

SOUTH AFRICA / JUDGMENT

S v Mosia (A1250/2006) [2008] ZAGPHC 198 (7 May 2008)

[2008] ZAGPHC 198**COURT**

High Courts - Gauteng

BEFORE

Botha, Legodi, Pretorius

CASE / FILE NUMBER

A1250/2006

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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSV AAL PROVINCIAL DIVISION)****Date: 07/05/2008****Case No: A1250/2006****UNREPORTABLE**

In the matter between:

JACOB MOSIA APPELLANT

And

THE STATE RESPONDENT

JUDGMENT**BOTHA J:**

The appellant was found guilty in the High Court of murder (count 1), attempted robbery with-aggravating circumstances (count 2), attempted murder (count 3 and 4), the unlawful possession of a .38 revolver (count 5) and the unlawful possession of ammunition (count 6).

The appellant was sentenced to 25 years' imprisonment on count 1, 20 years' imprisonment on count 2, 10 years' imprisonment on counts 3 and 4 that were taken together for the purposes of sentence, 2 years' on count 5 and 6 months' on count

6. It was ordered that the sentences on counts 1 and 2 run concurrently with the sentences on counts 3 and 4. The nett result was an effective sentence of 35 years' imprisonment. The court also recommended that the appellant not be considered for parole before he has served 25 years of his sentence.

The appellant has been granted leave to appeal against his sentence only.

The applicant was one of a group of three persons who attempted to rob the deceased, a farmer, of his bakkie. The deceased was selling maize cobs on his farm and the applicant and his associates approached the deceased under the pretext that they wanted to buy some." One of the associates of the appellant then produced a firearm. When the deceased ran round his bakkie, presumably to fetch his firearm, he was shot by one of the associates of the appellant. The deceased managed to get hold of his firearm and fired some shots, causing his attackers to run away. At a nearby road two of them, one of them the appellant, boarded a taxi. They were followed by a policeman and retired policeman who saw what had happened. When the taxi was stopped by the policemen, the appellant and his associate got out of the taxi and ran away, firing shots at the policemen. The appellant dropped the .38 revolver in his possession after he had been wounded. His associate was shot dead by the ex-policeman.

The court found that there was a common purpose between the appellant and his associates and that he had *dolus eventualis* in respect of the death of the deceased. The court also found that *dolus eventualis* was present in respect of the charges of attempted murder.

No previous convictions were proved against the appellant. Yet it was admitted that the applicant was serving a sentence of 8 years imprisonment for attempted robbery, which sentence was imposed on 30 November 1999.

The applicant was sentenced on 18 October 2000.

The crimes in this case were committed on 18 March 1998. The court therefore did not consider his conviction dated 30 April 1999 as a previous conviction.

The applicant had been in custody since 18 March 1998.

At the time the commission the crime the applicant was 19 years. He was unmarried and had no children. He passed grade 10 at school.

Act 105 1997 came into operation on 1 May 1998 and was not applicable to the appellant.

After almost a decade applying Act 105 1997 it is difficult for a court to cast its mind back in order to assess what would have been a suitable sentence on 18 October 2000 for a crime committed on 18 March 1998.

I want to start with the court a 's recommendation that the applicant serve 25 years his sentence before being considered for parole. Nowadays, in terms of section 2768 of Act 51 of 1977, a court can determine a non-parole period of not longer than 25 years. Section 2768 was introduced into Act 51 of 1977 by Act 87 of 1997 which came into operation on 1 October 2004. That means that for the time the court a 's recommendation was inappropriate. See *S v 1997(2) SACR 502P* at 504 e-f and *S v Otha 2006(2) SACR 110 SCA* at 115j-116a.

If one looks back one finds that the courts expressed themselves against exceedingly long sentences of imprisonment. When an accused had to be incarcerated for a very long term, it was considered preferable that he be sentenced to life imprisonment. Otherwise, it seems to me that the limit of effective imprisonment lay somewhere between 35 and 40 years. See *S v 1993(1) SACR 709 AA* and *S v and Another 1997(1) SACR 515 SCA*.

There are two issues to be considered: the individual sentences on each count and the effective sentence.

I have a problem with an effective sentence of 35 years in view of the following circumstances:

- (a) the fact that the appellant was 19 years at the time of the commission of the offence;
- (b) the period spent in custody awaiting trial;
- (c) the fact that the applicant was at the time serving a sentence of 8 years' imprisonment;
- (d) the fact that the appellant did not fire the shot that killed the deceased;
- (e) the fact that the form of mens rea was *dolus eventualis*.

Even though long term imprisonment was undoubtedly the only appropriate sentence, my view of what the effective sentence should be is such that it would entitle this court to interfere.

I shall now turn to the individual counts.

In view of the circumstances mentioned above, I am of the view that an appropriate sentence on this count would be 20 years imprisonment.

In respect of count 2 the court correctly remarked that the circumstance of the death of the deceased should be disregarded. If that is so, I cannot, with respect, justify a sentence of 20 years' imprisonment. The accused only attempted to steal the deceased's bakkie.

In my view a sentence of 12 years' imprisonment would be appropriate. A reduction of the sentence by this court would be academic, because the sentence on this count should run together with the sentence on count 1.

I would not interfere with the sentence on counts 3 and 4 even though it is a stiff sentence if one bears in mind that no wounds were inflicted. What makes the two counts serious is the fact that policemen were the complainants. Yet, in view of the relatedness between these two counts and counts 1 and 2 I am of the view that a portion of the sentence on counts 3 and 4 should run together with the sentences on counts 1 and 2.

The sentences on counts 5 and 6 are appropriate. So also the approach that they should run concurrently with the sentences on counts 3 and 4.

I am of the view that the proper sentences should have been:

Count 1: 20 years' imprisonment;

Count 2: 12 years' imprisonment;

Count 3 and 4: 10 years' imprisonment;

Count 5: 2 years' imprisonment;

Count 6: six months' imprisonment.

In my view the sentence on count 2 and 5 years of the sentence on counts 3 and 4 should run together with the sentence on count 1. The sentences on counts 5 and 6 should run together with the sentence on counts 3 and 4. That gives an effective sentence of 25 years, which I find appropriate.

In the result the following order is made:

1. The appeal against the sentence succeeds;
2. The sentences imposed by the court a quo are set aside and the following sentences are substituted for them:

"Count 1: years' imprisonment.

Count 2: 12 years' imprisonment.

Counts 3 and 4 (taken together): 10 ' imprisonment.

Counts 5: 2 years' imprisonment.

The sentence on count 2 shall run concurrently with the sentence on count 1. Five years of the sentence on counts 3 and 4 shall run concurrently with the sentence on count

1. The sentences on counts 5 and 6 shall run concurrently with the sentence on counts 3 and
4. The effective period of imprisonment is 25 years.
3. The sentence imposed in paragraph 2 above is antedated to 18 October 2000.

C.BOTHA

JUDGE OF THE HIGH COURT

I agree

M.F LEGODI

C PRETORIUS

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