IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE COVERSHEET

Case No.: A630/09

In the matter between

HENDRIK GOEIEMAN Appellant

and

THE STATE Respondent

Coram	:	BINNS-WARD, J et SAMELA, AJ
Judgment by	:	SAMELA, AJ
For the State	:	Adv M ALLIE
Instructed by	:	National Prosecuting Authority Director of Public Prosecutions, Cape Town
For the Accused	:	Adv W O RAPHELS
Instructed by	:	Legal Aid Board Cape Town
Date of Appeal	:	16 APRIL 2010
Judgment delivered on	:	14 MAY 2010

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JUDGMENT DELIVERED ON 14 MAY 2010

SAMELA, AJ

[1] This matter came before us in terms of section 309(1)(a)(ii) of Act 51 of 1977, as amended, which provides that:

> "*Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that –*
>
> > *if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997),*
>
> *he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a);*"

This section is an automatic right to appeal against both the conviction and sentence, where a person has been sentenced to life imprisonment by a Regional Court.

[2] On the 16th July 2008, the Appellant was charged before the Oudtshoorn Regional Court on three counts, namely (i) housebreaking with intent to commit an offence unknown to the prosecutor, (ii) murder and (iii) robbery with aggravating circumstances. The allegations against the accused were that on the 15th October 2007 at or near High Street (Hoogstraat), Oudtshoorn, within the regional division of the Western Cape, the accused, an adult male person, wrongfully and intentionally broke into the house of the deceased, Stefanus Cloete (a 76 year old male person), killed him and robbed the deceased of his goods. The Appellant pleaded guilty on all three counts in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, as amended.

[3] The Appellant, in his section 112(2) statement, *inter* alia, said the following:

3.

"Ek bevestig voorts dat ek geadviseer is dat die bepalings van Artikel 51(1) gelees met Deel 1 van Bylae 2 van Wet 105 van 1997 op hierdie betrokke saak van toepassing mag wees. Ek erken voorts dat ek geadviseer is dat die gevolg hiervan is dat die Hof verplig sal wees om my die voorgeskrewe minimum vonnis van lewenslank op te lê ten aansien van aanklag 2, tensy daar wesenlike en dwingende omstandighede bestaan op grond waarvan die Hof kan afwyk van die verpligte minimum vonnis. Ek bevestig voorts dat ek geadviseer is dat die Hof nie ligtelik of op flou en deursigtige gronde sal afwyk van die minimum vonnis nie.

4.

Ek erken dat ek op 15 Oktober 2007 te of naby Hoogstraat 354, Oudtshoorn, binne die jurisdiksie gebied van bovermelde Agbare Hof was.

5.

Ek erken dat ek op die betrokke oggend by bovermelde adres gewerk het as tuinier vir Mnr Stephan Johannes Cloete, hierna verwys as 'die

oorledene'. Ek het op 'n weeklikse grondslag by die oorledene gewerk vir 'n periode van ongeveer 3 maande voor die voorval.

6.

Ek het die betrokke dag in opdrag van die oorledene vroeg opgehou om te werk. Die oorledene het my meegedeel dat hy op pad is om na George te gaan en hy het my loon aan my oorhandig.

7.

Ek is toe vanaf die werk reguit na 'n drinkplek in Oudtshoorn beken as "Kappies". Ek het vanaf ongeveer 12h00 begin drink en teen ongeveer 18h30, het ek reeds drie liter suurwyn bekend aan my as Bonnie Steyn gedrink.

8.

AD AANKLAG 1

Terwyl ek gedrink het, het die gedagte om te gaan inbreek by my werkgewer tydens sy afwesigheid stelselmatig in my gedagte posgevat en het die moed om die daad by die plan te voeg al meer geword hoe dronker ek geword het.

9.

Ek het na die bovermelde adres gestap en het om ongeveer 19h00 die woning bereik. Ek het geen voertuig of ligte opgemerk nie. As ek geweet het dat die oorledene daar was, sou ek nie voortgegaan het om in te breek nie. Ek het die "putty" van 'n venster uitgekrap en die ruit verwyder op son 'n wyse dat dit so min moontlik geraas maak sodat die bure nie agterdogtig kan raak nie. Ek het die opset gehad om huisbraak te pleeg met die opset om te steel.

