IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A516/2014

DATE: 6 MARCH 2015

In the matter between:

ANDILE VANANDA Appellant

and

THE STATE Respondent

J U D G M E N T

RILEY, AJ:

On 24 November 2014 the appellant was convicted in the Regional Court at Wynberg on 2 counts, namely murder and robbery with aggravating circumstances. In regard to the robbery charges the State alleged that the provisions of section 51(2), 52(2), 52(A) and (B) of the Criminal Law Amendment Act 105 of 1997 ('the Act') was applicable, whilst on the murder charge the charge sheet specifically avers that section 51 and Schedule 2 of the Act was applicable in that the death of the victim was caused by the accused during the commission of the offence of robbery with aggravating circumstances and / or was committed by persons acting in the

execution or furtherance of a common purpose or conspiracy.

The trial Court ordered the 2 counts to be taken as one for the purpose of sentence and sentenced the appellant to life imprisonment. On 6 October 2014 the appellant was granted leave to appeal both his conviction and sentence by the Court *a quo*. The appellant, who was represented in the Court *a quo*, pleaded not guilty to the charges and made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 which can be summarised as follows:

(1) That the deceased was Pieter Johannes Gouws who died as a result of strangulation on 22 May 2006 at 32 Williams Street, Parow.

(2) That the deceased suffered no further injuries which in any way contributed to and / or caused his death and that the contents of the medico-legal post-mortem report was admitted as being correct.

(3) Several photo's of the murder scene and other photo's, a sketch plan and key thereto as prepared by Inspector Joubert of the South African Police Services was admitted as correct and allowed into evidence.

(4) That the appellant had pleaded guilty to escaping from lawful custody on 22 May 2006 and that he was arrested on 31 May 2006 at D56, Joe Slovo Squatter

Camp by the police.

(5) That after his arrest he was taken to a District Surgeon who took a sample of his blood for DNA profiling.

I pause to mention that after the close of the State's case the appellant further agreed that the statement that he had made to Colonel Louis Aspeling ('Aspeling') of the South African Police Services in regard to the allegations against him be admitted into evidence without any evidence being presented on the issue of its admissibility. The appellant also agreed to the correctness of the content of the statement.

The appellant elected not to testify and closed his case without calling any witnesses. The facts underpinning the conviction can be summarised as follows: On 22 May 2006 at approximately 08h50 the appellant and 2 other male persons who were being transported from Pollsmoor escaped from the back of a police van when they arrived at Parow Regional Court where they had been transported to for an unrelated court appearance. In the escape the appellant left one of his training shoes in the police van.

At approximately 10h00 the same morning the deceased telephoned one of the State witnesses, Lettie Meintjies

('Meinjies'), to come to his house at 32 Williams Street, Parow to discuss with him wooden clocks that she wanted him to make for her. Meintjies knew the deceased, a 74 year old male who lived on his own and who did his woodwork in his garage on his premises. She knew the house of the deceased well as she worked for the deceased occasionally. According to her she arrived at the deceased's house after eleven in the morning and rang the doorbell but there was no response.

She noticed that a window adjacent to the front door of the house was open wide and later moved around the side of the house where the garage is situated. As she walked around the side of the house she saw a black male (the appellant) looking at her from behind the wall of the furthest corner of the garage and immediately disappear when he saw her. She suspected something was amiss and she told the next door neighbour who approached her about her concerns and then requested that he telephone the deceased on his house telephone.

Though they could hear the telephone ringing inside the house no one answered. Meintjies and another neighbour of the deceased, Cornelia Susan De Villiers ('De Villiers'), who arrived on the scene, then proceeded towards the backdoor of the deceased's house to investigate. De Villiers entered the house and discovered the deceased laying on his back on the

kitchen floor. He was already dead. His mouth, neck and hands were tied with ties and a belt. I pause to mention that according to the medico-legal post-mortem report the chief post-mortem findings are consistent with strangulation with an associated fracture of the hyoid bone with ligature in situ above the ankles. The police and paramedics were contacted and arrived on the scene.

There were clear signs that a struggle had taken place. In the kitchen the contents of the dirt bin had been emptied on the floor and the bedrooms in the house had been ransacked with items laying all over the place. As appears from the evidence, bedding had been removed from the deceased's house and was found in a black plastic bag on the side of the house. In the course of the investigation of the scene the police found one of the appellant's training shoes in the black bag which contained the deceased's property.

