

16/8/2013

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED:

16/8/2018
DATE


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SIGNATURE

A. DE VRIES AJ

1. This matter comes before us with leave of the Court *a quo* Pretorius J. The 1st Appellant was accused number two and the 2nd Appellant accused number one in the trial.
2. On the 5th of March 2008 the Appellants were found guilty on the following counts:
 - 2.1. Murder;
 - 2.2. Assault with intent to do grievous bodily harm;
 - 2.3. Robbery with aggravating circumstances.
3. The accused were found not guilty on count four, attempted theft, count five, a contravention of Section 3 of Act 60 of 2000 and count six, a contravention of Section 90 of Act 60 of 2000.
4. After having admitted their previous convictions and after having heard argument in mitigation of sentence, the Court sentenced the accused to the following:
 - 4.1. On count one – 30 years imprisonment;
 - 4.2. On count two – 2 years imprisonment;
 - 4.3. On count three – 15 years imprisonment;
 - 4.4. On count five – 2 years imprisonment;
 - 4.5. On count six – 1 years imprisonment;

5. The sentences imposed in respect of counts five and six are a nullity, sentences having been imposed in respect of offences on which the accused had been acquitted. These fall to be set aside.

AD CONVICTION:

6. It was submitted on behalf of the accused that they should not have been found guilty of assault with intent to do grievous bodily harm on the basis that the assaults took place during the course of the robbery, and that this therefore amounted to a duplication of charges.
7. It was further submitted that apart from this technical point, that the accused should not have been convicted on the balance of the charges on the following basis:
 - 7.1. That the identification by Mrs. Van Deventer was a dock identification and that no identity parade had been held;
 - 7.2. That no plaster casts had been made of the imprints of their footsteps;
 - 7.3. That the accused had been arrested 12 kilometres away from the motor vehicles, and that it was improbable that they could have done so without showing soiled shoes and the effects of tiredness after travelling such a long distance on foot;
 - 7.4. That it was to be doubted that the accused had been found in possession of comparatively worthless property as opposed to the

valuable items left at the cars, in effect submitting that the evidence by the arresting officer in this regard was false.

- 7.5. That no fingerprints had been found at the scene;
 - 7.6. That there was no blood found on the Appellants clothes;
 - 7.7. The fact that the one was wearing safety boots and the other normal shoes did not positively tie them to the crimes;
 - 7.8. That the tracks in similarity could not be evaluated because no photographs had been taken thereof.
8. The trial court found that the three police witnesses had been honest and reliable witnesses, that Mrs. Van Deventer was a honest and truthful witness and rejected the evidence given by the accused. The denial being in possession of a hunting knife and cell phone by accused number one, and the keys of Van Deventer by accused number two, the latter indicating that the keys found were in fact his own keys, were rejected as false by the Court *l a quo*.
9. Apart from the Court's findings in regard to credibility the appellants have the following difficulties on the evidence:
- 9.1. The identification of the footprints found at the homestead, the tracks leading away from the cars and the tracks left by the Appellants when they were confronted were observed by constable Engelbrecht, a specialist tracker with some 14 years' experience. His observations that the tracks were those of the Appellants were confirmed by constable Pienaar who according to

his evidence was also a specialist trained tracker with many years of experience. The time frame within which the comparisons were done was within hours. Despite the criticism of Appellants' counsel of the fact that casts were not made nor were photographs taken of the foot prints, the circumstances were such that there was little or no chance of an error in identification.

- 9.2. Although the identification by Mrs. Van Deventer was a dock identification this is not a case where the witness was unable to identify the accused at the identity parade but later pointed them out in the dock. The evidence was that due to her injuries and mental state she was unable to participate in such a parade shortly after the incident. The Court *a quo* in any event treated her evidence with caution and considered it in the light of other corroborating evidence.
- 9.3. The distance from the scene of the crime where the appellants were found (12 km) is not so great that they could not have travelled that distance on foot. The deceased and Mrs. Van Deventer were attacked at 18:30. Some distance had been travelled in the vehicles. The appellants were found some time after 03:30 of the following morning.
- 9.4. No reasonable possible explanation for the appellants being found in possession of the property of deceased and Mrs. Van Deventer (comprising of cell phones and a driver's licence) other than the police had planted these items on them exists. This was never put to the state witnesses.

- 9.5. The other points raised in the Appellants Heads as set out in paragraphs 7.5 and 7.6 *supra* were not argued nor persevered with during the appeal. Correctly so as the absence of blood or fingerprints against the other evidence add little to cast doubt on the guilt of the Appellants.
- 9.6 All of the evidence considered together establishes the guilt of the appellants beyond reasonable doubt. (*S V Mkhabela* 1984 (1) SA 556 A; *R v Dhlumayo and Another* 1948 (2) SA 677 A; *S v Francis* 1991 (1) SACR 198 A; *S v Hadebe and Others* 1997 (2) SACR 641 SCA.)

AD SENTENCE:

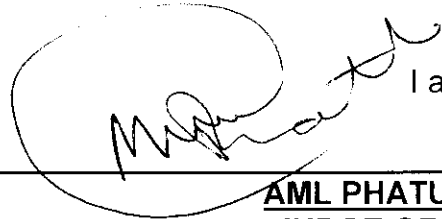
10. In view of the error made by the Court *a quo*, the only aspects of sentence which are germane to the appeal are, the 30 year imprisonment sentence handed down in respect of murder, the 2 year imprisonment sentence in respect of assault with intent to do grievous bodily harm, and 15 years in respect of robbery.
11. The Court *a quo* found that the ages of the accused were substantial and compelling circumstances leading to the imposition of a 30 year jail sentence in respect of count one, instead of life imprisonment. Having imposed a lighter sentence, in respect of murder, then is called for in terms of the appropriate legislation, the sentences do not induce a sense of shock entitling the Court of Appeal to interfere therewith. *S v Malgas* 2001 (1) SACR 469.

12. I would make the following order:

- 12.1. The Appeal in respect of conviction is dismissed;
- 12.2. The Appeal in respect of sentence succeeds in respect of counts five and six only, these sentences having been erroneously imposed as set out herein before.
- 12.3. The Appeal against the imposition of 30 years imprisonment on murder, 2 years imprisonment on assault with intent to do grievous bodily harm, and of 15 years in respect of robbery is dismissed.

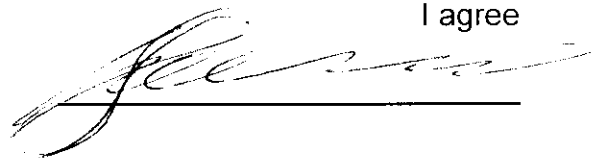


DE VRIES, AJ
ACTING JUDGE OF THE
HIGH COURT, RETORIA



I agree

AML PHATUDI J
JUDGE OF THE
HIGH COURT, PRETORIA



I agree

LAMPRECHT AJ
ACTING JUDGE OF THE
HIGH COURT, PRETORIA

Representation for the Appellants

Counsel

Instructed by Attorneys:

Representation for Respondents

Counsel

Instructed by