

SOUTH AFRICA / JUDGMENT

M.P and Others v S (CA152/2016) [2017] ZAECGHC 2 (10 January 2017) [2017] ZAECGHC 2

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, FBA Dawood, N Gqamana

CASE / FILE NUMBER

CA152/2016

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IN THE HIGH

COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: CA152/2016

In

the matter between:

M.
P.
First Appellant
RICARDO
LOMBERG
Second Appellant
NETHANIEL
BLOUW
Third Appellant
And
THE
STATE
Respondent

JUDGMENT

BESHE J:

[1] On the 10 November 2013 Malusi AJ sentenced five accused persons on six counts in connection with an incident that took place on the 12 August 2012 at Armadale Farm in Jansenville. A farm that belonged to deceased and his wife (complainant in respect of attempted murder charge). The six charges in respect of which the accused were convicted are the following:

1. Housebreaking with intent to commit robbery and murder.
2. Murder.
3. Attempted murder.
4. Robbery with aggravating circumstances.
5. Unlawful possession of firearms.
6. Unlawful possession of ammunition.

[2] The accused persons were sentenced on the 11 October 2013. Initially, three of the accused being numbers one, four and five sought to appeal against the sentences imposed by the learned judge. Accused number four who was the second appellant and was nineteen

(19) years and one month old at the time of the commission of the offence has since withdrawn his appeal against sentence. Accused number one and five persisted with their appeal against sentence. They are first and third appellant.

[3] The first appellant was sentenced as follows:

Count 1: 2 years imprisonment.

Count 2: 10 years imprisonment.

Count 3: 5 years imprisonment.

Count 4: 5 years imprisonment.

Counts 5 and 6: imprisonment for 2 years and 1 year respectively.

It was ordered that the sentences should run concurrently with the effect that the first appellant was sentenced to an effective term of imprisonment for ten (10) years.

[4] Third appellant (accused number five) was sentenced as follows:

Count 1: 5 years imprisonment.

Count 2: imprisonment for life.

Count 3: 15 years imprisonment.

Count 4: 15 years imprisonment.

Count 5: 5 years imprisonment.

Count 6: 1 year imprisonment.

[5] The appeal by first appellant is premised on the ground that in the court a quo erred in sentencing him to ten (10) years imprisonment as this sentence is unjust and shockingly inappropriate and severe in view of the following factors inter alia that:

He was thirteen (13) years old when the offences were committed;

He does not have previous convictions;

He only actively participated in the offences after the victims had been incapacitated;

He did not assault any of the victims;

There was no evidence that the offences of murder, attempted murder and robbery were pre-meditated;

He pleaded guilty and gave a credible plea explanation.

[6] It was submitted on his behalf that the court a quo erred in imposing an effective sentence of ten (10) years imprisonment as a child may only be imprisoned as a measure of last resort and then for the shortest appropriate period of time.

[7] Section 28 (1) (g) of the Constitution provides that:

“28. Children.–(1) Every child has the right–

(a)

(b)

(c)

(d)

(e)

(f)

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time.”

[8] It was further submitted that the court below neglected to consider the effect of period spent by first appellant in custody awaiting trial – a period of one (1) year and two (2) months.

[9] It is indeed so that Section 77 (5) of Child Justice Act (CJA)[1] provides that:

“A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth centre prior to sentence being imposed”

It is a feature of this case that the court below did not consider the effect of the time spent in custody by the appellant by antedating

the sentence imposed by a period equal to the period spent in custody prior to sentencing. So there is merit to this submission.

[10] Regarding the question whether by imposing an effective term of imprisonment for ten (10) years the trial court erred, the following must be borne in mind:

Section 28 (g) of the Constitution provides for the imposition of the shortest appropriate period of detention. [emphasis provided].

In my view this entails that the sentencing court should also consider the proportionality of the period of imprisonment to the crime/s committed. My view in this regard is emboldened by the provisions of Section 69 (4) of the Child Justice Act which provides that:

“69 Objectives of sentencing and factors to be considered

(4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

- (a) The seriousness of the offence, with due regard to-
 - (i) the amount of harm done or risked through the offence; and
 - (ii) the culpability of the child in causing or risking the harm;
- (b) the protection of the community;
- (c) the severity of the impact of the offence on the victim;
- (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
- (e) the desirability of keeping the child out of prison.”

