IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:A107/2016

12/12/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

9/12/2016 Ranchod J.
DATE SIGNATURE

In the matter between:

CLAYTON MALEKA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The appellant is before us on appeal only in respect of the sentence of life imprisonment imposed on him for murder and housebreaking with the intention to rob and robbery with aggravating circumstances. The two counts were taken together for purposes of sentencing by the trial Judge (Webster J).

The appeal is with the leave of the Deputy Judge President who presided in the application for leave to appeal as the trial judge was not available.

[2] According to the indictment the appellant was 17 years old when he was arrested and charged together with his co-accused. He was legally represented during the trial.

[3] As this is an appeal against sentence only the factual findings of the trial Court must be accepted.

[4] It is clear from the record that the application for leave to appeal centred on two issues, i.e. the age of the appellant and whether there were substantive and compelling circumstances to deviate from the prescribed minimum sentences for certain offences as specified in the Criminal Law Amendment Act 105 of 1997 (as amended) (the Act).

[5] But first a synopsis of the facts leading to the appellant's conviction. The appellant and his co-accused were found guilty of the murder of Mr Albert De Jongh, a 66 year old person who lived on a smallholding in the Wonderboom district. They were found guilty of hacking him to death with an axe when they attacked him at the gate to his premises. They then removed various items from the deceased's premises, loaded them into the deceased's motor vehicle and caused them to be driven away. The indictment states that the offences took place on 24 October 2011 but it was amended at the commencement of trial to read 24 October 2010. The date of the offence, particularly the year, is significant in relation to the age of the accused to which I will revert presently.

[6] The murder would ordinarily fall squarely within the ambit of section 51(1) read with Part 1 of Schedule 2 of the Act as it was committed in conjunction with a robbery with aggravating circumstances. The prescribed minimum sentence for this offence is therefore life imprisonment unless substantial and compelling circumstances were present justifying a departure therefrom.

[7] The investigating officer in the case, adjutant-officer Joubert, testified in the trial about the determination of the age of the appellant. It had appeared to him that the appellant was a minor and, since he was aware that the Child Justice Act 75 of 2008 (the CJA) had just come into operation the appellant was immediately taken to court. At the court he was told by the prosecutor to take appellant for an age determination. He testified that the appellant was determined to be 17 years old. The prosecutor then informed him that the appellant must have a parent or guardian with him during the taking of the warning statement and so forth ("met die "warning" en met al die goeters").

[8] The appellant had informed Joubert that his father was in Messina and his mother in Zimbabwe. (The appellant came to South Africa from Zimbabwe in search of work). However, he had a sister and brother in Wallmansthal. Joubert traced his siblings and they accompanied the appellant to the Magistrate's court apparently at a court set up in accordance with the CJA and they were also present when his warning statement was taken from him. Joubert said a probation officer had also interviewed the appellant before his first appearance in court.

[9] Under cross-examination Joubert said the appellant's brother was also present when he was taken for a pointing out. He was also kept apart in a separate cell at the police station.

[10] A psycho-social report prepared by a Ms Rirhandzu Ngobeni stated the appellant's date of birth on the front page as "1993.06.25" but, inexplicably, on the following page his date of birth is stated to be "1994/07/25". In terms of the former date the appellant was 17 years old at the time of committing the offence and under the latter date about 16 years old. In any event the probation officer consistently referred to the appellant as a child in the report.

[11] A medical report by a Dr Seller which was prepared to determine if the appellant had any injuries prior to him being taken for the pointing out also reflects his age as being 17 although it is not stated how this age was determined by the doctor.

[12] Finally, the trial court itself appears to have accepted when convicting the appellant that he was 17 years old when it commenced handing down judgment.

[13] I have set out the above facts in some detail to show that the appellant was treated from when he was arrested as being 17 years old.

[14] The CJA defines a child as being a person under the age of 18.

[15] In *Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009(6) SA 632 (CC)* the Constitutional Court declared the minimum sentence provisions of the Act inconsistent with the Constitution insofar as they applied to child offenders. As I said, the offences *in casu* took place on 24 October 2010 which was after the declaration of inconsistency by the Constitutional Court. The imposition of a life sentence on the appellant in terms of the minimum sentence provisions of the Act therefore constituted a misdirection by the trial court. It bears mentioning that the Act was subsequently amended by Act 42 of 2013 by substituting sub-section (6) of s51 which now reads as follows:

> '(6) 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).'

[16] However, that is not to say that a sentence of life imprisonment may never be imposed on a youthful offender. It depends on a number of factors including the level of maturity of the youth. In *S v Matyityi 2011(1) SACR 40 (SCA)* at 47e-48a the learned Judge of appeal said:

> "It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the

evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult."

[17] The principle that a child offender should only be deprived of his or her liberty as a matter of last resort and then only for the shortest possible time is now well established in our law. (*S v B 2006(1) SACR 311 (SCA), Brandt v S [2005]2 All SA1 (SCA)* and *Centre for Child Law supra*). Where imprisonment is unavoidable not only the duration, but also the form of imprisonment should be tempered.

[18] In *casu* the court *a quo* described the attack on the deceased by the appellant and his co-accused as brutal and savage and that he was hacked to death. The murder was premeditated in that the appellant even sharpened the axe earlier in preparation for the robbery. The deceased sustained seven wounds from the axe used by the appellant to attack him and the fatal blow was administered on the back of his neck when he was lying face down on the ground. He had two further chop wounds on the back of his head.

[19] There is no doubt that the attack on the 66 year old deceased was brutal as found by the learned Judge and ordinarily merited a life sentence as found by the Judge.