10.

Ek het myself deur die klein venstertjie gewurm nadat ek die ruit verwyder het en toe ek anderkant afspring, het ek gehoor dat die hond begin blaf in die hoofslaapkamer. Die volgende oomblik het die deur van die hoofslaapkamer tot my skok oopgegaan en die oorledene het uitgekom.

Die lig van die hoofslaapkamer was af, maar daar was 'n skynsel van die TV wat aangeskakel was wat ek eers toe die deur oopgaan opgemerk het.

11.

AD AANKLAG 2

Die oorledene het gevra wat soek ek in sy huis. Voor ek kon antwoord, het hy gesê dat hy my sal vrek skiet. Ek was bang dat hy 'n vuurwapen kon bekom. Ek kon op daardie stadium ook nie vinnig terugklim deur die venstertjie omdat dit effens te hoog was en te klein was om vinnig deur te klim. Die oorledene het ook 'n slaanding, 'n kolf of iets omhoog bo sy kop gehad waarmee hy op my afgestorm het. Ek het sy arm met die slaanding wasgegryp en met die oorledene begin worstel. Die oorledene het my na die hoofslaapkamer getrek. Ek was bang dat daar 'n vuurwapen in die kamer was.

12.

In die slaapkamer het die oorledene se krag waarmee hy my getrek het minder geword, die slaanding het geval en ek het kans gekry om 'n gordel wat ek op die bed gesien het om sy nek te draai en hom te begin wurg. Ek was ook al baie moeg van die stoeiery.

13.

Die oorledene se bene het onder hom padgegee en ek het gedink dat hy net flou geword het. Toe hy val, het ek die oorledene gelos. Toe hy nie opstaan nie, het ek gedink hy is net flou en ek het besluit om die huis te deursoek vir geld. Ek het nie die gordel om sy nek losgemaak nie.

14.

Ek erken ek het geweet dat 'n mens se nek en keel sensitiewe dele van 'n mens se liggaam is en dat 'n mens kan doodgaan as jou keel toegedruk word en jy nie asem kan haal nie. Ek erken dat ek geweet het en voorsien het dat as ek die gordel nie weer losmaak om sy nek nie, die oorledene kan doodgaan as gevolg van my handeling (d.w.s. dit wat ek doen of dit wat ek versuim om te doen). Ten spyte van hierdie wete en die feit dat ek voorsien het dat hy mag doodgaan het ek voortgegaan om die oorledene net daar te los. Ek bevestig derhalwe dat ek die opset gehad het met die moontlikheidsbewussyn dat die oorledene mag sterf.

15.

AD AANKLAG 3

Ek het na die geweld op die oorledene die oorledene in die slaapkamer gelaat en het my aanvanklike plan voortgesit deur die volgende goedere, wat ek tydens deursoeking van die huis gevind het, aan myself toe te eien:

(a) Een beursie ter waarde van ongeveer R50.00;

(b) R110.00 kontant;

(c) Een Tempo polshorlosie ter waarde van ongeveer R400.00;

(d) Een Nokia selfoon ter waarde van ongeveer R400.00;

(e) Een koelsak ter waarde van ongeveer R60.00;

(f) Een paar Hi Tec skoene ter waarde van ongeveer R250.00;

(g) Een pakkie skaaptjops;

(h) Een pakkie koekies;

(i) Een hangertjie met onbekende waarde.

22.

Wat al drie die aanklagte betref, erken ek voorts dat ek, hoewel ek sterk onder die invloed van drank was, ek nog steeds geweet het wat ek doen en dat ek nog kan onthou wat ek gedoen het. Ek erken voorts dat ek steeds beheer gehad het oor my handelinge en dit wat ek doen en dat ek derhalwe steeds beskik het oor die nodige toerekeningsvatbaarheid."

[4] The Appellant was convicted on all three counts on the basis of the evidence set out in the statement quoted above. He was sentenced to life imprisonment (all three counts taken together for purposes of sentence). He now appeals to this court against the sentence only.

[5] The court is to determine whether the court *a quo* correctly convicted the Appellant on count three, and whether it also correctly sentenced the Appellant on all three counts.