[11] There is no doubt that the appellant and his erstwhile co-accused committed very serious offences. The victims, who were both seventy

- (70) years old at the time were attacked in the sanctity of their farm whilst relaxing at home. Granted, there was no evidence that first appellant took part in stabbing the deceased, the deceased was however stabbed approximately twenty times. His wife was stabbed ten times, struck with a bottle on the head and left for dead. A large number of items including a motor vehicle, six firearms and bags of ammunition were taken during the robbery.
- [12] The frequency of attacks similar to the one perpetrated on the deceased and his wife was apparent from the statistics that were presented by the investigating officer of the case Captain Wolmarans. The statistics covered a period of three years – 2010 to 2013 of what the captain categorized as “farm attacks”.
- [13] A report that was prepared by a Clinical Psychologist Sarel S Steyn who saw the deceased’s wife after the incident outlines the impact of the crime on her (deceased’s wife), their children, extended family, former employees, friends and the community at large. The impact that the incident had is also apparent from the Probation Officer’s reports on the first appellant and his co-accused persons. I am therefore not persuaded that by not considering the suspension, postponement of the sentence, sending the appellant to Gali Thembani facility or any non-custodial sentence, the court a quo neglected to act in the best interest of the first appellant. In my view all the factors that should be considered at sentencing stage were given due regard. And that the sentence imposed in respect of first appellant was appropriate. Save for giving effect to the provisions of Section 77 (5) of Child Justice Act (supra) there is no reason to interfere with the sentence imposed in the court below. In my view the sentence imposed is proportional to the crime, the offender and the needs of the society and is the shortest possible period in the circumstances.
- [14] Ms Crouse who appeared for the first appellant urged us to use our inherent jurisdiction and review the sentence imposed in respect of second appellant who has since withdrawn his appeal by ordering that his sentence be antedated to the date of his arrest.
- [15] This was not opposed by Mr Robinson who appeared on behalf of the respondent both in respect of first appellant and former second appellant.
- [16] I would have no difficulty in reviewing and setting aside the sentence imposed in respect of former second appellant, and replacing it with the same sentence imposed in the court a quo, and antedating same to date of second appellant’s arrest.
- [17] In respect of the third appellant, it was submitted that by sentencing the second appellant to a lesser sentence of an effective

twenty (20) years imprisonment, the court below created an unjust disparity between their sentences. And that the court should have sentenced the third appellant to a similar lighter sentence. I have already stated that third appellant was sentenced to inter alia imprisonment for life as well as fifteen (15) years imprisonment in respect of counts three and four.

[18] In response to this submission, Mr Robinson although contending that second appellant was fortunate not to have received life imprisonment as third appellant, and he retorted that the disparity in their sentences was justified on the following grounds:

Third appellant is three (3) years older than second appellant.

Unlike second appellant, he pleaded not guilty to most charges.

He did not show any remorse during the trial.

He has five previous convictions as opposed to second appellant's one previous conviction.

During the sentencing stage, his counsel conceded that no substantial and compelling circumstances justifying a lesser sentence in respect of the murder charge existed.

[19] I am in agreement with Mr Robinson in this regard. There were sufficient grounds to differentiate between the two appellants for sentence purposes. I am not persuaded that the sentence imposed in respect of second appellant is disturbingly inappropriate as to warrant interference therewith. His appeal against sentence cannot be upheld.

[20] In the result I propose the following order:

(a) First appellant's appeal against sentence succeeds to the extent that the sentence of an effective term of imprisonment for ten

(10) years is confirmed but same is antedated to first appellant's date of arrest.

(b) Third appellant's appeal against sentence is dismissed.

(c) Former second appellant's sentence is reviewed and set aside. It is altered by adding that the sentence imposed by the court a quo is antedated to date of former second appellant's arrest.

N G BESHE

JUDGE OF THE HIGH COURT

DAWOOD J

I agree, it is so ordered.

FBA DAWOOD

GQAMANA AJ

I agree.

N GQAMANA

ACTING JUDGE OF THE HIGHER COURT

APPEARANCES

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Date Heard : 21 November 2016

Date Reserved : 21 November 2016

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[1] Act 75 of 2008.

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