IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: A115/2022
DPP REF NO: SA 21/2022
DATE OF APPEAL: 15 NOVEMBER 2022

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.
24 November 2022

In the matter between:

PHAKAMANI HLELA	1ST Appellant
ROBERT NDABANDABA	2ND Appellant
and	
THE STATE	Respondent

JUDGMENT

CAJEE AJ:

[1] This is an appeal against two minimum sentences of fifteen (15) years each against each of the appellants which were ordered to run consecutively by the Regional Court in Benoni.

[2] The appellants were convicted of robbery with aggravated circumstances in respect of two separate incidents eight days apart, namely the 1st of March 2017 and

the 9th of March 2017 respectively, which targeted the same business, namely Rebel Fruit and Vegetables in Benoni.

[3] They were part of a much larger group of people. On each occasion a considerable sum of money was taken, which was larger in the second robbery than the first. They were assisted by a security guard in the employment of the complainant, who stood trial with them. In each robbery at least two of the robbers was armed with and used the threat of a firearm. On the first occasion the second Appellant was found to be armed with a firearm.

[4] The appellants, who were legally represented throughout the proceedings, pleaded not guilty. The trial lasted two and a half years during which time the second appellants was incarcerated for the entire period while the first appellant was incarcerated for most of the period.

[5] The first appellant is thirty five years old, was thirty two years old at the time of sentencing, and thirty years old at the time the robberies were committed. He was employed as an informal trader at the time of the robbery. He had three small children residing in Kwa Zulu Natal at the time and contributed towards their upkeep. He had a grade 11 standard of education.

[6] The second appellant is roughly the same age as the first appellant. He was a taxi driver and mechanic at the time of the robbery and had a grade 10 standard of education. He had two small children.

[7] At the hearing of this matter Counsel for the Appellants, Mr. Du Plessis conceded that the Magistrate was correct in imposing the minimum sentence of 15 years in terms of section 51(1)(a)(i) read together with section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 in respect of each count. According to the Act a first offender convicted of robbery when there are aggravating circumstances attracts a minimum sentence of fifteen years unless there are compelling and substantial circumstances justifying a lesser sentence. His complaint however was that the court *a quo* misdirected itself by ordering that the sentences on the two convictions run wholly consecutively. He submitted that at least a part of the second

sentence should have been ordered to run concurrently. This in effect meant that each Appellant was effectively sentenced to thirty (30) years imprisonment, which he submitted induced a sense of shock.

[8] In support of his contention, one of the cases referred to by Mr. Du Plessis was Muller & Another v S 2012 (2) SACR 545 (SCA) for his submission that an effective sentence of 30 years imprisonment was one that should be reserved for particularly heinous offences, which these offences were not.

[9] In Muller supra the appellants were convicted on three separate counts of robbery committed within a month of each other in a localised area having a radius of about two kilometres. Each was committed at gunpoint after the two appellants, and at least one other accomplice, had entered the business premises of the complainant on a false pretext.

[10] At paragraphs [5] to [7] it was remarked that:

> *"[5] The appellants did not seek to deny their guilt, but the trial court remarked that despite their plea of guilty they did not appear to be truly remorseful and had rather regarded the court proceedings as something of a joke. They were both young men in their twenties, the first appellant having been 24 years of age at the time of the trial while the second appellant was five years older. The first appellant was married with two children but estranged from his wife as a result of his drug habit — he testified that he used 20-30 mandrax tablets per day. Although he had held down fixed employment for a period of seven years, he had lost his job and had been unemployed for about two years before the offences were committed. The second appellant, although unmarried, had seven children. He had reached grade six at school, but had only worked for short periods thereafter and was unemployed at the time of the offences.*
>
> *[6] Neither appellant is a stranger to the criminal courts. During the course of 1994, the first appellant appeared in court and was convicted*

in five different cases involving a total of seven counts of theft – mostly of video machines and video cassettes – for which he was leniently treated and enjoyed the benefit of either wholly or partially suspended sentences. He informed the trial court that on 20 February 1996 he had also been sentenced to a further two years' imprisonment for theft. The second appellant also had a number of relevant previous convictions. In 1993 he was convicted and sentenced on one count of theft and two counts of housebreaking with intent to steal and theft. He served about two years of his sentences before being released on parole in June 1994, a year before the present offences were committed.

