

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – MTHATHA

CASE NO. 180/2003

In the matter between:

R. M.

Appellant

and

THE STATE

Respondent

JUDGMENT

Bloem J.

- [1] The appellant was charged in the High Court before Hole AJ with murder, attempted murder and attempted robbery. At the commencement of the trial he pleaded guilty to those charges. He was sentenced to undergo 20 years' imprisonment for murder, 15 years' imprisonment for attempted murder and 10 years' imprisonment for attempted robbery. The court *a quo* concluded that the effect of the above sentences "*gives you a total of 45 years. To mitigate the cumulative effect of these sentences and also taking into account that the accused is serving, 15 years of this*

sentence will run concurrently with the sentence that the accused is currently serving. In respect of this case, the accused will spend an effective 30 years' imprisonment. If you add the 15 years you are serving, you will sit in gaol for 45 years".

- [2] On 25 June 2015 Nhlangulela ADJP (as he then was) condoned the late filing of the appellant's application for leave to appeal against the sentences imposed by Hole AJ on 20 May 2004 and granted the appellant leave to appeal against the above sentences to the full court of this Division.

- [3] The facts upon which the appellant was convicted are that on 3 April 1997 and shortly before the Lady Frere Supermarket and Wholesalers (the store) closed its doors for the day, the appellant entered and instructed Michael Ioannou and Khefu Madani, an employee, both of whom were inside the store, to lie on their stomachs. He had a firearm in his hand. A co-perpetrator was standing at the doorway. The appellant was looking for the keys to the safe. When Michael said that he did not have the keys the appellant accosted him to the door. John Ioannou, Michael's father, arrived and saw the appellant pointing a firearm at his son. He held his arms up and requested the appellant to leave his son alone. Shots were fired and Mr Ioannou senior and his son ran to the spot where Mr Madani was still lying on his stomach. Both of them were injured.

- [4] Mr Botma, counsel for the appellant, submitted firstly that the court *a quo* erred in not taking into account the appellant's youthfulness at the time of the commission of the offences and secondly that whatever sentence it imposed in respect of each of the offences "*should run concurrently with each other taking into consideration that*

they all flowed from the same incident” and that “[s]uch sentence [should] be antedated to 20 May 2004”. Mr Lamla, counsel for the state, submitted that the court *a quo* considered the appellant’s personal circumstances when it remarked that “people [of] the accused’s age, 16 years and thereabouts, tend to think that because of their tender age, the courts will not impose heavier [sentences]. If anybody still thinks so [he or she is] in for a big shock”. Insofar as the cumulative effect of the sentences is concerned, Mr Lamla submitted that the court *a quo* cannot be criticised for directing that 15 of the 45 years’ imprisonment should run concurrently with the sentence “that the accused is currently serving”.

[5] The appellant’s personal circumstances are that he was born on [.....] 1981, which means that on 30 April 1997, when he committed the offences subject to this appeal, he was 15 years and 11 months old and still schooling. As at 20 May 2004, when he was sentenced by the court *a quo*, the appellant was single and the father of two minor boys who were born during 1998 and 1999, respectively. His parents look after his children. The appellant has two older sisters. At the time of the commission of the offences the appellant was with other persons who, I accept in the appellant’s favour, influenced him to commit these offences. The appeal record reflects that on the day that he was sentenced it was apparent to both counsel and the trial judge that the appellant had in the interim been convicted and sentenced because he was dressed in prison uniform.

[6] It was not disputed that the appellant was convicted of serious offences. He obviously went to the store to commit robbery. He was armed. It is immaterial whether he or one of his friends fired the shots which killed Mr Ioannou senior and injured his son because they were clearly acting with a common purpose, namely to

rob the store even if it meant killing a person or persons. As a result of the shots that were fired Mr Ioannou senior was killed and his son sustained serious and permanent injuries. The medical evidence shows that the deceased died because of shock and haemorrhage following a gunshot through his chest. His son was left in a vegetative state because he sustained a gunshot wound to his head. The medical evidence shows that as at 12 June 1997 when he was examined by a neurosurgeon the gunshot wound rendered him brain damaged, paralysed on the right side and unable to understand or produce speech. No evidence was placed before the court regarding the son's condition as at the time when the appellant was sentenced.

- [7] At the time of the commission of the offences in this matter the appellant was a child which means that the offences may have been committed due to immature judgment, youthful vulnerability to error, impulse and influence.¹ This aspect was not considered by the court *a quo*. I must agree with Mr Botma that such failure constituted a misdirection.
- [8] The court *a quo* found that, after the commission of the offences, *"it appears that [the accused] was incarcerated and it also appears that later he began serving a 15 year sentence for an unrelated offence"*. It is apparent from the quoted finding that the trial judge was unclear about the offence of which the appellant was convicted. Nothing was placed before the trial judge to indicate with any certainty what the offence was of which he was convicted nor the term of imprisonment that was imposed. All that his counsel informed the trial judge was *"that he is serving for a case to do with a motor vehicle"* and *"perhaps – the accused person is serving*

¹ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) at 490i-491a.

about 15 years at the present moment". Mr Lamla informed the trial judge that he *"managed to get something from the prison authorities, which is a printout from the computer [which reflects that] he was sentenced to 15 years' imprisonment for robbery with aggravating circumstances case in Cape Town. I haven't shown it to my learned friend"*. Neither the appellant nor his counsel confirmed what Mr Lamla informed the trial judge. From what the appellant's counsel informed the trial judge it was also unclear whether the appellant was indeed sentenced to 15 years' imprisonment. Regard being had to the fact that the trial commenced 7 years after the commission of the offences, no one would have been prejudiced (more) if the trial was adjourned for say a month to establish the nature of the offence of which the appellant had been convicted and what term of imprisonment had been imposed. Courts have been encouraged to play a more active inquisitorial role in sentencing procedure so that all the relevant facts and circumstances are placed before them to enable them to properly exercise their judicial sentencing discretion.²

- [9] In the light of the above uncertainty and lack of evidence it is difficult to understand how the trial judge could have ordered that 15 of the 45 years' imprisonment should run concurrently with (what he assumed) the 15 years' imprisonment that the appellant is serving on *"an unrelated matter"*. In my view the trial judge could not have exercised a proper judicial sentencing discretion without knowing why the appellant was in prison and the term of such imprisonment. The trial judge's failure to establish why the appellant was in prison and the term of such imprisonment precluded him from ordering that a portion of the sentence he imposed should run concurrently with the uncertain term of imprisonment which the appellant is serving.

