

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

12/3/15

CASE NO: A507/2014

DELETE	WHICHEVER	IS	NOT
	APPLICABLE		
(1)	REPORTABLE: YES/NO		
(2)	OF INTEREST TO OTHER JUDGES: YES/NO		
(3)	REVISED		
DATE: 26 FEB 2015			
SIGNATURE:			

In the matter between:

ANDRÉ JOHAN VAN WYK

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSEN J

- [1] On 3 October 2007, the appellant (cited as the second accused in the court *a quo*) and a certain F J Cilliers (accused number one in the court *a*

quo) were arraigned in the Vereeniging circuit court on the following counts: —

- Count 1: Robbery with aggravating circumstances;
- Count 2: Contravention of section 3 of Act 60 of 2000
(possession of a unlicensed firearm);
- Count 3: Contravention of section 90 of Act 60 of 2000
(possession of ammunition);
- Count 4: Murder;
- Count 5: Murder;
- Count 6: Robbery with aggravating circumstances;
- Count 7: Housebreaking with the intent to steal and theft;
- Count 8: Murder;
- Count 9: Robbery with aggravating circumstances;
- Count 10: Contravention of section 3 of Act 60 of 2000
(possession of a unlicensed firearm);
- Count 11: Contravention of section 90 of Act 60 of 2000
(possession of ammunition);
- Count 12: Accused 1 only – Culpable Homicide and an
alternative count;
- Count 13: Accused 1 only – Driving under the influence and an
alternative count; and

Count 14: Contravention of section 117(a) of Act 111 of 1998
(attempting to escape from lawful custody).

- [2] The appellant pleaded guilty in respect of count 14 and was duly convicted based on his plea of guilty. Accused number one pleaded guilty in respect of count 13 (main count) and count 14 and was convicted on these two counts.
- [3] During the trial both accused had a change of heart and changed their pleas of non-guilty to pleas of guilty.
- [4] After his change of plea to guilty the appellant was convicted in respect of counts 1, 4, 5, 6 and 7. (As stated, he had already been convicted on count 14.)
- [5] On 12 October 2007 the appellant was sentenced as follows: —

Count 1: 8 years' imprisonment (Robbery with aggravating
circumstances);

Count 4: 22 years' imprisonment (Murder);

Count 5: 22 years' imprisonment (Murder);

Count 6: 12 years' imprisonment (Robbery with aggravating
circumstances);

Count 7: 6 years' imprisonment (Housebreaking with the intent to steal and theft); and

Count 14: 1 year imprisonment (attempted escape).

[6] The sentences imposed on the appellant in respect of counts 4, 5 and 6 were ordered to run concurrently. In total, the appellant was thus sentenced to 37 years of imprisonment.

[7] The circuit court refused leave to appeal in respect of sentence on 7 December 2007. On 16 January 2013, the Supreme Court of Appeal granted the appellant “leave to appeal”. Although the learned judges did not indicate that it was in respect of sentence only, it is clear from the context that that is what the learned judges sought to convey.

[8] The question to be answered therefore is whether direct imprisonment for a period of 37 years is warranted in the circumstances of this case?

[9] The leading case which deals with an appeal court’s power to interfere with a sentence imposed by a court *a quo* is that of *S v Pieters* 1987 (3) SA 717 at 727F–H.

[10] As stated by SS Terblanche **Guide to Sentencing in South Africa** 2nd Edition LexisNexis at pages 410–411 *sub cap.* “**The decision to interfere with a sentence**”: —

“The basic governing principle was restated by Botha JA in S v Pieters.¹ It boils down to the following: The discretion to impose sentence belongs to the trial court. Owing to this fact the appeal court may not and shall not interfere with the imposed sentence unless it is convinced² that the sentence discretion has been exercised improperly or unreasonably.³ If the trial court committed a misdirection of the nature and extent indicated in S v Pillay,⁴ it means the presiding officer did not exercise the discretion properly.⁵ The relevant portion in S v Pillay reads as follows: —

“[n]ow the word misdirection in the present context simply means an error committed by the Court in determining or

1 1987 3 SA 717 (A) at 727F–H. For a more recent, but essentially unchanged, version, see *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) at a para 21. See also, eg. *S v L* 1998 (1) SACR 463 (SCA) at 468ff; *S v Blank* 1995 (1) SACR 62 (A) at 65h–i.