[7] Despite their differing personal circumstances, there is no need to treat either appellant more leniently than the other. All these offences were carefully planned and executed. On each occasion resistance was overcome by the threat of a firearm. Although none of the complainants sustained severe injuries, they must have been terrified. It hardly needs to be emphasised that armed robberies of this nature are a plague in this country and a bane of society. By their very nature, they are severe offences deserving of heavy punishment. It is not without significance that although the ***Criminal Law Amendment Act 105 of 1997*** *was introduced after the incidents in question, under that Act offences of this nature now attract a prescribed minimum sentence of 15 years' imprisonment. In light of these factors, counsel for the appellants found himself unable to argue that the individual sentences were inappropriate. Furthermore, even though a difference between the individual sentences imposed on the respective counts may have been justifiable, the regional court's jurisdiction at the time was limited to 10 years' imprisonment, and a sentence of at least that period was justified on each count.*

[11] At paragraphs [10] and [11] the SCA in Muller remarked as follows

"[10] An effective sentence of 30 years' imprisonment is an extremely severe punishment that should be reserved for particularly heinous

offences – which these three offences, even viewed in their totality, were not. Although severe, they were not associated with the level of extreme violence or loss of life that unfortunately all too often occurs in armed robberies. And while not insubstantial, the value of what was stolen on each occasion was by no means at the level that is so often the case in many of the robberies which daily entertain the courts. The offences in question therefore cannot be regarded as falling within the upper echelons of the scale of severity.

[11] In addition, although they were by no means first offenders, the appellants were not hardened criminals who had previously served long terms of imprisonment. There is nothing to show that a lengthy period of imprisonment will not bring home the error of their ways. It would be unjust to impose a sentence the effect of which is more likely to destroy than to reform them. However, the cumulative effect of the sentences imposed on the appellants smacks of the use of a sledgehammer; it seems designed more to crush than to rehabilitate them.

[12] Bearing all these circumstances in mind, in my judgment the effective sentence of 30 years' imprisonment was far too severe and disturbingly inappropriate, and a sentence of effectively no more than 18 years' imprisonment was called for. Such a sentence would have reflected the public's righteous indignation, acted as a deterrent, punished the appellants and hopefully induced them to walk a straight path when released back into society. The effective sentence imposed by the trial court cannot be allowed to stand and the court a quo erred in not interfering with it.

[13] An effective 18 years' imprisonment will be achieved by ordering six years of each sentence imposed on counts two and three to run concurrently with the ten years imprisonment imposed on count one.

[12] In the present appeal, the appellants were also found to have shown no remorse and to even have displayed a disrespect and arrogance towards the court proceedings. They pleaded not guilty and maintaining their innocence till the very end. However, as pointed out above, they spent most of the time during which the trial ran in prison.

[13] For the purposes of sentencing they were both treated as first time offenders, even though a more than ten-year-old previous conviction of assault with intent to commit grievous bodily harm was proven against the first Appellant, unlike the appellants in Muller. Further the appellants in the present case were only convicted of two counts of robbery, while the ones in Muller were convicted on three counts. However, they committed the offences and were sentenced at a time when the minimum sentences regime ushered in by *the* ***Criminal Law Amendment Act 105 of 1997*** was in place.

[14] In his address Mr. Du Plessis on behalf of the appellants submitted that an effective sentence of twenty (20) years would be more appropriate which would be achieved by ordering ten (10) years of the second sentence to run concurrently with the first sentence. Adv. Shivuri on behalf of the State submitted that no more than five (5) years of the second sentence should be ordered to run concurrently with the first, leading to an effective sentence of twenty-five (25) years for each appellant.

[15] In the present case, even though the offences were committed within a few days of each other and did target the same business, it would be inappropriate for the entirety of the second sentence to run concurrently with the first sentence.

[16] An effective sentence of twenty (20) years imprisonment is called for. This can be achieved by ordering that ten (10) years of the second sentence be ordered to run concurrently with the fifteen-year sentence ordered in respect of the first sentence.

[17] The order of the trial court is set aside and replaced with the following:

[17.1] The appeal succeeds only to the extent set out in [17.2] below.

[17.2] In respect of count two, it is ordered that ten years of the period of fifteen years imprisonment imposed on such count is to run concurrently with the fifteen years imprisonment imposed on count one.

[17.3] The sentences are otherwise confirmed.

I hand down the judgment.

CAJEE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION
PRETORIA

I agree:

MOSHOANA J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 24 November 2022.

COUNSEL FOR THE APPELLANT:	Mr. Du Plessis
INSTRUCTED BY:	Legal Aid Board, Johannesburg.
COUNSEL FOR THE RESPONDENT:	Adv. Shivuri
INSTRUCTED BY:	Office of the Director of Public Prosecutions, Gauteng Provincial Division, Pretoria.
DATE OF THE APPEAL:	16 November 2022
DATE OF JUDGMENT:	28 November 2022