



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

CASE NO: AR404/2021

In the matter between:-

SIBONGISENI EMMANUEL NCUBE

FIRST APPELLANT

BHEKITHEMBA SONNYBOY SHANDU

SECOND APPELLANT

INNOCENT THEMBA NCANANA

THIRD APPELLANT

versus

THE STATE

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Nkosi AJ sitting as court for first instance):

[1] The appeal against the sentences imposed on the second and third appellants on 23 September 2010 is dismissed.

[2] The sentences of the second and third appellants are confirmed.

JUDGMENT

R. SINGH, AJ:

Introduction

[1] The three appellants were arraigned in the High Court of the KwaZulu-Natal Division of the High Court, Durban on the following charges:-

(a) All three Appellants for:-

(i) Robbery with aggravating circumstances as defined in section 1(b) of the Criminal Procedure Act 51 of 1977 (“CPA”), read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”) – Count 1;

(ii) Murder read with section 51 and Schedule 2 of the CLAA – Count 2;

(b) The first appellant for Counts 3 and 4:-

(i) Contravening section 3 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the Firearms Control Act 60 of 2000 – unlawful possession of a firearm;

(ii) Contravening section 90 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the Firearms Control Act 60 of 2000 (FCA)– unlawful possession of ammunition.

(c) The second appellant for Counts 5 and 6:-

(i) Contravening section 3 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the FCA – unlawful possession of a firearm;

(ii) Contravening section 90 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the FCA – unlawful possession of ammunition;

(d) The third appellant for Counts 7 and 8:-

(i) Contravening section 3 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the FCA – unlawful possession of a firearm;

(ii) Contravening section 90 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of FCA – unlawful possession of ammunition;

[2] The charges relating to the contravention of the FCA were also read with section 51 and Schedule 2 of the CLAA in that the weapons used in the commission of the offences were semi-automatic firearms.

[3] All three appellants pleaded not guilty and were convicted as charged on 22 September 2010.

[4] The first and second appellants were sentenced as follows:-

(a) Count 1 - 15 years imprisonment;

(b) Count 2 - imprisonment for life;

(c) Counts 3 and 4 and 5 and 6, respectively with both counts in respect of each of the two appellants taken together for purposes of sentence - 15 years imprisonment;

[5] The third appellant was sentenced as follows:-

(a) Count 1 - 15 years imprisonment;

(b) Count 2 - 20 years imprisonment;

(c) In respect of counts 7 and 8 he was sentenced to fifteen years imprisonment each with a further order that 10 years imprisonment of the sentences in respect of counts 1 and 7 were to run concurrently with the sentence in count 2. This was an effective 30 years imprisonment.

[6] The appellants aggrieved by the outcome, applied for leave to appeal against their convictions and sentences. The court a quo granted them leave to appeal against the sentences but denied them leave to appeal against the convictions. Consequently the matter came before us in respect of their appeals against their sentences. At the outset of the hearing, Mr Mbatha who appeared for the appellants advised us that the first appellant has passed away in custody. The appeal in respect of the first appellant was therefore withdrawn.

[7] A summary of the relevant evidence adduced in the court a quo was as follows:

(a) At around midnight on 25/26 June 2009, the three appellants with their former co-accused attacked and robbed the deceased, Mr Perican Mabhoni Zulu ("Mr Zulu") who was staying with his girlfriend, Ms Nellie Mhlongo ("Ms Mhlongo") by entering their dwelling. During the robbery, Mr Zulu attempted to escape from the appellants and as he fled the dwelling, was shot several times by the first and second appellants. He died a short distance away from his dwelling.

(b) The appellants were arrested on 9 July 2009 at the KwaMashu Hostel for the crimes after the second and third appellants were pointed out by the complainant, Ms Mhlongo.

[8] The evidence of Ms Mhlongo was that she and Mr Zulu were robbed of a kettle, a two plate stove, body lotions and R20-00 in cash.

