

SOUTH AFRICA / JUDGMENT

S (A502/2016, 14/4145/2006), R v [2017] ZAGPPHC 279 (2 June 2017)

[2017] ZAGPPHC 279**COURT**

North Gauteng High Court, Pretoria

BEFORE

T Brenner, J Teffo

CASE / FILE NUMBER

A502/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****REPUBLIC****OF SOUTH AFRICA****Reportable:**

Yes

Of

interest to other judges: Yes

Date

of hearing: 8 May 2017

Date

of judgment: 30 May 2017

Case

number: A502/2016

Case

number court a quo: 14/4145/2006

Delivered

on: 02/6/17

In

the matter between : S.
 M. M. N.
 R.
 Appellant
 and
 THE
 STATE
 Respondent

JUDGMENT

IN APPEAL

BRENNER, AJ:

1. This appeal involves the cumulative effect of sentences.
2. On 16 May 2016, the Regional Court in Pretoria granted the appellant, S. M. M. N. R., ("R."), leave to appeal against sentence only.
3. On 4 October 2012, the trial Court convicted R. on seven counts, namely:
 - a. Housebreaking with intent to steal and theft, on 20 December 2006, of a computer and playstation, the offence having occurred at [...] F. L., R., Pretoria, at the residence of Martin Victor ("Victor"), whose brother, Gerhardus Breedske, was looking after the home at the time;
 - b. Rape of S. D. ("D.") on 4 December 2006 at premises at the corner of [...] A. and E. Street, R.;
 - c. Housebreaking with intent to rob and robbery, with aggravating circumstances via the use of a hammer, on 4 December 2006, at D.s premises, the items stolen being a DVD worth about R2 000,00 and R400,00 in cash;
 - d. Rape of C. S. (formerly B.) ("S.") on 11 November 2006 at her residence at [...], [...] Lane, R.;
 - e. Housebreaking with intent to rob and robbery, with aggravating circumstances via the use of a gun, on 11 November 2006, at S.'s premises, the items stolen being a DVD player, jewellery, R700,00 in cash and two watches;
 - f. Theft of a JVC tape out of a motor vehicle at S.'s premises on 11 November 2006, the property of Johan S.;
 - g. Theft of a JVC front loader MP3 player out of a motor vehicle at S.'s premises on 11 November 2006, the property of J. S..
4. R. pleaded not guilty to all charges against him, and was legally represented throughout the trial. He was arrested on 20 December 2006.

5. R. remained in custody from 20 December 2006 until his conviction on 4 October 2012, when he was convicted and sentenced to an effective 30 years' imprisonment. The sentence was as follows:
 - a. On the count of housebreaking with intent to steal and theft, he was sentenced to a term of 3 years' imprisonment;
 - b. On the counts of rape of D. and housebreaking with intent to rob and robbery, taken together, he was sentenced to 15 years' imprisonment;
 - c. On the counts of rape of S., housebreaking with intent to rob and robbery, and two counts of theft from a motor vehicle, taken together, he was sentenced to 15 years' imprisonment;
 - d. The sentence on the count of housebreaking with intent to steal at Victor's premises was directed to run concurrently with the sentences of 15 years each, the effective sentence therefore being 30 years in toto.
6. R. was born on [...] 1989, and was therefore 17 years of age when the offences were committed. It is plain from the facts that he embarked on a crime spree, committing the offences on 11 November 2006, 4 December 2006 and 20 December 2006.
7. After numerous state witnesses had testified, the defence closed its case without adducing any evidence.
8. In its two page judgment on sentence, the trial Court took note of R.'s then age, which was 23 years at the date of judgment, and of the fact that he had a grade 9 education. The Court spoke of the "savage" manner in which R. had attacked the complainants in the privacy and sanctity of their homes. It came to the conclusion that, his being a danger to society, a custodial sentence was appropriate. The trial Court went on to state:

"It was argued that the court should keep in mind that you have been in custody since 20 December 2006 . That is however largely due to your own fault, because you malingered your illness."
9. The trial Court found that there were no substantial and compelling circumstances to justify lesser sentences but took cognisance of the cumulative effect of sentences. R. was also found unfit to possess a firearm. This constituted the essence of the trial Court's reasoning in its judgment on sentence.
10. The charge sheets on the counts of rape and robbery expressly referred to section 51 of the Criminal Law Amendment Act, number 105 of 1997 ("the CLAA"). It is noteworthy that section 51(6), enacted by the amendment Act, Act 42 of 2013, provides that section 51 which pertains to minimum sentences for certain offences, does not apply to accused persons who were under the age of eighteen at the time of commission of the offence. This subsection did not apply in 2006. Nevertheless, traditionally, youth has been a relevant factor in the sentencing process.