² *S v Siebert* 1998 (1) SACR 554 (AD) at 558j-559a.

In that regard he committed a misdirection sufficiently material for the directive that the sentences run concurrently be set aside.

[10] At the hearing of the appeal we requested the parties to ascertain the offence(s) of which the appellant was convicted before his conviction and sentence by the court *quo* and the term of imprisonment imposed in respect thereof. On the same day the appellant's attorney and Mr Lamla furnished us with a written report which they compiled after a consultation with one Mr van Kolwer of the Department of Correctional Services. We thank them for the report. They established that on 11 November 2002 the appellant was sentenced to 15 years' imprisonment by the regional court of Mitchell's Square, Cape Town under case number SHA 268/2002 for armed robbery (i.e. robbery with aggravating circumstances)³. As at 30 March 2016 when we heard the appeal, the appellant had already served 14 years and 2 months of the 15 years' imprisonment. The last 3 paragraphs of the report read as follows:

- "3 The service of the sentence referred to, in paragraph 1 hereof, shall expire on 11th November 2017 and accordingly, the appellant is still serving the sentence of 15 (fifteen) years imposed on 11th November 2002, under case no SHA 268/02.
- 4 No parole or other forms of pardon has been considered in respect of the appellant because, according to the regulations of correctional services, appellant is serving a total of 45 (forty five) years when the cumulative effect of the sentence being appealed against is being considered.
- 5 According to correctional services, appellant shall only be considered for parole on 19th May 2026 when he would have concluded half of 45 years (50% of 45 years) which is a total of the sentence due to be served by the appellant."

³ See section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) for the definition of "aggravating circumstances" in relation to robbery.

- [11] The appellant's previous conviction of robbery with aggravating circumstances is relevant to the imposition of an appropriate sentence in respect of the offences of which he was convicted in present matter. The trial judge misdirected himself when he referred to the previous conviction as "*an unrelated matter*".
- [12] I have set out above the appellant's personal circumstances, the most important being that he was a child of immature age at the time of the commission of the offences in the present matter. I will take into account the appellant's youthfulness at the time of the commission of those offences and his maturity at the time of sentence in 2004. It cannot however be ignored that between the commission of those offences and 20 May 2004 the appellant was convicted of robbery with aggravating circumstances and sentenced, as an adult, to 15 years' imprisonment. The reality is that the court *a quo* dealt with an adult who chose a life of crime as shown by the previous conviction on a related offence.⁴
- [13] It bears repeating that the appellant was convicted of serious offences. The court *a quo* took into account that murder and robbery are prevalent in the country. The appeal was argued by Mr Botma on the basis that, although the respective sentences imposed were appropriate, the cumulative effect of the sentence, namely 45 years' imprisonment was shockingly inappropriate. In my view the court *a quo* cannot be faulted for having imposed the respective sentences of 20, 15 and 10 years' imprisonment on the appellant for murder, attempted murder and attempted robbery. Those individual sentences are, in my view, appropriate. They reflect the seriousness of the offences and express the community's feeling of disgust at the

⁴ *S v Theron* 1986 (1) SA 884 (A) at 893E–895E.

murder, attempted murder and attempted robbery of two innocent persons. The deceased had his arms up as a sign of surrender when he pleaded that his son not be injured. For no reason he was shot and killed. Although Micheal escaped death his condition leaves him dependable on others for survival. Those sentences also take into account the appellant's personal circumstances, inclusive of the fact that he was a child when he committed the offences but an adult, with a relevant previous conviction, when he was sentenced.

[14] However, in my view, the cumulative effect (45 years' imprisonment) of all the sentences, inclusive of the 15 years' imprisonment for robbery with aggravating circumstances presently being served by the appellant, results in an extremely severe punishment that should be ameliorated. It can, on a practical level and having determined the precise details thereof, best be achieved by ordering portions of the sentences in the present appeal to run concurrently with the sentence imposed on the appellant by the regional court in 2002. To that extent the appeal should be upheld.

[15] In the result, the appellant's appeal is upheld to the limited extent that it is ordered:

15.1. That 8 of the 20 years' imprisonment imposed on the count of murder, 8 of the 15 years' imprisonment imposed on the count of attempted murder and the entire 10 years' imprisonment imposed on the count of attempted robbery are to run concurrently with the sentence imposed on the appellant on 11 November 2002 by the regional court of Mitchell's Square, Cape Town under case number SHA 268/2002.

15.2. That the sentences are antedated to 20 May 2004.

G H BLOEM
Judge of the High Court

VAN ZYL DJP

I agree.

D VAN ZYL
Judge of the High Court

MBENENGE J

I agree.

S M MBENENGE
Judge of the High Court

For the appellant :

Adv DC Botma, instructed Mvuzo Notyesi Inc,
Mthatha

For the state :

Adv NW Lamla, of the Office of the Director of Public

Prosecutions, Mthatha

Date of hearing : 30 March 2016

Date of delivery of the judgment : 12 April 2016