



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
JUDGMENT**

Not Reportable

Case No: AR 77/2015

In the matter between:

NTOKOZO ZONDI

Appellant

And

THE STATE

Respondent

Coram: Gorven, Seegobin and Olsen JJ

Heard: 25 January 2016

Delivered: 9 February 2016

ORDER

On appeal from KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Radebe AJ sitting as court of first instance):

1 The appeal is upheld and the sentence of the appellant is set aside and substituted with the following sentence:

‘The accused is sentenced to 10 years’ imprisonment.’

2 The sentence will run with effect from 15 July 2010.

JUDGMENT

Gorven J (Seegobin & Olsen JJ concurring):

[1] The appellant was one of five persons charged with a number of offences, including one count of murder and one of robbery with aggravating circumstances, all of which took place on 22 June 2006. He pleaded not guilty to the counts confronting him and elected not to disclose his defence. At the conclusion of the trial he was acquitted of all but the count of robbery with aggravating circumstances. One of the accused received a discharge at the close of the state case. Three of his co-accused were convicted of murder, robbery with aggravating circumstances and the unlawful possession of firearms and ammunition. They were each sentenced to life imprisonment in respect of the murder and 15 years’ imprisonment in respect of the robbery with aggravating circumstances. The appellant was sentenced to 15 years’ imprisonment. In terms of s 276B of the Criminal Procedure Act 51 of 1977 (the Act), the trial court directed that the appellant would not qualify for parole until he had served two thirds of his sentence. All four of the convicted accused persons applied for leave to appeal to the trial court in respect of their convictions and sentences but this was refused. The appellant was granted leave to appeal against his sentence only by the Supreme Court of Appeal.

[2] The circumstances in which the crimes took place were as follows. A group of the accused not including the appellant had set out to rob a shop at the

Southgate Shopping Centre in Pietermaritzburg. They abandoned this plan on arrival because the security presence was too high. Later that morning, that group met up with the appellant and two of his friends, Zakhele and Ntshangase, near the public toilets at Market Square in Pietermaritzburg. Zakhele suggested that they rob the Pelham Bottle Store. The augmented group, including the appellant and his friends, went to the bottle store in a VW kombi. Some of the group entered the bottle store, pushing the security guard inside. The appellant, whilst still outside, heard a gunshot from within. A person emerged from the bottle store but was grabbed and pushed back into the store by one of the group and the appellant followed them inside. On entering, they saw a man lying on the floor in a pool of blood and a woman kneeling next to him crying hysterically while accused one pointed a firearm toward them. Another of the group had also produced a firearm. The appellant and others helped themselves to money from a safe in a small office. They then left the bottle store and separated, later meeting up at Sophie's Tavern in Imbali. There the spoils were divided.

[3] As I have indicated, the trial court imposed a non-parole period under s 276B of the Act. This section reads as follows:

‘(1)(a) If 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.

(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole period in respect of the effective period of imprisonment.’

It has been held that, before invoking this section, a court must ‘determine whether there are exceptional circumstances that imperatively call for the

invocation’ of the section.¹ If so, the length of the non-parole period must be considered. In these circumstances, the parties are entitled to address the sentencing court in respect of both considerations.² In the present matter, the trial court did not afford the appellant the opportunity to address it on these considerations before imposing the non-parole period. The failure to do so constitutes a material misdirection. In addition, the trial court did not point to any exceptional circumstances which motivated the imposition of a non-parole period. This court is therefore at large to impose an appropriate sentence on appeal.

[4] The offence of which the appellant was convicted attracts a minimum sentence of 15 years’ imprisonment under the provisions of section 51(2) of the Criminal Law Amendment Act 15 of 1997 (the CLA Act) read with Part II of Schedule 2 to the CLA Act. Section 51(3) allows a court to impose a lower sentence than the prescribed minimum if the court is satisfied that substantial and compelling circumstances exist which justify this. In *S v Malgas*³, the Supreme Court of Appeal summarised the approach to take in this enquiry as follows:

‘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.’⁴

[5] It can therefore be seen that the traditional factors relating to the crime, the criminal and the needs of society must be evaluated and then compared to the prescribed minimum sentence. It hardly needs saying that the cold-blooded robbery of a bottle store in broad daylight is a very serious offence. What must

¹ *S v Mthimkulu* 2013 (2) SACR 89 (SCA) para 18.

² *S v Stander* 2012 (1) SACR (SCA) para 22.

³ *S v Malgas* 2001 (2) SA 1222 (SCA).

⁴ Paragraph 25.

be borne in mind, however, is that the trial court found that it was not proved that the appellant was aware that his fellow assailants were carrying firearms in order to carry out the robbery. This was the basis on which the appellant was acquitted on the count of murder. His first knowledge of the presence of firearms came when he heard the shot. It must be said that, at that point, it can be considered that the appellant ought to have left rather than enter the bottle store and remove money from the safe. I shall return to this aspect later.

[6] The needs of society have, at least in one respect, been addressed by the promulgation of the CLA Act. A democratically elected legislature has determined that crimes such as this must be treated very seriously. However, society undoubtedly benefits from an offender who rejoins it as a productive and positive member, having turned his back on a life of crime. The potential for rehabilitation is therefore a crucial consideration.

[7] The personal circumstances of the appellant are somewhat unusual in matters such as this. He was barely 18 years old at the time the offence was committed. He was in the company of older persons who were clearly inured to a life of crime and had already embarked on a plan to rob another store elsewhere. He was a first offender. It seems highly likely that he was caught up in their plan and carried along under the influence of these people. As regards his decision to enter the bottle store after hearing a shot, it must be considered that, in those circumstances, he may well have felt himself unable to dissociate from the group at that point.

[8] The appellant was in Grade 12 at school when the offence was committed. He thereafter passed grade 12 and enrolled for a two-year diploma course in the computing area. Having successfully completed this course, he enrolled for a two-year course in computers at the Durban University of

Technology. He was in the first year of this course when he was sentenced. His productive life after the commission of the offence and his relative youth supports an inference that he had prospects of rehabilitation. There is a basis for hope that, on his release, he will become a productive, law abiding member of society. His involvement in the offence should therefore be regarded as something of an aberration.

[9] In these circumstances, it seems clear to me that, to impose the prescribed minimum sentence would result in an injustice to the appellant. This means that substantial and compelling circumstances exist to impose a sentence of less than 15 years' imprisonment. Having said that, the circumstances as a whole warrant a lengthy term of imprisonment. In my view an appropriate sentence would be one of 10 years' imprisonment.

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

1 The appeal is upheld and the sentence of the appellant is set aside and substituted with the following sentence:

‘The accused is sentenced to 10 years' imprisonment.’

2 The sentence will run with effect from 15 July 2010.

GORVEN J

DATE OF HEARING: 25 January 2016

DATE OF JUDGMENT: 9 February 2016

FOR THE APPELLANT: D Barnard, instructed by the
Pietermaritzburg Justice Centre

FOR THE RESPONDENT: M Miza, instructed by the Director of
Public Prosecutions, Pietermaritzburg,
KwaZulu-Natal.