

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-11-14

UNREPORTABLE

Case Number: A271/2007

In the matter between:

CHABALIBUNGILE JOHN MKENTANI

Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

[1] On 5 May 2000 the appellant (the first accused) and Mpho Raymond Bonokwane (the second accused) were convicted in the Western Circuit Division (per Van Oosten J) of housebreaking with intent to rob and robbery with aggravating circumstances, murder, unlawful possession of a firearm and unlawful possession of ammunition. In addition the appellant was convicted of attempted rape. On the same day the Circuit Court sentenced the appellant and his co-accused as follows:

The appellant:

Count 1 (housebreaking with intent to rob and robbery with aggravating circumstances) – 20 years imprisonment;

Count 2 (attempted rape) – 7 years imprisonment;

Count 3 (murder) - 25 years imprisonment;

Counts 4 and 5 (unlawful possession of the firearm and ammunition) – 3 years imprisonment. (The two counts were taken together for the purposes of sentence.)

The court ordered that 5 years of each of the sentences imposed in respect of counts 1 (housebreaking) and 3 (murder) be served concurrently so that the appellant must serve an effective sentence of 50 years imprisonment.

Second Accused

Count 1 (housebreaking with intent to rob and robbery with aggravating circumstances) – 20 years imprisonment;

Count 2 (murder) - 25 years imprisonment;

Counts 4 and 5 (unlawful possession of the firearm and ammunition) – 3 years imprisonment. (The two counts were taken together for the purposes of sentence.)

The court ordered that 5 years of each of the sentences imposed in respect of counts 1 (housebreaking) and 3 (murder) be served concurrently so that the second accused must serve an effective sentence of 43 years imprisonment.

[2] With the leave of the Supreme Court of Appeal the appellant appeals against sentence only. The second accused has not sought leave to appeal.

[3] The appellant and his co-accused committed the crimes in the early evening of 16 December 1998 at the home of L L F (the deceased) and his wife E F in Klerksdorp. At about 17h30 on 16 December the two men gained access to the premises through an unlocked garden gate. Once inside they encountered the Fs' maidservant, A S, washing a bucket in the yard. They pretended to be employment registration officers and told her that she must be registered as an employee. They went to her room and she followed. In the room they pulled silk stockings over their heads, grabbed S, held a knife to her throat and demanded money. They also demanded that she tell them where her employers' money was. One of the two produced a

firearm and they tied her up. They stuffed her panties into her mouth and blindfolded her. They then took the house key which they found in her room and, taking her with them, entered the Fs' house. There they demanded that she show them the safe and after she showed them where it was one of the men used an axe to break into the cabinet containing the safe.

[4] In the meantime Mrs F had arrived home from work. As she entered the kitchen one of the robbers overpowered her, tied her hands together and blindfolded her. He also stuffed a rag into her mouth. They took her credit card and cell-phone and forced her to disclose the pin numbers. They did this by throttling her and holding a knife to her throat. During this assault the appellant started to undress her. He told her he was going to rape her. After taking off her panties he stopped when the second accused said he should not rape an old woman. The appellant and the second accused also demanded money.

[5] While this assault was in progress the deceased arrived. When he entered the house he encountered the robbers who demanded the key for the safe. He told them it was in the grandfather clock and they asked him again for the key. A shot was fired which struck the deceased in the neck killing him. The bullet severed the carotid artery and the deceased bled to death. There was no reason for this shot to be fired. The deceased was not resisting and did not attack them. The robbers left the deceased and Mrs F and went in search of valuables.

Mrs F managed to make her way to the kitchen and was in the passage where she encountered the robbers again. They dragged her back to the kitchen by the hair and left her there. They took her Mazda motor vehicle and the stolen items and left. After a while Mrs F managed to free herself and she found A S trussed up in the bedroom. Some time later the vehicle was found, stripped, in the possession of a police captain in Vereniging.

[6] This is a summary of the essential facts which supported the convictions. The details simply emphasize the seriousness of the incident. There is very little to mitigate the seriousness other than the relative youthfulness of the two perpetrators (the appellant was 20 years old and the second accused was 19 years old and still at school) and the fact that the second accused managed to persuade the appellant not to rape Mrs F. The robbery was carefully planned and the two men went to the house armed with a firearm and a knife which they did not hesitate to use. They shot and killed the deceased and used the knife to overcome resistance by A S and Mrs F.

