

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: AR24/15

In the matter between:

NKOSINATHI ERICK GAMEDE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Delivered on: TUESDAY, 09 FEBRUARY 2016

OLSEN J (GORVEN J et BOOYENS AJ concurring)

[1] The appellant Nkosinathi Erick Gamede was the sixth of seven accused persons charged on a number of counts in the court *a quo* arising from what is commonly known as a “cash-in-transit heist”. He and five other of the accused persons were convicted on five counts of attempted murder and four counts of robbery with aggravating circumstances. These convictions arose out of events which took place on 17 September 2001, and the accused were convicted on 23 September 2003.

[2] Sentence was imposed on 25 September 2003. The learned Acting Judge imposed sentences of 30 years imprisonment in respect of each of four of the attempted murder convictions, 20 years imprisonment in respect of the remaining conviction of attempted murder, 20 years imprisonment in respect of one of the robbery convictions, and 15 years imprisonment in respect of each of the remaining three robbery convictions. The learned Acting Judge then crafted a complex scheme of concurrency of sentences which resulted in four of the accused being sentenced to an effective term of imprisonment of 95 years, and the appellant and one other being sentenced to effective terms of imprisonment of 60 years. The four had previous convictions. The appellant was one of the two who did not have previous convictions. It seems clear from the judgment on sentence that it was the issue of previous convictions alone which determined the difference between the two periods of effective imprisonment imposed in the court *a quo*.

[3] The appellant appeals against the cumulative effect of the sentences imposed upon him with leave granted by another Judge of this Division. It appears from the record placed before us that in earlier appeal proceedings the sentences imposed upon three of those who were sentenced to effective terms of imprisonment of 95 years were reduced to 45 years imprisonment.

[4] There is no need in this judgment to give a full account of the evidence which gave rise to the convictions. The trial lasted some 22 days. In brief, the findings were that, acting with common purpose, the accused devised a plan to rob a Fidelity Guards van carrying cash said to amount to some R2.5million. The robbery would take place between Durban and Pietermaritzburg at a certain road in a small country town. The accused armed themselves with automatic assault rifles, secured stolen getaway cars and uniforms so that they could masquerade as police, studied the route that the target van would take, and planned their assault accordingly. The attack commenced with firing upon the van and its occupants. Bullets struck the tyres which caused the van to overturn. Two of the attempted murder charges related to firing upon the two Fidelity Guard employees in the van. Two of the robbery charges related to the theft of two revolvers from the Fidelity crew. As the van had overturned onto its access door the accused could not gain entry to the back of the van in order to steal the money they were after. Whilst some of them

attempted to break into the van using hammers, others set up a road block with a view to preventing interference with efforts to get into the van. Some members of the public had seen what was going on and attempted to intervene. They were fired upon. Two rifles were stolen from two of those members of the public. Two policemen from the Camperdown Police Station attempted to intervene and were fired upon as they approached in their vehicle. One of them was rendered a paraplegic as a result of the wounds he sustained, and the other very luckily escaped relatively unharmed when two bullets struck his chest in an area protected by his bullet proof vest. The money in the van was not accessed by the accused as they could not break into the rear section of the vehicle.

[5] The learned Acting Judge in the court *a quo* summarised his view of the crimes in his judgment on sentence as follows.

“These crimes committed by the accused are akin to a declaration of war not only on the State but on society as well. Two law enforcement members of the State were nearly killed and one is now a helpless paraplegic doomed to a life of pain and suffering because of the conduct of such accused. Three other members of the public, courageous enough to come to the assistance of the helpless Fidelity Guards came under fire, [and] but for swift evasive action, would have been killed. Each of the accused knew exactly what was expected of him and they performed their respective roles with a single-minded purpose to smash and grab the loot without any regard for life, person or property of innocent bystanders and members of the public. Fast moving vehicles, hi-tech communication vital to an economically growing prospective, prosperous and modern-day society, were used by such individuals to undermine its stability and tranquillity. If this is allowed to continue, the inevitable result will be chaos and disorder.”

[6] It is argued that in the court *a quo* too much emphasis was placed on the nature of the crimes and the community's interest in having harsh sentences imposed for such crimes in the hope of achieving a meaningful level of general deterrence; and that too little attention was given to the circumstances of the accused. But on the other hand it cannot be overlooked that what happened here was in the nature of a military incursion into a peaceful country town without any regard whatsoever for the potential for harm to members of the public who might

come upon the crime scene. The plan made by the accused was executed ruthlessly. It is merely fortuitous that the principal aim of stealing money from the cash-in-transit van was not achieved. Any number of people could have been killed or injured in the course of execution of the plan devised by the accused. It is clear from the manner of their preparation that the accused were well aware of that. A just sentence for crimes of this nature must take into account the public interest in having persons who invade public space with such violent conduct being treated severely.

