HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 05/11/2014.

CASE NO: A60/2014

NOT REPORTABLE

In the matter between:

MANQOBA MTHETHWA	First Appellant
MLUNGISI DUMA	Second Appellant
BLESSING HADEBE	Third Appellant
and	
THE STATE	Respondent

J U D G M E N T

MAKGOKA, J:

[1] This appeal, against sentence only, is with leave of the trial court. The appellants were convicted by the regional court, Pretoria, on two counts of housebreaking with intent to rob and robbery with aggravating circumstances (counts 2 and 3). Appellant 3 was, in addition, convicted of reckless driving (count 5). The appellants were all acquitted on the rest of the initial 13 counts.

[2] They were each sentenced to 12 years' imprisonment on counts 2 and 3. Appellant 3 was sentenced to 6 months' imprisonment on count 5. 6 years of the sentence imposed in count 3 were ordered to run concurrently with the 12 years in count 2, resulting in an effective 18 years' imprisonment. The state supports the sentence.

[3] The genesis of the convictions and the sentences is two robberies on 19 November 2009 during which the appellants robbed Mrs Alida Spronk and Mrs Annete Botes, in almost similar circumstances, and within minutes of each other. The appellants entered the house of Mrs Pronk at approximately 10h30 by breaking the entrance gate and the main entrance door. She was alone at that stage. She was threatened with a hammer, and her laptop computer was stolen, the value of which she estimated to be R9 000.

[4] Approximately 30 minutes later, the appellants and their co-assailant broke into the house of Mrs Botes, in almost similar circumstances as they did at the house of Mrs Spronk. There, Mrs Botes, who was also alone, was threatened with a screwdriver. Her laptop computer, camera, cellular phone, jewellery and a handbag containing several personal items, were removed by the assailants. Mrs Spronk's computer was recovered, although it had been damaged during the shootout between the appellants and the police. It was no more functional.

[5] All the stolen items were recovered following the arrest of the appellants. The appellants were apprehended a few hours later after a civilian had suspected the motor vehicle in which they were driving. When the police confronted the appellants, there was a shootout, during which Mrs Spronk's computer was damaged beyond repair. During the shootout, one of the assailants died, and appellant 3 sustained certain injuries, which I will revert to later in the judgment.

[6] The appellants did not testify in mitigation of sentence. However, pre-sentence reports compiled by different social workers and probation officers, respectively, were handed in, in which,

among others, their personal circumstances are set out. Below is a summary of the reports in respect of each appellant.

[7] Appellant 1 was 31 years old at the time of sentence. He is unmarried, although he has a minor child, a girl, out of wedlock, who was 3 and half years old at the time of sentence. He studied up to grade 11 at school, which he did not complete, as he dropped out due to financial difficulties. He has four siblings. He grew up in KwaZulu-Natal, but later moved to Gauteng with his parents. He lived with his parents at the time of arrest, although the family had moved back to KwaZulu-Natal at the time of sentence. His father is not formally employed, but does odd jobs.

[8] He was initially employed as a taxi assistant in KwaZulu-Natal for a year between 1997- 1998. After a period of unemployment for 6 years, he was employed as a temporary at a steel firm in 2005 for 9 months. Thereafter he became unemployed again until he was employed as a temporary worker by a cleaning company for 3 months in 2007. During his times of employment, the appellant assisted his mother financially. The appellant is not a first offender, having been convicted of house-breaking with intent to steal and theft in 2002, for which he was sentenced to a period of imprisonment, which was wholly suspended on certain conditions. Appellant 1 still persisted in his denial of involvement in the crimes for which he had been convicted.

[9] Appellant 2 is a first offender. He was 26 years old when he was sentenced. He completed grade 12. He is unmarried, although he also has a minor daughter, whose age does not appear from the record. It is stated in the probation officer's report that the appellant

'does not know' his daughter. This was not clarified during the sentence proceedings. He was also born in KwaZulu-Natal, where he grew up. He has three siblings. He was raised by his grandparents, as his mother worked away from home. His father died when he was 2 years old. He came to Gauteng in 2009 in search of employment, after his contract with a petroleum company came to an end. At the time of the arrest he was employed at a pub in Johannesburg, which enabled him to support his family.

