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IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

16/2/2017

CASE NO: A629/2015

REPORTABLE

IN THE INTEREST OF OTHER JUDGES

REVIEWED

SAM MASHWELE

Appellant

and

THE STATE

Respondent

JUDGMENT

VILAKAZI, AJ:

[1] On 30 March 2015, appellant appeared in Pretoria Regional Court, facing 3 counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA") (read with section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (the "Act"). He tendered a plea of not guilty and exercised his constitutional right to remain silent. The appellant was legally represented throughout the trial.

[2] The charges were subject to section 51 (2) read with Part II of Schedule 2 of the "Act", which means that upon conviction he faced the prospects of being sentenced to 15 years imprisonment absent of finding substantial and compelling circumstances.

[3] The trial court convicted appellant on 10 May 2010 and sentenced him on 3 June 2010 as charged. It found that there existed substantial and compelling circumstances justifying the imposition of a lesser sentence and in consequence sentenced appellant to 30 years' imprisonment. Appellant was legally represented during the trial.

[4] The appeal before us is against conviction and sentence with leave to appeal having been granted on petition by this court on 13 February 2015.

[5] The appellant was convicted of the following counts:

Count 1: That on 25 December 2001 near Witbank Northern Transvaal, the accused unlawfully and intentionally assaulted Bantu Mabena and did there and then, with force, take a 328i BMW, a motor vehicle, with registration number CNC [...] MP, his property in his lawful possession from him and the aggravating circumstances being that firearms were used;

Count 2: That on 30 December 2001 near Witbank in the district of Northern Transvaal. the accused did unlawfully and intentionally assault Andries Sambula/John Pienkie and did then with force took BMW, a motor vehicle, with registration number CGJ [...] MP, the property in his or her lawful possession with aggravating circumstances being that firearms were used;

Count 3: That on 15 January 2002 near Witbank, the accused did unlawfully and intentionally assault Themba Masango and did then with force took BMW, a motor vehicle, with registration number JDC [...] GP, the property in his or her lawful possession with aggravating circumstances being that firearms were used

[6] The sentences imposed upon the appellant were as follows:

Count 1: 12 years

Count 2: 12 years

Count 3: 12 years

[7] The trial court ordered that 6 years of the sentence in count 3 should run concurrently with the sentences imposed in count 1 and 2. The consequence thereof was that the accused was sentenced to an effective 30 years imprisonment.

[8] The state tendered the evidence of 11 witnesses, which included amongst others 4

complainants, 5 police officers and a registered police informant. The appellant testified in his own defence.

[9] The state presented viva voce evidence from the following witnesses: Bantu Abraham Mabena, Andries Sambula and Tshepo Gerry Mpoise, the owner of a 328i BMW motor vehicle with registration number CNC [...] MP. John Pienkie Mashiane, the owner of a BMW, a motor vehicle with registration number CGJ [...] MP and Dr Themba Masango, owner of a BMW motor vehicle with registration number JDC [...] GP.

[10] The police officers who testified were Inspector Cathrine Elizabeth Fitzgerald, a fingerprint expert; Inspector Hendrik Johannes Bester; Tebogo Sekhobe, a registered police agent; Captain Johannes Kekai and inspector Frederik Zitske and Inspector Simon Erasmus as investigating officers.

[11] Mabena testified in respect of the robbery incident which occurred on 25 December 2001. His testimony is that on 25 December 2001 at 20h00 he was driving a BMW 328i with registration number CNC [...] MP in Gumbi Street Lenville Township in Witbank. He had just dropped off a lady, and waited to ensure that she was safe. As his car was idle, 2 black men approached his vehicle. The appellant had a firearm and opened the driver's door and grabbed him with his left hand. The other robber, namely Thavi Given Mkhondo pushed him out of the driver's seat and then occupied the driver's seat. He wrestled with the appellant with the intention to get away from the vehicle and the appellant pointed a gun at him. He managed to get out of his motor vehicle. He knew accused 1 before this incident as they grew up together in Witbank. It is common cause that accused 1 was convicted of count 1 and 2 and sentenced to an effective imprisonment of 20 years.

