

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

Case No. CA52/2018

(ex ECM 97/2007)

In the matter between:

ZUZEKILE SOBHUYE

1st Applicant

SUNLIGHT VELETO

2nd Applicant

ERIC MAGINI

3rd Applicant

And

THE STATE

Respondent

JUDGMENT

JOLWANA J

[1] The three appellants were, among themselves, convicted of eight counts related to a spate of cash in transit armed robberies. These offences were committed in a period of about six months from the end of 2005 in various locations in Lusikisiki and Port St Johns.

[2] In granting leave to appeal against the cumulative effect of the sentences imposed to all the appellants the trial court also granted the third appellant leave to appeal against convictions in respect of counts 7 and 8. Ms Crouse, appellants' counsel conceded that she was unable to argue that the state had not proven common purpose beyond reasonable doubt in respect of these counts.

[3] In convicting the third appellant on counts 7 and 8 the trial court made the following factual findings:

❖ "Count 7

- At a meeting held at the home of accused no.4 (now accused no.3) it was decided to purchase a stolen vehicle to be used during the armed robbery near Swazini on 2 May 2006. Accused no.4 (now accused no.3) was present at this meeting.
- The vehicle was purchased and left at the home of accused no.4 (now accused no.3).
- However, there is no evidence suggesting that accused no.4 (now accused no.3) was involved in the actual robbery. However, he received R10 000.00 as his share of the robbery presumably for storing the stolen vehicle which was used during the robbery.

Although there is evidence of a prior agreement to which accused no.4 (now accused no.3) was a party, it is our view that he also fulfils the second condition of the common purpose doctrine namely that he actively associated himself with the conduct which resulted in the robbery. Again, for purposes of sentence his minor role will play a role but for purposes of conviction on the common purposes doctrine he falls squarely within the definition of common purposes on the basis of active association and prior agreement.

❖ Count 8

- If accused no.4 (now accused no.3) is convicted under count 7 it follows that on the same basis a conviction under count eight must follow. Again the role that he played in count 8 will be reflected in the sentence, but is irrelevant for purposes of conviction. As a result of his participation in two or more of the robberies, it follows that he must also be convicted in respect of count 1.”

[4] There is no basis for interfering with the above factual findings. The appeal court can only interfere with the trial court’s factual findings with great caution and respectful hesitation. This trite legal position on factual findings of the trial court was stated as follows in *S v Leve* 2011 (1) SACR 87 (ECG):

“8. The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court’s findings of fact and credibility are presumed to be correct, because the trial court and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.”

[5] Once the unassailability of the trial court’s factual findings is established in that they are neither vitiated by irregularity nor are they patently wrong, it follows that the convictions on counts 7 and 8 were correctly made. In convicting the third appellant on the basis of the doctrine of common purpose, the learned Judge correctly analysed and relied on the judgment he himself wrote for the full court in *Mzwempi v S* 2011 (2) SACR 237 (ECM). In that case this court held that:

“[52] The conditions in the first stage which trigger the principle of imputation are either a prior agreement or an active association in the joint venture. Any one of those two conditions must exist. On the fact of this case, a prior agreement was not proved. The question is therefore whether or not the appellant actively associated himself with the aims of the attack on the Makhwaleni. The answer to this question depends on the meaning and content which our Courts, and in particular the Supreme

Court of Appeal, have given to the concept of 'active association'. Both *Safatsa* (supra) and *Mgedezi* (supra) deal with this issue. In neither of these two cases was any reliance placed on a prior agreement. It is, with respect, important to bear this distinction in mind.

[53] The second stage of the definition imputes conduct to an accused **which falls within the common design or purpose** (my emphasis). Conduct which falls within the common design seems to be any or all conduct in the execution of the common design or purpose. In the case of a prior agreement therefore, all the parties thereto will be held liable for the act of any one of their members which either falls within the common design or is executed in the course of the implementation of the agreement (provided, however, the other definitional requirements such as *dolus* are also present.