[7] The appellant did not give evidence in mitigation. His counsel furnished the court with an account of his personal circumstances. He was the youngest of the accused who were convicted, 26 years of age at the time the crimes were committed and 28 years of age when he was sentenced. He had been in custody for about two years prior to sentencing. Although unmarried he had two minor children aged 8 and 6 years from different mothers. He did not get beyond Std 2 at school. His counsel submitted that it should be taken into account that although there were multiple convictions, all the crimes were perpetrated on the same occasion. He submitted that by making sentences run concurrently it was open to the court to show a measure of mercy. It was submitted on behalf of the appellant that given his age the prospect of rehabilitation should not be ignored. However it was not submitted on his behalf that any remorse was evident, and nothing in the record suggests that the appellant's counsel erred in that regard.

[8] In passing sentence the Acting Judge in the court *a quo* recorded that his purpose was to ensure that the accused were removed permanently from society. In *S v Moswathupa* 2012 (1) SACR 259 at para [9] a similar comment by a sentencing court was criticised as offending the principle expressed by Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410 G that wrongdoers "must not be visited with punishments to the point of being broken". In the present context it is worth quoting a little more of the passage from the judgment of Holmes JA.

"On the other hand, the offences were, without doubt, very grave; and in addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishment to the point of being

broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.”

[9] In my view an effective sentence of 60 years imprisonment is not required in order publicly to convey with regard to these crimes that the game is indeed not “worth the candle”. A sentence of 60 years imprisonment imposed upon a 28 year old man is a sentence designed to be a punishment to break the man. There is no indication in the judgment on sentence of any note being taken of the plea for mercy made on behalf of the appellant. The learned Acting Judge in the court *a quo* erred in these respects.

[10] The scheme of concurrency devised by the court *a quo* in sentencing the appellant was as follows. The various sentences (of 30 years, 20 years and 15 years imprisonment) imposed in respect of counts 1 to 6 and 8 were to run concurrently, generating an effective term of imprisonment of 30 years. The sentences imposed in respect of counts 9 and 10, of 30 years each, were to run concurrently, generating also an effective term of imprisonment of 30 years. Given that the leave to appeal granted to the appellant is against the cumulative effect of the sentences only (a decision which has not been challenged by the appellant), the minimum sentence which we can impose now is one of 30 years imprisonment, which might be achieved by making all of the sentences run concurrently.

[11] In *S v Muller* 2012 (2) SACR 545 (SCA) the court considered a case in which sentences of 10 years imprisonment were imposed in respect of each of three convictions on charges of robbery with aggravating circumstances. The effective sentence was therefore 30 years imprisonment. The court expressed the view that such an effective sentence is an extremely severe punishment and should be reserved for “particularly heinous offences”. The effective sentence was reduced to 18 years imprisonment.

[12] In *S v Mabunda* 2013 (2) SACR 161 (SCA) the court considered sentences of 15 years imprisonment imposed in respect of each of two convictions on charges of robbery with aggravating circumstances, also generating an effective sentence of 30 years imprisonment. Again the effective term was reduced to 18 years

imprisonment, and the court said this in paragraph [7] of the judgment, after making the observation that in crimes of the kind dealt with in that case punishment and deterrence are factors which come to the fore.

“On the other hand, 30 years imprisonment is an extremely severe sentence. It is a sentence on a scale that should be reserved for those cases falling within the upper echelons of severity. And while by their very nature all cases of robbery with aggravating circumstances are severe, neither of these robberies was associated with the level of gratuitous violence which is unfortunately all too often the case.”

[13] In this case there are multiple convictions. But all of them arise out of what might be called a single event. This is indeed a case where punishment and deterrence must come to the fore. It is in my view a case which reaches the “upper echelons of severity”. Taken collectively the offences are “particularly heinous”. A sentence of 30 years imprisonment would not be inappropriate.

[14] In my view an effective sentence in excess of 30 years imprisonment would not properly bring to account the fact that the appellant was a first offender, and would reflect inadequate attention to the duty of the court to consider the extent to which mercy should be blended with the community’s interest in seeing heinous crimes severely punished.

The following order is made.

- 1. The sentences of imprisonment imposed on the appellant on 25 September 2003 in respect of each of counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 are confirmed.**
- 2. The appeal against the orders made in the court *a quo* as to which of the sentences imposed on the appellant would run cumulatively, and which concurrently, is upheld, and those orders are set aside.**

3. It is ordered that the sentences of imprisonment imposed in respect of all convictions (that is to say on counts 1, 2, 3, 4, 5, 6, 8, 9 and 10) shall run concurrently. The effective sentence is accordingly 30 years imprisonment.
4. The effective sentence of 30 years imprisonment is ante-dated to 25 September 2003.

OLSEN J

GORVEN J

BOOYENS AJ

Date of Hearing: FRIDAY, 29 JANUARY 2016

Date of Judgment: : TUESDAY, 09 FEBRUARY 2016

For the Appellant : MR I KHAN

Instructed by: PMB JUSTICE CENTRE
Appellant's Attorneys
183 Church Streets
Pietermaritzburg
(Ref.: Mr I Khan)
(Tel No.: 033 – 394 2190)

For the Respondent: MR M MTHEMBU

Instructed by: Director of Public Prosecutions
325 Pietermaritz Street
Pietermaritzburg
(Ref.: Mr M Mthembu)
(Tel.: 033 – 845 4400)