In one of the rooms the police collected a cigarette butt which was analysed and it was later determined that it contained the appellant's DNA. Blood which was found on the training shoe of the appellant which was on the scene was tested and it was established to be the blood of the appellant. The appellant was arrested on 31 May 2006 at his house at Langa. At the time of his arrest he was wearing the deceased's shoes, a fact

which he readily admitted to the police. Later the same day the appellant made a statement to Aspeling in regard to his involvement in the commission of the offences.

The crucial issue to be determined in this appeal is whether or not the trial court had erred and misdirected itself in not attaching any weight to the exculpatory parts of the statement made by the appellant to Aspeling and whether the only reasonable inference to be drawn from the facts is that the appellant murdered the deceased. It was contended on behalf of the appellant that the State had failed to present evidence to rebut the version given by the appellant to Aspeling, i.e. that another person was present at the time the deceased was strangled and that that person had in fact murdered the deceased.

It is accordingly necessary to repeat the contents of the statement that appellant made to Aspeling in full so that it can be viewed in its proper perspective. The typed version of the statement, the contents of which was admitted by the appellant, reads as follows:

> "Verlede week Maandag 22 Mei 2006 het ek vanaf Pollsmoor gekom na Parow Hof. Ons was vyf mense in die polisiewa. Die waentjie se glas van

die deur was uit en daar was net die draad. Die draad was effens pap en ek en Olweto het die draad afgebreek en by die Hof uit die polisiewa gespring. Olweto het sy eie pad gehardloop. Ek en 'n man van Mfuleni wie ek nie ken nie, ons het in Parow na 'n huis gegaan. Ons het 'n huis gesien met 'n oop venster. Die ander man het eers by die venster ingeklim en ek daarna. Ons het iemand in die huis gehoor. Ek het saggies geloop en op iets getrap wat raas. Die man het kom kyk en die ander man het hom om die nek gegryp en gewurg. Hy wou hê ek moet kom help en gesê ek moet iets kry om die man vas te maak. Ek het 'n "Tie", das gekry in die kamer. Ek het teruggekom en gesien die man lê op die vloer. Ek het gedink hy is klaar. Ek het gehelp om sy hande vas te maak. Ek het sy selfoon gesien op die tafel en dit gevat. Ek het 'n R140.00 uit sy beursie geneem. Die ander man het R100.00 gevat en ek R40.00. Ek het vergeet om te sê dat die tyd wat ons gehardloop het, het ek een van my tekkies by die polisiewa gelos en met een tekkie gehardloop. Ek het my ander tekkie in die huis gelos en ander skoene in die huis aangetrek. By die huis het ons iemand hoor

klop voor by die huis. Ons het die agterdeur oopgemaak en uitgegaan. Ek het gesien dat die man wat voor geklop het, het my gesien. Ek het toe agter oor die muur gespring. Toe ek in die Main Road is, het ek gesien dat die ander man sy eie taxi na Bellville vat. Ek het my eie taxi gevat tot in Bonteheuwel. Ek het daar afgeklim en is terug na Langa. Ek het vir 'n onbekende persoon die selfoon gewys en gesê ek verkoop die foon. Ek het dit vir hom gewys. Ek het R30.00 vir die foon gekry aangesien die persoon gesê het dit is 'n ou foon. Ek was die res van die week by die huis tot gister, tot die polisie gekom het. Die polisie het 'n foto van my gehad en my toe gearresteer. Ek is meegedeel dat dit is 'n saak van moord. Ek het saam met die speurder gewerk en vir hom alles vertel."

The trial court correctly found that the statement made by the appellant to Aspeling does not amount to a confession. It is trite law that a confession is an ambiguous admission of guilt which would amount to a plea of guilty if made in a court of law. See R v Becker 1929 (AD) 167. Accordingly, all the elements of the offence must be admitted and all facts that might constitute a defence must be excluded. It is clear that

the statement referred to herein before does not amount to a confession.

I agree with the trial magistrate that at most the exculpatory statement made by the appellant amounts to an extra curial admission on his part. It is further a generally accepted legal principle that an admission made extra curially by an accused person is admissible provided it was made voluntarily and relates to the offence with which the accused is charged. In the present matter it is common cause that the prosecutor in the court *a quo* intended to call Aspeling to testify that the appellant had made the statement freely and voluntarily and that the statement was therefore admissible. The defence however agreed that the statement could be handed in on the basis that it was made freely and voluntarily and that the content of the statement was correctly recorded.

