



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: A252/18

DELETE WHICHEVER IS NOT APPLICABLE

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

19/9/2019 *D. Maree*

DATE

SIGNATURE

DARREN JASON MAREE

APPELLANT

v

THE STATE

RESPONDENT

JUDGMENT

NEUKIRCHER J

1. This appeal concerns solely the question of whether the Vereeniging Magistrates Court (the Court *a quo*) correctly sentenced the appellant.

The charges

2. The appellant was charged in the Court *a quo* with:
 - 2.1 one count of the murder of Willem Marthinus Swart (read with the provisions of section 51(1) of Act 102 of 1977);
 - 2.2 one count of the murder of Anna Isabella Swart (read together with the provisions of section 51(1) of the Act 105 of 1977); and
 - 2.3 one count of theft of the motor vehicle belonging to the two deceased.

The Record

3. It needs to be said from the outset that, although the proceedings of 10 October 2017 were recorded, the recording failed and had to be reconstructed by the presiding officer by making use of the charge sheet and “*from memory*”¹.
4. It appears from the reconstruction that:
 - 4.1 the appellant plead guilty to all three charges;
 - 4.2 a written statement and plea explanation was handed in and forms part of the present record;
 - 4.3 the post mortem reports, photo album and key formed part of the record.
5. The reconstructed notes then state -

“The court finds that the accused admits all the elements of the crimes he is charged with, as well as all the allegations contained in the

¹ His words

charged sheet (sic) preferred against him. The court is convinced that the accused is guilty."

6. As a result, the appellant was convicted on counts 1, 2 and 3.
7. The Court *a quo* then requested that heads of argument be filed on the issue of whether the provisions of section 51(1) or section 51(2) of the Criminal Law Amendment Act 105 of 1977 is applicable in respect of the two counts of murder. A Probation Officer's report and victim impact report were also requested.
8. These heads of argument and Probations Officer's report form part of the record, as do the post mortem reports and photographs.
9. The sentencing proceedings were properly recorded: the address and judgment on the issue of whether section 51(1) or section 51(2) applied and the address on sentence as well as the sentence itself are part of the record.
10. In Schoombee & another v The State² the Court stated the following regarding the issue of reconstruction of an appeal record:

"[27] This is because the applicants had a fair trial, including a fair appeal. The record of their trial was improperly and imperfectly

² 2017 (2) SACR 1 (CC)

reconstructed. But it was more than adequate to ensure the applicants exercised their constitutional right of appeal. The notes the trial Judge took were unusually full and detailed. They were not scrappy, telegram - style annotations. They appear to be a complete narrative account of the evidence led in the trial. They recorded the witnesses' evidence in chief, as well as their cross-examination. A full picture emerges from them, not only of the terrible events of the night of 3 to 4 October 2004, but of what transpired in the trial proceedings that resulted in the applicant's convictions and sentences".

[28] In Chabedi³, the SCA, though dealing there with an incomplete record, explained that a defective record need not be perfect. It need only to be adequate:

"[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial...The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends *inter alia*, on the nature of the particular record and on the nature of the issues to be decided on appeal."

[29] Where adjudication of an appeal on an imperfect record will not prejudice the appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an

³ S v Chabedi 2005 (1) SACR 415 (SCA) at para 5

improper reconstruction process. This principle is practical, sensible and just.

[30] It applies here. The reconstructed record is detailed and specific. The applicants reviewed this record. They took the advice of counsel. They, in accordance with that advice, chose to proceed with their appeal on the record. Even if they did not waive their right to participate in the reconstruction, they certainly signified their assent to the substantive recital contained in the reconstructed record."

11. This is precisely what occurred here:

11.1 the record (as set out supra) is full and detailed – it is clear why the Court *a quo* reached the conclusion it did regarding the conviction and sentence;

11.2 furthermore, no objection has been raised to the reconstructed record⁴

12. Thus this appeal can be reconsidered on the record as it stands.

The Facts

13. In his guilty plea in terms of section 112 of the Criminal Procedure Act 51 of 1977, the appellant admits to the following facts:

⁴ In fact, both the State Advocate and attorney for the appellant say that the reconstructed record is a true reflection of the court proceedings and both signed the reconstruction.

- 13.1 he rented a flat from Mr and Mrs Swart and at approximately 14h00 on 12 July 2017 Mr Swart confronted him about his arrear rent and an argument ensued;
- 13.2 he became angry and took a Bobbejaan spanner and hit Mr Swart three or four times on his head;
- 13.3 Mrs Swart came to see what was going on and he then hit her three or four times with the Bobbejaan spanner on the head;
- 13.4 Mr Swart and Mrs Swart both fell on the floor;
- 13.5 the appellant then rolled them in blankets and put them on the back seat of their Mercedes Benz vehicle because he thought they were dead;
- 13.6 he then cleaned up the washing room with soap and water and went to Emerald Casino until +-22h00;
- 13.7 he then decided to get rid of the bodies and went to a filling station and bought 5 litres of petrol;
- 13.8 he went home and tried to sleep, but couldn't. At 03h00 he got up, took turpentine from the garage and drove to Spider Valley;
- 13.9 he took the bodies out of the vehicle, threw petrol and turpentine over them and set them alight;
- 13.10 he then drove to Vereeniging Station where he abandoned the vehicle.

This appeal

14. This appeal concerns only the sentences handed down which were:

- 14.1 18 years' imprisonment on Count 1 (the murder of Mr Swart)
- 14.2 life imprisonment on Count 2 (the murder of Mrs Swart);
- 14.3 7 years' imprisonment on Count 3 (theft of the vehicle);
- 14.4 the sentences on Count 1 and 3 were to be served concurrently with the sentence of life imprisonment.