2 *Op cit* 728B–C. This means that the appellant has the burden of proof to convince the appeal court of the merits of the appeal.

3 Although various tests, aids and yardsticks have been formulated and applied by various courts in the practical application of the basic principle, too much must not be made of the differences between these tests – 727H–728A.

4 1977 (4) SA 531 (A) at 534H–535G.

5 A paraphrasing of “[i]ndien dit sou blyk dat daar ‘n mistasting begaan is, van die aard en omvang wat aangedui is in *S v Pillay*, dan sou dit beteken dat die Verhoorregter nie sy diskresie behoorlik uitgeoefen het nie”.

applying the facts for assessing the appropriate sentence ...

[A] mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

- [11] In assessing whether the court *a quo* exercised its discretion judiciously the following facts are taken into account: —
- [12] The court may not overemphasise the crime and underemphasise the personal circumstances of the appellant (or *vice versa*).
- [13] The trial court will have misdirected itself if it could not reasonably have imposed the sentence which it did. In order to assess the reasonableness of a sentence the courts have to use terminology such as “does the sentence induce a sense of shock?” or it is “startlingly (manifestly) inappropriate?”. It has also been held that the court *a quo* exercised its discretion unreasonably where there is a startling disparity between the imposed sentence and the sentence which the appeal court would have

imposed. One therefore has regard to the type of sentence imposed and the extent thereof.

[14] In respect of robbery with aggravating circumstances the minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997 is 15 years.

[15] In respect of the two robbery charges with aggravating circumstances the court found substantial and compelling reasons to deviate from the prescribed 15 year period which was reduced, in respect of the two robberies, to eight and 12 years respectively.

[16] Regarding the murder counts (counts 4 and 5) the minimum sentence was life imprisonment due to the fact that they are offences referred to in Part 1 of Schedule 2, which provides as follows: —

“Murder, when —

(a) ...

(b) ...

(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) ...

- (ii) *robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);*
- (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;*”

[17] The magistrate only imposed sentences of 22 years’ imprisonment.

[18] In the matter of *S v Swart* 2004 (2) SACR 370 (SCA) the following is stated at 378c–e: —

“What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”

[19] In *S v Valley* 1998 (1) SACR 417 (W) at 420C the seriousness of the crime of robbery with aggravating circumstances was also emphasised: —

“The crimes which the appellant committed are extremely serious. We live in a society which is becoming increasingly lawless; firearms are frequently used in robberies and victims are not uncommonly shot to death or badly wounded. Persons who perpetrate such crimes must be punished severely. Society demands this and it is absolutely necessary that the message go out to the world that people who commit these sorts of crimes will be dealt with severely.”

Relevant facts of this case

[20] The crime spree of the appellant and accused number one stretched over a period of approximately one month (12 February to 13 March 2005). It resulted in the death of three persons. (The third death was of a person in respect of which accused number one was convicted and the appellant was acquitted.) The attempt to escape from custody (count 14) was committed on 25 July 2005, after the appellant’s arrest.

- [21] As far as count 1 is concerned, the appellant, without being identified by any state witness, admitted to being the driver of the get-away car when he and accused number one robbed the complainant in count 1 (JA Botha) of his possessions, namely a 9MM pistol and a two-way radio. A .45 calibre pistol was used which belonged to the appellant's stepfather (which he replaced after the robbery).
- [22] A mere five days later, on 17 February 2005, the appellant and accused number one planned another robbery. They acted in concert to rob the Rothman couple of an amount of R44 400.00 which resulted in the death of Mr Rothman as the appellant and Mr Rothman fought for possession of the 9MM pistol and a shot went off. Mrs Rothman was first violently assaulted by accused number one who then forcefully removed her from the house, applied acute/extreme??? pressure to her neck and left her tied up in the veldt after ordering her to lift her head up and strangling her. The accused then left her in the veldt and proceeded to a bar.
- [23] Twenty three days later, on 12 March 2005, the appellant and accused number one broke into the premises of "Anapsids Reptilia" (count 7). They stole reptiles valued at approximately R40 000.00.