[10] Appellant 3 was born in Durban, KwaZulu-Natal. He is the eldest of five siblings. He dropped out in grade 11 due to the family financial difficulties. He worked as a bus conductor in Durban, but relocated to Johannesburg in 2002, where he started work as a metered-taxi driver, which job he held on to until he was arrested. He was 30 years old during sentence. As indicated earlier, appellant 3 sustained some injuries during the shootout with the police, namely to his bladder, which has now become dysfunctional. His vision was also affected during the incident, as a result of which he has become short-sighted. He has four previous convictions, all of theft, which occurred between 2001 and 2006. In three of them he was sentenced to a fine, and in the other one he was sentenced to correctional supervision. He acknowledges his involvement in the commission of the offences and takes responsibility for his actions.

[11] The circumstances of the robberies (counts 2 and 3) brought the sentencing within the purview of s 51(2) of the Criminal Law Amendment Act 105 of 1997, in terms of which 15 imprisonment is prescribed for a first offender, which all the appellants are. This is a prescribed, and not mandatory sentence, in the sense that the court is entitled to deviate from that sentence if it finds to exist, substantial

and compelling circumstances. In the present case, the appellants had spent close to three years in custody awaiting finalisation of their trial. The trial court found that to be a substantial and compelling circumstance, hence it deviated from the minimum sentence of 15 years' imprisonment on each count of robbery.

[12] The proper approach where minimum sentences are applicable, was established by the Supreme Court of Appeal in the path-finding and seminal judgment of *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220). The summary of the approach is conveniently set out in para 25 of that judgment, the effect of which is that the prescribed minimum sentences should ordinarily, and in the absence of weighty justification, be imposed. In para I of the summary, it is stated that the court may impose a lesser sentence if, on consideration of circumstances of the particular case, it is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence.

[13] The approach established in *Malgas,* which has since been followed in a long line of cases, sets out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. Among the factors to be considered when determining whether substantial and compelling circumstances are present or not, are the traditional sentencing factors: the triad of the nature of the offence, the personal circumstances of the accused, and the interests of society. See also *S v Ntsheno; S v Dlamini & S v R* 2010 (1) SACR 295 (GSJ). *Malgas* received the imprimatur of the

Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC), which described it as 'undoubtedly correct' and the summary referred to above, as having laid down 'a determinative test' as to when the prescribed sentence may be departed from.

[14] The trial court was undoubtedly correct in its finding that there are substantial and compelling circumstances entitling it to deviate from the prescribed minimum sentences. It is its consideration of sentence following that finding, which is considered here. Not bound by any prescribed sentence, the trial court had to consider a totality of factors, including the traditional triad, consisting of the nature of the offence, the personal circumstances of the appellant, and the interests of the society. What is more, because there is more than one count for which the appellants had to be sentenced, the court had a duty to consider the cumulative effect of the sentences. The appellants 'attack against the sentence is effectively two-fold. First, that the sentence of 18 years' imprisonment on each count is shockingly disproportionate in the circumstances of the case. Second, that the trial court did not sufficiently consider the cumulative effect of the sentence. On the other hand, the state supports the sentence on either basis. Before us, Mr. *Wilsenach*, for the state, contended that the effective sentence is on the lighter side.

[15] In my view, the trial court failed to take sufficiently into consideration the personal circumstances of the appellants, as well as the circumstances of the commission of the offences. With regard to the personal circumstances of the appellants, the following point should be made. It is one thing to recite the personal circumstances of an accused. It is another to fuse those circumstances in the

consideration of sentence. Unfortunately, in the present case, like many emanating from the lower courts, personal circumstances of the appellants were simply recited without considering how they should impact on sentence. That amounts to paying lip service to this component of sentencing. To demonstrate this point, nowhere did the learned regional regional magistrate consider the poor socio-economic backgrounds of all the appellants in his judgment on sentence. Approximately 80% of his judgment on sentence is devoted to the seriousness of the offences and their impact on the complainants. These are all legitimate considerations. But our sentencing ethos enjoins a sentencing court to carefully balance these against the personal circumstances of the appellants, lest an imbalanced sentence results.

[16] Of course, there are instances where, due to the seriousness of the offence, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the offender will consequently play a smaller role (*S v Swart* 2004 (2) SACR 370 at 378c-e). In my view, the circumstances of the present case do not lend themselves to that approach. The crimes are indeed serious, but the circumstances of their commission are equally important in considering an appropriate sentence, as are the personal circumstances of the appellants. Compare for example, *S v Ndlovu* 2007 (1) SACR 535 (SCA) para 13, where the Supreme Court of Appeal cautioned against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders.