Submissions in mitigation of sentence before the court a quo

[9] The second appellant's legal representative in the court a quo made the following submissions on his behalf:-

(a) The second appellant was 26 years old and collecting a disability grant due to a very serious injury he sustained with a firearm, which rendered him partially disabled in his arm;

(b) He was unable to complete school due to his poor social economic background;

(c) He at some stage prior to the proceedings intended to plead guilty but after going to Westville Prison, he was "schooled" to plead not guilty and told that he would be "silly" to plead guilty. This was indicative of remorse on his part;

(d) He was 25 years old at the time of the offence being committed and the offence was not planned or premeditated.

[10] The third appellant's legal representatives made the following submissions in the court a quo:-

(a) The third appellant was 24 years of age at the time of the commission of the crime;

(b) He was unemployed and the crime was not premediated or pre-planned.

Submissions on behalf of the appellants

[11] The appellants' counsel, *Mr Mbatha* submitted that the court a quo misdirected itself in attaching insufficient weight to the traditional mitigating factors, in particular, that the appellants were still young at the time of sentencing being between the ages of 26 and 29. The second appellant was

also a first offender. Although the third appellant had a previous conviction, he ought to have been treated as a first offender for the purpose of sentencing taking into account the nature of his previous conviction.

[12] It was submitted further in the heads of argument that the appellants are suitable candidates for rehabilitation and that the court a quo over-emphasized the failure of the appellants to show remorse and under-emphasized the appellants' personal circumstances. The overall submission was that the court a quo failed to exercise its discretion properly and that lesser sentences than those imposed by the court a quo would have been appropriate sentences. The present sentences were too harsh and induced a sense of shock.

[13] Ms Molmndo who appeared on behalf of the State submitted that she stood by the heads of argument submitted on behalf of the State, namely that the court a quo had weighed up all the compelling interests and carefully considered each appellants personal circumstances. It thus arrived at the correct conclusion. This was borne out by the third appellant being regarded as less blameworthy than the first and second appellant as he did not have a firearm nor did he shoot the deceased. Having made that finding, the court a quo correctly deviated from the imposition of the prescribed minimum sentence.

The law

[14] It is a well established principle that the question of sentencing lies within the discretion of the trial court and that a court of appeal will not unnecessarily interfere with the exercise of such discretion¹. A court of appeal will thus not,

“in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...”^{2, 3}.

¹ **S v Romer 2011 (2) SA SACR 153 (SCA) at para 22**

² **S v Malgas 2001 (1) SACR 469 (SCA) at 478 D to E**

³ **S v Fielies [2014] ZASCA 191 at para 14**

[15] The court sitting on appeal must therefore be satisfied and interfere with the sentence if the court a quo's sentencing discretion was not exercised at all or exercised improperly or unreasonably when imposing its sentence⁴. The fact that a sentence is disturbingly inappropriate or sufficiently disparate has been accepted as sufficient reason for a court of appeal to intervene^{5, 6}.

[16] In the case of **S v Anderson**⁷, the Appellate Division (as it then was) very succinctly stated the following "the court of appeal after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence".

[17] The over-emphasis of the effect of the appellant's crimes and the underestimation of the person of the appellant, constitutes a misdirection and in the result a sentence ought to be set aside if same is the case⁸. In **S v Salzwedel and Others**, the Supreme Court of Appeal held that equally the principle enunciated in **S v Zinn** must be true when there is an overemphasis of the personal circumstances of the accused and an underestimation of the gravity of the offence⁹.

[18] Where an appeal court is faced with considering substantial and compelling circumstances in terms of the CLAA, the approach should be different from an approach to sentences not imposed under the CLAA, as the prescribed minimum sentences in terms of the CLAA are not to be lightly departed from. The proper approach for the court of appeal would be to focus

⁴ **S v Hewitt** 2017 (1) SACR 309 (SCA) at para 8

⁵ **S v Mothibe** 1977 (3) SA 823 (A) at 830 D

⁶ **S v Salzwedel and Others** 1999 (2) SACR 586 (SCA)

⁷ 1964 (3) SA 494 (A) at 494 G to H

⁸ **S v Zinn** 1969 (2) SA 537 (A) at 540 F to G

⁹ 1999 (2) SACR 586 (SC) at page 591 G to H

on whether the facts which the sentencing court had considered, were substantial and compelling or not¹⁰.