- [24] On 25 July the appellant's mother smuggled a saw into the court and the appellant attempted to escape by sawing through the bars of the court cells where he was incarcerated.

Mitigating factors

- [25] As a "mitigating factor" the age of the appellant, namely 18 years old when the offences were committed, was taken into account.
- [26] The appellant's counsel further emphasised the following factors: —
- [26.1] He passed standard 7 at school.
- [26.2] His father passed away on 24 November 1991.
- [26.3] His mother remarried twice and as a result he had two consecutive stepfathers.
- [26.4] The first stepfather did not treat him well but he had a good relationship with his second stepfather.
- [26.5] His mother's conduct was not exemplary in many respects.
- [26.6] He worked at a DROS restaurant where he received tips.

- [26.7] He inherited money after his father was killed in a hit and run accident.
- [26.8] The appellant and his two siblings were placed in a hostel after they were removed by welfare officials.
- [26.9] After spending one and a half years at the hostel he went to live with his maternal grandmother whereafter he moved back to Boksburg and lived with his stepfather. The appellant and his siblings then moved to Cape Town (where his mother was a caretaker of a block of flats) and lived there for eight years.
- [26.10] Due to him being employed he was earning an income.
- [27] Furthermore, accused number one, who was 27 years old when the appellant met him, was a manipulative and experienced criminal. He told the appellant that he deserved a better life style. The appellant regarded accused number one as a leader and mentor, and stated in his evidence that he was manipulated by him. (The appellant, however, then freely admitted that the only reason for the offences was monetary gain.)
- [28] It is clearly for these reasons that the court, in sentencing the appellant, did not impose the prescribed minimum sentences.

Aggravating factors

- [29] It was argued by the appellant that even though the court found substantial and compelling circumstances to deviate from the prescribed minimum sentence, the court *a quo* misdirected itself in not giving sufficient weight to the following factors: —
- [30] It was strongly argued that the evidence of the psychologist Mr CP de Jager, who emphasised the fact that the appellant acted with diminished criminal capacity and had the emotional development of a 16 year old child and had only passed standard seven (even though having an above average intellect) had been ignored by the court *a quo*. The psychologist had further opined that the appellant had good prospects for rehabilitation. He had also gone to the trouble to interview the appellant's mother and grandmother.
- [31] The court also held that the appellant did not show genuine remorse (even though it was argued that he did).
- [32] Upon an analysis of the court's judgment, it is clear that the court *a quo* did take these factors into account, but also, correctly, took into account that the appellant, with an above average intelligence, conceded during cross-examination that he was neither forced nor influenced to partake in the commission of the offences. He testified that the reason why he

became involved in the crimes was because of accused number one's promise of a better life. He was adamant that he committed the crimes not because of need but because of the prospects of a better financial life.

[33] It should be borne in mind that in terms of the common law the age when a person is *doli capax* is fourteen years. Hence the appellant was not only legally regarded as knowing the difference between right and wrong but also factually. He willingly and with full knowledge that his deeds were wrong participated in the crimes.

