Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no:1/2006
Date delivered: 11/05/2007

JOHN MAARMAN **APPELLANT**

versus

THE STATE **RESPONDENT**

JUDGMENT ON LEAVE TO APPEAL

MOKGOHLOA AJ

1. The appellant appeared before me with other two accused on charges of housebreaking with intent to rob and robbery with aggravating circumstances; murder; and housebreaking with intent to steal and theft. He was legally represented and pleaded not guilty to all the charges. I nevertheless convicted him on the first and second counts and also on theft on the third count. He was sentenced to 18 years imprisonment on count 1; life imprisonment on count 2; and 8 years on count 3. I ordered that the sentences

on counts 1 and 3 run concurrently with the sentence of life imprisonment.

2. The appellant's grounds for leave to appeal fashioned by himself and dated 21 November 2006 are as follows:

"*Skuldigbevinding*

1. *Die geleerde regter het gefouteer deur:*

1.1 Te bevind dat die staat sy saak bo redelike twyfel bewys het.

1.2 Nie genoegsaam te let op die weersprekings van die staatsaak nie.

1.3 Nie my weergawe as redelik moontlik waar te aanvaar nie.

AD VONNIS

2. *Die geleerde landdros het verder gefouteer deur:*

2.1 Die erns van die misdryf en die belange van die gemeenskap te veel beklemtoon.

2.2 Nie my persoonlike omstandighede genoegsaam in ag te neem.

2.3 'n Vonnis op te lê wat redelik en onvan toepaslik nie."

AD CONVICTIONS

3. The state's case was based on circumstantial evidence. The deceased was attacked at his home. The intruders broke into his house assaulted him gruesomely and left him to die. They then stole some of his furniture and his motor vehicle, a Colt bakkie

which was parked in front of the garage.

4. The police uplifted shoe prints from the scene of crime. These prints matched the prints on the shoes and tekkies that were found when the appellant and his co-accused were arrested. There was evidence that the appellant and his co-accused were driving the deceased's Colt bakkie on that night in question. There was some furniture in that bakkie which furniture was off-loaded at accused 3's house. The furniture was later identified as belonging to the deceased. Further evidence was that the appellant and his co-accused drove the Colt bakkie to Mooinooi to the place of one Ms Jabonki. The appellant admitted having travelled in the bakkie that night but claimed that he was given a lift to Mooinooi. The appellant admitted having driven the bakkie to off-load the furniture at accused 3's place though he said he was acting on the instructions from one Masaka who denied this. It was through Masaka's information that the police managed to arrest the appellant and his co-accused.

5. The deceased's Colt bakkie was found at Mooinooi at Ms Jabonki's place. A bag belonging to the appellant was also found there. In this bag the keys which were later identified as belonging to the deceased's outbuildings were also found.

6. The appellant made a statement to the police wherein he confirmed that he told his story to the Inspector and to the Captain. At the beginning he denied making the statement. He later admitted signing the statement but said that he did not understand

what he signed. Inspector Luis and other police officials present when the appellant's constitutional rights were explained to him testified that indeed the appellant made that statement. Inspector Luis also testified that the appellant confessed to having committed all three offences.

7. The appellant himself testified. He denied all allegations against him except that he drove the deceased's Colt bakkie and delivered the furniture therein at accused 3's place. He said that this was through Masaka's instructions. He further admitted to have travelled to Mooinooi in that Colt bakkie but that he was just a passenger.

8. The appellant failed to rebut the *prima facie* case that the State proved against him through the evidence of credible witnesses. I was accordingly satisfied that the State had proved its case beyond a reasonable doubt and rejected the appellant's evidence as false. In **Osman and Another v Attorney-General, Transvaal 1998(2) SACR 493 (CC) at 501 B-C Madala J** said:

"*Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach*

of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

9. Having regard to the aforegoing I am convinced that the appellant has no reasonable prospects of success against the convictions.

AD SENTENCES

10. The appellant did not give evidence in mitigation of sentence. His legal representative merely addressed me from the Bar. Only the appellant's personal circumstances were proffered. Despite his best endeavours, the appellant's legal representative was unable to argue that those personal circumstances constituted substantial and compelling circumstances.

11. The appellant was given an opportunity to consult with the Probation Officer who would then compile a pre-sentencing report. The appellant refused to cooperate with that Probation Officer. I was satisfied that there existed no substantial and compelling circumstances that warranted the departure from the imposition of the prescribed minimum sentence on count 2. I also took into account the triad enunciated in **S v Zinn 1969(2) SA 537 (A) at 540 G** and all other relevant factors applicable to sentencing.

12. I am satisfied that there are no prospects of success on appeal on the sentences as well.

I therefore make the following order:

The application for leave to appeal against both convictions and sentences is dismissed.

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FE MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION

FOR THE APPELLANT : *Adv. Rasethunsa* Instructed by: The Legal Aid Board
FOR THE RESPONDENT : *Adv. Cloete* Instructed by: The Director for Public Prosecution