[6] Section 51(2) read together with Part II of Schedule 2 of the Criminal Law Amendment Act (hereinafter called Minimum Sentences Act or Act), 105 of 1997 provides:

"*Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall –*

(a) *if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in the case of –*

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) *if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of –*

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) *if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of –*

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection."

Section 51(1) read together with Part 1 of Schedule 2 of the Criminal Law Amendment Act (the Minimum Act), provides:

"*(1) Notwithstanding any other law, but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life.*"

Part 1 of Schedule 2 provides:

"*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

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) rape; 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."

Housebreaking with intent to commit a crime, is defined as consisting in unlawful and intentional breaking into and entering a building or structure, with the intention of committing some crime in it. The important elements of the crime are:

(i) breaking,

(ii) entering,

(iii) a building or structure,

(iv) unlawfully and

(v) intentionally. (see **Snyman CR Criminal Law 5th Edition Lexis Nexis (2008)** at 549 and **S v Badenhorst** 1960(3) SA 563 (A) at 566B);

Murder is defined as the unlawful and intentional causing of the death of another human being. The elements of the crime are:

(i) causing the death,

(ii) of another person,

(iii) unlawfully, and

(iv) intentionally (see **Snyman** (above) at 447 and also **S v Ntuli** 1975(1) SA 429 (A) at 436-437).

It is important to realise that due to the passing of the Minimum Sentences Act, the crime of murder falls into either of the two mentioned categories stated in paragraph 6 above.

Theft is defined as when a person unlawfully and intentionally appropriates movable, corporeal property which

(a) belongs to, and is in the possession of another;

(b) belongs to another, but is in the perpetrator's own possession; or

(c) belongs to the perpetrator, but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession

Provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.

The elements of the crime are:

(a) an act of appropriation,

(b) in respect of a certain type of property,

(c) which takes place unlawfully, and

(d) intentionally (including an intention to appropriate). (see **Snyman** (above) at 484 and **S v Visagie** 1991(1) SA 177 (A) at 181 H-I), and

robbery is defined as consisting in theft of property by unlawfully and intentionally using

(a) violence to take the property from somebody else; or

(b) threats of violence to induce the possessor of the property to submit to the taking of the property and is customary described as "theft by violence".

The elements of the crime are:

(a) the theft of property,

(b) through the use of either violence or threats of violence,

(c) a casual link between the violence and the taking of the property,

(d) unlawfulness, and

(e) intention (see **Snyman** (above) at 517 and **S v Benjamin** 1980(1) SA 950 (A) at 958H). Section 51 of the Criminal Law Amendment Act 105 of

1997 also laid down minimum sentences for robbery as well, as stated in paragraph 6 above.

Section 276B of the Criminal Procedure Act 51 of 1977, as amended, provides:

> "*1.(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may, as part of the sentence, fix a period during which the person shall not be placed on parole.*
>
> *(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.*
>
> *2. If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences shall run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole period in respect of the effective period of imprisonment.*"

Inserted by section 22 of Act 87 of 1997.

[7] Mr Botha, who appeared on behalf of the Appellant, in the court *a quo* submitted in that court that:

> "*Edelagbare, wat betref die moordklagte en die roofklagte, wil ek die hof daarop wys dat daar nie voorafbeplanning was nie. Huisbraak, ja, dit was 'n voorafbeplande huisbraak. Edelagbare, ek versoek dat die agbare hof ook in ag sal neem dat die beskuldigde onder die invloed van drank was.*"

The magistrate in his judgment had this to say:

> "*Die tweede klagtes is een van moord en die derde klagtes is roof met verswarende omstandighede, soos bedoel in Artikel 1 van Wet 51/1977, gelees met de bepalings van Artikel 51(2), 52(2), 52(A), 52(B) van die Strafproseswysigingswet 105/1997.*"

In sentencing the Appellant the magistrate said the following:

> "*Ek is volledig deur beide die staat en die verdediging toegespreek ten opsigte van vonnis. Ek, die staat en die verdediging is* ad idem *dat hierdie 'n geval is waar die beskuldigde, Mnr Goeieman, die risiko loop van 'n vonnis*

van lewenslange gevangenisstraf. En dit is die geval vanaf dag een, daar is in die pleitverduideliking, paragraaf 3 gesê –

