IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No: AR 691/15

In the matter between:

KHULEKANI WONDERBOY NTSHALINTSHALI APPELLANT

And

THE STATE RESPONDENT

Coram : Seegobin, Poyo Dlwati JJ et Hemraj AJ
Heard : 27 May 2016
Delivered : 07 June 2016

ORDER

On appeal from KwaZulu Natal High Court, Pietermaritzburg, Nkosi AJ sitting as a court of first instance:

(a) The appeal against sentence is upheld. The sentence of the court *a quo* is set aside and substituted with the following sentence:

(b) The accused is sentenced to 6 years imprisonment in respect of counts 1 to 5 which are taken together for the purposes of sentence;

(c) The accused is sentenced to 10 years imprisonment in respect of count 6.

(d) The sentences are ante dated to 23 July 2010.

JUDGMENT

POYO DLWATI J

[1] This is an appeal against the sentence imposed by Nkosi AJ on 23 July 2010 sitting as a court of first instance in the Pietermaritzburg High Court.

[2] Following on a plea of guilty, the appellant was convicted of five counts of attempted murder (counts 1 to 5) and one count of robbery with aggravating circumstances (count 6). The provisions of Section 51 and Schedule 2 of the Criminal law Amendment Act 105 of 1997 were applicable to count 6. Counts 1 to 5 were taken as one for the purposes of sentence and the appellant was sentenced to 15 years. He was also sentenced to 15 years imprisonment for count 6. Five (5) years of the sentence in counts 1 to 5 were ordered to run concurrently with the sentence in count 6. The effective term of imprisonment was 20 years. The Learned Acting Judge also fixed a non-parole period of fifteen years imprisonment in terms of s 278B of the Criminal Procedure Act 51 of 1977 (the Act).

[3] The facts upon which the appellant was convicted were that he was part of a group of 12 men who had planned to rob and did rob the KwaSiyabonga Butchery and Fresh Produce Supermarket (the supermarket) in Kranskop on 2 July 2010. On the day in question the supermarket was also used as an old age and disability pensions pay point. There were therefore a large number of persons present in and around the supermarket. At about 14h00 on that day the assailants entered the supermarket and held the occupants at gunpoint. A shoot out ensued between the assailants and the members of the public who wanted to come to the rescue of the supermarket owners. As a result, the complainants in

counts 1 to 5, who were mostly members of the public, were injured in the process. The assailants took off with some cash, cellular phone, airtime vouchers, a firearm and ammunition from the supermarket. The assailants were arrested shortly after the incident and the appellant pleaded guilty to the charges.

[4] There are two issues which arise on appeal. The first is whether the learned judge *a quo* misdirected himself when he fixed a non-parole period of 15 years imprisonment on the appellant without first having alerted the parties of his intentions to fix such a period and to invite submissions of either the appellant or the state in that regard. As held in *S v Stander*,[1] a court that considers a non-parole period should alert the parties to this fact and give them an opportunity to address it on at least the following two issues, should a non-parole period be ordered and, furthermore what period should be attached to the order. Furthermore, the court *a quo* should have made specific findings as regards the presence of exceptional circumstances which would justify fixing a non-parole period; and the court should advance reasons why it was found desirable to impose a non-parole period.

[5] And as held in *S v Pauls*[2] the exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. These should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist. In the present matter none of these issues seem to have been considered. The state has, correctly in my view, conceded this point and agrees that the court *a quo* erred in having a non-parole period fixed on the appellant. I agree therefore that the court *a quo* misdirected

[1] 2012 (1) SACR 53 (SCA) para 22.
[2] 2011 (2) SACR 417 ECG para 15.

itself when it fixed a non-parole period when sentencing the appellant as this case was not shown to be exceptional. The non-parole period therefore ought to be deleted. We are therefore at large to impose a fresh sentence that we deem appropriate and that brings me to the second issue.