In dealing with the weight to be attached to the exculpatory statement made by the appellant, the trial magistrate, in a succinct summary of the law, correctly held as follows:

> "Die verontskuldigende gedeeltes van die verklaring aan Aspeling is nie getuienis nie. Dit sou slegs tot die status van getuienis verhef kon word indien dit onder eed herhaal was. Dit word

egter nietemin saam met al die getuienis oorweeg om te bepaal welke waarde, indien enige, daaraan geheg kan word. In S v Yelani 1989 (2) SA 43 het die Appèlhof as volg beslis op 49H-J en is die volgende gesê: 'When an extra curial statement by an accused is tendered in evidence the Court's approach thereto is governed by the principles enunciated by Greenberg, JA in R v Valachia and Another 1945 (AD) 826.' Na verwysing na die Valachia beginsel gaan die Hof voort en sê as volg; 'Although a Court is entitled to reject exculpatory portions of an accused's extra curial statement while accepting parts thereof which incriminate him (S v Khoza 1982 (3) SA 1019 (A) at 1039A) it should do so only after a proper consideration of the evidence as a whole.' En soos reeds gesê is in Valachia, 'Naturally, the fact the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weigh to be given to those portions of the statement favourable to its author as compared with the weight which should be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or

rejected according to the Court's view of their cogency."

The trial Magistrate was alive to the fact that she had to make a determination from the available evidence whether the only inference to be drawn from the facts was that the appellant had murdered the deceased. It is trite law that in the adjudication of a criminal trial, where the burden of proof rests on the State to prove the guilt of the accused beyond a reasonable doubt, that a fact in issue can be proved by circumstantial evidence provided that:

(1) The inference which is sought to be drawn is consistent with all the proved facts, and

(2) No other reasonable inference can be drawn from those facts. See R v Blom 1939 (AD) 188.

In coming to, what she correctly describes as the inescapable conclusion that the appellant murdered the deceased, the trial Magistrate found as follows:

"Nou met dit in gedagte neem die Hof in ag dat daar geen aanduiding uit die beskikbare getuienis is dat meer as een persoon die woning van Gouws betree het op 22 Mei 2006 nie. Die items

wat beskryf kan word as synde die items wat geroof was kon deur een persoon verwyder word, veral gegewe die feit dat heelwat van die items in die swart sak langs die huis herwin was. Verder het Me Meintjies slegs een persoon op die toneel gewaar en die beskuldigde was by sy eie erkenning daar. Die sigaret stompies op die toneel herwin het klaarblyklik slegs die beskuldigde se DNA profiel onthul. Die beskuldigde se tekkies is op die toneel agtergelaat en geen ander besittings van vreemde oorsprong is in die huis gevind nie. In die beskuldigde se skriftelike erkenning aan Superintendent Aspeling, bewysstuk "N", verplaas die beskuldigde die blaam vir die oorledene se dood na 'n onbekende persoon wie in Mfuleni woon. Die getuienis in die geheel onderskraag egter nie 'n bevinding dat daar nog 'n persoon in die woning teenwoordig was saam met die beskuldigde nie. Wat wel vas staan na aanleiding van dit wat gemene saak is, is dat Gouws gelewe het toe die beskuldigde sy woning binnegegaan het en dat Gouws verwurg, vasgebind en oorlede was nadat die beskuldigde die toneel verlaat het. Indien die beskuldigde 'n

onskuldige verduideliking gehad het vir hierdie feit, moet ek aanvaar dat hy daaroor sou wou getuig het onder eed."

I agree with the conclusions reached by the trial Magistrate and I am accordingly satisfied that the trial Magistrate's reasoning cannot be faulted. The appeal against the conviction should accordingly be dismissed.

I now turn to deal with the appeal on sentence. It is contended that the trial court had failed to take into account the appellant's personal circumstances, overemphasised retribution, failed to take into account the element of mercy, that long term imprisonment would have a negative effect on the rehabilitation of the appellant and that the sentence was shockingly inappropriate. The Criminal Law Amendment Act 105 of 1997 prescribes a sentence of 15 years imprisonment in respect of the charge of robbery with aggravating circumstances and a minimum sentence of life in respect of the murder charge unless there are substantial and compelling circumstances present that justify a lesser sentence.