15. The Court *a quo* before handing sentence in respect of Counts 1 and 2

- 15.1 heard full address in whether the provisions of section 51(1) or section 51(2) of the Act 105 of 1977 applies;
- 15.2 handed down a separate judgment on this issue;
- 15.3 heard full address regarding sentence, including the appellant's personal circumstances and considered the probation officer's report and victim impact report;
- 15.4 it was only then that sentence was handed down.

Is section 51(1) or 51 (2) applicable?

16. The definition of "*murder*" is the following:

"Murder, when-

- (a) *it was planned or premeditated;*
- (b) *the victim was-*
 - (i) *a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or*
 - (ii) *a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;*
- (c) *the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:*
 - (i) *Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or*
 - (ii) *robbery with aggravating circumstances; or*
- (d) *the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."*

17. In the separate hearing mentioned in 14.1 (supra) the Court a quo found that the killing of Mr and Mrs Swart was either planned or premeditated as referred to in section 51(1). He also distinguished between these two murders and stated:

"Dealing with that murder of Mrs Swart, I think it is different. There is no obvious reason why this attack on Mrs Swart took place, except for the fact that she came upon the accused shortly after the attack on Mr Swart and she would have been able to testify against him. There seems to be no other plausible explanation why he murdered Mrs Swart than to ensure her silence."

18. Given the facts, he found that Count 1 fell within the ambit of the provision of section 51(2) of the Act 105 of 1977 and Count 2 within the ambit of section 51 (1) being *"the murder of a potential witness."*

19. Conviction:

19.1 of a offence set out in Part 1 of Schedule 2⁵ of section 51 (1) calls for a minimum sentence of imprisonment for life;

19.2 of an offence set out in Part 11 of Schedule 2, in the case of

a) a first offender calls for imprisonment of not less than 15 years;

b) a second offender calls for imprisonment of not less than 20 years; and

c) a third or subsequent offender to imprisonment of not less than 25 years.

20. The appellant's personal circumstances were the following:

20.1 he was 40 years old and unmarried;

20.2 he was employed at the time of the offences occurred;

⁵ Which includes the offences of murder, robbery with aggravating circumstances; or b) involving the taking of a motor vehicle

20.3 he was maintaining a child who was nearly 3 years old and he visited the child every Saturday;

20.4 he plead guilty on all the charges and gave his co-operation to the police;

20.5 he was remorseful and apologised to the family and friends of the deceased;

20.6 he had a gambling problem.

21. In sentencing the appellant, the Court *a quo* took these into account as well as the victim impact report and the fact that appellant had two previous convictions⁶. What weighed as well was the fact that, according to the medical report, the deceased were still alive when the appellant set them alight.

22. The Court *a quo* stated⁷

"After careful consideration of the facts available to me I fail to find any substantial and compelling circumstances to deviate from the minimum sentence. I furthermore feel that the murder of Mr Swart deserves a sentence in excess of the prescribed minimum sentence."

⁶ One for fraud and one for theft committed many years prior.

23. Mr Coetzer argues the words of Holmes JA are applicable regarding the discretion of the Court on appeal to interfere with the sentence imposed by a lower Court:

"It is the trial Court which has the discretion and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by an irregularity or misdirection or is so severe that no reasonable Court should have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It shall therefore be recognised that appellant jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

24. Mr Kgagara argues that

24.1 there was no basis on which to find that the murder of Mrs Swart falls within the ambit of section 51(1) as the murder of a potential witness, and that the inference drawn was speculative and without basis and thus the life sentence is strikingly disproportionate;

24.2 the sentence of 18 years in respect of the murder of Mr Swart has no basis as the Court did not give reasons to

justify why it deviated from the minimum sentence. Thus this sentence too is strikingly disproportionate.

25. I cannot agree. It is quite clear that the Court took into account the circumstances in which these murders took place and the fact that the deceased were alive after the assault. It took into account that the appellant left the two deceased, who were alive after the initial assaults, and after cleaning the scene with soap and water, went to Emerald Casino for 8 hours to gamble; on the way back stopped to purchase 5 litres of petrol, went home to try to sleep but couldn't and at 03h00 took the "*bodies*" elsewhere and tried to dispose of them by setting them alight - this is in fact what killed them.

26. The Court a quo carefully balanced the personal circumstances of the appellant with the interests of the family of the deceased and the public and found that there was no reason to deviate from the minimum sentence of life imprisonment for the murder of Mrs Swart⁷.

27. It also, given the facts, found good reason to impose a harsher sentence than the minimum for the murder of Mr Swart⁸.

⁷ For the reason set out in [16] *supra*

⁸ Para [21] *supra*

28. I cannot, on all the facts before me, found fault with the conduct or reasoning of the Court a quo. The sentences are thus, in my view, not "strikingly disproportionate" with the crimes committed.

29. There was no argument presented in respect of the sentence imposed for Count 3 and thus nothing further be said on this issue.

Order

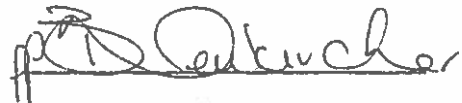
30. in the circumstances the order I make is the following:

The appeal is dismissed.



NEUKIRCHER J

JUDGE OF THE HIGH COURT



MKHAWANE AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 4 September 2019

Date of judgment: 10 September 2019

Counsel for appellant: Mr Kgagara

Legal Aid South Africa, Pretoria

Counsel for the respondent: Mr Coetzer

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