IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

A293/09

Case Number: CC101/2007

In the matter between:

Edwin Franks	**First Appellant**
Cheslyn Vernon Ferhelst	**Second Appellant**
and	
The State	**Respondent**

JUDGMENT DATED 25 MARCH 2011

Baartman J

[1] On 11 November 2008, Matojane, AJ, as he then was, convicted the appellants on 1 count of murder (**count 1**) and 1 count of housebreaking with intent to rob and robbery (**count 2**). The provisions of the Criminal Law Amendment Act 105 of 1997 (**the Act**) were applicable to both counts. On 13 November 2008, the trial court found that there were no substantial and compelling circumstances present in the matter and imposed the prescribed minimum sentences, being life imprisonment in respect of count 1 and 15

years imprisonment in respect of count 2. This is an appeal against the sentences, with the leave of the trial court.

[2] It appeared from the record that the first appellant misunderstood the applicable minimum sentence in respect of count 1. That misunderstanding has a significant impact on the outcome of this appeal; therefore, I deal with it up front.

FIRST APPELLANT'S MISUNDERSTANDING

[3] It appears from the record that the State's counsel had at the start of the proceedings indicated to the trial court that the provisions of the Act were applicable to both counts. The appellants were both legally represented at the trial. The trial court asked the first appellant whether he understood the implications of the applicability of the Act. He responded as follows:

"Soos die minimum vonnis vir moord is 15 jaar. Daai verstaan ek, en so aan."

[4] Instead of clarifying the misunderstanding, the trial judge addressed Mr van Zyl, the first appellant's legal representative, who responded by saying:

"Ek het vir hom verduidelik."

[5] The trial court, apparently satisfied with Van Zyl's response, proceeded with the trial. It is apparent from Van Zyl's address on sentence that he had understood that the prescribed minimum sentence in respect of count 1 was life imprisonment. However, it appears that his client was under a different impression.

[6] The first appellant's understanding of the applicable minimum sentence appears further from his response to questions put to him by Mr Marais, an assessor in the trial court:

"Mr Marias:...u het nou geweet dit gaan oor moord, en u het geweet daar gaan baie jare ter sprake wees wat u moontlik kan opgelê word...waaroor wil u oop kaarte speel?

First appellant: Oor die huisbraak en die phone en so aan, meneer.

Mr Marias:...En het u gedink u gaan nou vir huisbraak en die steel van die selfoon baie jare kry? Of waarvoor het u gedink, kan u moontlik ...

First appellant:...vir alles, meneer.

Mr Marias: ....u sê u wil oop kaarte speel, u het geweet u gaan baie jare kry, u het geweet moord is hier ter sprake...

First appellant:...Ek vra om genade...Ek speel dan oop kaarte van die begin af. ...Sy (referring to the deceased) het vir my ge-attack....Sy het my eintlik aangerand, en ons het haar net vasgebind om haar stil te kry..."

[7] It is clear from the first appellant's response to the trial judge and the assessor that he understood the applicable minimum sentence in respect of count 1 to be 15 years or "baie jare". I am of the view that he did not appreciate that, in respect of count 1, he was "*faced with life imprisonment – the most serious sentence that can be imposed....*" (See **S v Makato** 2006 (2) SACR 582 (SCA) at p587 para 7) That failure "constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed". (**S v Ndlovo 2003** (1) SACR 331 (SCA) at p337 para 14) In addition, in my view, in the circumstances of this matter, it was highly unfair to have confronted the first appellant with the minimum sentence in respect of count 1 at that late stage in the trial. (See **S v Legoa** 2003 (1) SACR 13 (SCA))

[8] It follows that the trial court erred in imposing the prescribed minimum sentence in respect of count 1. Consequently, this court is

entitled to sentence the first appellant afresh on count 1. I am of the view that that is also the position in respect of the second appellant. It appears from the record that after the first appellant indicated that he understood the minimum sentence in respect of count 1 to be 15 years, nothing was done to rectify that misunderstanding. Instead, the presiding judge enquired from the second appellant whether he understood the applicable sentence regime to which the second appellant merely indicated that he did. There is no reason to assume that his understanding was any different to that expressed by the first appellant. It follows that this court is also entitled to sentence the second appellant afresh in respect of count 1.

FACTORS CONSIDERED IN RESPECT OF A JUST SENTENCE

[9] In arriving at a just sentence, I have considered the factors traditionally considered relevant to sentence, such as the interest of the community, the seriousness of the offence and the personal circumstances of the appellants. (See **S v Zinn** 1969 (2) SA 537 (A) en **S v Msimanga en 'n ander** 2005 (1) SACR 577 (T))

The circumstances of the murder

[10] The circumstances of the murder appear from the record to have been the following:

(a) The deceased, Constance Van der Merwe, was a 39-year-old married mother of a minor son. On the night of the murder, the deceased and her son were at home while her husband was away on business. When the appellants entered the deceased's residence, she and her son were asleep in different bedrooms in the house. The deceased was naked in bed when she was awoken by the intruders.