[20] A psychosocial report in respect of the appellant was prepared by Ms Ngobeni at the request of the court for sentencing purposes. The appellant comes from an impoverished background in Zimbabwe where he had lived with his parents and seven siblings. He is the fifth-born. His mother and five siblings are still in Zimbabwe while the other two and his father are in South Africa. Both his parents are unemployed but his father previously worked as a

truck driver in Musina in Limpopo where he is still resident. The two siblings in South Africa are employed.

[21] The appellant is not married and has no children. He has maintained regular contact with his family with whom he has a good relationship. His family describes him as a very introverted, respectful, humble, calm and well-mannered person. He had dropped out of school in grade 7. He said he dropped out because of financial constraints as his parents could not afford to pay his school fees. He then fled to South Africa where he has been doing odd-jobs such as gardening. His family said he was mentally stable and in good health.

[22] The probation officer is of the opinion that the appellant knew exactly what he was doing when he attacked the deceased due to the number and severity of the wounds on the deceased. Yet the appellant disavowed robbing and intentionally killing the deceased. He maintained that he and his co-accused were hired by the deceased to do some work for the day and then refused to pay them. There was an altercation and a scuffle between his co-accused and the deceased and he (appellant) had merely attempted to hit a "slush" (it seems to me the probation officer meant a "slasher") out of the deceased's hands with a machete. He confirmed hitting the slasher but said he had accidentally hit the deceased on the hand. The deceased fell down and he and his co-accused went away.

[23] It is apparent from this version given by the appellant to the probation officer that he continues to deny having murdered the deceased with his co-accused. However, the accepted facts indicate that they had planned the attack on the deceased. Even during the trial the appellant did not take the court into his confidence but steadfastly maintained his innocence in the face of compelling evidence against him. Can it then be said that there is a chance of rehabilitation of someone who seems to have no insight into the gravity of the offences he has committed? In the case of an adult the answer would probably be no. What about a youthful offender? In *S v N 2008(2) SACR 135 (SCA)* Cameron JA (as he then was) in a majority judgment said that a

lengthy sentence would treat the youthful offender too much like the adult he was not and foreclose the possibility of rehabilitation. It is accepted, said the learned Judge that children are treated differently than adults in recognition of, *inter alia*, "immature judgment" and "youthful vulnerability to error" which could influence their actions. In these circumstances, *in casu*, the trial Judge's remarks that he could find nothing to suggest that the appellant is prepared to reform indicates that the principle applicable to sentencing child offenders were not sufficiently, or at all, taken into consideration. This court is thus at liberty to consider sentence afresh.

[24] During the appeal hearing counsel for the appellant conceded that a long term of imprisonment was called for due to the nature and gravity and the brutality of the murder. It was also conceded that although the appellant was the younger of the two accused he appeared to be the more dominant one and could be called the "ringleader".

[25] The post-mortem report reveals that the deceased had, *inter alia*, seven chop wounds, mostly on his head and neck. It appears that there was not merely an attempt to overcome resistance by the deceased so that he could be robbed of his belongings, but to kill him outright.

[26] The attack and murder of the deceased had a life-changing effect on the deceased's close friend of more than 23 years, Mrs Verheule. His friends who lived near to where the deceased lived alone on a farm were no doubt traumatised as well as his family in the Netherlands. According to the probation officer, Mr B.M Collins, (who prepared a pre-sentence report in respect of the second accused), the impact of the deceased's death was so severe that Mrs Verheule suffered a stroke which has affected her speech.

[27] I have already set out the appellant's personal circumstances earlier, and his lack of remorse. He is a first offender. It is also noted that the appellant spent more than three years awaiting trial.

[28] The trial court took the two counts together for the purpose of sentence. The Criminal Procedure Act 51 of 1977 does not expressly prohibit charges being taken together for purpose of sentence nor does such an act in itself constitute a misdirection. (*S v Keulder 1994(1) SACR 91(A) at 101i-102b* and *S v Immelman [1978 (3)] 726 [AD] at 728E-729D*).

[29] However, bearing in mind that the Act provides for minimum sentences for specified offences and the court *a quo* approached sentencing as if the Act was applicable it is in my view undesirable in cases where minimum sentences were applicable for the various offences that they be taken together for sentence. The reason is that for each count where a minimum sentence is applicable the question whether substantial and compelling circumstances exist to justify a departure from it should be considered separately. This matter before us is an example of the undesirability of such an approach in that there was a need to consider whether substantial and compelling circumstances existed in respect of each of the two offences. Another reason for the disapproval of joint sentences is the problem that can arise on appeal or review when some of the convictions are set aside. Also, by considering each count separately there is a greater likelihood of a more correct sentence being imposed.

[30] As I said, *in casu* the Act does not apply in respect of the appellant and the sentence imposed is not a misdirection *per se* nor is it an issue that has been raised on appeal.

[31] Taking all factors into account it seems to me that the life sentence should be set aside and a lengthy determinate sentence be imposed instead. The life sentence is disproportionate, not so much to the crimes but in relation to a child offender.

[32] I propose the following order:

1. The appeal is upheld.
2. The sentence of life imprisonment imposed by the court *a quo* is set aside.

3. A sentence of 20 (twenty) years' imprisonment is imposed, ante-dated to 7 April, 2014, both counts taken together as one for the purpose of sentence.

RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE

TOLMAY J
JUDGE OF THE HIGH COURT

I AGREE

TLHAPI J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Att. H.L Alberts
Instructed by	: Pretoria Justice Centre
Counsel on behalf of Respondent	: Adv J Cronje
Instructed by	: Director of Public Prosecutions, Pretoria
Date heard	: 9 September 2016
Date delivered	: 12 December 2016