11. I am of the view that there is cause to interfere with the effective sentence against R., based on several misdirections by the trial Court.
12. The Court misdirected itself in discounting the substantial period of time spent in custody awaiting trial owing to R.'s purported malingering. It amounted to almost 6 years.
13. R. was detained at Weskoppies hospital on two occasions in terms of sections 77, 78 and 79 of the Criminal Procedure Act, no 5 of 1977 ("the CPA").
14. On 6 November 2009, R.'s legal representative asked for an order to refer R. to Weskoppies. Some seven months later, the psychiatric report was forthcoming.
15. The psychiatric report dated June 2010, signed by three psychiatrists, diagnosed his condition as one of "malingering". They found him capable of understanding proceedings and of having had the mental capacity at the dates of the offences of distinguishing between right and wrong.
16. On 21 January 2011, a new assessment at Weskoppies was ordered since R. disputed the findings of this report. In April 2011, a further report signed by two psychiatrists determined that there was "no psychiatric diagnosis" and that R. was "malingering".
17. On 29 April 2011, his legal representative found no basis to challenge the finding. R. instructed his attorney to withdraw. On 25 October 2011, R. applied for bail, representing himself. Bail was refused.
18. On 25 January 2012, a new lawyer was appointed to represent him. A consideration of the transcript reveals that no evidence was led during the interregnum period while R. was unrepresented. The evidence of state witnesses resumed on 11 May 2012, when he was represented by a new lawyer.
19. That several psychiatrists diagnosed his psychiatric condition as one of malingering, in two separate reports, does not derogate from what constituted his legal right to exercise the provisions of sections 77, 78 and 79 of the CPA. It was his legal right to apply for bail. If there was a delay in the process, these occurrences could not be held against R. in affording consideration to time spent in custody. R. had spent almost 6 years in custody prior to being sentenced. It was this fact simpliciter which should have been considered, irrespective of the causes for the delay in the prosecution of the trial, which were not factors of direct relevance.
20. In any event, factors outside of R.'s control played a part in the delay. Proceedings only commenced on 11 November 2008, some two years after the offences. Sixteen state witnesses testified- over a four year period.
21. Cognisance has to be taken of the fact that R. committed several serious offences: two rapes, two robberies, three housebreakings and two thefts at three separate venues over a period of some five weeks. It is unclear from the evidence what the total value of the goods stolen amounted to. Having regard to the nature of the items stolen, the value could not have been inordinately substantial.

22. In the trial Court's judgment, while noting his age of 23 at the date of judgment, no mention was made of the fact that R. was 17 years old at the dates of commission of the offences, and that he was a first offender. There was no evidence that the two rapes and robberies had resulted in irreparable harm or severe injuries to the complainants. Albeit that the complainants were threatened with a hammer and a gun respectively, these instruments were not used to perpetrate violence during the perpetration of any of the offences. No personal injuries were caused to any of the complainants, apart from the obvious trauma, which cannot be disregarded.

23. The effect of the sentence imposed on R. was that, after having spent 6 years incarcerated awaiting trial, he received a further term of 30 years' imprisonment.

24. If the cumulative effect of a sentence is too severe, this will result in a sentence which is inappropriate.

25. In the case of *S v Muller* and another 2012(3) SACR 545 SCA, a sentence of 30 years' imprisonment on 3 counts of robbery, not of the most serious type, was reduced to 18 years' imprisonment. The complainants were threatened with firearms or assaulted and tied up. The amount stolen was slightly less than R100 000,00. The appellants were young men in their twenties with previous convictions of theft, and in the case of one of them, housebreaking. They had pleaded guilty. It was held by the Court at paragraph 9 et sequitur:

"When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, 'he should approach this task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence."

26. I have taken account of the high number of offences and their severity, in particular, the two robberies with aggravating circumstances, and the two rapes. These are heinous offences.

27. Weighed against these offences are the fact that no irreparable personal harm was caused to the complainants and that no violence of any significant magnitude was meted out by him. There was no loss of life. The value of the items stolen was not inordinately high. R. was 17 years of age when he committed the offences and he was

a first offender. He spent

almost 6 years in custody awaiting trial, that is, from 20 December 2006 until 4 October 2012. I refer to the case of s v Radebe and another

2013(2) SACR 165 SCA. In this case the Court dealt with the period spent in custody pending trial. It held:

"...The test was not whether on its own that period of detention constituted a "substantial and compelling circumstance" but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one."

28. I am of the view that, given the above factors of relevance to sentencing, and that the imposed sentence, which included detention awaiting trial of almost six years was indeed unjust, an effective sentence of 18 years' imprisonment is warranted. This may be achieved by directing that a certain period of the offences run concurrently.

29. The following order is granted, namely:

- a. the appeal against sentence succeeds to the extent set out below;
- b. on count 1, the sentence of 3 years' imprisonment is confirmed;
- c. on counts 3 and 4, taken together, the sentence of 15 years' imprisonment is confirmed;
- d. on counts 5,6,7 and 8, taken together, the sentence of 15 years' imprisonment is confirmed;
- e. the full period of the sentence on count 1 shall run concurrently with the sentences on counts 3,4,5,6,7 and 8;
- f. 6 years of the sentence on counts 3 and 4 shall run concurrently with the sentences on count 1 and counts 5,6,7 and 8;
- g. 6 years of the sentence on counts 5,6,7 and 8 shall run concurrently with the sentences on counts 1 and 3 and 4.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

30 MAY 2017

I agree.

J TEFFO

It is so ordered.

Appearances

For the Appellant:

Adv L Augustyn

Instructed by:

Pretoria Justice Centre (Legal Aid SA)

Counsel for Respondent: Adv AJ Fourie

Instructed by:

The Director of Public Prosecutions

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