HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. 01C

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SIGNATURE

11/3/2016

Case no. A735/2015

In the matter between:

F.O. DLAMINI **Appellant**

and

THE STATE **Respondent**

JUDGMENT

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1. The appellant appeals to this court by leave of the trial court against the sentence of 50 years' imprisonment imposed upon him in the Circuit Court of Vereeniging on 9 November 1998.

2. The appellant was part of a criminal gang which broke into a shopping centre during the night of 5 April 1997 and stole four shot gun rifles, a number of firearm

magazines and cartridges as well as certain other items. A few days later on 9 April 1997 the appellant was again part of a gang which intended to rob certain shops in the shopping centre. This time, however, the security guards were alerted and two of them went to investigate. The two security guards confronted members of the gang but were shot and killed. Their firearms were also stolen.

3. The appellant stood trial with two of the gang members. The appellant was convicted of the following crimes: two counts of murder; robbery with aggravating circumstances; housebreaking with the intent to steal and theft; two counts of the unlawful possession of firearms; and one count of unlawful possession of ammunition. The appellant was sentenced as follows: 25 years' imprisonment in respect of each of the murder charges which were ordered to be served concurrently; 15 years' imprisonment in respect of the robbery and house-breaking charges respectively which were ordered to be served concurrently; 7 years' and 5 years' imprisonment respectively in respect of the two unlawful possession of firearms charges of which three years of the five-year sentence were ordered to run concurrently with the sentence of seven years; 1 year imprisonment in respect of the charge for the unlawful possession of ammunition. The effective sentence was therefor one of 50 years imprisonment.

4. It was submitted on behalf of the appellant that the effective sentence of 50 years imprisonment was a shockingly harsh sentence and negated the principle of rehabilitation of the appellant.

5. On behalf of the State it was submitted that the sentence was not vitiated by irregularity or misdirection and that it was not disturbingly inappropriate. In the heads of argument reference was made to decisions by our courts which

emphasised the need for heavier sentences for violent and premeditated crimes to serve the interests of the public and to avoid bringing the administration of justice into disrepute.

6. The personal circumstances of the appellant referred to in the judgement on sentence by the trial court were the following: the accused was 19 years of age when the offences were committed and 21 years at the time of sentencing. According to a welfare report the appellant passed standard 8 at school and thereafter worked as a security official on a part-time basis at a security firm in Vereeniging. The appellant was the product of a broken home, his parents having been divorced when he was still in his early teens. The appellant had three previous convictions dating from 19 August 1994. These convictions emanated from one event which constituted housebreaking with the intent to steal and theft of firearms from a safe in a private residence.

7. In aggravation of sentence the trial court considered the seriousness of the offences and the fact that the actions of the appellant and his cohorts had been meticulously planned. This was proved, *inter alia*, by the theft of firearms, which consisted of shotguns, a few days prior to the main heist when the security guards were killed as well as the fact that the appellant wore a bullet-proof vest on the night in question. The appellant and the others waited for the security guards in the dark when they went to investigate the barking of a dog and shot them down in cold blood. In mitigation the court considered the factors mentioned above as well as the youth of the appellant and the possibility of rehabilitation.

8. Since the imposition by the trial court of the sentence of 50 years' imprisonment the Supreme Court of Appeal has in a number of cases pronounced on the undesirability of excessively long sentences being imposed by trial courts. In granting leave to appeal to this court the trial court acknowledged this fact and referred to the then latest judgement of the Supreme Court of Appeal in the matter of *Zondo v* S *(627/12)* [2012J ZASCA 51 (28 March 2013)]. It is appropriate to refer to the following finding by that court:

> 'This court has repeatedly warned against excessively long sentences being imposed by trial courts. In S v ***Mhlakaza*** [1997 (1) SACR 515 SCA at 519 g] the court had to consider whether sentences of imprisonment, which are cumulatively far in excess of 25 years, are proper. Harms JA, dealing with the element of deterrence, noted that although it remained, according to judicial precedent, an important consideration when imposing sentence, its effectiveness in deterring others from committing (similar) offences was unclear. He further stated that '(a)s far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is *always* proportionate to its length' before going on to state that a lengthy term of imprisonment would serve none of the purposes of punishment and would simply serve to appease public opinion. He pointed out, accordingly, that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption. See also: S *v Skenjana* 1985 (3) SA 51 (A) at 55 C-D; S *v Siluale* 1999 (2) SACR 102 (SCA) at 106g-107a; S v *Bull;* S *v Chavulla* 2001 (2) SACR 681 (SCA) para 22 and S *v Matlala* 2003 (1) SACR 80 (SCA) para 7-3.'

9. I respectfully agree with the sentiments expressed in the aforementioned cases. It is not necessary, in my view, to refer to other authority which espoused the same principles. Although every case should be considered on its own merits, I am of the view that the term of imprisonment imposed upon the appellant was too lengthy to serve the purposes of punishment. It also does not cater sufficiently for the youthfulness of the appellant when he committed the offences in question nor of the possibility of his rehabilitation. It was not suggested that the appellant could not be rehabilitated.

10. I am fully aware of the seriousness of the offences committed by the appellant. I am also deeply aware of the callousness of the murders where two security guards were shot dead in cold blood. However, in my view a lesser sentence would equally serve the purposes of punishment having regard to the nature of the crimes, the circumstances attending its commission, the legitimate interests of society and the interests of the victims. On the other hand, a sentence of 50 years' imprisonment would, for somebody of the age of the appellant, create a sense of helplessness rather than result in his possible rehabilitation.

11. On behalf of the appellant it was submitted that the present sentence of 50 years should be replaced by a sentence of 38 years. In my view, however, a sentence of 35 years' imprisonment would be adequate punishment for the crimes committed and would offer the appellant an opportunity to become a useful member of society.

12. In my view the individual sentences imposed in respect of the separate offences should not be varied for they reflect the seriousness of the offences and the legitimate responses thereto. It would be just and justifiable, however, to soften the cumulative effect thereof by ordering some thereof to be served concurrently.

13. In the result the following order is made:

    1. The appeal against sentence is successful and the sentences imposed by the trial court is set aside and replaced with the following:

       "Count one, 25 years' imprisonment; count two, 25 years' imprisonment. It is ordered that the sentences on count one and count two be served concurrently. Count three, 15 years' imprisonment; count four, 15 years'

imprisonment. It is ordered that 10 years of each of the sentences in respect of count three and count four be served concurrently with the sentence in respect of count one. Count five, 7 years' imprisonment; count six, 1 year imprisonment; and count 7, five years' imprisonment. It is ordered that the whole of the sentences imposed in respect of count five, six and seven be served concurrently with the sentence in respect of count one. The effective sentence of the appellant is therefore 35 years' imprisonment."

2. The sentence of the appellant is ante-dated in terms of section 282 of the Criminal Procedure Act, Act 51 of 1977, to 9 November 1998.

C.P. RABIE
JUDGE OF THE HIGH COURT

I agree

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree

M.H.E. ISMAIL
JUDGE OF THE HIGH COURT