IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A290/2016

Date: 14/12/2016

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

14-12-2016 .....
DATE SIGNATURE

In the matter between:

LENNOX PONTI **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The Appellant (accused no 3 in the trial Court) was charged with and convicted of one count of murder and one of robbery with aggravating circumstances. He was sentenced on the murder charge to imprisonment for life and on the robbery with aggravated circumstances charge to 15 years imprisonment.

[2] Leave to appeal was granted by the Supreme Court of Appeal against sentence only. It was not argued by counsel for Appellant that we should intervene as far as the sentence on the robbery charge is concerned. The argument was limited to the sentence of life imprisonment on the murder charge.

[3] A short summary of the facts is essential. Accused 1 was employed by the deceased. On the day of the incident Appellant was accompanied by the other accused to the house of the deceased, where the deceased was brutally murdered and robbed of some of his property. Accused 1 was arrested and he pointed out the appellant who in turn pointed out accused 2. A bag containing head phones was found in appellant's possession and it was subsequently identified as the deceased's property. It later transpired that the appellant had also taken a radio.

[4] The J88 indicated the cause of death as strangulation, a broken neck and head injuries.

[5] Most of the evidence is not in dispute. The appellant however disputed being found in possession of the head phones. The accused, including the appellant, made substantial admissions at the onset of the trial and all three of them consented to the handing in of statements made after their arrest.

[6] According to Appellant's admitted statement, he arrived at the deceased's home, spoke to the deceased, and then left. He also states that he took a radio and a bag from the premises. He admits that in his presence accused 1 grabbed the deceased by the throat. The deceased was screaming, and he saw the deceased being locked in the garage.

[7] The content of extra-curial statements (confessions or admissions) by one accused is not admissible against another.[1] As a result the statement made by Appellant is the only statement that may be used against him to determine his involvement in the crimes committed. According to his statement he was not present when the deceased was strangled. When he arrived back the deceased was already tied up. However after completing his statement the following was added:

"*The deponent informs me that he left something we (sic) want to add. DEPONENT: When Stanley called me for the second time, after I took a bag and radio. The white was screaming, Stanley grabbed him on*

[1] S v Litako and others 2014 (2) SACR 431 (SCA) S v Mhlongo, S v Nkosi 2015 (2) SACR 323 (CC)

(sic) the throat, they took him into the garage and they locked him inside the garage. That is all I know."

[8] The other accused and the appellant did not testify and no witnesses were called on their behalf consequently the only evidence against the Appellant is that contained in his statement. His involvement in the crimes that were committed on that day is clear.

[9] It was argued that Appellant played a minor role in the murder and that this aspect would constitute compelling and substantial circumstances.

[10] The Appellant may not have been present during the actual murder of the deceased but he never disassociated himself from what was happening.

[11] The following personal circumstances pertaining to the Appellant were considered by the Court *a quo* and is set out in the judgment as follows:

"Accused 3 is also a first offender. He is 24 years old and did not receive any formal education. He was taught to read and write by his sister. He arrived in Gauteng from the Transkei in 1996 in order to seek employment. For about a year he worked in Alexandria, thereafter he worked in Brakpan as a painter, painting houses for about a year and three months. Thereafter he was unemployed. He then moved to a house in Geluksdal and was paid R300-00 a month to take care of it. Then he became involved in a relationship with a

woman called Mary and he has fathered one child. His own father is dead and his mother lives in the Transkei."

[12] The Court *a quo* found that the murder and robbery were premeditated and found that the manner in which the deceased died was inconsistent with *dolus eventualis*, but indicated *dolus directus*.

[13] The Court *a quo* found that no substantial and compelling circumstances exist which would allow for a deviation from the mandatory sentence of life imprisonment.

[14] It is trite that sentencing falls ultimately in the discretion of the trial Court and that unless there is a misdirection or the sentence is shockingly inappropriate the Court of Appeal should not intervene.

[15] Life imprisonment is the ultimate sentence that a court can impose. In ***S v GN***[2] the Court held that life imprisonment must not be imposed lightly even when it is the prescribed minimum sentence. The court held that:

"It is axiomatic that, in order for it to arrive at a just sentence, a court must have a balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed."

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[2] *2010(1) SACR 93 (T)*

And further:

"It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Where the prescribed minimum sentences is less than life imprisonment, such differentiation is possible either by imposing a heavier sentence than the prescribed minimum or, where there are substantial and compelling circumstances so to do, impose a lesser sentence. Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment." (My emphasis)

[16] One is obliged in the light of the aforementioned authority to take into consideration that life imprisonment is the ultimate sentence that our Courts can impose. However, to deviate from the prescribed minimum sentence, one still have to find that there are compelling and substantial circumstances to do so. In this case the only circumstances that may assist the Appellant is his youth at the time of the incident,

the fact that he was a first offender and to a much lesser extent the fact that, according to his statement, he didn't assist in the actual murder.

[17] I acknowledge that due to his youth a greater possibility of rehabilitation may exist. It is trite that with younger offenders our Courts consider the possibility of rehabilitation as an important consideration in determining an appropriate sentence. The fact that the Appellant is young and a first offender must consequently be given sufficient weight.

[18] The suffering of victims and their families should also be given due consideration. Even young people should take responsibility for their actions and one should guard against a too sympathetic approach towards the young. That is why one should always return to the ever appropriate triad of balancing the rights of the accused, the rights if the victim and the interest of society when considering a sentence. This was a brutal murder of an elderly man by three young men.

[19] In the light the all the circumstances I am of the view that the fact that the Appellant was a first offender, and relatively young constitute substantial and compelling circumstances and that the Court *a quo* misdirected itself by not finding so, consequently this Court should intervene and impose a lesser sentence, but Appellant should serve a very long term of imprisonment.

[20] Consequently I propose the following order:

1. **The sentences on count 1 is set aside;**
2. **The Appellant is sentenced to 25 years imprisonment on count 1;**
3. **The sentence of 15 years on count 2, robbery with aggravating circumstances is confirmed;**
4. **It is ordered that 10 years on count 1 will run concurrently with the sentence on count 2;**
4. **The effective sentence is thus 30 years imprisonment; and**
5 **The sentence is *ante* dated to 27 February 2001.**

R G TOLMAY
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

C PRETORIUS
JUDGE OF THE HIGH COURT

I agree:

N TUCHTEN
JUDGE OF THE HIGH COURT