



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE

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SIGNATURE

Case No. A02/2017

In the matter between:

BILLY THEMBA JACOBS

Appellant

and

THE STATE

Respondent

Case Summary: Criminal Law – Sentence – Robbery with aggravating circumstances - In sentencing the appellant, the trial court misdirected itself in three fundamental respects: First, in finding that this was his ‘third conviction of the same offence’ and thus applying s 51(2)(a)(iii) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) in sentencing the appellant as ‘a third or subsequent offender’ to 25 years’ imprisonment. Second, in not finding that there were substantial and compelling circumstances within the meaning of s 51(3)(a) of the Act, which warranted the imposition of a lesser sentence than the prescribed one. Third, in ordering that the appellant ‘is to serve two thirds of his sentence before he can be considered for parole’ without affording the parties the opportunity to address it on whether a non-parole period as provided for in s 276B of the CPA should be imposed and what the duration of the non-parole period should be.

JUDGMENT

MEYER J (NGOBENI AJ concurring)

[1] This is an appeal against the sentence of imprisonment for 25 years that was imposed upon the appellant, Mr Billy Themba Jacobs, by the Regional Court, Benoni (the trial court) on 19 August 2013, pursuant to his conviction of robbery with aggravating circumstances committed on 25 July 2007.

[2] It is common cause that the appellant has three previous convictions: On 15 June 2000, he was convicted for having committed housebreaking with the intent to steal and theft on 7 October 1999, and he was sentenced to four years' imprisonment of which two years were suspended for five years on condition that he was not convicted of theft or robbery committed during the period of suspension. On 25 September 2009, the High Court (Johannesburg) convicted him of robbery, which he, it is common cause, committed during June 2007, and he was sentenced to fifteen years' imprisonment. And on 9 June 2010, the Regional Court (Benoni) convicted him of robbery with aggravating circumstances, which he, it is common cause, also committed during June 2007 shortly before he committed the robbery for which he was convicted by the High Court. The Regional Court sentenced him to ten years' imprisonment and it was ordered that five years of that sentence is to run concurrently with the sentence of fifteen years' imprisonment imposed upon him by the High Court.

[3] The appellant thus committed housebreaking with the intent to steal and theft on 7 October 1999. In June 2007, he committed robbery with aggravating

circumstances and, shortly thereafter, robbery. And on 25 July 2007, he again committed robbery with aggravating circumstances for which he, pursuant to his plea of guilty, was convicted by the trial court on 19 August 2013, and sentenced to 25 years' imprisonment. The trial court ordered the whole sentence to run concurrently with the sentences imposed by the High Court on 25 September 2009 and by the Regional Court on 9 June 2010 respectively. The trial court also ordered that he 'is to serve two thirds of his sentence before he can be considered for parole'. It is against this sentence that the present appeal lies.

[4] The charge of robbery with aggravating circumstances against the appellant was that he, on 25 July 2007 at Boksburg, unlawfully and intentionally assaulted Ms Mariette Smith and then with force took a Mercedes Benz C180 with registration number and letters DMN 772 EC and a wallet with its contents, which were her property or in her lawful possession, from her. The aggravating circumstances were alleged to be that Ms Smith was threatened with a firearm.

[5] The facts to which the appellant pleaded guilty as set out in his written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), are, *inter alia*, the following:

'5.1 On 25 July 2007 I was present in Boksburg in the jurisdiction of this Honourable Court.

5.2 On the said day I was in the company of my friend to wit Jackson Dlamini. We were walking along a road in Boksburg in the direction of CTM Tiles. While walking as mentioned above we saw a vehicle to wit a Mercedes Benz 180 with registration number DMN 772 EC stopping in front of a gate at an office block. When we were at the vehicle Jackson Dlamini took out a fire arm and pointed the fire arm at the driver, at the time a female. He ordered the driver out of the vehicle and informed me to get behind the steering wheel of the vehicle which I did. My friend then got into the

passenger side of the vehicle and I drove away with the vehicle. After having driven the vehicle for a few kilometres I became scared that there is a possibility that the vehicle might be fitted with a tracker. I indicated to Jackson Dlamini that I do not want to participate in the offence any further. I parked the car and we walked away from the vehicle. I then returned home.

5.3 Although I did not physically handle the fire arm or pointed the fire arm at the driver of the vehicle I associated myself with the actions of Jackson Dlamini by getting into the driver side of the vehicle and driving away with the vehicle and its contents.'

[6] In sentencing the appellant, the trial court misdirected itself in three fundamental respects: First, in finding that this was his 'third conviction of the same offence' and thus applying s 51(2)(a)(iii) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) in sentencing the appellant as 'a third or subsequent offender' to 25 years' imprisonment. Second, in not finding that there were substantial and compelling circumstances within the meaning of s 51(3)(a) of the Act, which warranted the imposition of a lesser sentence than the prescribed one. Third, in ordering that the appellant 'is to serve two thirds of his sentence before he can be considered for parole without affording the parties the opportunity to address it on whether a non-parole period as provided for in s 276B of the CPA should be imposed and what the duration of the non-parole period should be.

[7] Robbery when there are aggravating circumstances or involving the taking of a motor vehicle are offences listed in Part II of Schedule 2 of the Act. Section 51(2)(a) of the Act provides as follows:

'Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender *of any such offence*, to imprisonment for a period not less than 20 years;
- (iii) a third or subsequent offender *of any such offence*, to imprisonment for a period not less than 25 years;'

(Emphasis added.)

