

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

SS52/06

5 DATE:

18 MAY 2006

THE STATE

versus

1. Z GQASAWA2. STEVEN TOTO NDUDULA10 3. SIMPHIWE FENI

SENTENCEFOURIE, J:

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The three Accused have been found guilty on two counts namely, count 1, housebreaking with the intention to commit robbery and robbery with aggravating circumstances and count 2, murder.

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They now have to be sentenced and in arriving at an appropriate sentence the Court is bound to take into account the nature of the offences that they committed, their personal circumstances as well as the interests of the community including the interests of those that have been harmed by

these crimes.

The nature of the offences was fully dealt with in the judgment on the merits and I do not intend repeating all of that, but in
5 summary it should be borne in mind that the deceased was an elderly man of nearly 77 years who lived on his own and who was then overpowered by the accused breaking into his house. They robbed him of his property, they subdued him by tying him up and gagging him with the result that he died.

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Murder is the most serious crime that a human being can commit. The right to life is sacred; nobody has the right to deprive another of his or her life. The deceased was an old retired man and he was entitled to spend his last years in the
15 peace and comfort of his home. He was no match for the three accused who stealthily awaited his return to his home and thereupon forced themselves upon him, ransacking his house, robbing him and causing his death.

20 We are all aware of the many instances in which elderly people are attacked, robbed and killed in their homes. This is yet another senseless attack upon an elderly person and the community clearly requires the Courts to impose heavy sentences in cases like this. One cannot begin to image the
25 emotional distress to which the deceased was subjected when

he was tied up and gagged in this manner, realising that his death was imminent.

However, in having regard to the nature of the crimes
5 committed, I should also bear in mind our finding that the accused did not enter the house of the deceased with the intent of killing him, but in gagging and tying him up they foresaw the possibility of his death ensuing and reconciled themselves with that possibility.

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The interests of the family and friends of the deceased also have to be taken into account. According to the witness Linda Voster, the deceased's wife has passed away but he has four children. One can imagine their grief and sorrow when they
15 heard of the death of their father in circumstances where he was tied up, gagged and left to die.

This brings me to the personal circumstances of the accused. I take into account the evidence led on your behalf and the
20 submissions made by your counsel. You were relatively young at the time that you committed these offences. I also take into account that accused 1 and 3 have no previous convictions. Accused 2, however, has several relevant previous convictions including robbery, attempted murder and housebreaking.

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In addition, it should be borne in mind that the present offences were committed while accused 2 was out on parole. I am not convinced that any of the accused has shown any real remorse for what they have done. It appears from the evidence that they were brought to book mainly through the efforts of the mother of accused 1.

On the prospects of rehabilitation of the accused, I am also rather pessimistic. Accused 2 has clearly not mended his ways notwithstanding his previous encounters with the law. Accused 1 and 3, as first offenders, will hopefully have more incentive to mend their ways in future. I should add that, in my view, there is no merit in the submission made on behalf of accused 3, that liquor played a role in the commission of these offences. There is no evidence to support a finding of this nature. I do, however, take into account the fact that the accused come from a disadvantaged background and had to leave school at early ages to seek work.

Act 105 of 1997 provides that where murder is committed in circumstances where the death of the victim was caused by the accused in committing robbery with aggravating circumstances, the Court is obliged to impose a sentence of life imprisonment. The Act, however, provides that if the Court finds that there are substantial and compelling circumstances

justifying a lesser sentence the Court may impose a lesser sentence than life imprisonment.

In deciding whether such circumstances are present the Court
5 has to take into account all the traditional mitigating factors,
weigh them up and decide whether the impact thereof is such
that it can be described as substantial and compelling. The
Act also prescribes a minimum sentence of 15 years
imprisonment for robbery with aggravating circumstances
10 which may also be reduced by the Court if substantial and
compelling circumstances are found to be present justifying a
lesser sentence.

In the case of accused 1 and 3, I am satisfied that there are
15 substantial and compelling circumstances justifying lesser
sentences than those prescribed by the Act. In particular, they
are both first offenders who should normally be afforded more
leniency when it comes to sentencing. In addition, I also
consider our finding that the accused did not have the direct
20 intention to kill the deceased, to be a factor which should
count in favour of accused 1 and 3. Finally, I also take into
account that on the evidence it appears that accused 2 was
the leader of the pack and that he persuaded accused 1 and 3
to join him in this venture.

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In the case of accused 2, I am not satisfied that in regard to Count 1, i.e. the count of housebreaking and robbery with aggravating circumstances, there are circumstances justifying a lesser sentence than the prescribed sentence of 15 years imprisonment. Accused 2 is a frequent offender and he has previous convictions for robbery and housebreaking. Although he was relatively young at the time of the commission of these offences, namely 20 years, he had been given opportunities in the past by the Courts to reform himself, but to no avail. Not even his release on parole on 12 December 2003, deterred him from committing these crimes within five months of his release.

In regard to Count 2, that is the count of murder, I have only after serious consideration, concluded that the prescribed sentence of life imprisonment should not be imposed on accused 2. In this regard the fact that he was relatively young at the time of the commission of the offence is taken into account. This fact would, on its own, not in my view have constituted substantial and compelling circumstances. However, to this should be added the fact that the Court found that the accused 2 did not have the direct intent to kill the deceased, but that he was killed in circumstances where the accused foresaw the possibility of his death eventuating and reconciled himself therewith.

Had it been proved that accused 2 had the direct intent to kill the deceased, I would have had no hesitation in imposing a sentence of life imprisonment. I am, however, of the view that the seriousness of the crimes committed, as well as the fact
5 that the escapade was premeditated, justify a long term of imprisonment to be imposed in regard to all three accused. In view of his previous convictions and the leading role which he had played in the events, accused 2 should receive the more severe sentence.

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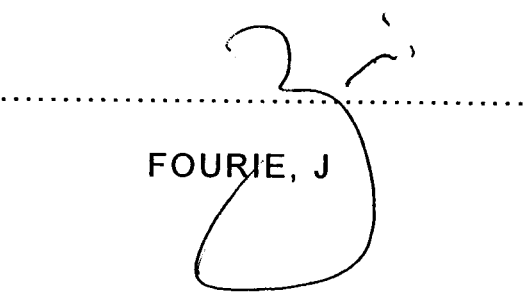
In deciding upon appropriate terms of imprisonment, I take into account the fact that the accused have all spent approximately two years in prison awaiting trial. Having regard to all these facts and circumstances, the accused are sentenced as
15 follows:

Accused 1 and 3, on Count 1, you are each sentenced to TEN (10) YEARS IMPRISONMENT. On Count 2 you are each sentenced to SEVENTEEN (17) YEARS IMPRISONMENT. In
20 terms of Section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences of imprisonment imposed on Counts 1 and 2 are to run concurrently. In the result your effective sentence is 17 years imprisonment.

25 Accused 2, on Count 1 you are sentenced to FIFTEEN (15)

YEARS IMPRISONMENT. On Count 2 you are sentenced to
TWENTY TWO (22) YEARS IMPRISONMENT. In terms of
Section 280(2) of the Criminal Procedure Act 51 of 1977 it is
ordered that the sentences of imprisonment imposed on
5 Counts 1 and 2 are to run concurrently. Your effective
sentence is accordingly 22 years imprisonment.

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FOURIE, J