

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A92/2008

DATE:

13 FEBRUARY 2009

5 In the matter between:

DAVID DE VILLIERS

versus

THE STATE

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JUDGMENT

VAN REENEN, J:

15 I shall refer to the appellant as the accused, merely for the
sake of convenience.

20 The accused, who was charged in the Regional Court,
Wynberg, together with one Martin Cyster, after having
tendered a plea of not guilty to those and six other charges, at
the conclusion of the trial, was found guilty of robbery with
aggravating circumstances, on count 1, housebreaking with the
intent to rob and robbery with aggravating circumstances,
count 2, extortion, count 6, assault and count 7, the unlawful
25 pointing of a firearm in contravention of the

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provisions of Section 39(1)(ii) of Act 75/1969. After his previous convictions had been proved by the State, the accused, who enjoyed legal representation during the trial, was sentenced to the following periods of imprisonment: on
5 count 1 - 15 years; count 2 - 15 years; count 6 - 10 years; count 7 - 10 years imprisonment; count 8 - one year imprisonment. The magistrate ordered that five years of the imprisonment imposed in respect of count 2 were to be served concurrently with the sentence imposed in respect of count 1,
10 and that the sentence of one year imprisonment imposed in respect of count 8 was to be served concurrently with the 10 years imprisonment imposed on count 7. I interpose to point out that there is a discrepancy in the typed record of the proceedings and the schedule of sentences imposed in respect
15 of count 7, in that whereas the schedule reflects the sentence imposed as 10 years, the record reflects it as one year. In view of the conclusion to which we have come to in this matter, it is not necessary to resolve that discrepancy. On my calculation, the accused had to serve a period of 40 years
20 imprisonment.

The accused's application for leave to appeal against the convictions and the sentences imposed on him was refused. On petition to this Court, however, he was granted leave to
25 appeal firstly against the conviction on counts 1 and 2, but

only as regards the question whether there was a duplication of convictions in respect thereof, and secondly against the sentences imposed by the court *a quo*.

5 The facts relating to counts 1 and 2 are briefly as follows.
Mr Stewart Cedric Shub (to whom I shall refer to as Shub) and his wife, who were in their sixties at the time, resided in Kenilworth in a house well equipped with security systems and hired guards for 24 hours per day. The accused and Martin
10 Cyster were two of the guards who were so employed. The accused did so until June 1998, and Martin Cyster until December 1998. When Shub and his wife returned to the residence during the evening of 30 September 1998 in the latter's Mercedes Benz motor car, they entered the property
15 and the garage, after having activated the sliding gate of the property and the garage door respectively by means of a remote control. When they were about to exit the car in the garage, they were overpowered by four or five masked men. Their hands and feet were bound and they were blindfolded.
20 The assailants demanded the keys to the safe in the house and as a consequence were handed a bundle of keys by Shub. They returned and then Shub had to identify the safe's key, after he had slightly lifted the blindfold on his face in order to do so. He told the assailants that there was no money in the
25 safe. They later returned and confirmed that there was none,

but then proceeded to rob them of their Mercedes Benz car and an expensive men's wristwatch. Shub then entered into negotiations with one of the assailants, whilst still bound and blindfolded, but succeeded in identifying him from his speech and body movements as the accused. Shub succeeded in pacifying the assailants by promising to pay them a substantial amount of cash the following day. After the assailants had left, Martin Cyster, who had been on duty that night, appeared, untied Shub and his wife and purported that he too had been overpowered and bound by the assailants. Shub, on three different occasions thereafter, transferred amounts totalling R49 000,00 into the accused's bank account on his demand. Shub also succeeded in identifying Martin Cyster as one of the assailants and he, at the trial, was found guilty on counts 1 and 2, as well as extortion, i.e. count 6. He was sentenced to 15 years imprisonment in respect of each of counts 1 and 2, and 10 years imprisonment in respect of count 6. It was ordered that 10 years of the imprisonment imposed in respect of count 2 was to be served concurrently with the sentence imposed in respect of count 1.

On appeal the conviction and sentence imposed in respect of count 2 was set aside. The sentence imposed in respect of count 6 was reduced to six years imprisonment and half thereof was ordered to be served concurrently with the

sentence of 15 years imposed in respect of count 1. My learned colleague Cleaver, J., with whom Bozalek, J. agreed, in Martin Cyster's case, No A40/2002 delivered on 5 December 2003, after an analysis of the relevant case law and the facts that have been set out above, came to the conclusion that the convictions on counts 1 and 2 amounted to an impermissible duplication and accordingly set the conviction on count 2, as well as the sentence imposed in respect thereof, aside. I am in full agreement with that conclusion, which was supported by

10 Mr Burgers in his heads of argument and conceded as correct by Mr Stephen for the State, with his customary fairness.

Accordingly the CONVICTION OF THE ACCUSED ON COUNT 2 is SET ASIDE, AND SO IS THE SENTENCE OF 15 YEARS

15 IMPRISONMENT IMPOSED IN RESPECT THEREOF.

It is trite that a court of appeal is not entitled to arbitrarily interfere with a sentence imposed by a lower court. It is permissible only if the trial court has committed a material misdirection or has imposed a sentence which induces a sense of shock or is startlingly inappropriate. There, in my view, is no basis for interfering with the sentences imposed in respect of counts 1, 6 and 8. When the sentence imposed in respect of count 7 is compared with the sentence I would have

25 imposed had I sat as court of first instance, it, in my view, is

startlingly inappropriate. The nature of the assault is not of such an aggravated nature that it warrants a sentence of 10 years imprisonment, if that is in fact the sentence that was imposed by the magistrate.

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Accordingly, the sentence imposed in respect of that count (as recorded in the Schedule) is SUBSTITUTED WITH A SENTENCE OF ONE YEAR'S IMPRISONMENT.

10 There is some discrepancy between the sentence of 10 years imprisonment imposed in respect of count 6 and the sentence of six years imposed on appeal in respect of Martin Cyster. However, it appears from the evidence adduced at the trial, that the accused was the person who took the initiative as
15 regards the commission of the acts which formed the subject matter of those charges. Accordingly the disparity is justified. (See S V Marks, 1989(1) SA 222 (A) at 225B - 226A)

- 20 1] The appeal succeeds but only to the following extent:-
a] The conviction of the accused on count 2 and the sentence imposed in respect thereof are set aside.
b] The sentence imposed in respect of count 7 is set aside and substituted with a sentence of 1 year's imprisonment.

25 c] The one year imprisonment imposed in respect of

count 8 is ordered to run concurrently with the sentence of 1 year's imprisonment imposed in respect of count 7.

In summary the accused will have to serve a term of imprisonment of 26 years.

2] The sentences imposed today shall be deemed to have been imposed on 10 April 2000 ie. the date on which the accused had originally been sentenced.

3] The magistrate's finding that the accused is unfit to handle and possess a fire-arm remains unaffected.

4] It is recorded that the magistrate's request that the release of the accused on parole must not be considered before he has served 20 years of his sentence had not at the time been statutorily sanctioned as yet and is deleted.

5] Paragraph 1(b) above will be effective only if the sentence imposed in respect of count 7 was 10 (ten) years' imprisonment.

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X. V. Reenen

VAN REENEN, J

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I agree.

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GOLIATH, J