[54] It follows that, where a prior agreement is proved, the accused is not required to be present at the scene where the crime is committed, and neither is he required to have actively participated in the conduct which caused the crime. Provided that the conduct imputed to him falls within the common design or the execution of the agreement, and that he had the necessary *mens rea* (either direct or *dolus eventualis*), he may be held liable under the common purpose rule."

[6] Therefore counsel's reassessment of the appeal on convictions on these counts and the subsequent decision not to pursue it is laudable and was correctly made. On the facts of this matter and the legal position on common purpose, the third appellant's appeal on convictions for counts 7 and 8 would have, in any event, been without merit.

[7] What now remains to be considered is the three appellants' appeal against the sentences imposed on them by the trial court. The appellants were sentenced as follows:

❖ "Accused no.1

- In respect of COUNTS 2, 3, 5, 6 and 7 you are sentenced to SEVEN (7) YEARS IMPRISONMENT in respect of each count. These sentences are to run consecutively. It means that they do not run at the same time, but one after the other.
- In respect of count 4 which is the attempted robbery, you are sentenced to FIVE (5) YEARS IMPRISONMENT and this sentence will also run consecutively with the sentences under counts 2, 3, 5, 6 and 7.

- In respect of COUNT 1 you are sentenced to FIVE (5) YEARS IMPRISONMENT which will run concurrently with the sentences imposed under counts 2, 3, 4, 5, 6 and 7 which means that this period of sentence runs at the same time as those other sentences.
- In respect of COUNT 8 you are sentenced to FIVE (5) YEARS IMPRISONMENT which is to run concurrently with the sentence under count 7, which means it will run at the same time as the sentence under count 7

Therefore the TOTAL PERIOD OF IMPRISONMENT IS FORTY (40) YEARS.

❖ Accused no.2

- In respect of COUNTS 2 and 4 you are sentenced to FIVE (5) YEARS IMPRISONMENT, in respect of each count.
- In respect of COUNTS 3, 5 and 6 you are sentenced to SEVEN (7) YEARS IMPRISONMENT in respect of EACH COUNT.

The sentences in respect of counts 2, 3, 4, 5 and 6 are to run consecutively, which means not at the same time.

- In respect of COUNT 1 you are sentenced to FIVE (5) YEARS IMPRISONMENT which will run concurrently with the sentences under counts 3, 5 and 6.

Therefore you are sentenced to a TOTAL PERIOD OF THIRTY ONE (31) YEARS IMPRISONMENT.

❖ Accused no.4: (now accused no.3)

- In respect of COUNT 4 you are sentenced to FIVE (5) YEARS IMPRISONMENT.
- In respect of COUNTS 5 and 6 you are sentenced to SEVEN (7) YEARS IMPRISONMENT in respect of each count.
- In respect of counts 7 and 8 you are sentenced to FIVE (5) YEARS IMPRISONMENT in respect of EACH COUNT.
- The sentences in respect of counts 4, 5, 6 and 7 are to run consecutively, which means one after the other.
- The sentence in respect of count 8 is to run concurrently with the sentence under count 7, in other words, at the same time.
- In respect of COUNT 1 you are sentenced to FIVE (5) YEARS IMPRISONMENT.

In respect of the sentence under count 1, it will run concurrently with the sentence imposed under counts 5, 6 and 7.

It follows that you are sentenced to IMPRISONMENT FOR A TOTAL NUMBER OF TWENTY FOUR (24) YEARS."

[8] Before passing the above sentences the trial court observed that each one of the robberies for which the appellants had been convicted was carefully planned and

executed with military precision. The weapons used were AK47's, R1 rifles, shotguns and a variety of 9mm handguns. In committing the offences they had no hesitation in opening fire on old age pensioners and other sickly people who were queuing for social grants. These people were both unsuspecting, defenceless innocent good people from the communities surrounding the pay points. In fact one elderly pensioner and a security guard were wounded during the attempted robbery.

