

SOUTH AFRICA / JUDGMENT

S v Jackson and Others (CC36/2013) [2014] ZAECHGC 36 (23 May 2014)

[2014] ZAECHGC 36

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Goosen

CASE / FILE NUMBER

CC36/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CC 36 / 2013

DATE HEARD: 20 MAY 2014

DATE DELIVERED: 23 MAY 2014

IN THE MATTER BETWEEN

THE STATE

AND

LOYISO JACKSON

Accused 1

LUNGA VELLEM

Accused 2

KWESELI HEMPE

Accused 3

MFUNDO NTLANZANA

Accused 4

MNCEDI HLABENI

Accused 5

SENTENCE

GOOSEN, J.

- [1] The accused have been convicted of robbery with aggravating circumstances and attempted murder and a number of related charges of possession of unlicensed firearms and ammunition. Accused 2, 3 and 4 have also been convicted of attempting to defeat the course of justice. The charges arose from an armed robbery which took place on a remote farm situated on the R 75 near the town of Kirkwood. The circumstances of the robbery and the attempted murder have been fully set out in the main judgement. I shall therefore only deal with those aspects which are relevant to the existence of aggravating circumstances.
- [2] It is common cause that the provisions of section 51 (2) of Act 105 of 1997 apply to the charge of robbery with aggravating circumstances. A prescribed minimum sentence of 15 years imprisonment for a first offender would therefore ordinarily be imposed. Although the indictment also pleads that a prescribed minimum sentence is applicable to count three (for which accused 2 alone has been convicted), the prosecution drew attention to the judgement in *S v Baartman* 2011
- (2) SACR 79 (WC). In that matter, in an appeal against sentence imposed by a magistrate, pursuant to the provisions of the Firearms Control Act 60 of 2000, the Western Cape High Court held that the mandatory minimum penalty provisions for semi-automatic firearms in Act 105 of 1997 are irreconcilable with the identical sentence of 15 years that may be imposed as a maximum in accordance with schedule 4 of the Firearms Control Act. The court concluded therefore that the sentencing provision in Act 105 of 1997 in regard to possession of semi-automatic weapons has been impliedly revoked by the later Firearms Control Act. As a result of this the prosecution did not seek to rely upon the imposition of a prescribed minimum sentence in regard to count 3.
- [3] The prosecution argued that the circumstances of this armed robbery are very serious and that the aggravating features present should find expression in the sentences imposed. The robbery took place on a remote farm. The accused all hail from Port Elizabeth. In order to carry out the robbery the accused would necessarily have had to plan it carefully, to make arrangements to be transported to the farm and to get away. This was not an opportunistic crime. The manner in which it was carried out suggests that the accused lay in wait for Mr and Mrs Rudman to return home. When they did, they pounced upon them and overpowered them. The conduct of the accused during the robbery also indicates the gravity of the offence. Mr R. was shot at almost point-blank range by Accused 2. When Mrs R. was accosted she was also threatened with being shot. Guns were pointed at her head and even under her chin. Later, when they were in the bedroom. Mrs R. was again threatened with violence. She was told that she would be placed in a bath of boiling water unless she told the

accused where the second safe was located. One of the accused stood next to the bed, and pointed a finger at Mr R.'s head and made clicking sounds indicating shots being fired. That the Rudman's escaped without any further violence directed at them is to be attributed to extraordinary bravery and quick thinking on Mrs R.'s part. When she noticed that accused 3, who was also armed and who was meant to be guarding them was not paying attention to them she was able to slam the bedroom door shut isolating herself and her husband from the accused. This action almost certainly brought an end to the accused's plans for that night and may well have saved the R.s from even greater harm.