[6] The second issue is whether the sentence that was imposed on the appellant was unduly harsh or shockingly disproportionate to the circumstances of the case. It seemed that the court *a quo* found that the appellant's personal circumstances were demonstrably weighty to constitute substantial and compelling circumstances with regard to counts 1 to 5 but did not find them to be substantial and compelling with regard to count 6. This, in my view, is another misdirection committed by the court *a quo*. This is especially so because the attempted murder charges were committed during the course of the robbery and any evidence applicable to counts 1 to 5 would be applicable to count 6. As held in *S v Muller*,[3] 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. This is another reason that warrants our interference.

[7] The evidence before the court *a quo* was that the appellant was 24 years old and was unmarried. He had three children. He had passed grade 9 and had left school due to financial difficulties. He worked temporarily as a gardener at times and also as a mechanic's assistant. He was a first offender and was remorseful for his actions hence he pleaded guilty. At the time of his plea he undertook to testify against his co-assailants which he, according to Mr Barnard, who appeared on his behalf, has done and as a result six of those co-assailants have been convicted mainly because of his evidence. Accordingly, if

[3] 2012 (2) SACR 545 (SCA) para 9.

those who are apprehended are prepared to co-operate and assist the authorities in getting more criminals behind the bars then they should receive credit for such co-operation as in that way they make a real contribution towards combating the incidence of crime.[4]

[8] There is no doubt that the offences committed by the appellant were not only serious but are prevalent in our country. They acted recklessly with utter disregard for human lives. These included the most vulnerable in our society, the elderly and the disabled. Severe sentences should therefore be imposed not only to signal the court's abhorrence of such crimes but also to deter would be offenders. However, the cumulative effect of the sentence is unduly harsh in the circumstances and is disproportionate to the offences. This much was also conceded by Ms Watt who appeared on behalf of the state. In my view, this appellant should not be sacrificed on the altar of deterrence. As held by Leach JA in *S v Muller*,[5] mercy and not a sledgehammer is the concomitant of justice. A judge should approach sentence with humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.

[9] The appellant's youthfulness coupled with the plea of guilty are a good indication that he is a good candidate for rehabilitation. And as held in *S v Sparks and another*,[6] wrongdoers must not be visited with punishment to the point of being broken. Furthermore, the appellant's explanation that his role in the robbery was to stand guard must also be taken into account as this was part of his plea explanation tendered in terms of s 112(2) of the Act that was accepted by the state.[7] In any event, he has accepted responsibility for all the

[4] *S v Sebata* 1994 (2) SACR 319 (C) at 325e – f.
[5] 2012 (2) SACR 545 (SCA) para 9.
[6] 1972 (3) SA 396 (A) at 410 G.
[7] S v Nkosi 2011 (2) SACR 482 (SCA) para 33.

attempted murder charges and the robbery. Even though the court *a quo* had ordered that part of the sentence in counts 1 to 5 should run concurrently with the sentence in count 6 this still did not make much of a difference to the severity of the sentence.

[10] As held in *S v Mthethwa*[8] an order that sentences should run concurrently is called for where the evidence shows that the relevant offences are inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent. Having taken into account all of the appellant's personal circumstances and weighing them against the offences and their seriousness and the interests of society, I am satisfied that they are weighty enough to constitute substantial and compelling circumstances justifying the imposition of less severe sentences than the ones imposed. Justice will still be served if a sentence of less than 20 years imprisonment is imposed. Deterrence should also be achieved by the sentence we are going to impose.

[11] Accordingly I propose the following order:

(a) The appeal against sentence is upheld. The sentence of the court *a quo* is set aside and substituted with the following sentence:

(b) The accused is sentenced to 6 years imprisonment in respect of counts 1 to 5 which are taken together for the purposes of sentence;

(c) The accused is sentenced to 10 years imprisonment in respect of count 6.

(d) The sentences are ante dated to 23 July 2010.

POYO DLWATI J

[8] 2015 (1) SACR 302 (GP) para 22.

I agree

SEEGOBIN J **HEMRAJ AJ**

Date of Hearing : 27 May 2016
Date of Judgment : 07 June 2016
Counsel for Appellant : Mr L Barnard
Counsel for Respondent : Ms A Watt