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Case number 311/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

IVANOV LOBI Appellant

and

THE STATE Respondent

CORAM : SMALBERGER, F H GROSSKOPF

et HOWIE JJA

DATE OF HEARING : 23 FEBRUARY 1995

DATE OF JUDGMENT : 6 MARCH 1995

J U D G M E N T

HOWIE JA/.....

HOWIE JA :

This is an appeal on sentence. On the strength of his plea of guilty appellant was convicted in a regional Court of various offences arising out of an armed robbery at a factory in Stikland, Cape, in July 1991. He was sentenced to the following terms of imprisonment:

Count 1 :	possession of an AK47 rifle - three years;
Count 2 :	housebreaking with intent to steal and theft - two years;
Counts 3, 4, 5 and 6 :	robbery (taken as one for purposes of sentence) - seven years;
Count 14 :	theft of a motor car - three years;

Counts 15 to 27 : kidnapping (taken as one for the purposes of sentence) - three years.

The sentences on counts 2 and 14 were ordered to run concurrently with the sentence on counts 3 to 6. The period to be served was therefore effectively 13 years. Appellant appealed unsuccessfully to the Cape of Good Hope Provincial Division which refused him leave to appeal further. Pursuant to a petition to the Chief Justice appellant obtained leave to appeal against his sentences but only - to quote the Registrar's notification to his attorneys - "on the basis that their cumulative effect may be too harsh".

It follows from the restricted basis on which leave to appeal was granted that the individual imprisonment sentences must stand and that the effective sentence to be served cannot be less than the longest of those sentences, namely, seven years.

On appellant's behalf it was contended that his effective sentence should be no more than seven years.

It is convenient to deal first with the offences committed and appellant's role in their commission.

Appellant, a 23 year old electrical engineering student at the time, was approached at home in Guguletu, so he testified, by three acquaintances with whom he regularly played soccer at weekends. They asked him to help them carry out a robbery at Stikland. One of them had received information from a friend who worked at the factory concerned as to where the safe was located and who carried the keys to it. The plan was that they would arrive at the factory at closing time, capture the man with the keys (who was usually the last to leave) and rifle the safe. Appellant agreed.

The group was equipped with an AK47 rifle supplied by one of his acquaintances. It was carried in a sports bag. The two other acquaintances each had a knife. They

travelled by taxi to their destination but the plan went awry. They were unable to take the man with the keys because he emerged in the presence of other staff. Undaunted, however, they decided to break into the factory later in the evening when all was quiet. There they remained, intending to carry on their purpose the next morning by holding up the rest of the staff while the person who had the keys opened the safe.

When the staff arrived in the morning it was appellant who held them at bay and his confederates who focused their attention on the safe. When problems were encountered in opening the safe one of the others took over from appellant while the latter went off with a staff member to fetch an angle grinder from premises next door. Eventually the safe was opened and the money inside was taken.

To effect their escape they drove off in the motor car belonging to Ronald Sampson, a co-owner of the business. Soon afterwards, near Cape Town airport, the police closed

in on them. Appellant, who was driving, dropped off the others who took the weapons and the money with them. He then drove on some way before abandoning the car. Not much later he was arrested. Subsequently he assisted the police in their attempts to trace the other three men but they were never caught.

That, in broad outline, was the story as appellant sought to tell it. I say "sought" because he was particularly evasive about his possession of the AK47 rifle and later evidence shed far more light on his participation than he was prepared to reveal.

When the prosecutor attempted to establish how, and at what stage, appellant handled the AK47 rifle, he repeatedly avoided a straight answer. He persisted in the explanation that at the time when he confronted the arriving personnel the weapon was simply behind the chair in which he was then seated. The magistrate was eventually driven to ask whether he had held the firearm at all. The most he would

admit was that it was in his hands "at some stage" but not when the staff were coming in.

