

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 34/2014

THE STATE

And

SANDILE KENNETH NOMBAMBA

TOBELA BAILEY

M. J.

Accused

Coram: **Chetty J**

Heard: **23 June 2016**

Delivered: **23 June 2016**

JUDGMENT

Chetty J:

[1] These offences had its genesis in a gathering during the late afternoon of 18 June 2012 where the three (3) accused, together with their erstwhile co-accused *Xhanti Msizi* and one (1) *Athenkosi* at *Msizi's* home in Walmer Township, Port Elizabeth where, as they were accustomed to, spent the afternoon imbibing alcohol and smoking mandrax. Later that evening the offences particularised in the indictment were committed and at the ensuing trial, accused no. 1 was convicted on counts 1 to 7; accused no. 2 on counts 1, 3, 4 and 5 and accused no. 3 on counts 1, 4 and 5. The circumstances under which the offences were committed are adverted to in the main judgment and bear no repetition, save to emphasize that the accused acted with deadly intent and a callous disregard for the rights and bodily integrity of their victims.

[2] Although the accused were unaware that the content of the telephonic conversation between *Msizi* and his caller pertained to the hijacking of a Toyota Corolla, the evidence established that en route to Govan Mbeki, *Msizi* appraised accused no. 1 of their avowed purpose. When they reached their intended destination accused no. 1 played the leading role. It was only his ineptitude in handling the firearm that caused *Msizi* to take possession of it and shoot the deceased. Although there is no evidence that either of accused no.'s 2 and 3 were aware of the purpose of the visit to Govan Mbeki, accused no. 2 participated in the hijacking of the vehicle by holding onto Ms *Sikiti* whilst the deceased was forcibly removed therefrom and thereafter shot.

[3] The subsequent events at the service stations, so vividly depicted in the CCTV footage (exhibit P), demonstrate that the robberies were not an arbitrary affair but executed with measured precision. Both incidents were goal directed, each of the accused being assigned a particular role to play to guarantee the success of the operations.

[4] Accused no. 1 is the youngest of the three (3) accused persons but played a leading role in the events which unfolded. The photographs in exhibit U are ominous and demonstrate quite unequivocally the accused's infatuation with firearms. His personal circumstances are thoroughly detailed in the pre-sentence report and bear no repetition. I accept that he is the product of a broken home but his step-grandmother appears to have created a stable environment in which he found for nothing. His own association with criminal elements and drug addicts has led to the malaise in which he finds himself.

[5] Accused no. 2's personal circumstances are fully documented in the pre-sentence report. Although he was virtually abandoned by his mother on her relocation to Johannesburg, his maternal aunt fulfilled the void left by her departure. The accused's father nonetheless continued to fulfil his fatherly duties but the accused appears to have learnt very little. He preferred the company of social misfits as evidenced by his frequent visits to *Msizi's* residence to indulge in drugs and alcohol.

[6] Accused no. 3 was sixteen (16) years old at the time of the commission of these offences. His familial situation is not unlike the others. He is the product of an acrimonious relationship between his mother and father and according to the report this appears to have instilled a sense of anger in the accused and contributed to his short temperedness and ultimately his conviction on the assault charge. The report however emphasizes that the accused appears to have realised the error of his ways and his association with a musical group has had a beneficial influence on his life. It is evident from the report that the accused is deeply remorseful for his conduct and has vowed to steer clear of criminal influences.

[7] The convictions on counts 2, 3, 4, 5 and 6, to wit murder, robbery with aggravating circumstances and the unlawful possession of a firearm trigger the operation of the minimum sentence provisions encapsulated in s 51 of the ***Criminal Law Amendment Act*** (the “Act”)¹. The Act is however not of application as far as accused no.’s 1 and 3 is concerned. Section 51(6) of the Act specifically provides that:

“(6) This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).”

¹ Act No 105 of 1997

The situation is however altogether different as far as accused no. 2 is concerned. He was nineteen (19) years old at the time. Robbery with aggravating circumstances or involving the taking of a motor vehicle attracts a mandatory sentence of not less than 15 years imprisonment absent a finding that there are substantial and compelling circumstances which justify the imposition of a lesser sentence. On the proven facts, the mandatory sentence regime is of direct application to accused no. 2.

[8] It has been submitted on his behalf that there are indeed substantial and compelling circumstances which render the imposition of the ordained sentence unjust. Mr *Crompton* submitted that the accused's personal circumstances, his age, the lesser degree of participation and the villainous influence of *Msizi* over him constitute the requisite circumstances. Although accused no. 2 projects an air or bravado, his immaturity is readily apparent and hence his susceptibility to negative influences real. I accept that the factors enumerated by Mr *Crompton* indeed render the mandatory sentence unjust.

[9] It is evident however that the only appropriate sentence in the case of each of the accused is a custodial one, and the question which arises is confined to the length of such imprisonment. As adumbrated hereinbefore, the robberies were not random acts. Each involved a measure of planning with particular roles being assigned to each of the participants. Accused no. 3's role was no less significant than that of his co-accused. A look-out's function is as equally morally reprehensible.

[10] In the result the accused are sentenced as follows:

Accused no. 1 - On Count 1 – 5 years imprisonment;
On Count 2 – 15 years imprisonment;
On Count 3 – 10 years imprisonment;
On Count 4 – 10 years imprisonment;
On Count 5 – 10 years imprisonment;
On Count 6 – 5 years imprisonment;
On Count 7 - 2 years imprisonment;

It is however ordered that the sentences imposed on counts 1, 3, 4, 5, 6 and 7 run concurrently with the sentence imposed on count 2.

The effective sentence is one of fifteen (15) years imprisonment.

Accused no. 2 - On Count 1 – 5 years imprisonment;
On Count 3 – 12 years imprisonment;
On Count 4 – 12 years imprisonment;
On Count 5 – 12 years imprisonment;

It is however ordered that the sentences on counts 1, 3 and 4 run concurrently with that imposed on count 5.

The effective sentence is one of ten (12) years imprisonment.

Accused no. 3 - On Count 1 – 5 years imprisonment;
On Count 4 – 10 years imprisonment;
On Count 5 – 10 years imprisonment;

It is ordered that the sentences imposed on counts 1 and 4 run concurrently with that imposed on count 5. The effective sentence is one of ten (10) years imprisonment.

D. CHETTY

JUDGE OF THE HIGH COURT

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