[8] The Supreme Court of Appeal, in *S v Mokele* 2012 (1) SACR 431 (SCA) para 6, held as follows:

'It is a clear requirement of s 51(2)(a)(ii) that, for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the state had to prove that he is a second offender of robbery with aggravating circumstances. This is a jurisdictional requirement necessary to trigger s 51(2)(a)(ii). All that the state proved in this case is that the appellant had previous convictions, amongst others, for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)(a)(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.'

[9] The same holds true in the case of s 51(2)(a)(iii). The jurisdictional requirement necessary to trigger s 51(2)(a)(iii), and, therefore, for an accused person to attract a minimum sentence of imprisonment of not less than 25 years, is that the state needs to prove that an accused person is a third or subsequent offender of robbery with aggravating circumstances (or a third or subsequent offender of robbery involving the taking of a motor vehicle). The appellant only had one previous conviction for robbery with aggravating circumstances. Absent 'substantial and compelling circumstances' as contemplated in s 51(3)(a) of the Act, the trial court,

therefore, ought to have applied s 51(2)(a)(ii) and sentenced the appellant (as a second offender of robbery with aggravating circumstances) to imprisonment for a period not less than 20 years.

[10] The appellant testified and his counsel addressed the trial court in mitigation of sentence. He was 25 years of age at the time when he committed this offence, he had completed standard 10, was married, had three children (eleven, nine and seven years of ages respectively) and was self-employed earning approximately R4 800 per month. He testified (and the state did not challenge his evidence) that he pleaded guilty to the commission of this offence because he had remorse. He took the trial court into his confidence and admitted that had he committed crimes during the June/July 2007 period of his life. He had already been in prison for four years at the time when he was sentenced by the trial court and he told the trial court about his involvement in programmes and activities in prison, and his leading role therein. The trial court should have accepted that he was thus a good candidate for rehabilitation and that he had sincere remorse. Cumulatively these circumstances amount to substantial and compelling circumstances within the meaning of s 51(3)(a) of the Act, which warranted the imposition of a lesser sentence than the prescribed one of 20 years. It follows that the sentence of imprisonment for a period of 25 years must be set aside.

[11] In my view an appropriate sentence for the appellant is one of imprisonment for a period of 15 years. The trial court correctly considered the cumulative effect of the sentence it imposed upon the appellant and those imposed by the High Court on 25 September 2009 and the Regional Court on 9 June 2010, and accordingly ordered its sentence of imprisonment for 25 years to run concurrently with those sentences. The three offences are similar, they were closely related in time and

were committed during the June/July 2007 period of the appellant's life when he involved himself in the commission of crimes. The cumulative effect of the sentence which I propose to impose upon the appellant and the sentences imposed by the High Court and the Regional Court would be harsh and disproportionate to the triad consisting of the crime, the offender and the interests of society.

[12] I now turn to the trial court's order that the appellant 'is to serve two thirds of his sentence before he can be considered for parole' (the non-parole order). Section 276B(1) of the CPA provides that '[i]f a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.' Such period, in terms of that sub-section, is ' . . . the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.' This provision was inserted into the CPA by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997, which was promulgated on 12 December 1997, but only put into operation on 1 October 2004. Relevant provisions of the Correctional Services Act 111 of 1998 have also been amended to take account of such an order by a sentencing court.

[13] It was pointed out in *Stander v The State* 2012 (1) SACR 537 (SCA) paras 7-8, that prior to s 276B of the CPA a decision about parole remained exclusively within the domain of the Department of Correctional Services as an executive function and courts have persistently recognised the need for that to be so. And in *S Mthimkhulu* 2013 (2) SACR 89 (SCA), para 23, it was held that 'a court should only exercise its discretion to impose a non-parole period in exceptional circumstances'. (Also see *Ndlovu v S* (925/2016) [2017] ZASCA 26 (27 March 2017), paras 8-12.)

[14] The trial court made the non-parole order without affording the parties the opportunity to address it on whether a non-parole period as provided for in s 276B of the CPA should be imposed and what the duration of the non-parole period should be. Such failure, the Supreme Court of Appeal held in *Stander* (supra) para 22 and in *Ndlovu* para 11, constitutes a misdirection, and such failure, it held in *Mthimkhulu* (supra) para 21, might, depending on the facts of each case, well constitute an infringement of an accused person's right to a fair trial. Furthermore, there were no exceptional circumstances shown to exist in order for the trial court to have exercised its discretion to impose a non-parole period against the appellant. The fact that the appellant was a candidate for rehabilitation is 'a factor of paramount importance in assessing whether to impose a non-parole period' (*Mthimkhulu* (supra) para 23).

[15] In the result the following order is made:

- (a) The appeal is upheld.
- (b) The sentence of imprisonment for a period of 25 years imposed upon the appellant by the court below pursuant to his conviction of robbery with aggravating circumstances committed on 25 July 2007 and the order fixing a non-parole period of two thirds of the sentence are set aside and replaced with the following order:
 - '(i) The accused is sentenced to imprisonment for a period of 15 years pursuant to his conviction of robbery with aggravating circumstances committed on 25 July 2007.
 - (ii) The whole sentence is to run concurrently with the sentences imposed upon the appellant by the High Court on 25 September 2009 and by the Regional Court on 9 June 2010.

(iii) This sentence is ante-dated to 19 August 2013.’

I agree.

P.A. MEYER
JUDGE OF THE HIGH COURT

O.G. NGOBENI
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	2 May 2017
Date of judgment:	3 May 2017
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