[7] On 16 December 1998 the Criminal Law Amendment Act No 105 of 1997 had already come into operation. This meant that the court was obliged to impose the prescribed minimum sentences unless there were substantial and compelling circumstances which justified the imposition of lesser sentences. The minimum sentence for murder committed in the course of a robbery was life imprisonment and the

minimum sentence for robbery was 15 years imprisonment. There is no indication that the court below applied the provisions of Act 105 of 1997. In the reasons for sentence there is no reference to the minimum sentences prescribed by the Act and the court did not consider whether substantial and compelling circumstances justified the imposition of a lesser sentence than the prescribed sentence. The court and the state's representative seem to have completely overlooked the provisions of the Act and the decided cases relevant thereto. Appellant's counsel is therefore correct in submitting that to sentence without taking account of the important sentencing provisions contained in the Act was a misdirection.

- [8] The learned judge obviously considered that the murder on its own did not justify the imposition of a life sentence, a competent but not obligatory sentence in terms of section 276(1)(b) of the Criminal Procedure Act No 51 of 1977, and that the housebreaking and robbery warranted a very heavy sentence. In my view he cannot be faulted in this approach. However the learned judge did not take into account that Act 105 of 1997 prescribes life imprisonment for murder committed while the accused is committing robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977. In the absence of substantial and compelling circumstances the court below was obliged to impose life imprisonment for the murder. The court below obviously intended to remove the appellant permanently from society.

- [9] The parties agree that the provisions of section 51 of Act 105 of 1997 were applicable and that the murder committed while the appellant was committing the robbery with aggravating circumstances required that a life sentence be imposed. In their heads of argument they disagreed about what this court should do.
- [10] Without dealing with the question of substantial and compelling circumstances the appellant's counsel contended that the effective sentence of 50 years imprisonment was excessive – see **S v Hlapezula 1965 (4) SA 439 (A)**; **S v Ivanisevic 1967 (4) SA 572 (A)** at 575; **S v Whitehead 1970 (4) SA 424 (A)** at 436; **S v Salzwedel 1999 (2) SACR 586 (SCA)** paras 10 and 11. The state's representative contended that the court below was obliged to impose a sentence of life imprisonment on count 3 (murder) and that this court should now impose the correct sentence. He pointed out that the court below obviously wished to remove the appellant from society permanently and submitted that it cannot be contended that there were substantial and compelling circumstances present.
- [11] At the hearing the appellant's counsel agreed that the court below was obliged to impose a sentence of life imprisonment for the murder and that such a sentence should now be imposed. The appellant's counsel said that the only factor which could possibly justify a finding that there were substantial and compelling circumstances present was the

appellant's age at the time (he was 20) but he did not submit that this court should find such circumstances. In my view the relative youthfulness of the appellant does not constitute substantial and compelling circumstances for the purposes of Act 105 of 1997.

- [12] The approach of the parties is supported by authority. In ***S v Siluale en 'n Ander 1999 (2) SACR 102 (SCA)*** at 106i-j the court said that life imprisonment is and was intended to be the heaviest sentence which could be imposed and that if the circumstances of the case required that the accused be removed permanently from society, life imprisonment is the only appropriate sentence. There are procedures which make parole possible in appropriate circumstances; for example where, contrary to all expectations, the accused reforms. A sentence of 50 years imprisonment is therefore not an appropriate sentence if the court considers that the circumstances of the crime warrant the ultimate penalty. The court also found (at 107h-j) that the provisions of section 322(2) and (6) of Act 51 of 1977 can be utilized by an appeal court to interfere with the sentence imposed and impose the sentence which the trial court should have imposed and that the appeal court can take counts together for the purpose of sentence. That approach is appropriate in the present case. All the counts will be taken together for the purposes of sentence and one sentence of life imprisonment will be imposed.

- [13] The same reasoning seems to apply to the sentences imposed on the second accused who has not sought to appeal. The court below imposed the wrong sentence on the second accused for the murder and this should be rectified. This can be done only by means of an appeal. The registrar of this court, the Legal Aid Board and the Director of Public Prosecutions will be requested and directed to furnish the second accused with a copy of this judgment and to advise him as to how he can appeal if he is so advised.

ORDER

- [13] 1. The appeal is upheld to the extent that all the sentences imposed on the appellant are set aside and substituted with the following sentence:
- Life imprisonment (All the counts have been taken together for the purpose of sentence.)
2. The registrar of this court, the Legal Aid Board, Pretoria, and the Director of Public Prosecutions are requested and directed to furnish the second accused, Mpho Raymond Barokwane, with a copy of this judgment and to advise him how he can appeal against the sentences imposed on him, if he is so advised.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

F.G. PRELLER
JUDGE OF THE HIGH COURT

I agree

S.W. SAPIRE
ACTING JUDGE OF THE HIGH COURT

CASE NO: A271/2007

HEARD ON: 12 November 2008

FOR THE APPELLANT: ADV. J. HOLLAND-MÜTER

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. J.J. KOTZÉ

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 14 November 2008