[12] Tebogo Sekhobe, a registered police agent testified that on 27 December 2001. he received instructions from Inspector Erasmus to purchase a BMW motor vehicle. He met with Inspector Kekai at a parking garage in Pretoria and he gave him cash in the amount of R 10 000. He was driving in an Audi A4 motor vehicle. He met with the appellant and accused 1 at a parking garage in the presence of Inspector Kekai. Appellant and accused 1 took him to the parking garage where the BMW 328 with registration number CNC [...] MP was kept. Appellant switched the engine on and

removed the registration plates of the vehicle. He paid the appellant cash in the amount of R 10 000. He drove the said BMW and the appellant and accused alighted off in Beatrix Street in Pretoria. He handed over possession and control of the motor vehicle to Inspector Erasmus.

[13] Inspector Simon Erasmus testified that he was an investigating officer in this case and is stationed in the Organised Crime Unit. He used a registered agent whom he gave cash in the amount of R10 000 and instructed him to purchase a BMW for that amount. As per his instruction the BMW with registration number CNC [...] MP was purchased. On 27 December 2001 at 23H00 in Bush Street, Willow Manor he was handed over the said motor vehicle by the agent. The vehicle was kept at storage and handed in as exhibit under SAP13/I48/0I.

[14] Tshepo Gerry Mpoise testified that he is the owner of a BMW 328 with registration number CNC [...] MP. That on 23 November 2002 he attended to a storage site in Pretoria West and identified his motor vehicle before Inspector Zietzke.

[15] In respect of the second incident, Andries Sambula, testified that on 30 December 2001 at about 20H30 he was occupying a passenger seat of a BMW with registration number CGJ [...] MP. The motor vehicle was parked in the yard. The owner of the said motor vehicle namely, John Mashiane was in the house. An unknown male carrying a firearm approached him and he instructed him to open the driver's door. He opened the rear door and climbed into the car. When he opened the driver's door, a second unknown male had already opened the driver's door and climbed in the car. The keys had been left in the ignition and the unknown male drove the vehicle. They drove off with him bundled into the boot and dropped him off on the highway. Appellant was the driver of the motor vehicle. He had an opportunity to see him before being bundled in the boot.

[16] John Pinkie Mashiane testified that he is the owner of a BMW, a motor vehicle with registration number CGJ [...] GP. He confirmed the evidence of Andries Sambula, that on 30 December 2001 while Andries was in his motor vehicle he was hijacked. On 12 April 2002, he identified his motor vehicle before Inspector Erasmus.

[17] Tebogo Sekhobe, testified that on 30 December 2001, he was contacted by appellant and advised him that he is selling a BMW. He could not purchase the motor vehicle immediately due to instructions from Inspector Erasmus. On 2 January 2002 at about 08H00 appellant contacted him regarding this sale and purchase of a BMW. On the very same day at 11H30 he received cash from Inspector Erasmus. Subsequent thereto, he met accused 1 and the appellant at a garage in Mamelodi. From Mamelodi he drove with accused 1 and the appellant to a parking garage in Vermeulen Street. The BMW was parked at Vermeulen Street in the parking garage. Accused 1 switched on the engine of the motor vehicle. Appellant removed the registration plates of the motor vehicle. He paid an amount of R0 000 to purchase this vehicle. He then handed over the motor vehicle to Inspector Erasmus.

[18] Captain Johannes Kekai testified that during December 2001, he was on patrol operations called PATROL. Accused 1 informed him that a BMW motor vehicle was available for sale. The appellant took him to a parking garage at Vermeulen Street in Pretoria where the BMW was parked. Tebogo Sekhobe paid the cash to accused 1.

[19] Inspector Cathrina Elizabeth Fitzgerald testified that he is based in the Fingerprints Department, stationed at the Criminal court centre. That on 3 January 2002 he investigated a 318 BMW with registration number CGJ [...] MP. Her report indicated that the appellant fingerprints were found on the right back door handle of the said motor vehicle.

[20] In respect of the third incident, Dr Temba Masango testified that on 15 January 2002 he was driving a motor vehicle, a BMW with registration number JDC [...] GP at approximately 21h00. He was caught in traffic in Kromdraai. 2 men armed with guns approached him. They instructed him to occupy the back seat and place his head in between his thighs. The 2 men occupied the front seats. Amidst the hijacking he heard shots from behind and could see the blue SAPS flashing lights. The hijackers in his car fired shots at the SAPS vehicle. The hijackers searched him and robbed him of his mobile phone, cash in the amount of R500 and then proceeded to bundle him in the boot of his car. Thereafter he was dropped off in Menlyn Park Shopping Centre.