- [4] These features which speak of planning and deliberate actions on the part of the robbers aimed at a vulnerable elderly couple on a remote farm homestead are undoubtedly aggravating. When this is coupled to the fact that firearms were used (at least two of the accused were armed) and that acquiring firearms was, on the probabilities, also an object of the robbery, there is little scope for a finding other than that this was a particularly serious offence.
- [5] When determining an appropriate sentence to impose upon an accused person the sentencing court is called upon to look to the nature and seriousness of the crime, the interests of the accused and the interests of the society in seeking retribution and punishment for the wrongs committed against it. The sentencing court is required to balance these competing interests and to ensure that the imposition of punishment meets all of the requisites and objectives of such punishment, including the need to obtain the rehabilitation of an offender and reintegration of that offender into society.
- [6] The imposition of the prescribed minimum sentences for which provision is made in Act 105 of 1997, is subject to section 51 (3) of the Act, which provides that a court may impose a sentence other than the prescribed minimum sentence if it is satisfied that substantial and compelling circumstances exist which warrant a departure from such sentence. In deciding whether there are substantial and compelling circumstances present the court will consider all relevant mitigating factors which are ordinarily taken into account. The court will also consider whether the prescribed sentence is proportional to the crime, the criminal and the legitimate needs of the society. If the court considers that the imposition of the prescribed sentence is disproportionate then that on its own constitutes substantial and compelling circumstances which would warrant a departure from such sentence (see in this regard *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Fatyí* 2001 (1) SACR 485 (SCA); *S v Vilakazi* 2009 (1) SACR 552 (SCA)).
- [7] I have already set out that those features which suggest themselves as aggravating features. It was argued on behalf of the prosecution that these features outweigh the mitigating factors presented by each of the accused and that the nature of the crime warrants the imposition of a sentence in excess of the prescribed minimum sentence.

- [8] Sentences must of course be individualised in order to address the particular circumstances of an accused person as well. It is appropriate therefore to turn to consideration of the case presented by each of the accused in mitigation of sentence.
- [9] The prosecution proved two previous convictions in respect of accused 2. The first of these was for rape where the accused was convicted and sentenced on 21 May 1996 to a period of 6 years imprisonment, 2 ½ years of which was suspended on conditions. The second conviction was for three counts of robbery imposed on 30 December 2000. In respect of the first of these counts the accused was sentenced to 6 years imprisonment 2 of which were suspended on conditions. In respect of the second count he was sentenced to 6 months imprisonment and on the third, count to a period of 4 years imprisonment 2 of which were suspended.
- [10] The accused is [...] years of age. He was unemployed at the time of his arrest and is unmarried. He has a minor son aged [...] years of age who is cared for by his [...] as the mother of his child passed away. The accused left school having completed standard [...]. He is the oldest of five siblings who grew up with his mother. His mother passed away in [...]. He has been in custody since his arrest on 9 December 2011.
- [11] It was argued on his behalf that although he is not a first offender that consideration should be given to the fact that at the time of the commission of the offences in this matter he had already been out of prison for a period of almost 6 years and that more than 10 years has elapsed since his previous convictions. His counsel was constrained to submit that the circumstances of this matter and the accused's personal circumstances could properly be considered as substantial and compelling circumstances warranting a departure from the imposition of the prescribed minimum sentence in regard to count 1. It was nevertheless argued that the court should give careful consideration to the cumulative effect of the sentences to be imposed in respect of each of the counts for which the accused has been convicted and should accordingly order that the sentences in respect of the possession of the firearms for which the accused has been convicted be served concurrently with the sentence imposed in respect of the robbery count. It was also submitted that the commission of the offences in count 1, and count 2 are such as would warrant that those respect of sentence is also be ordered to run concurrently.
- [12] I am unable to agree with this. Whilst it is so that the attempted murder occurred during the carrying out of the robbery it is nevertheless a serious offence for which the accused ought to be appropriately punished separately. I accept however that the court consider the potential cumulative effect of numerous sentences imposed for different criminal conduct, and must ensure that it is a just sentence. In this regard too, I consider that it will be appropriate to take into consideration the fact that the accused have all been in custody since their arrest, a period in excess of two years.

