IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

10/8/2016

Reportable: No

Of interest to other judges: No

Revised.

CASE No. A667/12

NGHC CASE No.CC202/07

In the matter between:

CASBERT HLABANA SAKO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PRELLER J:

This appeal against sentence only comes before us with the leave of the court *a quo.* The appellant was convicted and sentenced by Raulinga J as follows:

Count 1: Robbery with aggravating circumstances - 15 years' imprisonment;

Count2: Murder - Imprisonment for life;

Count 3: Assault with intent to do grievous bodily harm - 5 years' imprisonment;

Count 4: Possession of a firearm without a valid license - 5 years' imprisonment;

Count 5: Possession of ammunition without a valid license - 3 years' imprisonment.

The sentences on counts 1,3, 4 and 5 were ordered to be served concurrently with the sentence of life imprisonment that was imposed on count 2.

The trial arose from an incident on 30 January 2003 during which one W.J.T., who was in his 70's, was murdered and robbed of *inter alia* a motor vehicle and a revolver by the appellant and two accomplices. During the incident his domestic assistant, S.G.M. was raped and stabbed with a knife between the shoulder blades. The stabbing was the subject matter of count 3 and the appellant was convicted on the basis of the common purpose that was found to have existed among the three perpetrators. The same applied to counts 4 and 5. Because the complainant could not identify the one of the three who had raped her and the court could not find that there had been a common purpose to commit the rape, the appellant was acquitted on count 6.

After argument in the case before us, Mr. Moeng for the appellant informed us that, arising from his discussions with the appellant, he had some reservations about the latter's mental state. This court had some similar concerns arising from his behavior at the trial, particularly before Webster J, to which reference will be made below. It was accordingly agreed with counsel that the appeal would be postponed *sine die* and that the appellant shall be seen by a district surgeon, a psychologist or a psychiatrist to report to this court whether there are grounds for referring the appellant for observation in terms of section 78 or 79 of the Criminal Procedure Act. If there were such grounds, we would set the convictions aside and refer the matter back to the court *a qua* to consider whether the appellant should be so referred for observation. If not, we shall simply deliver our judgment with hearing further argument. We subsequently received a report from Dr. N. J. Luphuwana, a practicing psychiatrist from Thohoyandou, according to which there are no grounds for referring the appellant for such observation. In terms of our agreement with counsel, this judgment is given without further ado.

The appellant was not legally represented at his trial, but that was his own choice. He initially appeared before Webster J and it is clear from the record of the proceedings before him that the appellant went out of his way to be obstructive. Because he was connected to the incident by a fingerprint that had been found on the scene, it was necessary that his fingerprints be taken again before the hearing. Although he had elected before the Magistrate to make use of legal aid counsel, who had been duly appointed an supplied with copies of the documents, he informed Webster J that he would find his own lawyer, who would be paid by his parents. However, his mother who was present, informed the court that she was unemployed and had no money. The case had to stand down for his fingerprints to be taken, if needs be with force, and for counsel who was present in court to be properly instructed.

Although counsel had apparently been properly instructed during the adjournment and he seems to have supplied the necessary fingerprints, he again insisted on having his own lawyer. In order to avoid any possible irregularity, the court allowed the case to stand down to the next day to afford the appellant a further opportunity to instruct a lawyer of his own. The next day he informed the court that his lawyer is Jesus Christ, who will tell the court the truth. Eventually the case had to be postponed for a further eight months, and resumed before Raulinga J.

At the resumption of the trial the appellant first changed his previous plea to one of guilty (except in respect of count 6, the one of rape) and admitted having committed the crimes. In the course of his questioning in terms of section 112 (1)(b) of Act 51/1977 he informed the court that he did not know that what he was doing was wrong and eventually the court simply amended his plea to one of not guilty to all the counts. That was the eminently sensible thing to do as the court was getting nowhere with the plea proceedings after the appellant had rambled on for 16 pages of the record.

The crime committed by the appellant and his accomplices was a heinous one. A defenceless man in his seventies was cruelly beaten around the head and body with two monkey wrenches and then shot with his own firearm. The shooting after the brutal attack was purely gratuitous, as he was in no position to offer any resistance.

The appellant was not a first offender. On 9 December 2002, which was two weeks before his 21" birthday, he was convicted of assault with intent to do grievous bodily harm and sentenced to pay a fine of R 1000 or 4 months' imprisonment, which was wholly suspended for three years. On 26 May 2004 he was convicted of housebreaking, robbery and attempted murder for which he was sentenced to an effective term of 24 years' imprisonment. Unfortunately the date of the commission of these offences does not appear from the form SAP 69 that was handed in, but the police reference in respect of the offences is 144/11/2002, which indicates that the offences were reported and probably committed in November 2002, which was before his first conviction and also before the current offences. Although the latter three offences were probably committed before the current offences, the conviction was only after the commission of the current offences and should strictly not be treated as previous convictions. He was 21 years and 5 weeks old when he committed the current offences. They were committed a mere two months after the crimes which later earned him an effective sentence of 24 years' imprisonment.

The appellant's submissions in mitigation was mainly that he had been born again, that he was preaching to other prisoners and that he was studying for a pastoral diploma in prison and wished to be released so that he could follow a career in the ministry. He also regretted his deeds and did not waste the court's time by denying his guilt. The court elicited from him that he was 28 years old and it appears from the record that he had been in custody awaiting trial for more than 30 months before his conviction, although he had been a convicted prisoner for the better part of that period. Although his alleged conversion to religion will, if true, probably keep him from crime in the future, some doubt is cast on the sincerity of his remorse by the fact that he was not prepared to point out his co-perpetrators to the police.

In my view it is clear that the appellant had embarked on a life of not merely crime, but of serious crime and was a real threat to society. That is a fact that cannot be ignored, even if he were to be treated as a first offender for the purpose of sentence. Looking at the events leading to the present convictions without taking the appellant's history into account, I am driven to the conclusion that the murder and also the robbery were both of a very serious kind. The murder and the robbery were both committed with a purpose common to the three perpetrators and the murder was committed in the course of a

robbery with aggravating circumstances. The grounds advanced by the appellant mainly came after the event and cannot amount to substantial and compelling circumstances justifying a departure from the prescribed minimum sentences. In imposing sentence the court *a qua* gave a properly motivated judgment and I can find no misdirection in it. There is no reason to interfere with the sentence imposed.

I propose the following order:

The appeal is dismissed

_____
F G PRELLER
JUDGE OF THE HIGH COURT

I agree.

_____
E BERTELSMANN
JUDGE OF THE HIGH COURT

I agree

_____
S P MOTHLE
JUDGE OF THE HIGH COURT

IT IS SO ORDERED.