REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 8/89/08

APPEAL 36/2010

In the matter between:

PHUMZILE LANGENI APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

ANDREWS, AJ

[1] The appellant appeals against the sentences imposed by the Port Elizabeth Regional Court after his conviction on 22nd January 2010. He was convicted on fifteen counts, including two counts of attempted murder, two counts of armed robbery with aggravating circumstances, escaping custody and ten counts relating to the unlawful possession of firearms and ammunition. His initial sentences taken cumulatively resulted in a sentence of 43 years imprisonment. Thirteen of these years were then were ordered to run concurrently, resulting in an effective sentence of 30 years of imprisonment.

[2] The appellant applied for leave to appeal against both his convictions and sentences. He was refused leave to appeal in respect of both. He then petitioned this court and on 23rd July 2010 it was ordered that the application

for leave to appeal against the convictions be refused, but that leave to appeal be granted against the imposed sentences.

[3] The following were the convictions and sentences:

a) Count 1: robbery with aggravating circumstances.

Sentence of 15 years imprisonment.

b) Count 2: robbery with aggravating circumstances.

Sentence of 15 years imprisonment.

b) Count 4: attempted murder.

Sentence of 5 years imprisonment.

c) Count 5: attempted murder.

Sentence of 10 years imprisonment.

d) Count 6: possession of a firearm.

Sentence of 3 years imprisonment.

e) Count 7: escaping from lawful custody.

Sentence of 3 years imprisonment.

f) Counts 8 and 20: possession of a firearm and ammunition.

Sentence of 3 years imprisonment.

g) Counts 10 to 15: possession of firearms.

Sentence of 8 years imprisonment.

h) Count 19: possession of ammunition.

Sentence of 6 months imprisonment.

Appellant was sentenced to an effective sentence of 30 years imprisonment as counts 4,5,6,7,8, 10 to 15, 19 and 20 were ordered to run concurrently with a sentence of 15 years imposed in respect of Count 1, robbery.

[4] A summary of the basis of the appeal as set out in the appellant's heads of argument is as follows:

b) The trial court in sentencing attempted to temper the cumulative effect of the various imposed sentences, imposing 15 years in respect of each of the counts of armed robbery and ordering that the sentences for the remaining counts be served concurrently with the sentence imposed on the first count of armed robbery. However it failed to give regard to the cumulative effect of the imposed sentences, resulting in an unduly harsh effective sentence of 30 years imprisonment;

c) although the sentences of long imprisonment were appropriate in respect of the convictions for armed robbery and attempted murder, the trial court erred in finding that substantial and compelling circumstances did not exist. It was submitted that the existence of substantial and compelling circumstances are indicated by the following factors:

1. appellant was a first offender;
2. appellant had been in custody awaiting trial for more than two years;
3. appellant has a minor child of two years and was supporting the child;
4. both parents of the appellant are deceased and he supported two unemployed siblings;
5. appellant was self employed and earning an income through his business.

d) It was argued that if such circumstances were found it would allow for the imposition of shorter sentences in respect of the counts of armed robbery. However even if not found, it was argued that the court still erred in imposing an effective term of 30 years imprisonment, which is unduly harsh and inappropriate, and in itself adequate reason for deviating from the imposed sentences.

[5] In summary the respondent's heads of argument stated that the appeal should be dismissed based on the following grounds:

a) None of the individual sentences imposed on the various counts was shockingly inappropriate in themselves. The two robbery counts involved the use of firearms which elevated their gravity to the extent that they were both subject to the prescribed minimum sentence of 15 years imprisonment in the absence of substantial and compelling circumstances;

b) the first robbery was premeditated and callous disregard was shown for the well-being of victims who were locked in a deep freeze and could have died had they not been rescued;

c) the second robbery was also premeditated, and planned and executed, and involved the use of firearms which were fired upon victims in the execution of the robbery;

d) on both of these counts it was submitted that the trial court was correct in finding no substantial and compelling circumstances to deviate from the prescribed minimum sentence on this count;

e) with regard to the second robbery, the appellant was not strictly a first offender having been involved in the first robbery and the learned magistrate would have been justified to hold this against him as an aggravating factor.

Substantial and compelling circumstances

[6] The approach of courts in assessing whether substantial and compelling circumstances exist, justifying a deviation from the minimum sentences prescribed by section 51 of the Criminal Law Amendment Act, 105 of 1997 is guided by the following principles set out in *S v Malgas*[1]*:*

"a) Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or

[1] 2001(1) SACR 469 (SCA) para 25

imprisonment for the specified periods for offences listed in other parts of Schedule 2);

b) courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as a sentence that would ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specific circumstances;

c) unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts;

d) the specific sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded;

e) the legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for the departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against, this does not mean that all other considerations are to be ignored;

f) all factors (other than those set out in d) above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process;

g) the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardized response that the legislature has ordained."

[7] In terms of Section 51(2) of the Criminal Law Amendment Act, 105 of 1997 the minimum sentences for robbery with aggravating circumstances in the case of a first offender is imprisonment for a period of 15 years. This provision thus takes into account for sentencing purposes the fact that the conviction may be the convicted person's first offence. In *S v Muller*[2], it was stated by Satchwell, J:

"I take into account that this accused has no previous convictions and that he is a man in his fifties. However, I must also take into account that there is no authority for the proposition that the previously clean record of an accused convicted of offences involving Part 1 of Schedule 2 constitutes, in and of itself, "substantial and compelling circumstances". At most it must be one of the considerations taken into account for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding."

[8] The appellant's clean record will therefore be considered in conjunction with the other factors mentioned at the sentencing, which include his economic and family circumstances, the period spent by him incarcerated awaiting trial and the nature and consequences of the offences for which he was convicted.

Economic circumstances and dependents

[9] It has been held that the existence of dependants and reliable employment may indicate that imprisonment should not be imposed on a convicted person. (*See S v Edward*[3]*).* The appellant, however gave so little evidence as to the amount of his earnings, the extent of his employment and the amount that he is contributing to his family that such contributions are difficult to evaluate for the purpose of sentencing.

[10] The appellant was initially reluctant to say anything in this regard to the court below, and was only forthcoming after being asked repeatedly for information by the court. His income, which comes from what he refers to as "pirate" taxi operations, appears to be informal, possibly from an unlicensed activity, and therefore not to be a reliable source of income. His siblings whom he

[2] [2007] JOL 19407 (W) para 64
[3] 1978(1) SA 317 (NC) 318C

supported are now being supported by their uncle, and his minor child is being supported by the parents of its mother. In the circumstances, while the appellant may have made a contribution to the living expenses of some of his family members in the past, he has not indicated sufficient information for me to be able to infer that this is a substantial and compelling circumstance.

Circumstances relating to the offences committed

[11] In this case the crimes for which the appellant was convicted are serious violent offences, committed over a period of ten months. The armed robberies, which included other accomplices and where firearms were used would have required planning and premeditation. Persons who did not pose a threat to the appellant were robbed at gunpoint or shot at and could have been killed.

[12] Count I involved the robbery (with aggravating circumstances) of the Madison Restaurant in Walmer in December 2006. After the business was robbed the five witnesses were told to get into the fridge. The evidence of Mr Robinson and Ms Chofuti was that they could have frozen to death but on being questioned Mr Robinson indicated that they let themselves out of the fridge, contradicting other evidence that they were rescued by a fellow worker. There is no indication that the appellant was aware of this fact, however. The robbery was also a serious and violent crime by virtue of the fact that two persons were held at gunpoint.

[13] Count 5 relates to the attempted murder of the appellant's friend, one Mr Shabalala on 21st September 2007, who was shot three times at point blank range and miraculously survived. Count 6 concerns the possession of a firearm relating to count 5.

[14] Count 2 relates to the robbery of a Coin Security van on 19th February 2007, and attempted murder. A substantial amount of money was taken by the robbers, R56 000, and firearms were used. A shot was fired at one Mr Roth,

and missed him by about a centimetre. As a result of the stress caused by this incident Mr Roth has been boarded from work and been unable to earn a living because of the trauma he experienced in this robbery. He has become his wife's dependant where prior to this incident he was able to earn a living.

[15] Count 7 concerns the accused's escape from lawful custody arising from count 5.

[16] Count 8, 19 and 20 relate to the unlawful possession of a firearm and ammunition.

[17] Counts 10, 11, 12,13, 14, and 15 relate to the possession of firearms, one of which was proved by the State to have been used in count 2, a charge of robbery with aggravating circumstances. I agree with the observation of the prosecutor in argument before the sentencing that took place before the court below, that a veritable arsenal of firearms, six to be precise, had been assembled by the appellant and that in all likelihood the purpose of the possession of those firearms was to commit robberies.

[18] In summary, the appellant was a well armed, callous individual who committed a serious of premeditated armed robberies and an attempted murder, over a period of almost a year and where he could have killed a number of people. In so doing reconciled himself with the consequences of his actions which could have resulted in their deaths.

[19] The appellant was an awaiting trial prisoner from his arrest on 12th August 2008 until his conviction on 22nd January 2010, a period of one year and five months.

[20] Although this is the appellant's first conviction, the offences were separate and numerous and were committed over a period of ten months. As such they constituted a pattern of violent premeditated criminal conduct which constitutes an aggravating circumstance.

[21] Given the above facts and circumstances I am unable to find that the various factors mentioned by the appellant in paragraph 4 above, considered together with the fact that this is his first conviction, constitute substantial and

compelling circumstances. The issue of this conviction being a first offence is however relevant to the next question, namely whether the cumulative sentence imposed is unduly harsh.

Cumulative effect of sentences

[22] Counsel for appellant argued that the imposition of an effective term of 30 years imprisonment by the court below was unduly harsh and inappropriate, and in itself adequate reason for deviating from the imposed sentence. It was argued further that if a sentence of an effective 25 years imprisonment was imposed such a sentence would make possible his rehabilitation and society would see that the appellant had been amply deterred from any future such conduct. Given that he is 37 years old an effective 30 year sentence would leave him with no prospects for the future. Reference was made to the matter of *S v Mhlakaza*[4] where court commented as follows regarding the imposition of sentences in excess of 25 years:

"The object of sentencing is not to satisfy public opinion but to serve the public interest. The sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."

[23] Counsel for appellant also referred to *S v Maseola*[5] where the court below imposed a sentence of 43 years for a conviction of two counts of murder, the unlawful possession of and dealing in an automatic firearm and the possession of ammunition. The deceased were two policemen. The Supreme Court of Appeal found that the cumulative effect of the sentences was so harsh and disproportionate that it was entitled to interfere and substitute its discretion for that of the trial court. It then imposed a sentence of 30 years. It was argued on behalf of the appellant that by comparison to this case, his 30 year sentence was disproportionate, and shockingly inappropriate given that in *S v Maseola*[6] the most serious charges involved the killing of two policemen.

[4] 1997 (1) SACR 515 (SCA) 518
[5] 2010(2) SACR 311(SCA) paras 11 -14
[6] 2010 (2) SACR 311 (SCA)

[24] Counsel for the Respondent criticized appellant's reliance on *S Mhlakaza* to justify its conclusion that 30 years imprisonment is unduly harsh and inappropriate in the circumstances. It argued that this judgment should be seen in context, paying regard to the fact that the judgment states that there is no rule that a sentence of 25 years is only to be considered in "extreme cases" or "particularly serious cases" as that would fetter the sentencing discretion of the trial court in an unacceptable way. The sentence in each particular case should be based upon the merits of that case and other cases only looked at as guidelines. Reference was made to the conclusion of Eksteen, JA in *S v M*[7] where, after analysing various *dicta* to the effect that the maximum sentence imposed in this country was, in practice not more than 25 years, he concluded:

Dit volg dus myns insiens dat daar nie sprake kan wees van 'n maksimum vonnis nie. Daar moet ook gewaak word teen 'n begrip dat 'n vonnis van 25 jaar slegs in "uiterste gevalle" of "besondere ernstige gevalle" opgele sal word. So 'n begrip sou die diskresie wat 'n Verhoorregter het om 'n redlike en billike vonnis op te le op 'n onaanvaarbare manier aan bande kan le. (S v Tshomi en 'n Ander 1983(3) SA 662 E (A) op 666E-H.) Om te se dat so 'n vonnis slegs in "buitengewone" of "uitsonderlike" gevalle opgele sal word, beteken dus niks meer as dat sulke lang tydperke van gevangenisstraf nie algemeen in ons Howe voorkom nie maar slegs waar die oortreding van so 'n aard is dat dit vereis word dat so 'n vonnis in die belang van geregtigheid opgele moet word.

Counsel for Respondent argued that although the effective sentence of 30 years was robust, given the circumstances of the two robberies it was not shockingly inappropriate.