Sampson's evidence was that he entered the factory office and found three of his women employees standing there in a state of fright. As he made to close the front door appellant - who had been hiding behind it - pointed the AK47 at his chest and said "Good morning, I've been waiting for you". Appellant then ushered him at gunpoint to the room where the safe was and asked him to open it. Here, Sampson encountered other members of the gang with stockings over their faces. One pointed a pistol at him. Sampson told them he had to get the combination details out of his briefcase. As he did so one of the men spotted his firearm inside the briefcase and snatched it away. While Sampson was engaged in trying to open the safe one of the gang held a pistol to his head. He objected, saying he could not concentrate and appealed to appellant who, in Sampson's assessment, appeared to be the leader of the

gang. At first appellant refused to assist saying that Sampson should get on and open the safe. When Sampson said he could not control his hand movements properly appellant ordered the other man to lower the pistol.

Sampson proceeded to operate the combination successfully but then found that a key had been broken in one of the locks. This caused appellant to round on his accomplices and demand to know which of them had tampered with the lock. Sampson told them that it would be extremely difficult to open the safe. However, appellant replied that he had all the time in the world and that Sampson would get it open. The latter then suggested the use of the angle grinder. When it was obtained Sampson and one of his employees cut their way into the safe. Finally there remained the lock containing the broken key. At that point appellant moved Sampson aside and, after fiddling with the lock, succeeded, with some show of bravado, in extracting the broken key and the safe was then opened.

Appellant proceeded to take out the money and handed it to his companions. By this time Sampson feared that, having got the money, the gang was going to kill him so he pleaded with them to take his car and leave. They did.

The police were contacted and responded immediately. Within about 25 minutes they reported the recovery of the car. In due course they also recovered all but R1 200,00 of the R17 000,00 that had been stolen.

According to Sampson appellant acted calmly, collectedly and with professional coolness throughout. He even promised Sampson that the car would be left at the Khayelitsha Police Station.

The sole challenge to Sampson's account was the proposition put by defence counsel that appellant was not in fact the leader and Sampson could not deny this.

Gertruide Kuyk said that when she arrived at work she was confronted by appellant in the same way as that described by Sampson. In fact, this was the fate of each

successive arrival. Most were taken by appellant further into the building to his confederates. She said that he conducted himself throughout with nonchalant arrogance. At times he grinned as if it was a joke. For the victims, however, she said, it was a terrifying experience. She, too, gained the impression that appellant was the organiser and the leader. She said he carried the AK47 with him the entire time. And he was the one, she said, who locked the women employees in a lavatory.

As for the other salient features of the robbery, apart from locking up the women, the gang also tied up the male employees. All in all 13 staff members were detained by these means. In addition, two men other than Sampson were robbed of their firearms. It remains to mention that the AK47 was loaded.

With regard to appellant's claim that his companions made off with the money and all the firearms, the undisputed evidence of the investigating officer was that

it was appellant who later that same day took him to some bushes near the spot where the car was abandoned and pointed out a bush under which one of the stolen firearms was recovered. On appellant's own version he would not have had that knowledge.

On a conspectus of the facts, therefore, it is clear that the robbery and attendant crimes constituted a most serious violation and that appellant's role in all this was a prominent and important one.

Turning to the reason for his participation, he said in evidence that his father's membership of the Ikapa Town Council engendered much hostility among the majority of the Cape Flats black community. Most regarded his father as a political enemy. So extreme was the feeling that his father had had four shops and his house burnt down. He had also experienced lethal attacks on his person. As a result, said appellant, he himself felt targeted as an outcast. In addition he felt that people would not

converse in his presence for fear that he might carry reports to his father. Accordingly, when asked to join the gang in the present instance he did so in order to gain recognition and acceptance in "the community", as he put it.

The magistrate regarded this explanation as so improbable that it could not be believed. The Court **a quo** endorsed that view.

Of course, if one construes appellant's explanation as referring literally to the community, the magistrate's reasons are logical. The community at large, including the sector where appellant lived, naturally disapproves of violent crime. Participation in it could, therefore, hardly attract admiration. Moreover, as the culprits had no intention of making known what they had done, appellant's exploits were not intended for public information.