(b) It appears from the *post mortem* report, exhibit "C" in the court *a quo*, that the deceased's circumstances presented as follows after the intrusion:

"1. The hands were tied behind the back with a red night gown, as well as with an electric cord. The legs were in extension and bound at the ankles with a red night gown belt. A blood soaked white cloth was noted tied around the neck with a knot on the posterior aspect of the neck. Peri-orbital bruising was noted on the left eye.

2. Petechial haemorrhages were present in the anterior chest wall. Superiorly, on the inner aspect of the upper arm, on the left lateral aspect of the abdomen, on the left pelvic area, as well as over the left superiorly.

3. Abrasions were noted on the anterior aspect of the right knee with bruising on the lateral aspect, as well as on the anterior aspect of the right lower leg.

4. Bruises and abrasions were identified on the left knee, both on the anterior and lateral aspects.

5. Bruising was present on the medical aspect of the left foot, as well as on the dorsal surface of the right foot.

6. Abrasions were noted on the left side of the submandibular region.

7. Abrasions were present on the posterior aspect of the left and right elbows.

8. A bruise was identified on the lower back.

9. On the left shoulder, supero-lateral aspect, an abrasion was present."

(c) In terms of the pathology findings expressed in "exhibit "C", the cause of death was "consistent with soft tissue injury of the neck due to ligature strangulation".

(d) The State relied on first appellant's statement he made to the police in which he said that he and the second appellant had been on a mission to steal on the night of the murder. He found a motor vehicle parked in front of the deceased's house, which vehicle was fitted with an alarm that caused him to abandon his attempt to steal anything from the vehicle. Instead:

"Ek sien toe die een huis se deur ...met 'n safety gate ...halfpad oop.

Ek is toe verder die huis in en toe ek by 'n slaapkamer ingaan sien ek daar slaap 'n kind. ...so agt jaar oud. Ek het toe hom toegegooi met die duvet en trek toe die deur toe.

Ek is toe na 'n ander slaapkamer en toe ek die lig aansit sien ek 'n volwasse vrou op die bed lê. Die vrou het geen klere aangehad nie en was wakker.

Ek sien 'n selfoon voor die bed op die grond lê en gaan om dit op te tel. Op daardie stadium spring die vrou op en attack my en begin help te skree. Tokkie(second appellant) en ek het toe altwee begin stoei met die dame en(om) haar te kry. Ek het haar arms probeer vashou terwyl Tokkie haar mond en nek gebruik het...sy nie kan skree nie. Ons het prober om haar in 'n duvet toedraai...Ons het toe weggehardloop. Ek het met die selfoon gehardloop van die dame. Ek het toe die selfoon verkoop aan Kasief...

My bedoeling was glad nie om die vrou dood te maak nie. Toe ek weg by die huis gehardloop het was ek oortuig dat die vrou nog lewe. Ek wou net iets steel om te verkoop om kos vir my familie te koop ..."

The trial court's description of the murder

[11] The trial court said the following about the circumstances of the murder:

> *"1. The deceased and her 13 year old son, were particularly vulnerable as they were alone in the house. Her husband had gone on business to Johannesburg the previous day. The pain that the accused inflicted on her in the last moment of her life is clear from the photos that were presented in evidence, she was found lying on her stomach, her hands were bound at the back with an electric cord, her feet were tied with a night gown belt and a piece of cloth was rolled around her face and neck. The cloth was covered in blood and was used to strangulate her to death. According to medical evidence extreme force was used to strangle the deceased."*

The appellants' personal circumstances

The first appellant

[12] The first appellant was 33 years old, unmarried and had no children when he was sentenced. At the time, he lived with his mother and had also abused drugs. He left school in standard 7; thereafter, he was employed as an assistant chef.

[13] Prior to being sentenced, the first appellant had already been in custody for 2 years.

The second appellant

[14] When he was sentenced, the second appellant was a 28-year-old, unmarried father of 2 minor children. His children were aged 9 and 5 and lived with their respective mothers.

[15] After leaving school in standard 6, the second appellant held various temporary positions. He had a previous conviction for robbery. The second appellant denied that he murdered the deceased.

CONCLUSION

[16] In my view, direct, long-term imprisonment is the only just sentence in respect of count 1. I have also considered the cumulative effect of any sentence imposed in respect of count 1 with the sentence already imposed in respect of count 2. The latter sentence does not warrant any interference on appeal as it was just in the circumstances of this matter. (See ***S v Vilakazi*** 2009(1) SASV 55 (SCA)).

The proposed sentence

[17] I, for the reasons stated above, propose that the sentence imposed by the trial court in respect of count 1 be set aside and substituted and that the sentence imposed in respect of count 2 be confirmed as below:

(a) Count 1: Accused 1 and 2 are each sentenced to 20 years direct imprisonment.

(b) Count 2: The sentence of 15 years direct imprisonment on each accused be confirmed but that 10 years shall run concurrently with the sentence imposed on count 1.

(i) The appellants are therefore each sentenced to an effective period of imprisonment of 25 years.

(c) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 13 November 2008.

Baartman J

I agree, it is so ordered.

Hlophe JP

I agree.

Cleaver J