

SOUTH AFRICA / JUDGMENT

Herwil v S (A585/2008) [2010] ZAWCHC 359 (1 February 2010)

[2010] ZAWCHC 359

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Goliath, Louw

CASE / FILE NUMBER

A585/2008

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

Case

No: A585/2008

In

the matter between:

LOOD

HERWIL

.....Appellant

Versus

STATE

.....Respondent

JUDGMENT

DELIVERED ON 1 FEBRUARY 2010 Allie, J [1] The appellant was convicted in this court on 8 November 2002 as one of 7 accused on eight counts of robbery with aggravating

circumstances, one count of rape, two counts of assault with intent to do grievous bodily harm and one count of the illegal possession

of a firearm. [2] He pleaded not guilty and had legal representation. [3] On 14 November 2002, he was sentenced as follows: 3.1. 15 Years imprisonment on each count of robbery with aggravating circumstances but the sentences were ordered to run concurrently. 3.2. 10 Years imprisonment on the rape count. 3.3. 3 Years imprisonment on each of the assault with intent to inflict grievous

bodily harm counts but these were ordered to run concurrently with the sentence imposed on the robbery charges. 3.4. 5 Years imprisonment on the illegal possession of a firearm count. [4] The appellant appeals with the leave of the court a quo only against the sentence imposed. His primary contention is that as he was sentenced to an effective 40 years imprisonment on 24 April 2002 by another court in a case involving two robberies with aggravating circumstances and two counts of the unlawful possession of firearms, the effective sentence of 30 years imprisonment imposed in this case would create a situation where he is imprisoned for a potential period of 70 years in total. [5] It was accordingly submitted on behalf of the appellant that the court a quo misdirected itself by imposing a sentence of direct imprisonment which is of an undue length. [6] In *S v Mpofu* 1985 (4) SA 322 (ZHC) at 324 the principle of considering the total effect of a long term of imprisonment was considered. The court held as follows: "In all multiple crime cases the courts pay regard to what Thomas describes as "the totality principle". "(The court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences." (Thomas Principles of Sentencing 2nd Ed at 56.) In effect, the accused normally receives a "discount" for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole. In giving effect to this principle, individual sentences are passed on each count in some cases, whereas in others a globular penalty is imposed, but in either event, the overall severity of the sentence is modified to take account of the total and combined impact of all the offences together." [7] In *S v Koutandos & Another* 2002 (1) SACR 219 at 221 g-h (SCA) the following remarks are equally apposite in the present case: The offences were without doubt deserving of long term imprisonment. Nonetheless, when regard is had to the cumulative effect of the sentences imposed on both appellants, the result strikes me as so excessive as to justify interference by this court." [8] In considering whether the cumulative effect of the sentence imposed in this case and the sentence of 40 years imprisonment imposed in the other case is so excessive as to move this court to reduce the effect of the sentences imposed in this case, the facts of the present case are relevant.

JUDGMENT

DELIVERED ON 1 FEBRUARY 2010

Allie, J

[1] The appellant was convicted in this court on 8 November 2002 as one of 7 accused on eight counts of robbery with aggravating

circumstances, one count of rape, two counts of assault with intent to do grievous bodily harm and one count of the illegal possession

of a firearm.

[2] He pleaded not guilty and had legal representation.

[3] On 14 November 2002, he was sentenced as follows:

3.1. 15 Years imprisonment on each count of robbery with aggravating circumstances but the sentences were ordered to run concurrently.

3.2. 10 Years imprisonment on the rape count.

3.3. 3 Years imprisonment on each of the assault with intent to inflict grievous bodily harm counts but these were ordered to run concurrently with the sentence imposed on the robbery charges.

3.4. 5 Years imprisonment on the illegal possession of a firearm count.

[4] The appellant appeals with the leave of the court a quo only against the sentence imposed. His primary contention is that as he was sentenced to an effective 40 years imprisonment on 24 April 2002 by another court in a case involving two robberies with aggravating circumstances and two counts of the unlawful possession of firearms, the effective sentence of 30 years imprisonment imposed in this case would create a situation where he is imprisoned for a potential period of 70 years in total.