- [13] Insofar as the possession of firearms is concerned I have already indicated that a minimum sentence does not apply. I shall, for the offences related to the robbery consider the cumulative effect and order that those sentences relating to the possession of firearms and ammunition taken during the course of the robbery (counts 4 and 5) run concurrently with the sentence imposed in respect of the robbery.
- [14] Accused 2 is not a first offender. Whilst it is so that the conviction for robbery was more than ten years ago, he was required to serve a period of imprisonment. It is apparent from his previous convictions that the accused has not desisted from violent crime. When this factor is considered in the light of the particular role played it is my view that a sentence in excess of the prescribed sentence is warranted.
- [15] In regard to the offence of attempting to defeat the course of justice it must be noted that this is a very serious offence which strikes at the heart of the system of the administration of justice. It warrants a period of imprisonment. The offence itself was wholly separate from those committed in relation to the robbery and the sentence ought to reflect this fact.
- [16] The state also proved a previous conviction in respect of accused 3. He was convicted of theft on 2 March 2005 and was sentenced to a fine of R3000, or 9 months imprisonment of which R2000 or 6 months was suspended on conditions. He is now [...] years of age and is unmarried. He is the [...] of a minor [...] aged [...], who lives with her [...] since her mother has passed away. Prior to his arrest he was employed as a [...] worker and was earning R2400 per fortnight. He used this income to support himself, his child and his family. It was argued on his behalf that consideration should be given to the cumulative effect of the sentences and that those offences which were committed as part of the commission of the robbery should be ordered to run concurrently. It was also argued that the court should take into consideration the fact that he has been in custody since 9 December 2011 and that the period spent as an awaiting trial prisoner in essence constituted time served without remission or without the benefit of the programs that a sentenced prisoner is exposed to.
- [17] Although the accused has a previous conviction for theft, it appears from the sentence imposed that that it was not a particularly harsh punishment. I shall, accordingly, treat the accused as a first offender, for the purposes of imposing sentence in this matter. Consideration of the accused's personal circumstances do not however warrant a finding that there are substantial and compelling circumstances present which would warrant a departure from the imposition of the minimum prescribed sentence in respect of count
1. Nor do I consider that imposition of the minimum sentence in respect of that count would be inappropriate or would bring about an injustice in the light of the circumstances in which the offence was committed. I shall however take into consideration the fact that the possession of the firearms and ammunition for which the accused has been convicted arose in consequence of the execution of the robbery and shall order that the sentences run concurrently with the sentences imposed in respect of count one. In ameliorating the

overall effect of the sentence I will take into account the fact that the accused has been in custody for a period of almost 2 ½ years.

- [18] The prosecution did not prove any previous convictions on the part of accused 4. He was at the time of the commission of these offences [.....] years of age. He had completed standard [.....] at school and between 2004 and 2008 had been employed as a machine [.....] earning approximately R500 per week. After that period he earned approximately R2000 per month as a taxi driver. He is unmarried, but has two children, to whom he provides financial support in the amount of R500 per child per month. He has three younger siblings and has been in custody since his arrest on 9 December 2011.
- [19] His counsel conceded that these factors taken together do not constitute substantial and compelling circumstances to depart from the prescribed minimum sentence. It was however argued on his behalf that consideration should be given to the fact that he is a first offender, and at the age of 26 and that this is indicative of the fact that he has lived a crime free life to date and that he, on that basis, is certainly a candidate for rehabilitation. It was also argued that his role was not as extensive as that of accused 2 and that that should distinguish the sentences imposed in respect of the offences for which he has been convicted.

On this basis it was submitted that a cumulative sentence of approximately 15 years would not be unjust in the circumstances.

