IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A983/2013

Date: 8 August 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

8/8/2014 .....
DATE SIGNATURE

In the matter between:

BRENDON MOJAKI Appellant

and

THE STATE Respondent

JUDGMENT

PRETORIUS J,

[1] The appellant was convicted and sentenced on 22 October 2007. He was convicted of count 1: housebreaking with the intention to rob and robbery with aggravating circumstances; count 2 and 3: assault with

intent to do grievous bodily harm; count 4: unlawful possession of firearm; count 5: unlawful possession of ammunition. He was sentenced to count 1: 17 years imprisonment; counts 2 and 3: 3 years imprisonment; count 4: 2 years imprisonment; count 5: 1 year imprisonment. It was ordered that the sentences on counts 1, 4 and 5 were to run concurrently. The appellant is thus serving an effective sentence of 20 years imprisonment.

[2] Leave to appeal against the convictions were refused and the Supreme Court of Appeal similarly refused leave to appeal against the convictions. On 7 September 2011 the court *a quo* granted leave to appeal against the sentence.

[3] During the night of 9 July 2005 three armed men broke into the home of the Mohammeds, where both Mr Mohammed and his son were severely attacked, tortured and robbed by the three robbers. The complainants identified the three co-accused as their attackers who had tortured them. The appellant was never identified. The court *a quo* found that the appellant was the person who had transported the stolen goods from the Mohammed's house. He drove the getaway car and moved the goods from the complainants' home during the five hour ordeal.

[4] It is clear in the judgment by the court *a quo* that the appellant was a lesser participant in these crimes:

> *"There is no evidence that either actually inflicted an assault and they have, accordingly, been convicted on the basis of common purpose."*

[5] Murphy J, when granting leave to appeal on sentence, remarked:

> *"Having reread the judgment in this matter and having listened to the submission of counsel and read the notice in the application for leave to appeal, I am persuaded that the applicant's participation in all of the offences in this matter was* ***of a much lesser degree and thus that his culpability was certain less than those of his co-accused and whilst that was certainly taken*** *into consideration at the time of sentence was handed down, on reflection I am of the view that another court,* ***having regard to the lesser degree of participation of the applicant, might reasonably conclude that a different sentence should be imposed in respect of all of the charges.***" (Court's emphasis)

[6] Counsel for the appellant argued that a sentence of 20 years imprisonment in these circumstances is too harsh. The court *a quo* found that accused 3 and 4 went beyond what was needed to subdue the Mohammeds. Should the appellant have foreseen that they would torture the complainants or would it be reasonable to have foreseen

that they would only subdue the complainants? It is clear that the appellant could not have foreseen the brutal attack on the occupants of the house – he knew only that there was to be a robbery and he associated him with the fact that somebody may be hurt. This court takes into consideration that the appellants last previous conviction was 12 years ago.

[7] It is so that the court *a quo* individualized the sentences, but the argument is that the appellant's role was so much less that there should have been a greater disparity between his sentence and that imposed on his co-accused. Furthermore it is argued that the sentences should run concurrently as they emanated from one incident and due to the finding by the court *a quo* that the appellant was convicted according to the doctrine of common purpose all the sentences should be ordered to be served concurrently.

[8] The appellant is 43 years old, is married, and has two sons, aged 10 and 18. He is the only breadwinner, is self-employed and earned about R1500.00 to R2000.00 a month running a taxi. He also suffers from high blood pressure. He has five previous convictions.

[9] The aggravating facts are that the crime was planned and premeditated. There was a brutal assault on the occupants of the house. It must be reiterated that the appellant was aware of all the

facts of the robbery and associated himself with it, but that the brutal attack and torture could not have been foreseen by the appellant.

[10] In **S v Dodo 2001 (1) SACR 594 CC** paragraph 38 Ackermann J held:

> *"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."*

[11] In **S v Swart 2004 (2) SACR 370 (SCA)** Nugent JA found at paragraph 12:

> *"What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."*

[12] This court finds substantial and compelling circumstances in regard to the appellant. The degree of his participation in the robbery was much less than that of his co-accused. The same can be said in regard to his participation in the assaults on the complainants. The fact that he had relevant previous convictions, which the last one was 12 years ago, shows that he had stayed out of trouble for 12 years and there is a chance that he can be rehabilitated.

[13] Therefor the appeal against sentence should be upheld.

[14] The order:

1. The appeal against sentence is upheld;
2. The sentences on counts 1, 2, 3, 4 and 5 are set aside;
3. The appellant is sentenced as follows:

   Count 1: 15 (fifteen) years imprisonment;

   Count 2 and 3: 2 (two) years imprisonment;

   Count 4: 1 (one) year imprisonment;

   Count 5: 6 (six) months imprisonment.

   It is ordered that the sentences on counts 2, 3, 4 and 5 shall run concurrently with that of count 1. The appellant is to serve an effective sentence of 15 (fifteen) years imprisonment.
4. The sentence is ante-dated to 22 October 2007.

C Pretorius

Judge of the High Court

I agree,

NV Khumalo

Judge of the High Court

I agree,

D Nair

Acting Judge of the High Court

Case number	:	A983/2013
Heard on	:	30 July 2014
For the Appellant	:	Adv Booysen
Instructed by	:	Legal Aid South Africa

For the Respondent	:	Adv Smit
Instructed by	:	Director of Public Prosecutions
Date of Judgment	:	8 August 2014