[34] The appellant's counsel referred the court to the case of *S v Matyityi* 2011 (1) SACR 40 (SCA) at 47E–48B regarding the role that an accused's age plays when imposing an appropriate sentence: —

“It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental

capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor." [emphasis added]

- [35] The court *a quo* correctly held that the appellant's age was a substantial and compelling reason why the minimum sentence should not be imposed. Nonetheless, the court held that, proportionally, the nature of the crimes committed by the appellant compelled the court to impose a severe sentence. The court, in this regard, stated the following: —

"Mindful of your age and the role that you played when the offences were committed, the circumstances of your case cry out for severe sentences. Your conduct of the days in question was despicable, repugnant and abhorrent. It is respectfully submitted that the appellants' deeds and the active role that he played in the commission of the offences, are indicative of a hardened criminal

rather than that of a youthful offender. His brutal actions, in my respectful submission, largely negated immaturity.”

- [36] Hence the court *a quo* held that the callousness and brazenness of the offences committed during a killing spree lasting a month, the use of a firearm belonging to the appellant’s stepfather, the use of their illegal gains to purchase luxury items, the brutality of the Rothmans’ deaths in the full knowledge that accused number one knew the deceased as their son was married to his sister, the manner in which the Rothmans were overpowered in their own home after being deceived by the appellant asking them for water, the callous murder of Mrs Rothman merely because she would be able to identify her husband’s murderers and the appellant’s effrontery in attending their funerals and Mrs Rothman in the hospital (in all likelihood to see whether she would live and be able to identify them); the fact that Mrs Rothman was so brutally attacked that her son could hardly recognise her in the hospital, the devastating effect which their deaths had on the family as their business closed down (which resulted in their employees losing their employment and livelihood) and the senseless theft of reptiles due to their greed – were all factors which warranted a harsh sentence. It is clearly for this reason that the sentences in respect of counts 1, 7 and 14 were ordered to run consecutively.

[37] In *S v Dodo* 2001 (1) SACR 594 (CC) at paragraph [38] the Constitutional Court confirmed the principle of *Proportionality* and the “*Determinative Test*” in order to prevent prescribed sentences being imposed as a norm. It was also held that: —

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the

absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity." [emphasis added]

[38] In the instant case, the court clearly took into account the proportionality of the sentence with the severity of the crimes.

[39] It was further held in *S v Matyityi supra* at 47A–E that genuine remorse and regret are two wholly different concepts: —

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the

accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

[40] The callousness of the appellant is demonstrated by the facts set out above, namely that he initially pleaded not guilty and even went to the hospital to check on the condition of Mrs Rothman before her death.

[41] The fact that discretionary minimum sentences for certain serious offences as prescribed by section 51 (1) and 51(2) are not applicable in respect of an accused person who was under the age of 18 years at the time of the commission of an offence as contemplated by section 51(1) and 51(2) of the Criminal Procedure Act is dealt with in section 51(6) of the said Act. Section 51(6) reads as follows: —

“51(6) This section does not apply in respect of an accused person who was under the age of 18 years at the time

of the commission of an offence contemplated in subsection (1) or (2).”

[42] However, ordering all the sentences to run consecutively, resulting in a prison sentence of 37 years in respect of an 18 year old with the emotional development of a 16 year old, is inordinately harsh.

[43] Ordering all the sentences to run concurrently would result in a sentence of 22 years only. On mature consideration, a sentence of 25 years would be proportionate to the brutality and severity of the plethora of crimes, yet lessen the period of imprisonment by 12 years. Such a substantially lesser term of imprisonment takes due cognisance of the age and immaturity of the appellant.

[44] The court *a quo* correctly ordered the sentences in respect of counts 4, 5 and 6 to run concurrently as they related to one occurrence only.

[45] In the result, the appeal in respect of sentence is upheld and the following order is made: —

1. A prison term of 25 years is imposed.

2. The sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 12 October 2007.



Jansen

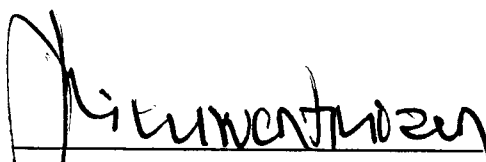
JANSEN J
JUDGE OF THE HIGH COURT

I agree



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ISMAIL J
JUDGE OF THE HIGH COURT



Janse van Nieuwenhuizen

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