[9] The learned judge *a quo* further observed that with these kind of serious and violent crimes escalating the society at large would be gravely concerned. Society's expectation is that its anxieties, fears and wishes must be reflected in the sentences imposed so that such sentences serve a deterrent purpose. The court concluded that the circumstances of the case did, however, justify a departure from the Minimum Sentences Act to prevent an unreasonable cumulative effect of the total period of imprisonment and to take into account the seven years pre-sentencing period which the appellants had already served.

[10] Save for the cumulative effect of the sentences due to the number of crimes they were convicted of the court found that there was nothing out of the ordinary in regard to the personal circumstances of the first appellant. With respect to second appellant the court found that there was nothing peculiar in his personal circumstances even though he seemed genuinely remorseful, took responsibility for his actions and had a chance of rehabilitating himself in prison. With regard to the third appellant the court found that his personal circumstances are not different from the other appellants.

[11] In launching the appeal against sentence the appellants made the following submissions in their heads of argument:

“23. It is trite that a court of appeal will only interfere with a sentence if the sentencing court has failed to exercise its discretion reasonably and properly.

24. It is submitted that the trial court erred in imposing shockingly inappropriate sentences on each Appellant.

25. The Trial Court should have given more consideration to the cumulative effect of the imposed sentences.

26. Furthermore, the Appellants:

26.1. Were incarcerated for seven years awaiting trial prior to their sentences;

26.2. Are all first offenders, despite not being young anymore;

26.3. The Third Appellant suffers from ill health.”

[12] The state’s main contention for the dismissal of the appeal is that in addition to the fact that the appellants were convicted of very serious offences for which minimum sentences are applicable the trial court did take into account all the relevant factors including the cumulative effect of the sentences. The cumulative effect of the sentences is the main basis on which the appeal against sentence is sought to be assailed.

[13] Our principles on sentencing, when correctly applied, are such that the finding that there are no substantial and compelling circumstances does not necessarily result in the imposition of the prescribed minimum sentences. The trial court still has a discretion to depart from the minimum sentences.

[14] There is no better way of articulating this aspect of our sentencing regime than referring to what Nugent JA said in *S v Vilakazi* 2009 (1) SACR 552 at 560 in which the learned judge of appeal said:

“[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas* – which was said by the Constitutional Court in *S v Dodo* to be undoubtedly correct –

that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in *Dodo* found the Act to be not unconstitutional. For by avoiding sentences that are so disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some cases that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in *Malgas*, and in particular its ‘determinative test’ for deciding whether a prescribed sentence may be departed from,

makes plain that the power of the court to impose a lesser sentence ... can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross [and thus constitutionally offensive].

That ‘determinative test’ for when the prescribed sentence may be departed from was expressed as follows in *Malgas* and it deserves to be emphasized:

If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

[15] I must mention that it was the trial court’s finding that the appellants were indeed first offenders. First appellant was 41 years old on the date of the sentence. Therefore he had maintained a clean record for 41 years before this sentence. Appellant no.2 was born in 1958 and therefore was 55 years old when he was sentenced. Appellant no.3 was 47 years old which means that he had lived a clean life with no brushes with the law for 40 years. It is only fair to observe that they had no brushes with the law for a substantial period of their lives.

[16] It is clear that the court a quo wrestled with the conundrum of the seriousness of the crimes, the interests of the society and the personal circumstances of the appellants which it said were neither substantial nor compelling but still having to depart from the prescribed sentences, “*to prevent an unreasonable cumulative effect of the total period of imprisonment, and to take into account the seven years which the three accused had already served in custody*”.

[17] There is no basis for criticising the court *a quo*'s approach on the facts of this matter as it is clear that it applied its mind and sought to balance the crimes committed, the interests of society and the interests of the appellants. However, the sentences do appear to be still cumulatively unreasonable when the total number of years that the appellants must each serve is taken into consideration.