However this literal approach does not take due

account of the real crux of the two expert professional opinions advanced in evidence on appellant's behalf. The witnesses concerned were a practising clinical psychologist, Rigby Hough, and Associate Professor Gordon Isaacs, director of the School of Social Work at the University of Cape Town. It is unnecessary to recount their evidence in any detail. It suffices to summarise the gist of it as being this. In addition to the ostracisation perceived and described by appellant there were two other relevant factors. One was that his parents had divorced acrimoniously when he was at a vulnerable and impressionable age. Another was that he did not go to school in the black community: for much of his school life his father had been able to afford the fees of a private school in Athlone. Now, however, he was a resident of the black community again and it was there that he had to find friends and acquaintances if he could. The cumulative effect was that appellant felt a strong need for

recognition of his personal worth, for social acceptance as a member of a group and for close personal contact. These were needs which had not been fulfilled in his past and remained to be fulfilled even although he was now a young adult. This rendered him susceptible to seize any chance of peer approval and esteem. The approach by the other robbers provided just such an opportunity.

In the assessment of the two experts concerned, therefore, appellant's ill-articulated reason for his participation was acceptable as consistent with the facts concerning his personality and history. In their view his eagerness for acceptance overrode his better judgment. They considered that his crimes were out of character and that he had very good prospects or rehabilitation.

Once it is reasonably possible, as the expert evidence shows it to be, that appellant's participation in these crimes was influenced to a material degree by the psychological factors referred to, it follows that the

trial Court adopted a restricted and misdirected approach to the evidence. That alone opens the way for appellate interference with the overall effective sentence.

As to what such sentence should be, there are mitigating factors in addition to those mentioned already. Appellant has no previous convictions. He also has a commendable educational record. Preceding the events in question he was employed by consulting engineers who thought sufficiently highly of him that they gave him a bursary with which to continue his studies. In evidence appellant expressed his remorse concerning what he had done and in the opinion of Hough, Isaacs and the trial Court itself, that attitude was genuine. As regards the robbery, unlike so many with which it is the Courts' misfortune to deal, the physical violence involved was of a low order and restricted to tying up some of the victims. And, following on from what has been said already, appellant was not the instigator.

As regards the aggravating features it is not necessary to spell them out. Apart from their being obvious, one is not concerned here with justifying incarceration as opposed to a non-custodial punishment. Imprisonment for at least seven years must in any case be imposed.

In the considered assessment of the trial Court the housebreaking and the car theft were closely enough associated with the robbery that the sentences for all those offences were ordered to run concurrently. Counsel for the State, fairly and rightly in my view, said that the kidnappings could just as readily be said to be part and parcel of the core offence. Indeed, it may be competent but it is not usual to find kidnapping charged where the victim of a robbery is deprived of his liberty by being tied or locked up. On the other hand, of course, 13 people were involved on those counts not just one or two as is often the case. The magistrate may well have been

justified, therefore, in his view that some period additional to the concurrent sentences ought to be served in respect of the kidnappings. In the end, however, any doubt in this connection ought to be resolved, I think, by taking into account the cumulative force of the mitigating considerations. As pointed out, their impact is greater than the trial Court found them to be. They warrant the conclusion that the kidnapping sentence should also run concurrently.

There remains the question of appellant's possession of the AK47 rifle.

As mentioned earlier, this weapon emanated from one of the other gang members but it was crucial to the part appellant played. He said in evidence that he did not believe he would have fired it had resistance been encountered. That is all too easy to say now and it is a protestation that can carry but little weight. The gun was loaded and its capabilities as a weapon of consummately

destructive effect must have been known to all in the gang, appellant included. Its presence carried grave and obvious risks. Had a pistol or revolver been involved one might have taken a different view. And even though it could be said that possession of the AK47 was just as much an element of the entire transaction as the other crimes which accompanied this particular robbery, there is such a profound need for firm action by which to combat the availability of this devastating kind of weapon and to deter its employment in the commission of violent crime that an additional sentence is called for which does not run concurrently with the others.

For all these reasons I consider that the effective gaol sentence should be reduced from 13 years to 10 years. To that extent, therefore, the appeal succeeds.

The following order is made:

1. The appeal is allowed.

2. The three year sentence imposed in respect of counts 15 to 27 (taken together) is ordered to run concurrently with the sentence of seven years imposed in respect of counts 3 to 6 (taken together).

C T HOWIE

JUDGE OF APPEAL

SMALBERGER JA]

CONCUR

F H GROSSKOPF JA]

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