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LISLE GOLDMAN v THE STATE

SMALBERGER, JA

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between

LISLE GOLDMAN

Appellant

and

THE STATE

Respondent

CORAM: SMALBERGER, STEYN et GROSSKOPF, JJA.

HEARD: 5 September 1989

DELIVERED: 14 September 1989

J U D G M E N T

SMALBERGER, JA :-

This is an appeal against sentence. The appellant was convicted in the Regional Court in Pretoria on two counts of robbery. On each count he was sentenced to 6 years imprisonment, half of which was conditionally suspended for 5 years. His appeal against his sentence to the Transvaal Provincial Division was dismissed. His present appeal

is with leave of this Court.

The appellant was initially charged with three other accused. His co-accused were accused 1, 3 and 4 respectively, and I shall refer to them individually as such. At the original hearing the appellant pleaded not guilty; his co-accused pleaded guilty. A separation of trials was ordered. The cases against the appellant's co-accused were duly disposed of. The appellant's trial subsequently proceeded before a different magistrate. At the commencement thereof the appellant changed his plea to one of guilty on both counts of robbery with which he was charged.

The facts relevant to the convictions of the appellant and his co-accused are the following. On 20, 22 and 24 August 1986 respectively robberies occurred at three filling stations in the Pretoria area. On

each occasion a loaded crossbow was used to threaten and subdue the attendants at the various filling stations. They were thereafter robbed of the money in their possession. The total amount taken on the three occasions amounted to just under R700-00.

The appellant participated in the second and third robberies, but not in the first. Accused 1 participated in all three robberies; accused 3 and 4 in the first and second only. At the time when the offences were committed the appellant was 18 years and 7 months of age. Accused 1 had just turned 19; accused 3 was 19 years and 8 months old; and accused 4 was 16 years and 10 months of age. Accused 3 was married with one child.

The magistrate who tried accused 1, 3 and 4 sentenced them as follows:

Accused 1: 5 years imprisonment and 5 cuts.

The whole of the sentence of imprisonment was conditionally suspended for 5 years.

Accused 3: A fine of R1 000-00 or 12 months imprisonment, plus a further 3 years imprisonment conditionally suspended for 5 years.

Accused 4: A moderate correction of 5 cuts with a light cane, together with 2 years imprisonment conditionally suspended for 5 years.

Before the appellant was sentenced the presiding magistrate was advised of the ages of the appellant's co-accused and the sentences imposed upon them. When leave was granted by this Court to the appellant to appeal against his sentence, he was

simultaneously granted leave to lead further evidence by placing before this Court the record of the proceedings at the trial of his co-accused. The record of those proceedings has duly been incorporated in the appeal record.

At his trial the appellant handed in a signed statement outlining the circumstances of the two robberies in which he participated. The State apparently accepted the correctness of the facts alleged in the statement. The statement reads as follows:

"I am the accused in the present matter and I am aware of all the facts contained in this statement. I was initially a co-accused with three other persons in respect of three robberies that took place. I was present during two of the three robberies that were committed.

I took part in the second robbery that was committed under the following circumstances:

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1. We drove to a garage in Pretoria East in one of the other accused's car which car was driven by the owner of the said vehicle.

I was sitting at the back of the car holding a cross-bow. We stopped at the said garage and I got out of the car and held the two petrol attendants up with the cross-bow. I however saw to it that the cross-bow was never pointed at them and I also saw to it that the cross-bow's safety-catch was on. I then forced the two petrol attendants to lie on the ground while my co-accused took some money and Coke from the garage and the driver filled his car up with petrol.

2. The third robbery took place under exactly the same circumstances apart from the fact that the garage involved was in Pretoria North. I once more made sure that the cross-bow was never pointed in the direction of the petrol attendants

and care was taken that the safety-catch of the cross-bow was on during the actual robbery.

3. I have no knowledge as to what took place during the first robbery."

Although it is trite that sentences should be individualised, our courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances. In sentencing the appellant it was incumbent upon the magistrate to have regard to the sentences imposed upon his co-accused. If he had proper regard thereto, as he professes to have done, it is difficult to explain the obvious and striking disparity between the sentence imposed upon the appellant (an effective 6 years imprisonment) and those imposed on his co-accused (which avoided direct

imprisonment). The disparity may to some extent be accounted for on the basis of a misdirection by the magistrate with regard to the age of accused 1. He appears to have been under the mistaken impression that accused 1 was only 16 (and therefore much younger than the appellant) at the relevant time, whereas he was in fact slightly older than the appellant.