[5] It was accordingly submitted on behalf of the appellant that the court a quo misdirected itself by imposing a sentence of direct imprisonment which is of an undue length.

[6] In *S v Mpofu* 1985 (4) SA 322 (ZHC) at 324 the principle of considering the total effect of a long term of imprisonment was considered. The court held as follows:

"In all multiple crime cases the courts pay regard to what Thomas describes as "the totality principle". "(The court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences." (Thomas Principles of Sentencing 2nd Ed at 56.) In effect, the accused normally receives a "discount" for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole. In giving effect to this principle, individual sentences are passed on each count in some cases, whereas in others a globular penalty is imposed, but in either event, the overall severity of the sentence is modified to take account of the total and combined impact of all the offences together."

[7] In *S v Koutandos & Another* 2002 (1) SACR 219 at 221 g-h (SCA) the following remarks are equally apposite in the present case:

The offences were without doubt deserving of long term imprisonment. Nonetheless, when regard is had to the cumulative effect of the sentences imposed on both appellants, the result strikes me as so excessive as to justify interference by this court."

- [8] In considering whether the cumulative effect of the sentence imposed in this case and the sentence of 40 years imprisonment imposed in the other case is so excessive as to move this court to reduce the effect of the sentences imposed in this case, the facts of the present case are relevant.
- [9] Although the appellant committed 8 counts of robbery with aggravated circumstances, 2 counts of assault with intent to inflict grievous bodily harm and possessed a firearm, they were all committed on the same day, 14 June 1998 in the course of carrying out the primary offence, namely robbery with aggravating circumstances. [10] The rape of the security officer which also occurred on the same day while she was tied up on the floor and in the presence of other people who were working in the shop, is a separate offence unrelated to the appellant's primary objective of robbery. The appellant gratuitously sought to satisfy his sexual appetite by brutally humiliating and violating the complainant in the rape charge. [11] The appellant was 27 years old at the time when he committed the offences. At that age he was old enough to appreciate the

consequences of his actions. He had also fallen foul of the law prior to that time and ought to have understood the serious consequences of the crimes he planned to commit. The offences he committed were not only planned, but were brutal and prolonged. The trauma for the victims were still present at the time of the trial. I can find no reason to interfere with the finding of the court a quo that no substantial and compelling circumstances exist to justify a departure from the prescribed minimum sentences. [12] The appellant also has a history of committing offences which involved both violence and dishonesty. The effective sentence of 30 years imprisonment is consequently an entirely appropriate sentence for the very serious crimes committed by the appellant on 14 June

1998. What needs to be considered, however, is the cumulative effect of the effective sentences imposed on the two separate occasions. [13] The cumulative effect of the sentences imposed on the two separate occasions and the detrimental effect upon the appellant has to be weighed against the other purposes of sentence namely retribution and deterrence. [14] The court has been informed that at this stage the appellant has not brought an application for leave to appeal against his convictions or the sentence of 40 years imposed in the other matter. The actual period that he will serve in that case is not known. [15] The court is at large to interfere in the sentence because its cumulative effect will operate harshly against the appellant who was 31 years old at the time of sentence and be largely ineffective if he is to remain in prison until the age of 100 years. This court's decision to intervene and reduce the cumulative effect of the sentences imposed in both cases is based upon the supposition that the effective term of 40 years imprisonment in the other case is not reduced on appeal. [16] I would accordingly order in terms of the provisions of Section 280
- (2) of Act 51 of 1977, that the sentences imposed by the court a quo on the eight counts of robbery with aggravating circumstances, the two counts of assault with intent to do grievous bodily harm and one count of the possession of an illegal firearm run concurrently with the effective sentence of 40 years imprisonment imposed on 24 April 2002. [17] I would order

that, in addition, the appellant serve the 10 years imprisonment which was imposed by the court a quo on the rape count separately. [18] I would consequently make the following order: 18.1. The sentences imposed by the court a quo are confirmed but it is ordered that the sentences imposed on counts 1, 2, 3, 4, 5, 6, 9 and 10 (robbery with aggravating circumstances),

counts 13 and 14 (assault with intent to do grievous bodily harm) and count 28 (the unlawful possession of a firearm), all run

concurrently with the effective sentence of 40 years imprisonment imposed by the Bellville Regional Court on 24 April 2002. 18.2. The sentence of 10 years imprisonment imposed by the court a quo on count 11 (rape) shall not run concurrently with any of the sentences imposed by the Bellville Regional Court on 24 April 2002 or with any of the other sentences imposed by the court a quo on 14 November 2002. ALLIE, J I agree GOLIATH, J I agree and it is so ordered LOUW, J