[18] Even in violent crimes such as those for which the appellants were convicted, the Supreme Court of Appeal has cautioned against over-emphasizing the retributive and deterrent elements in sentencing and thus unwittingly de-emphasizing rehabilitation. In *Scott–Crossley v S* [2007] 127 SCA the court stated thus:

“[34] The natural indignation which the community must feel at the appellant's conduct warrants appropriate recognition in the sentence. Nevertheless that can hardly invite a sentence that is out of proportion to the nature and gravity of the offence. Against the public interest must be weighed the unblemished record of the appellant, who, at the time of the commission of the offence, was a useful member of society upon whom some 100 people and their families were economically dependent. To his credit the appellant has expressed contrition and remorse.

[35] Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. Against that must be weighed the appellant's prospect of reformation, which appear to be good. It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of the society.”

[19] As the trial court itself observed, the appellants could easily have killed many people. However, it is a fact that in all five armed robberies and the attempted robbery, not a single person died even though the robberies were committed in places crowded with the elderly and sickly. It is also a fact that in all those five armed robberies and one attempted robbery, only two people were injured.

[20] Whilst there is nothing necessarily wrong with the sentences imposed, the manner in which the court *a quo* determined that those sentences are to be served has resulted in the unreasonable cumulative effect which the court itself determined should be avoided, still remaining a concern. This clearly justifies an interference with the sentences imposed in so far as the manner in which the sentences are to be served is concerned.

[21] Therefore appellants' appeal against sentence must succeed and the sentence imposed by the trial court must be set aside.

[22] Accordingly the following order will issue:

1. The appeal against sentence succeeds.
2. The sentence imposed by the trial court is set aside and substituted with the following sentences:

First appellant

2.1 In respect of count 1 the first appellant is sentenced to five (5) years imprisonment.

2.2 In respect of counts 2, 3, 4, 5, 6 and 7 the first appellant is sentenced to seven (7) years imprisonment in respect of each count.

2.3 The sentences in respect of counts 2, 3 and 4 are to run consecutively. The sentences in respect of counts 5, 6 and 7 are to run concurrently with the sentences in respect of counts 2, 3 and 4.

2.4 In respect of count 8 the first appellant is sentenced to five (5) years imprisonment.

2.5 Therefore the total period of imprisonment is 31 years.

Second appellant

3.1 In respect of count 1 the second appellant is sentenced to five years imprisonment.

3.2 In respect of counts 2, 3, 4, 5 and 6 the second appellant is sentenced to seven (7) years imprisonment in respect of each count.

3.3 The sentences in respect of counts 2 and 3 are to run consecutively. The sentences in respect of counts 4, 5 and 6 are to run concurrently with the sentences in respect of counts 2 and 3.

3.4 The second appellant is therefore sentenced to a total period of 19 years imprisonment.

Third Appellant

4.1 In respect of count 1 the third appellant is sentenced to five (5) years imprisonment. 4.2 In respect of counts 4, 5 and 6 the third appellant is sentenced to seven years imprisonment in respect of each count. The

sentences in respect of counts 5 and 6 will run concurrently with the sentence in respect of count 4.

4.3 In respect of counts 7 and 8 the third appellant is sentenced to five years imprisonment. The sentences in respect of counts 7 and 8 will run concurrently with the sentence in respect of count 4.

4.4 Therefore the total period of imprisonment is 12 years.

5. The sentences are to be antedated to the 28 March 2013 for all three appellants.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

T. MALUSI

JUDGE OF THE HIGH COURT

I agree:

M. MNYATHELI

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellant: E. CROUSE

Instructed by: Legal Aid Board

PORT ELIZABETH JUSTICE CENTRE

Counsel for the Respondent: M.W. SIYO

Instructed by: NPA

MTHATHA

Heard on : 10 October 2018

Delivered on : 05 February 2019