- [20] The concession as to the absence of substantial and compelling circumstances was well made. In my view no significant distinction, save on the basis that accused 2 was found to be the perpetrator who had shot Mr Rudman, can properly be drawn between the accused in respect of the commission of the robbery. The evidence of Mr and Mrs Rudman indicates that each of the accused was actively involved in the events of that night and there is, on the evidence before the court no basis to draw any significant distinction in relation to the participation of the accused in the commission of the offences. I shall, as in the case of accused 2 and 3, take into account that the accused has spent a considerable period as an awaiting trial prisoner.
- [21] The prosecution proved three previous convictions on the part of the accused 5. The first was for assault for which he was convicted during December 2000. He was sentenced to a fine which was wholly suspended on conditions. The second was for theft, for which he was convicted during August 2002. He was again sentenced to a fine which was wholly suspended on conditions. The third conviction was not strictly speaking a previous conviction. The accused was convicted and sentenced for robbery with aggravating circumstances on 17 March 2014. The offence was committed during
2009. He received a sentence of 10 years imprisonment of which four were suspended on conditions. The prosecution nevertheless argued that that even though the conviction occurred after the commission of the offences in this matter that the fact of such conviction is nevertheless relevant to the determination of sentence in this matter because

it is indicative of an aspect of the accused's character and shows a propensity to involve himself in the commission of very serious offences. I did not understand Mr Renaud to suggest that the conviction was not relevant. I agree that the conviction is

relevant and that it indeed may be taken into account as indicating an aspect of the accused's character (see in this regard *S v S* 1988 (1) SA 120 (A)). The fact that the accused has within a very short period of time engaged in armed robbery suggests a propensity for involvement in violent crime.

[22] Insofar as the accused's other convictions are concerned they were imposed a considerable time ago and will be left out of consideration.

[23] It was argued on behalf of accused 5 that this court should, in imposing its sentence take into account the sentence imposed upon the accused in respect of his most recent conviction and should order that a portion of the sentence in this matter run concurrently with the sentence in that matter. Reliance was here placed on *S v Breytenbach* 1988 (4) SA 286 at 292 – 293. That judgment however is not authority for the view that in every instance where an already sentenced prisoner is to be sentenced a court is obliged to order that a portion of the earlier sentence run concurrently with the sentence to be imposed.

[24] In my view there is no basis for making such an order. The accused has been convicted of offences which have no bearing on the earlier matter. The court in that matter imposed an appropriate sentence as must the court in this matter.

[25] It was argued by way of general mitigation on behalf of the accused that his resort to criminal conduct was brought about by the economic hardship arising from the economic recession in which the country finds itself. It may well be that hard times produce desperate men and women but there is, in the circumstances of this case, nothing to suggest that the accused were purely motivated by a desire to survive.

[26] Taking into account all of the factors set out above and the circumstances of each of the accused, the accused are sentenced as follows:

Accused 2

Count 1 - Robbery with aggravating circumstances: 17 years

Count 2 - Attempted murder: 6 years

Count 3 - Possession of a semi- automatic pistol: 5 years

Count 4 - Possession of firearm in contravention of s3 – 3 years

Count 5 - Possession of ammunition – 1 year

Count 6 - Attempting to defeat the course of justice – 2 years

It is ordered that 4 years of the sentence on Count 2 ; 3 years of the sentence on Count 3 and the whole of the sentence on Counts 4 and 5 be served concurrently with the sentence on Count 1 so that the total effective sentence shall be 23 years.

Accused 3

Count 1- Robbery with aggravating circumstances: 15 years

Count 4- Possession of firearm in contravention of s3 – 3 years

Count 5- Possession of ammunition – 1 year

It is ordered that 4 years of the sentence on Count 2 and the whole of the sentence on Counts 4 and 5 be served concurrently with the sentence on Count 1 so that the total effective sentence shall be 19 years.

Accused 4

Count 5 – Possession of ammunition – 1 year

Count 6 – Attempting to defeat the course of justice – 2 years

Accused 5

Count 1 – Robbery with aggravating circumstances: 17 years

Count 4 – Possession of firearm in contravention of s3 – 3 years

It is ordered that 4 years of the sentence on Count 2 and the whole of the sentence on Counts 4 and 5 be served concurrently with the sentence on Count 1 so that the total effective shall be 19 years.

G. GOOSEN

JUDGE OF THE HIGH COURT

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