[21] On 17 January 2002, he identified his motor vehicle in Pretoria West before

Inspector Zitske.

[22] Inspector Hendrik Johannes Bester testified that he is stationed at Witbank and on 15 January 2002 at approximately 21h00. He was driving a SAPS motor vehicle. He fired shots at a BMW motor vehicle with registration number JDC [...] GP and in return the passengers of the BMW returned fire. As a result of this shooting, he was shot in the left eye and his face is now partially paralysed.

[23] Tebogo Sekhobe regarding this incident testified that appellant contacted him on 16 January 2002 at approximately 13h30. He informed him that he is in possession of a stolen motor vehicle and requested to park it in his premises. He opened the gate and allowed the appellant onto his property to park the BMW. Appellant further informed him that there was a shoot-out with the police and he shot and wounded a police officer as a result of the hijacking of this motor vehicle. The BMW was kept overnight on his premises. He drove accused 1 and the appellant to Mamelodi. He observed that the motor vehicle had bullet holes. Inspector Erasmus seized the motor vehicle.

[24] The appellant denied any involvement in the robbery. He testified that in respect of the incident on 25 December 2001, he was in Mamelodi with his family at home watching television.

[25] In respect of the robbery that took place on 30 December 2001, he could not recall his whereabouts. His defence was on alibi.

[26] In respect of the third incident that occurred on 15 January 2002, he denied any involvement in this crime and claimed to have been at his grandmother's house. He testified that Andre Flock, a police officer, arrested him on 5 September 2002 at his residential home.

[27] The trial court concluded that the state proved its case beyond a reasonable doubt and that the state's case against the appellant was overwhelming.

[28] It was submitted by counsel on behalf of the appellant that he cannot argue with any measure of conviction regarding the conviction of the appellant by the trial court in

respect of the three charges for which he has been convicted. In a nutshell it was the appellant's submission that he concedes to his conviction by the court a quo.

THE SENTENCE

[29] The trial court convicted appellant as charged. It found that there existed substantial and compelling circumstances justifying the imposition of a lesser sentence and in consequence sentenced appellant to 30 years imprisonment.

[30] As to sentence, the trial court duly considered the appellant's personal circumstances as well as the seriousness of the offences. The appellant was 24 years of age at the time of the commission of the offences. He has a previous conviction of robbery and that he had spent 9 years in custody awaiting conclusion of his trial.

[31] In respect of how the appellant committed these offences the evidence presented was that on 25 December 2001, the appellant was in possession of a firearm, which he pointed at Bantu Mabeno, the complainant. In respect of the second incident which took place on 30 December 2001, the appellant was the driver of the vehicle and with the assistance of accused 1 who was in possession of a firearm, humiliated Andries Sombula, the complainant, by bundling him in the trunk of the motor vehicle and dumped him in the evening on the highway. In respect of the third incident on 15 January 2002, Dr Mosongo was hijacked at gunpoint and also bundled in the boot of his car and dropped off in the middle of the night at Menlyn Shopping Centre.

[32] What further aggravated these circumstances is that the appellant exchanged fire with the police and Inspector Hendrik Bester was shot and suffered a permanent injury. The court took into account the fact that the appellant was brazen and despite the consequences that he might face he nevertheless followed through with his plans. Despite the overwhelming evidence and his fingerprints being found on the motor vehicle, he showed no contrition and pleaded not guilty.

[33] Regarding the needs of the society there is no doubt that the community expects the court to protect innocent men and women. There is an increase in armed robberies and the community expects the court to send a clear message to would be offenders

that such acts will not be tolerated. The trial court mentioned that these crimes have become a common place in and around major cities.

[34] In argument before us it was submitted that the sentence imposed by the trial court is shockingly excessive and not a balanced one. Counsel on behalf of the appellant argued that the trial court ought to have considered that the vehicles were recovered and there is no evidence that they were damaged and weight should thus be accorded to this factor.

[35] Counsel on behalf of the appellant submitted that the complainants did not sustain any injury during the robbery.

[36] It was the appellant's final submission that a period of 8 years he spent in custody awaiting completion of his trial is unreasonably long. In support of this submission counsel relied on the dicta of Makgoka J in *S v Xaba* [A487/2014] at par 31:

[37] "I need to say more on the period spent in custody, as there seems to me a perception that where the prescribed sentence is life imprisonment, that factor becomes irrelevant. That is a wrong premise because the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is just one"

[38] Counsel on behalf of the State argued that appellant was not a first time offender. He has a previous conviction of robbery in 1997 for which he was given a 4 years imprisonment. Appellant has become habituated. Appellant is to blame for spending a lengthy period of time in custody due to changing his legal representatives.

