and desiring the death of the deceased dead, is not only improbable, but is a lie. The motive for the murder must and can only have been robbery. The appellant saw the key to the vehicle before he started the assault on the appellant.

[28] In my view the appeal against the conviction on the count of robbery with aggravating circumstances must fail.

[29] That brings me to the appellant's appeal against the sentence imposed on both counts. It is trite that the circumstances under which an appeal court may interfere with the sentence imposed by the trial court are limited. An appeal court may interfere in circumstances where there has been a material misdirection by the trial court or where the sentence imposed is shocking or startlingly inappropriate.

[30] A conviction on a count of murder as well as that of robbery with aggravating circumstances carries with it prescribed minimum sentences; life imprisonment for murder and 15 years' imprisonment respectively.

[31] Unless an accused person is timeously apprised of this, in order that he can make important decisions as to his defense, an accused person's right to a fair trial may be impeded. For this reason the indictment should draw to the accused's attention the fact that the offence for which he is indicted is governed by section 51(1) of the

Criminal Law Amendment Act, Act No. 105 of 1997 ("*the CLAA*").[3] Other steps too may be implemented to ensure that the accused is mindful of the minimum sentence that the offence with which he is indicted carries[4]. The rational for this is that an accused must be in a position to properly meet the charge before conviction.[5] Knowledge of the minimum sentences that may be imposed permits an accused person to make informed decisions as to the conduct of his defense.

[32] In this case the indictment did not mention that the accused, upon conviction, may be looking into the eyes of life imprisonment on the count of murder and fifteen years on the count of robbery with aggravating circumstances. Nor did the court *a quo* during the course of or at the commencement of the trial inform the appellant of this. The trial court's failure to inform the appellant that he was facing the risk of a lengthy custodial sentence is misdirection.

[33] In my view the sentences on both of the counts must therefore be set aside and this court must consider afresh the appropriate sentence to be imposed. In doing so this court must also consider whether "*substantial and compelling circumstances*" exist to impose a lesser sentence for murder and robbery with aggravating circumstances, than the legislature has enjoined.

[34] In my view substantial and compelling circumstances do exist in the appellant's case for this court to impose a lesser sentence. Among other circumstances which in my view could constitute substantial and compelling circumstances, the appellant's

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3 S v Ndlovu 2003 (1) SACR 331 (SCA).

4 Such as, e.g., by the presiding Judge (or Magistrate) at the outset of the proceedings or during the course thereof provided that there is sufficient notice for the accused person to enable him to conduct his defense properly.

5 S v Makatu 2006 (2) SACR 582 (SCA).

abeyance since the appellant was placed in the care of Mrs Rabie were converted to children's court proceedings on the basis that the appellant was in need of care. The appellant remained at this place of safety (i.e. under Mr and Mrs Botha's care) until he turned the age of 18. Despite this Mr and Mrs Botha were willing to take care of the appellant because he had no other place to go and they did so.

[41] There are suggestions in Mrs Pieterse's report of behavioural problems. It seems however that under Mr and Mrs Botha's positive influence and in their care the appellant did not display behavioural problems. The Botha couple expressed the opinion to Mrs Pieterse that the appellant's long enduring rejection by his parents constituted a traumatic aspect in his life. However in the Botha couple's care he acquired their trust so much so that they consented to his betrothal to their daughter.

[42] It appears from Mrs Pieterse's report that the appellant's childhood was marred by rejection and; both physical and emotional abuse at the hands of his father, who displayed aggressive behaviour during outrages. The appellant's attempts to reach out to his father for nurturing were rejected. The appellant endured physical abuse at the hand of his stepfather as well. Not only was he rejected by his father and step-father but he was also rejected by his mother.

[43] On 8 May 2003 (being less than one month of the murder) the appellant confessed guilt to the murder. He fully co-operated with the police in their investigation. At no time did the appellant attempt to avoid the confession.