In considering an appropriate sentence for the appellant in this matter, the trial court took into account the appellant's personal circumstances, the gravity of the offence and the

interest of the community. In my view the trial court adopted a balanced approach in the determination of what it thought to be an appropriate punishment, taking into account all relevant factors without over or underemphasising any of the relevant factors that have to be taken into account in the determination of an appropriate sentence.

The appellant was 21 years old when he committed the offences and 26 years old at the time that the sentence was imposed. He was unmarried with no dependants and he had been in custody since May 2006. According to the information contained in the probation officer's report which was handed in as evidence, the appellant was very young when his mother died. He was placed in the care of his grandmother and had no contact with his father after his mother's death.

He had been under the impression that his father was dead. His grandmother tried her best to provide for the needs and care of the appellant and his siblings. He left school on his own accord at a very early age and as a teenager got involved with the wrong friends and became involved in drugs. The appellant is not a first offender. He has several previous convictions for housebreaking and theft which was committed whilst he was still youthful and he was given a suspended sentence coupled with community service and placed under the

supervision of a probation officer. He has also been sentenced to direct imprisonment. The fact that he has been in custody for some time awaiting trial or for the duration of his trial is undoubtedly a relevant consideration in determining sentence.

The question that however has to be asked is 'whether its effect taken together with the prescribed minimum sentence would render a sentence so disproportionate to the offence of which the accused had been convicted of as to amount in the context of all relevant factors to substantial and compelling circumstances, warranting the imposition of a lesser sentence'. See S v Fortune 2014 (2) SACR 178 (WCC) at 188e-f. In my view the time spent by the appellant in prison prior to the imposition of sentence was not a sufficiently weighty consideration in the context of all the other circumstances to result in a deviation from the prescribed minimum sentence.

The following factors are aggravating; the appellant was convicted on 3 February 2004 for murder, housebreaking with intent to rob and robbery and assault with intent to do grievous bodily harm. In March 2009 the appellant was sentenced respectively to 12 years, 8 years and 4 years for the offences referred to above. The sentences on the housebreaking with intent to rob and robbery and the assault with intent to do

grievous bodily harm charges were ordered to run concurrently with the sentence on the murder charge. At the time of sentence on this matter he was serving an effective 12 years imprisonment for the offences referred to above.

The appellant shows a clear propensity to commit offences of dishonesty and offences associated with serious violence. The appellant did not show genuine remorse and rather attempted to downplay his role in the commission of the offences. the present murder and aggravated robbery were committed within a short space of time after his escape from lawful custody and the appellant had time to weigh up his actions before entering the deceased's home. The appellant's conduct illustrates extreme brazenness by entering the deceased's house through a window which was visible from the road in broad daylight.

The deceased was a frail, defenceless, 70 year old man who suffered from diabetes. The violence meted out at the deceased was unnecessary to achieve the end and therefore clearly gratuitous. The circumstances of the present murder is similar to the previous murder he committed and is indicative of the modus operandi that shows the appellant is someone who preys on elderly, defenceless persons by breaking into their homes, robbing them and then murdering them by way of strangulation.

Our courts have repeatedly held that society demands that persons who make themselves guilty of offences of this nature must be severely dealt with. In cases such as the present the element of retribution and deterrence rather than the interest of the offender come to the fore strongly in the assessment of the appropriate sentence. I am mindful that in situations such as this where imprisonment for life is prescribed as a minimum sentence, that this is the ultimate penalty that the courts in this country can impose. Accordingly it must not be imposed lightly or without full consideration as to whether it is the appropriate sentence. Violent crime of this nature is endemic in this country and society and in particular the vulnerable require protection. Considering the facts and circumstances of this matter, I am not persuaded that the sentence is shockingly inappropriate and / or that it is disproportionate to the nature of the offences so that it can by typified as gross and thus constitutionally offensive. See S v Vilakazi 2009 (1) SACR 552 (SCA) at 560.

The trial court made a detailed and thorough assessment of the existence of substantial and compelling circumstances in determining whether or not it could impose a lesser sentence and in my view correctly concluded that there were no substantial and compelling circumstances present which

justified the imposition of a lesser sentence to the sentence prescribed by the legislature on the count of murder. In my view the trial court exercised its discretion in regard to sentence properly and judicially and there is no basis to interfere with the sentence imposed.

In the result the following order is made:

THE APPEAL AGAINST CONVICTION AND SENTENCE IS DISMISSED.

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RILEY, AJ

I agree. The appeal is dismissed. The conviction and sentence is confirmed.

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ERASMUS, J

/RG