> *'Ek bevestig dat ek geadviseer is dat die bepalings van Artikel 51(1) gelees met Deel 1 van Bylae 2 van Wet 105/1997 op hierdie saak van toepassing mag wees. En ek erken voorts dat ek geadviseer is dat die gevolg hiervan is dat die hof verplig sal wees om my die voorgeskrewe minimum vonnis van lewenslank op te lê ten aansien van aanklag 2, tensy daar wesenlike en dwingende omstandighede bestaan op grond waarvan die hof kan afwyk van die verpligte minimum vonnis.'"*

[8] In my view the court *a quo* erred in convicting the Appellant of robbery with aggravating circumstances (count 3). On the basis of the facts accepted by the State, the Appellant did not assault the deceased with the object of forcing him to submit to the theft of his property. The fatal assault occurred in the context of an unexpected confrontation with the deceased. It was after the deceased had been killed in the course of that confrontation, that the Appellant proceeded to take his time searching for and selecting goods to steal. In the circumstances, in the exercise of this court's inherent jurisdiction to review the decisions of the court below, the conviction of robbery with aggravating circumstances should be set aside and replaced with one of theft.

[9] As a result of the alteration of the conviction on court three to one of theft, the minimum sentence of life imprisonment prescribed in terms of paragraph c(ii) of Part 1 of Schedule 2 to the Criminal Law Amendment Act did not apply. It is also apparent on the facts that the murder was not premeditated or planned and the prescribed minimum sentence on court two is 15 years' imprisonment. In the circumstances the maximum sentence that could be imposed by the magistrate was 20 years. See section 51(2) read together with Part II of Schedule 2.

[10] Mr Raphels, who appeared on behalf of the Appellant, submitted that the court *a quo* erred in finding that the Appellant was a habitual criminal in theft and housebreaking. He submitted that the court *a quo* further misdirected itself by coming into conclusion that as a result of housebreaking, the Appellant should

have foreseen the possibility of attempted murder and murder happening. Though the Appellant had explained to the court that at the time of the incident, he was under the influence of alcohol. He pointed out that the court *a quo* over-emphasised the importance of the community. Mr Raphels further submitted that the court *a quo* misdirected itself by failing to take into account the Appellant's personal circumstances, amongst other things, that the Appellant acted in self defence as the deceased had an iron rod in his hands. Though the Appellant was not a first offender, however, it was argued that it was the first time that the Appellant was convicted of murder which he had not planned. Mr Raphels submitted that the Appellant came from a poor background and that the Appellant did not waste the court's time by pleading guilty. He pointed out that the Appellant had requested pardon from the deceased's family, which was a sign of remorse. Mr Raphels further submitted that there were substantial and compelling circumstances in this matter and that the court should depart from imposing the prescribed minimum sentences with regards to count 2 (murder) and counts 3 (robbery with aggravating circumstances). He pointed out that the Appellant was incorrectly sentenced to life imprisonment regarding count 2, namely, murder.

[11] Ms Allie, on behalf of the Respondent, submitted that the Appellant was convicted and sentenced correctly. However, she conceded that the Appellant had been incorrectly sentenced with regards to count 2 (murder) in that the magistrate incorrectly applied the wrong section. She further submitted that the Appellant was correctly sentenced for counts 1 and 3.

[12] The main purpose for enacting the Minimum Sentence Act was clearly stated in **S v Malgas** 2001(1) SACR 469 (SCA) especially at page 476e-g where the court had this to say:

> "*That situation was and remains notorious; an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. ... The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and*

that it was no longer to be 'business as usual' when sentencing for the commission of the specified crimes."

[13] It is trite that prescribed sentence should be imposed where there is absence of genuine convincing reasons what Marais JA called "weighty justification". The learned judge said the following at page 482 para e [in the above case]:

"*If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.*"

This means, therefore, that if the prescribed sentence would result in an injustice being perpetrated against the accused, the disproportion between the prescribed sentence and just sentence would automatically qualify as substantial and compelling circumstances.