A comparison between the role played by the appellant and his co-accused (particularly accused 1) in the commission of the offences, and their respective personal circumstances, establishes that the striking disparity in their sentences is not justified. As previously mentioned, the appellant only participated in the second and third robberies. The idea to rob did not originate with him, nor was he party to the planning and execution of the initial robbery. The second and third robberies followed on the successful

execution of the first. By contrast accused 1. was party to the planning of the first robbery, and participated in all three. The finding by the court a quo that "die appellant volgens sy eie verklaring die leier van die bende was wat 'n gewetenlose aanval op petroljoggies uitgevoer het" is not supported by the evidence. It does not follow from the fact that on two occasions he was in possession of the only weapon, that the appellant was the leader of the group. His non-involvement in the initial robbery rather suggests the contrary. The appellant handled the crossbow at the second and third robberies; accused 1 did so at the first. The robberies represented a joint effort between those participating on each occasion. The appellant and his co-accused each had a specific role to play. In the circumstances the moral guilt of the person handling the crossbow would not appear to be any

greater than that of the other participants. Furthermore, the appellant handled the crossbow with care to avoid causing injury. There is accordingly nothing in the circumstances surrounding the robberies to justify a disparity of sentence between the appellant and accused 1 - if anything, the role of accused 1 is deserving of greater moral stricture than that of the appellant.

Turning to a comparison of their personal circumstances one finds little to choose between the appellant and accused 1. They were both of a roughly similar age. The appellant has a previous conviction for hindering the police in the execution of their duties for which he was sentenced to a juvenile whipping of 5 strokes. Accused 1 is a first offender but, as I have pointed out, he was involved in all three robberies. The appellant comes from a more

stable and prosperous environment than accused 1, but both are prone to outside influence, and each experienced psychological and other problems during his formative years. I do not propose to canvass the evidence in this regard in detail. Suffice it to say that there are no significant, or sufficiently significant, differences in their personal circumstances to justify the one being imprisoned and the other not.

Despite the serious nature of the crimes committed the sentence imposed upon accused 1 cannot be said to be unreasonable or clearly inappropriate. Having regard to their relatively equal degrees of participation and moral blameworthiness, and their comparable personal circumstances, the sentence imposed upon the appellant, compared with that of accused 1, is disturbingly inappropriate, and interference therewith

is fully justified (S v Marx 1989(1) SA 222 (A)). A comparison with the sentence imposed on accused 3 leads to the same conclusion.

It was also strenuously argued on appeal that the magistrate had misdirected himself in failing to give due and proper consideration to the evidence of the clinical psychologist, Mrs du Toit, who testified on the appellant's behalf. The contentions that were advanced are not without merit, but in view of the conclusion already reached it is not necessary to consider them further, nor to analyse the evidence of Mrs du Toit, or the magistrate's approach thereto, in any detail. In arriving at what I consider to be an appropriate sentence I shall have regard to the salient features of Mrs du Toit's evidence.

The appellant spent 9 months in gaol serving his sentence before he was admitted to bail pending the

present appeal. The actual imprisonment already undergone by him is relevant in determining what sentence should be substituted for that of the magistrate, and what order should be made to do proper justice to the appellant. In my view the appellant does not merit a heavier sentence than that imposed on accused 1. On a conspectus of all relevant considerations a fully suspended sentence of imprisonment would be appropriate.

The appeal succeeds and the following order is made:

- 1) The sentences imposed upon the appellant are set aside. There is substituted in their stead the following sentence:

"Both counts taken together for the purposes of sentence - 5 years imprisonment, the whole of which is suspended for 5

years on condition that the accused is not convicted of robbery or theft, or any attempt thereto, committed during the period of suspension."

- 2) It is further ordered that, if the suspended sentence is at any time brought into force, it is to be borne in mind that the appellant (accused) has already served 9 months imprisonment which period is then to be taken into account.

JUDGE OF APPEAL
J W SMALBERGER

STEYN, JA)
GROSSKOPF JA) CONCUR