[17] I turn now to the circumstances of the commission of the offences. Both robberies were carried out with minimal physical violence. The weapons used during the robbery were a hammer and a screwdriver, respectively. These are not lethal weapons compared to firearms, which are normally used in these types of offences. The submission by Mr *Wilsenach*, for the state, that it makes no difference as to the type of weapon used, is simply untenable. That might be irrelevant for a conviction, but has to perforce be taken into account when sentence is considered. The trauma of being pointed with a firearm can certainly not compare to one where a hammer or screwdriver is used. The complainants suffered no serious injuries during the robberies. Mrs Botes was only scratched on her upper thighs with a screw driver, which is of course indignant. Mrs Pronk sustained no injuries at all. Furthermore, the stolen items were all recovered, although Mrs Pronk's computer had been damaged.

[18] The factors mentioned in the three preceding paragraphs, should have been accorded due weight. They were not, and in failing to do so, the trial court misdirected itself. In my view, it is the type of misdirection contemplated in *S v Pillay* 1977 (4) SA 531 (A) 535E-F, it being 'of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.' This warrants interference by this court. This court is therefore at large to consider sentence afresh and impose what we deem appropriate in the circumstances.

[19] The offences which the appellants have been convicted of remain very serious indeed. The complainants, both women who were alone in their houses, were traumatised by the incidents. They

both feel vulnerable and afraid to be left alone in their respective houses. Apart from the emotional trauma, both families had to incur costs in repairing their damaged gates and doors. Both had to also improve security around their properties, at considerable cost. The Botes family also incurred costs of a psychologist for counseling. They even contemplated moving house. A further aggravating is the time of the day during which the offences were carried out. The appellants broke into the homes of the complainants in broad day-light, during mid-morning. That was brazen and daring, and the trial court correctly characterized their conduct as 'arrogant'.

[20] Considering all the relevant factors, I am of the view that a period of 10 years' imprisonment each on counts 2 and 3 would satisfy the aims of punishment, be fair to the society and the appellant in the sense that they have an opportunity for rehabilitation.

[21] Lastly, I consider whether the sentences should be ordered to run wholly concurrently. It is to be recalled that the trial court ordered only part of the sentence in count 3 to run concurrently with the sentence in count 2. In this regard the position can be summarised as follows. Where an accused person is convicted of more than one offence, it is a salutary practice for a sentencing court to consider the cumulative effect of the respective sentences. In this regard, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment (*S v Whitehead* 1970 (4) SA 424 (A); *S v Kwenamore* 2004 (1) SACR 385 (SCA)).

[22] An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' (*S v Mokela* 2012 (1) SACR 431 (SCA) para [11]). Put differently, where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered (*S v Mate* 2000 (1) SACR 552 (T)).

[23] In the present case, there was indeed an inextricable link between the offences in terms of the locality, time and the protagonists. There was also a substantial overlap in the overall intent in respect of the crimes. In my view, the failure of the trial court to take these factors into consideration resulted in the cumulative effect of sentence being disturbingly inappropriate. These factors justified an order of concurrence in the sentences. This is a further basis for interference by this court.

[24] In the result the following order is made:

1. The appeal against the sentence is upheld to the extent set out below;
2. The sentence imposed by the regional court is set aside and the following is substituted for it:

'On count 2 accused 2, 3 and 4 are each sentenced to 10 years' imprisonment;
On count 3 accused 2, 3 and 4 are each sentenced to 10 years' imprisonment'
It is ordered that the sentence imposed in count 3 shall run wholly concurrently with the sentence imposed in count 2. Effective period of imprisonment is therefore 10 years.'

3. The sentence of 6 months' imprisonment imposed on appellant 3 in respect of count 5 is retained, but shall also run concurrently with the sentence imposed in count 2.
4. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is ante-dated to 31 October 2012, being the date on which the appellants were sentenced.

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree

L.M. MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

DATE HEARD : **20 OCTOBER 2014**

JUDGMENT DELIVERED : **5 NOVEMBER 2014**

FOR APPELLANTS 1 & 2 : **MR. S. MOENG**

INSTRUCTED BY : **PRETORIA JUSTICE CENTRE**

FOR APPELLANT 3 : **MR. D.L.J. MOKGATLE**

FIRM : **MOKGATLE ATTORNEYS, PRETORIA**

FOR THE STATE : **ADV. WILSENACH**

INSTRUCTED BY : **DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA**