Given Mabunda Vs. the State

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Court : South Africa Supreme Court of Appeal

Decided On : Mar-27-2013

Judge : Lewis, Leach Jja &Amp; Erasmus Aja

Appeal No. : 765 of 12

Appellant : Given Mabunda

Respondent : The State

Judgement :

On appeal from:Limpopo High Court, Thohoyandou (Makhafola J sitting as court of first instance):

(a) The appeal succeeds to the extent only that it is ordered that 12 of the 15 years imprisonment imposed in respect of count 2 are to run concurrently with the sentence of 15 years imprisonment imposed on count 1.

(b) The appeal is otherwise dismissed.

JUDGMENT

LEACH JA (LEWIS JA and ERASMUS AJA concurring)

[1] The appellant, Given Mabunda, was one of three accused tried in the Thoyoyandou High Court on two charges of robbery with aggravating

circumstances. He was convicted as charged and sentenced to 15 years imprisonment on each count. As these sentences were not ordered to run concurrently to any extent, this amounted to an effective sentence of 30 years imprisonment. With the leave of the high court, the appellant appeals to this court solely against his sentence, leave to appeal against his conviction having been refused.

[2] The charges brought against the appellant arose from two incidents that occurred during the course of the night of 5 May 2004 at Mashau in the province of Limpopo. The first, which gave rise to the first charge, took place at the home of Ms Rejoice Mudau who shared a house with her child and two elderly women described by her as grannies. After having watched television until 22h30 they were preparing for bed when three intruders, one of whom was armed with a firearm, used an iron bar to break into the house. One of the intruders slapped Ms Mudau and ordered her to hand over all her money if she did not want to die. She tried to fob him off by giving him a small amount of money she kept in a container on top of a wardrobe, but he was not satisfied and continued to threaten her until she eventually took out R1500 she had hidden in a purse under blankets in a cupboard. After this the intruders left, leaving their victims in tears. They took with them not only the cash I have mentioned but also Ms Mudaus cellphone and its charger, as well as her necklace, a pair of earrings, a mini hi-fi and a TV aerial. Save for one earring and the cash, the other items were later recovered and returned by the police.

[3] The second incident, which formed the basis of the second charge on which the appellant was prosecuted, took place later that night in the same area. It involved the theft of a number of cellphones that were in the possession of Mr Humbulani Matari who repaired cellphones for a living. As he did not have a workshop at the time, Mr Matari used to store the cellphones in his possession in a box which he entrusted to a security guard, Mr Nkwaku Muloto, who kept them overnight at the premises that he guarded. Later on the night in question three young men, one of whom was armed with a firearm, arrived at the premises and held up Mr Muloto at gunpoint. He was forced to prostate himself on the ground and was told not to do anything or else he would be killed. When pressed to

produce either money or a firearm, he told his attackers that he had neither. However, in a state of fear, he told them of the box of cellphones which they proceeded to take. Before they left, one of the robbers expressed the desire to shoot Mr Muloto but was dissuaded from doing so by one of his companions. Having fired a shot into the air, presumably to discourage pursuit, the robbers then left. The value of the stolen cellphones was alleged in the charge sheet to be in excess of R6 000 although no evidence was led to establish this.

[4] As appears from what I have said, both these robberies were associated with aggravating circumstances in that the complainants were threatened with firearms. Unfortunately, violent crime of this nature is endemic in this country and, in an attempt to combat offences of this nature, the legislature has provided a prescribed minimum sentence of 15 years imprisonment for a first offender who commits the offence of robbery with aggravating circumstances ” see s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 as read with Part II of Schedule 2 of that Act. The court a quo was therefore obliged to impose at least that sentence on each count unless there were substantial and compelling circumstances as envisaged by s 53 of that Act which justified a lesser sentence. It concluded that there were no such circumstances and imposed the prescribed minimum sentence on each count; effectively a sentence of 30 years imprisonment.

[5] The appellants appeal against this sentence was initially advanced on two legs. First, it was submitted that the court below had erred in finding that there were no substantial and compelling circumstances justifying a lesser sentence. Secondly, it was contended that even if the prescribed sentences should stand, the failure to order them to run concurrently to any extent rendered the cumulative effect thereof shockingly inappropriate and too severe. However when the matter was argued, counsel for the appellant found himself constrained to concede that there were no substantial and compelling circumstances which justified a sentence less than that prescribed for each count, and limited his argument to the second leg. In the light of the circumstances of the appellant, the nature of the crimes and the factors set out below, counsels concession was correctly made.

[6] In arguing that the effective sentence of 30 years imprisonment was far too severe, it was stressed on the appellants behalf that he had been a first offender, in his mid-twenties at the time he committed the offences and that he had spent some seven months in detention before sentence had been imposed. These are obviously relevant factors and were, indeed, taken into account by the court a quo in considering sentence. But on the other hand, there are substantial aggravating features to be weighed in the scales. The two robberies were motivated by greed, were well planned and were clearly not the product of a sudden decision taken on the spur of the moment, the two incidents having taken place at night some 25 km from where the appellant lived. It is also necessary to remember that the victims were, with good reason, clearly terrified and feared for their lives. In addition the appellant and his companions physically broke into the home of Mrs Mudau where they preyed upon three defenceless women and a child. People are entitled to feel safe in their homes, and criminals who forcefully break into houses and violate the dignity and well-being of others by the threat of violence should feel the full might of the law if apprehended. In crimes like these, punishment and deterrence are factors that come to the fore in determining an appropriate sentence.

[7] On the other hand, 30 years imprisonment is an extremely severe sentence. It is a sentence on a scale that should be reserved for those cases falling within the upper echelons of severity. And while by their very nature all cases of robbery with aggravating circumstances are severe, neither of these robberies was associated with the level of gratuitous violence which is unfortunately all too often the case. And although the victims were clearly terrified of being shot, and Mr Mudau was slapped, no further physical violence was inflicted and no bodily injuries of any severity suffered. Moreover the value of the items stolen, relatively speaking, was not great, and much was recovered.

[8] Consequently, despite the various aggravating features that I have mentioned, neither robbery can be regarded as falling into the upper echelon of severity of crimes of this nature. In the light of these factors, while the individual sentences are not to be interfered with, the effective sentence of 30 years imprisonment must be regarded as being shockingly inappropriate.

[9] As much as it is necessary both to punish the appellant and attempt to deter others from similar crimes, the effective sentence is one that is likely to break rather than to rehabilitate him. It would be wrong to sacrifice the appellant on the altar of deterrence. As was recently reaffirmed by this court, mercy and not a sledgehammer is the concomitant of justice.[1]In my view, the interests of justice would be served by ordering 12 years of the sentences imposed on each count to run concurrently. This will oblige the appellant to serve an effective 18 years imprisonment.

[10] The following order is made:

(a) The appeal succeeds to the extent only that it is ordered that 12 of the 15 years imprisonment imposed in respect of count 2 are to run concurrently with the sentence of 15 years imprisonment imposed on count 1.

(b) The appeal is otherwise dismissed.

1. S v Motswathuga 2012 (1) SACR 259 (SCA) para 8.