

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



24/03/2017

Case Number: A755/15

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO.
- (2) OF INTEREST TO OTHER JUDGES: NO.
- (3) REVISED.

DATE

SIGNATURE

In the matter between:

NKOSANA MOYO MBATHA

APPELLANT

and

THE STATE

RESPONDENT

Coram: HUGHES J et SHIRILELE

JUDGMENT

HUGHES J

[1] The appellant in this matter was convicted on 5 September 2014 in the regional court of Nigel. He was legally represented and had pleaded not guilty to the

charges put to him. The court a quo eventually found him guilty for the following counts and sentenced him to cumulatively 50 years imprisonment:

Count 6 - Robbery with aggravating circumstances where he received a sentence of fifteen years imprisonment;

Count 7 – Robbery with aggravating circumstances where he received a sentence of fifteen years;

Count 8 – Housebreaking with intent to rob where he was sentenced to five years imprisonment;

Count 9 – Robbery with aggravating circumstances where he was sentenced to fifteen years.

He applied for leave to appeal and same was refused by the court a quo. He petitioned this court and was granted leave to appeal in respect of sentence only.

[2] In respect of the counts that the appellant was found guilty, of briefly the facts thereto are:

Count 6 – on 12 February 2013, at or near Devon, the appellant together with two others robbed Musud Rahman, at gunpoint, of his two cellphones (Nokia and Blackberry), airtime to the value of R2000.00 and cash in the amount of R1600.00;

Count 7 – on 26 January 2013 the appellant and the same group mentioned in the previous charge and also in Devon robbed Halima Hanie, using a fire arm they took 9 cellphones, cigarettes and cash to the value of R11 900.00.

Count 8 – on 8 February 2013 also in Devon they broke into house 228 extension 2 Impumellelo with the intent to rob Mbikane Makaja and Tshepo Rakadadi; and

Count 9 – on the very same day, place and involving the same complaints the appellant and the same three others using a firearm robbed the complainants of 7 cellphones, Sony amplifier, Subhoover, cash, clothes and takkies to the total value of R13 610.00.

In count 6 and 7 the robberies were of business premises whilst the break-in, in count 8 was at a residential address. The appellant and the two accompanied him were alleged to have been customers at these business establishments and knew the owners.

[3] One of the basis of the appeal of the appellant is that from the record of the proceedings there is no indication that the appellant was warned by the court a quo

of the applicability of the minimum sentence before he pleaded to the charges put to him. Adv. M Masete, for the appellant, argued that the court a quo erred in the proceedings when it did not explain the ramifications of the minimum sentence implications. Therefore the appellant did not have a fair trial and reference was made of *S v Chowe* 2010 (1) SACR 141 (GNP).

[4] Adv. C Pruis, for the state, argued that the appellant did have a fair trial as he was legally represented and fully aware of the minimum sentence implications as it appeared from the charge put to the appellant to which he pleaded. This was so Adv. Pruis argued even though the consequences of the minimum sentence was not explained by the presiding officer himself.

[5] It is trite that the appellant's right to have had a fair trial is entrenched in the Constitution, as set out in section 35 (3) (a), that every person is entitled to a fair trial. It suffice to say that the accused must be informed of the charge he is to face which must contain sufficient detailed particulars in order that the accused answers and prepare adequately. The question of what constitutes sufficient detail was dealt with in *S v Kolea* 2013 (1) SACR 409; *S v Legoa* 2003 (1) SACR (SCA); *S v Seleke en Andere* 1976 (1) SA 675 (T) and the nub of the dicta in these cases is that though it is *desirable* to have all proper and regular fact of the charge an accused is facing and its consequences if found guilty, it is *not essential* to do so.[My emphasis in italics]

[6] If an enquiry is necessary to conclude whether the accused had a fair trial or not, in light of the fact that he was not informed of the consequences of the applicability of the minimum sentences, all the facts of the circumstances of the trial process would have to be considered. Ponnann JA in a minority judgment in *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) para [51] stated that the fair-trial enquiry is one that is not conducted in a *vacuo* and is *first and foremost a fact-based enquiry*.