[25] In determining the appropriate sentence the totality of the appellant's conduct and the consequences thereof must be considered. The concerns of society must be evaluated against the facts of the appellant's conduct. This would include the number of crimes committed, the nature of the crimes, whether they were planned or premeditated, the degree of violence and attitude of the

[7] 1993(1) SACR 126 (A) 135

perpetrator, the period over which they were committed, the nature of the weapons used and injuries and any other harm inflicted, whether the victims posed a threat to the appellant, and what the long term impact on them was, as a result of the crimes. Guidance can certainly be found in other cases but each case has to be decided on its own facts taking into account the overall needs of the society and the circumstances of the accused.

[26] As set out above the appellant committed a number of crimes over a period of almost a year, in each case threatening his victims with a firearm and when shooting at them did so in such a manner that they could easily have died, and in fact it is something of a miracle that they did not. By embarking on a number of crimes over an extended period appellant showed that he had reconciled himself with the consequences of these actions, which was the possible death of his victims. This fact together with his escape from custody shows that he was undeterred by imprisonment. He assembled a veritable arsenal of weapons, using them with impunity and no with regard for the potentially deadly consequences of his actions. His objective was armed robbery and he was successful in stealing a large amount of money. He coupled his robberies with gratuitous and potentially lethal assaults on defenceless people. Crimes of armed robbery where people are gunned down are becoming increasingly prevalent in South Africa. The accused by his actions has reaped havoc on the lives of defenceless people whom he encountered whilst committing his robberies.

[27] The crime of armed robbery threatens the very fabric of our society (*S v Nombewu*[8]). In an unreported judgment of *S V Jaka*[9], Plasket J stated:

> *"Society has a legitimate interest in seeing that those who devastate the lives of people through the use of violence and to use violence to steal from others are appropriately punished and that the punishment imposed reflects societal censure and an appropriate measure of retribution. The problem of high levels of crime and in particular of crimes of extreme violence and brutality remains a burning problem in*

[8] 1996(2) SACR 396 (E) 425
[9] EC 10/2009 para 10

this country. Society is entitled to demand protection from the state from the scourge of criminality."

[28] In *S v Robiyana and others*[10] Dhlodhlo, J considered the cumulative effect of sentences where the accused had committed a number of crimes.

"To the extent that the cumulative effect of the sentence might appear to be "shocking", this result is the inevitable consequence of the appellant's own criminal activities, purposefully executed with contemptuous disregard for the law and rights of others. When an accused commits a number of criminal offences it is an inevitable consequence that the aggregates of the sentences that must accrue on each count will result in a total sentence which appears "shocking". This, however, does not mean that it is to be classified as shocking. A sentence is only to be classified as shocking if it is disproportionate to the crime in question. Whereas a court is required to be mindful of the cumulative effect of sentences, it is precluded from reducing the sentence on each or any one count to the extent of trivializing the gravity of the count in question."

[29] As regards appellant's reference to the *Mesola* case, where a sentence of 30 years effective imprisonment was imposed, this crime related to a single incident and two policemen were shot dead. In the appellant's case is distinguishable in that two violent robberies and an attempted murder took place on three different dates. An equal number of persons could have been killed had it not been for sheer luck. In the circumstances I do not regard the case as a useful indicator of the appropriate sentence, given the completely different facts. Appellant has been convicted of two armed robberies each of which carries a minimum sentence of 15 years together with a conviction for attempted murder, escaping custody and being in possession of a large amount of firearms and ammunition. In the circumstances a long period of imprisonment is inevitable.

[30] While the cumulative effect of the sentences may appear great I do not believe that the magistrate has exercised his discretion so unreasonably as to

[10] 2009(1) SACR 104 (Ck)

justify an interference with the sentence imposed. To do so would in my view not reflect the gravity of the two robberies in question and the need to account for the prevalence of violent crimes committed with firearms. The magistrate has exercised his discretion properly in being alive to the cumulative effect of the sentences by reducing the sentence from 43 years to 30 years imprisonment.

[31] In the circumstances I find no merit in the appeal. The following order is made:

The appeal is dismissed.

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A ANDREWS

ACTING JUDGE OF THE HIGH COURT

I concur,

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L PAKADE

ACTING DEPUTY JUDGE PRESIDENT

It is so ordered

DATE HEARD : 2nd March 2011

DATE DELIVERED : 14th July 2011

For the Applicant	:	Adv Van Der Spuy
Instructed by	:	Grahamstown Justice Centre
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		GRAHAMSTOWN
For the Defendant	:	Adv Henning
Instructed by	:	DIRECTOR OF PUBLIC PROSECUTIONS
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