[14] The deceased in this matter was a 76 year old man. He was an elderly vulnerable member of the community. The elderly defenceless person was cowardly, brutally and mercilessly attacked by a young man of 28 years old who was the deceased's employee. He was strangled to death with his belt. It is evident from the manner in which the Appellant knotted the belt securely around the deceased's neck that he must have totally overpowered him. The unequal struggle that took place before the deceased's death is also borne out by the fact that the deceased suffered extensive bruising and other injuries whereas there is nothing in the evidence to suggest that the Appellant sustained any bodily injuries whatsoever. After killing the deceased the Appellant proceeded to ransack the deceased's room and some goods and money (as stated in paragraph 3 on page 5 above) taken away. The increased in high levels of crime especially crimes of extreme violence and brutality to elderly people, women and children are in my view a serious and worrying factor in our country. This matter is one of many cases which occur and reported daily in our society.

[15] The Appellant's personal circumstances, amongst other things, were that: He was 28 years old, married with one child. The Appellant's highest academic standard is standard 5. He was employed (temporary) by the deceased as a gardener and worked for half days earning R20.00. The Appellant was not a first offender, having six previous convictions on housebreaking and two for theft.

[16] The imposition of an appropriate sentence falls entirely within the discretion of the trial court. Unless the trial court has imposed a sentence which induces a sense of shock or misdirected itself, which misdirection should appear *ex facie* the record, a court of appeal would not lightly interfere with the sentence imposed by the trial court, see **S v Kibido** 1998(3) ALLSA 72 (A) and **S v Ntsele** 1998(2) SACR 178 (SCA). In the present matter there is a misdirection as discussed above and this court is at liberty to impose an appropriate sentence.

[17] In my view, this is a matter in which the Appellant would have been in real danger of attracting a life imprisonment sentence had he been prosecuted in the High Court. The course of events illustrates the importance of any decision by the prosecuting authority to decide to prosecute the most serious offences in the regional court rather than the High Court. In this case it was no doubt decided that the regional court would be appropriate because it was considered that it has jurisdiction to impose a sentence of life imprisonment. The decision was ill considered. Regarding count three, it should have been apparent to the prosecuting authority that the agreed facts which it was prepared to accept did not sustain a conviction of robbery with aggravated circumstances, and that the regional court's sentence jurisdiction would be limited to 20 years. The state's decision to proceed in the regional court on the basis of the facts it was prepared to accept was unfortunate. In considering a substitute sentence, this court is not able to impose a sentence beyond the maximum which the trial court was empowered to impose.

[18] In the circumstances, I am of the view that the magistrate was correct in taking the three counts as one for the purpose of sentence. The offences, particularly the brutal murder, were extremely serious. I am of the view that the Appellant is a danger to society; and in the current matter the brutality of his

actions was compounded by the fact that his breaking into the deceased's house included a breach of trust, using information acquired by him in the course of his employment by the deceased. I would have imposed a sentence of more than 20 years' imprisonment had it been within my power to do so. In the circumstances the sentence should be altered to the maximum that the magistrate could appropriately have imposed, namely 20 years. However, I consider that the sentence is objectively inadequate to address the egregiousness of the murder, although the maximum that could in the circumstances be imposed, and in the context of the Appellant's criminal record suggesting that he is not amenable to reform I consider that it would be appropriate to make an order in terms of section 276B of the Criminal Procedure Act, as amended, directing that the Appellant may not be placed on parole until he has served at least 13 years and 4 months of the term of imprisonment imposed. (See **S v Pakane & Others** 2008(1) SACR 518 (SCA)).

[19] In the result, I accordingly propose the following order:

The appeal against conviction and sentence in respect of count 3 is upheld. The sentence of life imprisonment imposed by the magistrate is set aside. It is replaced with the following:

1. The conviction on count three (3) (robbery with aggravating circumstances) is set aside and replaced with one of theft;

2. Count one (1), two (2) and three (3) be taken together for the purposes of sentence;
3. Sentence of twenty (20) years' imprisonment on counts one (1), two (2) and three (3);
4. The substituted sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended. to 28 August 2008;
5. It is directed in terms of section 276B of the Criminal Procedure Act 51 of 1977, as amended, that the Appellant

may not be placed on parole until he has served at least 13 years and 4 months of his sentence in prison.

SAMELA, AJ

I agree and it is so ordered.

BINNS-WARD, J