[7] In the circumstances of this case being that the charges that were put to the appellant, specifically counts 6, 7 and 9, clearly stated that the charge of robbery with aggravating circumstances in those counts should be read with the provisions of section 51(2) of the Criminal Procedure Act 105 of 1997, the fact that the appellant

was legally represented and that the presiding officer in the court a quo acknowledged and advised the appellant before sentencing that he had to consider if there were substantial and compelling factor to warrant that he deviate from the prescribed sentence to be imposed, is sufficient for me to conclude that the appellant had a fair trial.

[8] Adv. Masete submitted that the imposition of a cumulative sentences of 50 years was not in the interest of the community and the appellant. He further submitted that the sentence was harsh and induced a sense of shock. She argued that the court a quo erred by finding that there were no substantial and compelling factors to impose a lesser sentence than the prescribed minimum sentence.

[9] In my view the court a quo from the record took into account the age of the appellant (34 years), that he was a first offender and had no pending cases. Further, that he had a 64 year old mother and a one year old son whom he helped maintain. Against this backdrop, the court a quo weigh this against the facts of the case. The community being under siege by the conduct of the appellant and his two accomplices in that the convictions on the counts formed part of spat of robberies over a short period of time. That the businesses robbed were places which the appellant was known. That the value of the goods taken and money robbed were substantial, the serious nature of the offences and the interest of society needed to be taken into account in these circumstances.

[10] I am satisfied that the mitigating factors advanced on behalf of the appellant before sentencing amount to general mitigation factors and the court a quo was correct in concluding that they were not substantial and compelling to deviate from the imposition of the prescribed minimum sentence for each count were such was applicable.

[11] Though the court a quo appreciated the dicta as set out in *S v Rabie* 1975 (4) SA 855 (A), that sentencing should be approach with firmness, but with humanity and compassion to human frailties and pressures of society which contribute to criminality. The presiding officer in the court a quo, in my view, lost the plot when he stated that '*The court is not going to order that any sentence run concurrently.*' This

was advanced with no explanation why this stances was being taken in light of the factors advanced in mitigation.

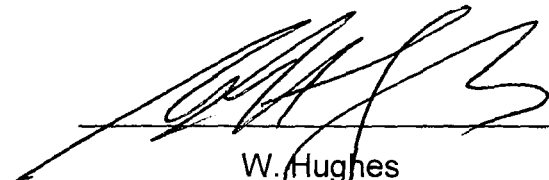
[12] Thus it is evident that the prospect of rehabilitation of the appellant was not taken into account when this pronouncement was made taking into account the cumulative effect of the sentence imposed. Such sentences of fifty years should be reserved for heinous offences. See *S v Muller* 2012 (2) SACR 545 (SCA) at para [10]. In this instances, my view is that, these offences that the appellant is convicted of do not fall into the category of heinous offence. In addition the appellant is a first offender with no pending cases and is rehabilitative taking into account his age and other factors mentioned.

[13] I am fortified that the prescribed minimum sentence be ascribed for counts 6, 7 and 9, that is, each of these counts would obtain the minimum sentence of fifteen years. However, the sentences in these counts would run concurrently, that being, the sentences in counts 7 and 9 will run concurrently with that sentence imposed for count 6. The sentence imposed for count 8 of five years should remain in force having granted measure of mercy but still remaining firm. A cumulative period of twenty years imprisonment is therefore imposed.

[14] In the result the appeal in respect of sentence succeeds. The order of the court a quo is replaced with the following order:

- (a) The appeal succeeds only to the extent set out in (b) below.
- (b) In respect of counts 7 and 9, it is ordered that the sentence of fifteen years imposed in each of these counts, is to run concurrently with the sentence of fifteen years imposed in count 6.
- (c) The sentence in count 8 of five years is confirmed.
- (d) A total period of twenty years imprisonment is thus imposed.

It is so ordered

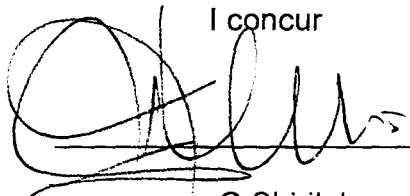


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W. Hughes

Judge of the High Court Gauteng, Pretoria

I concur



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C Shirilele

Acting Judge of the High Court Gauteng, Pretoria