[44] He also did not attempt to delay the proceedings. He pleaded guilty on the first day of the resumption of the trial on 25 March 2004, which had been postponed on 10 November 2003 to facilitate the an observation of the appellant by psychiatrists in terms of sections 77, 78 read together with section 79 of the CPA.

[45] The appellant expressed remorse for his deeds to Mrs Pieterse. His incarceration had caused him anxiety. He has had to continually look out for his safety and resist indecent assault. He appreciated that retribution for his crimes must follow.

[46] While, the accused was fit to stand trial and did not at the time of committing the offences suffer from a mental disorder or a mental defect, he was inflicted with an anti-social personality disorder.

[47] The appellant was approximately 20 years' old when he committed the crimes. I consider the appellant's youth, the fact that he was a first offender and his unhappy childhood plagued with rejection and instability to constitute substantial and compelling reasons warranting departure from the prescribed minimum sentence for murder; i.e. life imprisonment and 15 years for robbery with aggravating circumstances.

[48] His co-operation with the investigation carried out by the police as well as his plea of guilt- this expedited the court proceedings are relevant.

[49] According to Mrs Pieterse the appellant is remorseful and appreciates that there must be retribution for his crimes. These too, in my view constitute substantial and compelling circumstances.

[50] I also consider the following additional circumstances as being substantial and compelling, warranting the imposition of a lesser sentence for the crimes:

(a) The vehicle was returned to the deceased's husband.

(b) The deceased's husband indicated no expectation as to the sentence that should be imposed. He also does not harbour ill-will towards the appellant. His attitude towards the appellant was described by Mrs Pieterse as being "*onpartydig*".

(c) The deceased's daughter on the other hand felt that the appellant must be imprisoned for a lengthy period. However she appears to feel empathy for the accused. In her own words she said that he (the appellant) "*het sy lewe opgemors*" by committing the crimes.

(d) The deceased's son who had attended the trial and had the opportunity to observe the appellant said that he felt sorry for the appellant because it seemed to him that the appellant had a traumatic childhood. He expressed a desire to visit the appellant in prison at some future time to convey that he has forgiven the appellant.

[51] I am not unmindful of the brutality of the crime. Nor am I unmindful of the fact that the appellant was not forthcoming as to his motive for the murder; however if life imprisonment is imposed, the appellant who has not in all his years lived a normal, meaningful life in a family that was not dysfunctional, will have snatched from him the opportunity of living a normal life in society some day in the future. Long custodial sentences apart from not necessarily acting as a deterrent to crime give birth to hardened criminals.

[52] In view of his favourable behavior under the care and influence of the Botha couple the appellant ought in my view to be given an opportunity to experience this caring and positive influence in his life and integrate into society at a time sometime in the future- life imprisonment will deny him that chance.

[53] The circumstances of his traumatic childhood to which life imprisonment is added will deprive the appellant of the benefit that every member of society should be allowed the opportunity to experience namely a stable and secure home environment.

[54] In my view the 15 months spent by the appellant in custody must be taken account of. I have done so in determining the appropriate sentences in the prevailing circumstances.

[55] In my view the sentences fall to be set aside; and the appropriate sentences are as set out hereunder.

In the result the following order is made:

1. The appeal against the conviction of robbery with aggravating circumstances is dismissed and the conviction is confirmed;

2. The appeal against the sentences imposed on the counts of both murder and robbery with aggravating circumstances is upheld, the sentences imposed are set aside and replaced with the following:
   "The accused is sentenced to sixteen years' imprisonment in respect of count 1, *viz.* murder and 10 years' imprisonment in respect of count 2, *viz.* robbery with aggravating circumstances.";

3. The sentence on count 2 is to run concurrently with the sentence on count 1;

4. In terms of section 282 of the Criminal Procedure Act, Act No. 51 of 1977, the sentence is antedated to ~~14 July 2004~~. 02 JUNE 2004

S K Hassim
Acting Judge of the High Court

I agree.

A.M.I. Phatudi
Judge of the High Court

I agree.

D.S. Molefe
Acting Judge of the High Court

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