[39] Appellant did not testify in mitigation of sentence, his legal representative addressed the court from the bar, that he is 24 years old, that the girlfriend that was expecting his children. Those children are 9 years old and that the owners of these motor vehicles have recovered their assets.

[40] In relation to the seriousness of these offences, the police had to intervene and use the state resources in order to restore possession of the motor vehicles to their respective owners. Appellant was part of a syndicate, which was astute in its illicit activities and targeted BMW 3 series motor vehicles. Further aggravating factor is that in these incidents the complainants were hijacked at gun point, bundled in the boot and left stranded in the middle of the night, dumped on the side of the road and in the shopping centre. A police officer in executing his duties, was shot at in his eye and has lost sight of is left and is partially paralysed as a result of appellant selfish deed.

[41] The society expects the court to protect it against this kind of offence, which is prevalent in the cities.

[42] In *S v Radebe* 2013 (2) SACR (SCA) 165, Lewis JA stated the following in regard to the period spent in prison awaiting trial: "A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction is unhelpful. The circumstances of the individual accused must be assessed in each case determining the extent to which the sentence proposed should be reduced. A better approach in my view is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified, whether the effective period of imprisonment to be imposed is justified, whether it is proportionate to the crime committed," It is my view that the submission by appellant has no merit in view of the fact that the magistrate took the period spent in prison into account and deviated from imposing a prescribed minimum sentence of 15 years per charge per charge convicted, I consider imprisonment to be appropriate for this type of offence.

[43] The first question to be considered is whether the trial court having found that substantial and compelling circumstances did exist, which warranted deviation from imposing a sentence ordained by the Legislature for serious offences in imposing a 30 year period of imprisonment, did it exercise its discretion judicially and properly?

[44] Did the magistrate commit a gross misdirection and is a 30 year period given the personal circumstances of the appellant and the needs of society, is this period of imprisonment shockingly excessive?

[45] It is generally accepted that inordinately long periods of imprisonment do not contribute to the reform of an accused person, On the contrary they have the negative effect of denuding the accused of all hope of rehabilitation. I consider Nicholson JA's dicta in *S v Skenjana* 1985 (3) SA 51 (A) at 55C-D, appropriate, He said the following: '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) SA396 (A) at410G)'

[46] Giving all due weight to the enormity of the crime, the needs of society in an appropriately severe punishment being imposed for it, I consider the personal circumstances of the accused. He was 24 years old at the time of the commission of the offence, the fact that the complainants were unharmed and that he spent a period of 8 years in custody as strong mitigating factors. These circumstances cumulatively regarded satisfy me that a sentence of 30 years is shockingly excessive and inappropriate.

[47] Counsel on behalf of appellant submitted that a sentence of not more than 15 years would strike the necessary balance between the interests of the community and the personal circumstances of the appellant whilst still keeping in mind the fact these are all serious offences,

[48] Having considered all the relevant circumstances and the mitigating factors and bearing in mind all the factors relevant when imposing appropriate sentence I would uphold the appeal. An effective sentence of 20 years imprisonment in my view would be appropriate.

[49] In the result I would make the following order:

- i. The appeal against conviction is dismissed:
- ii. The appeal against sentence succeeds:
- iii. The sentence imposed by the court a quo is set aside and replaced with the following:

"On counts 1, 2 and 3 taken together for the purpose of sentence the accused is sentenced to 20 years Imprisonment." The dale of commencement of sentence is backdated to 3 June 2010.

**T D VILAKAZI
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION**

I agree it is so ordered

**N.V KHUMALO J
JUDGE OF THE HIGH COURT, GAUTENG
DIVISION**

DATED AND SIGNED AT PRETORIA ON 15 DECEMBER 2016

MATTER HEARD: 5 DECEMBER 2016
 DATE OF JUDGMENT: 16 FEBRUARY 2017
 COUNSEL FOR APPELLANT: ADVOCATE R.S MATLAPENG
 (Instructed by Legal Aid South Africa, Pretoria Justice
 Centre)
 COUNSEL FOR RESPONDENT: ADVOCATE P.W COETZE
 (Directorate of Public Prosecutions)