[9] Although the appellant committed 8 counts of robbery with aggravated circumstances, 2 counts of assault with intent to inflict grievous bodily harm and possessed a firearm, they were all committed on the same day, 14 June 1998 in the course of carrying out the primary offence, namely robbery with aggravating circumstances.

[10] The rape of the security officer which also occurred on the same day while she was tied up on the floor and in the presence of other people who were working in the shop, is a separate offence unrelated to the appellant's primary objective of robbery. The appellant gratuitously sought to satisfy his sexual appetite by brutally humiliating and violating the complainant in the rape charge.

[11] The appellant was 27 years old at the time when he committed the offences. At that age he was old enough to appreciate the

consequences of his actions. He had also fallen foul of the law prior to that time and ought to have understood the serious consequences of the crimes he planned to commit. The offences he committed were not only planned, but were brutal and prolonged. The trauma for the victims were still present at the time of the trial. I can find no reason to interfere with the finding of the court a quo that no substantial and compelling circumstances exist to justify a departure from the prescribed minimum sentences.

[12] The appellant also has a history of committing offences which involved both violence and dishonesty. The effective sentence of 30 years imprisonment is consequently an entirely appropriate sentence for the very serious crimes committed by the appellant on 14 June

1998. What needs to be considered, however, is the cumulative effect of the effective sentences imposed on the two separate occasions.

- [13] The cumulative effect of the sentences imposed on the two separate occasions and the detrimental effect upon the appellant has to be weighed against the other purposes of sentence namely retribution and deterrence.
- [14] The court has been informed that at this stage the appellant has not brought an application for leave to appeal against his convictions or the sentence of 40 years imposed in the other matter. The actual period that he will serve in that case is not known.
- [15] The court is at large to interfere in the sentence because its cumulative effect will operate harshly against the appellant who was 31 years old at the time of sentence and be largely ineffective if he is to remain in prison until the age of 100 years. This court's decision to intervene and reduce the cumulative effect of the sentences imposed in both cases is based upon the supposition that the effective term of 40 years imprisonment in the other case is not reduced on appeal.
- [16] I would accordingly order in terms of the provisions of Section 280
- (2) of Act 51 of 1977, that the sentences imposed by the court a quo on the eight counts of robbery with aggravating circumstances, the two counts of assault with intent to do grievous bodily harm and one count of the possession of an illegal firearm run concurrently with the effective sentence of 40 years imprisonment imposed on 24 April 2002.
- [17] I would order that, in addition, the appellant serve the 10 years imprisonment which was imposed by the court a quo on the rape count separately.
- [18] I would consequently make the following order:

18.1. The sentences imposed by the court a quo are confirmed but it is ordered that the sentences imposed on counts 1, 2, 3, 4, 5, 6, 9 and 10 (robbery with aggravating circumstances),

counts 13 and 14 (assault with intent to do grievous bodily harm) and count 28 (the unlawful possession of a firearm), all run

concurrently with the effective sentence of 40 years imprisonment imposed by the Bellville Regional Court on 24 April 2002.

18.2. The sentence of 10 years imprisonment imposed by the court a quo on count 11 (rape) shall not run concurrently with any of the sentences imposed by the Bellville Regional Court on 24 April 2002 or with any of the other sentences imposed by the court a quo on 14 November 2002.

ALLIE, J

I agree

GOLIATH, J

I agree and it is so ordered

LOUW, J

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2010/359.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/herwil-v-s-unknown-topic-awchc-2010>

Prepared on 11 October 2026 · Esheria