[19] This does not however mean that an appeal court is restricted to the circumstances that the trial court had taken into account. All circumstances must be considered to determine whether there were, or were not substantial and compelling circumstances. There is nothing in the CLAA which fetters an appeal court's power to reconsider the issue of substantial and compelling circumstances. This would also be in keeping with the spirit of the Constitution which protects an accused person against shocking or disproportionate punishment¹¹.

[20] The consideration of minimum sentences does not bar the requirement that a sentence must be proportionate to the circumstances and if the prescribed sentence is not proportionate with regard to the circumstances of the case, it ought not to be imposed¹². Courts however have to be alive to their duty to impose prescribed minimum sentences unless there are truly convincing reasons to depart therefrom. Factors such as "youthfulness" or remorse must not be lightly taken into consideration¹³.

[21] For remorse to be considered as a substantial and compelling circumstance to justify the departure from a prescribed minimum sentence will mean that the accused will have to show genuine remorse. His surrounding actions rather than any last ditch submissions on his behalf will be true indicators of whether he was remorseful or not¹⁴.

Application of the law to the facts

[22] Both appellants' personal circumstances have been summarized. It is against those personal circumstances that, this court must consider the

¹⁰ S v PB 2013 (2) SACR 533 SCA at para 20

¹¹ S v GK 2013 (2) SACR 505 (WCC) at para 7

¹² S v Vilakazi 2009 (1) SACR 552 SCA at para 18

¹³ S v Matyitya 2011 (1) SACR 40(SCA) at para 23

¹⁴ S v Monye and Another 2017 (1) SACR 329 (SCA) at para 14

aggravating circumstances of the crimes which were committed. Levels of crime in our country have reached alarming proportions such that it has long begun to pose a threat to our democracy. The courts are clearly entitled and, indeed obliged and, take action to protect human life and property against senseless violation by others. Members of the public are understandably concerned, often afraid for their lives and safety, having to constantly look over their shoulders where the incidence of crime are high and the rate of apprehension is low.

[23] The deceased and the complainant were in their home which was meant to be their place of sanctity. The photographs of the deceased which formed part of the exhibits clearly show a semi-dressed man reflecting someone who was truly at ease and not expecting a brazen intrusion into his home. The same can be said about the complainant Ms Mhlongo. Neither of them were expecting the rude intrusion of the appellants in the middle of the night.

[24] A perusal of the post-mortem report in respect of Mr Zulu shows that not only was he shot multiple times from the front but even when he chose to protect himself and in the words of the court a quo “run the gauntlet”, then too was he not given an opportunity to save himself. The post mortem report reflected at least three bullet wounds with entry points on his left and right buttocks. He was clearly shot from behind. The appellants would have stopped at nothing even though it was clear that Mr Zulu posed no threat to them. What is even more aggravating in this matter is that the deceased lived in a shack and he was killed for meagre items such as a hot plate stove, a kettle, some body lotions and R20-00 in coins. Surely his life was worth more than that.

[25] I am not persuaded that any of the personal circumstances placed before this court in mitigation of sentence and as pleas to depart from the minimum prescribed sentence are worthy. I am further not persuaded that there were any material misdirection by the court a quo to warrant interference with the sentences which were imposed. I am accordingly satisfied that the court a quo gave proper consideration to both the mitigating and aggravating factors placed before it. The sentences are proportionate to the crimes.

Conclusion

[26] I accordingly propose the following order:-

[1] The second and third appellants' appeals against their sentences are dismissed.

[2] The second and third appellants' convictions and sentences are confirmed.

R. SINGH, AJ

I agree and it is ordered.

CHILI, ADJP

I agree.

P. BEZUIDENHOUT, J

DATE OF HEARING: 6 OCTOBER 2023

DATE OF JUDGMENT: 20 OCTOBER 2023

Appearances:

For the Appellants: Mr Mbatha

Instructed by: Durban Justice Centre,
Ground Floor, The Marine,
22 Dorothy Nyembe Street,
Durban.

For the Respondent: Ms Molmdo

Instructed by: Office of the Director of Public Prosecutions
Durban