IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR630/2013

In the matter between:

SPHAMANDLA NGEMA — APPELLANT

And

THE STATE — RESPONDENT

Coram : Seegobin et Poyo Dlwati JJ
Heard : 24 May 2016
Delivered : 27 May 2016

ORDER

On appeal from the Regional Court, Durban (Mrs Maphumulo, sitting as a court of first instance):

(a) The appeal against sentence succeeds to the extent set out below:

(b) The sentence imposed by the court *a quo* is set aside and is replaced by the following:

(i) Counts 1, 2 and 3 are taken as one for purpose of sentence and the accused is sentenced to 15 years imprisonment.

(ii) Counts 4, 5 and 6 are taken as one for purpose of sentence and the accused is sentenced to five years imprisonment. The effective sentence is thus one of 20 years imprisonment.

JUDGMENT

SEEGOBIN J (et Poyo Dlwati JJ concurring):

[1] This is an appeal against sentence only. The appellant was one of two accused who was arraigned in the Regional Court, Durban, on the following charges: count 1, robbery with aggravating circumstances; count 2, robbery with aggravating circumstances; count 3, attempted murder; court 4, kidnapping; count 5, unlawful possession of firearm; count 6, unlawful possession of ammunition; count 8, attempted murder and count 9, attempted murder. The appellant was convicted on counts 1 to 6. He was sentenced as follows: on counts 1 and 2 he was sentenced to 15 years imprisonment on each count; on count 3, he was sentenced to 15 years imprisonment; on count 4 to five years imprisonment, on count 5 to three years imprisonment and on count 6 to 18 months imprisonment. The sentence on count 2 was ordered to run concurrently with that on count 1 and the sentences on counts 5 and 6 were ordered to run concurrently with count 4. The effective sentence was therefore one of 35 years imprisonment.

[2] In argument before us, *Mr Pillay*, on behalf of the appellant, pointed out that in respect of the robbery charges on counts 1 and 2, the charge sheet merely states 'that the accused is guilty of the crime of robbery with aggravating circumstances read with sections 51 and 52 of Act 105 of 1997, firearm used'. It was pointed out that in respect of both these counts the charge sheet does not indicate which part of section 51 the State relies on for purposes of sentence in view of the fact that the charge of robbery is covered under Parts I, II and IV of Schedule 2 of the Act. Despite the rather sloppy manner in which the charge

sheet was framed with reference to the provisions of Act 105 of 1997, Mr Pillay accepted that the learned magistrate had acted correctly in having regard to the provisions of Part II of Schedule 2 for the purposes of sentence in respect of the robbery counts. In terms of Part II of Schedule 2 the minimum sentence to be imposed on a charge of robbery with aggravating circumstances for a first offender is one of 15 years imprisonment. This was the sentence imposed by the court *a quo* on each of the robbery convictions on counts 1 and 2, no substantial and compelling circumstances having been found.

[3] Mr Pillay submitted that the learned magistrate erred in not finding any substantial and compelling circumstances which would have justified the imposition of a lesser sentence from that prescribed. He proffered the following factors which he submitted if considered cumulatively would constitute substantial and compelling circumstances in favour of the appellant: (a) that he was a first offender; (b) that he was only 18 years old at the time of the commission of the offences; (c) that he had already spent a period of two and a half years in custody awaiting trial; (d) that the items taken in the course of the robberies were recovered and returned to the complainants; and (e) that the complainants suffered no serious physical injuries.

[4] I have given anxious thought to the above factors as advanced by Mr Pillay but, regrettably I am unable to agree that either individually or collectively these factors constitute substantial and compelling circumstances. I agree with *Ms Greef* for the State that there is nothing out of the ordinary about any of the factors referred to above. While the appellant was only 18 years old at the time, his youthfulness is offset by the sheer viciousness of the attack on the complainants. It was the appellant who had fired a shot at point-blank range at the head of the complainant in count 1 with the clear intention of killing him. It was simply fortuitous that the shot was not fatal. The appellant and his

cohorts of course were under the impression that the complainant was dead when they left the scene taking the complainant's girlfriend along with them.

[5] It is a sad reality that most of the serious and violent crimes in this country are committed by young people such as the appellant herein. In my view, offenders such as the appellant who commit despicable acts of violence against innocent and defenceless members of society cannot expect to receive a lighter sentence by claiming to rely on their youthfulness at the time of commission of the offence. There is nothing on record to indicate that the appellant, by virtue of his youthfulness, displayed a level of immaturity and diminished his moral blameworthiness to some extent. On the contrary, the callous and cruel manner in which these offences were committed by the appellant indicates that he acted with a level of maturity far beyond his years. In my view, the aggravating features of this case outweigh any mitigating effect brought about by the appellant's youthfulness.

[6] The same considerations apply insofar as the sentence of 15 years on the attempted murder in count 3 is concerned. Mr Pillay submitted that the sentence was unduly harsh and excessive bearing in mind that the Act made provision for a minimum sentence of five years only. This may be so but as I pointed out above it was the appellant who fired the shot at the complainant. In my view, the learned magistrate was fully justified in imposing the sentence which she did on this count.

[7] Turning to the effective sentence of 35 years, I agree with Mr Pillay that the sentence is unduly harsh and must be ameliorated. It is well-established that a court dealing with multiple offences must not lose sight of the fact that the

aggregate penalty must not be unduly severe[1]. In *S v Muller*[2] the position was stated as follows by Leach JA:

> "When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence. As Nicholas JA observed in *S v Skenjana*:
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> > 'A sentence of 20 years' imprisonment is undoubtedly very severe . . . . My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.
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> > . . .
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> > Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers must not be visited with punishments to the point of being broken. (*Per* Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G.)"

[8] In light of the nature and gravity of the offences committed by the appellant and having regard to the main objectives of punishment which are deterrent, preventative, reformative and retributive, I consider that the aggregate

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[1] S v Moswathupa 2012(1) SACR 259 SCA.
[2] 2012(2) SACR 545 (SCA) at 549-550.

sentence should be one not exceeding 20 years. This can be achieved by ordering that counts 1, 2 and 3 be taken as one for purposes of sentence and that the appellant be sentenced to 15 years imprisonment and that counts 4, 5 and 6 be taken as one and the appellant be sentenced to five years imprisonment. The changed sentence will be reflected in the order I make.

ORDER

[9] In the result, I make the following order:

(a) The appeal against sentence succeeds to the extent set out below:

(b) The sentence imposed by the court *a quo* is set aside and is replaced by the following:

(i) Counts 1, 2 and 3 are taken as one for purpose of sentence and the accused is sentenced to 15 years imprisonment.

(ii) Counts 4, 5 and 6 are taken as one for purpose of sentence and the accused is sentenced to five years imprisonment. The effective sentence is thus one of 20 years imprisonment.

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POYO DLWATI J I agree

Date of Hearing	:	24 May 2016
Date of Judgment	:	27 May 2016
Counsel for Appellant	:	Mr T Pillay
Instructed by	:	Justice Centre, Durban
Counsel for Respondent	:	Ms W Greef
Instructed by	:	Director of Public Prosecutions, Pietermaritzburg