THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 855/10

In the matter between:

MARAWAAN MULLER	**First Appellant**
PETER FISHER	**Second Appellant**
v	
THE STATE	**Respondent**

Neutral citation: *Muller v The State* (855/10) [2011] ZASCA 151 (27 September 2011)

Coram: Cloete, Ponnan and Leach JJA

Heard: 26 August 2011

Delivered: 27 September 2011

Summary: Criminal procedure ─ appellants convicted on three counts of robbery with aggravating circumstances ─ effective sentence of 30 years' imprisonment imposed by trial court ─ such a sentence reserved for particularly heinous crimes which these were not ─ effective sentence reduced to 18 years' imprisonment.

O R D E R

On appeal from: Western Cape High Court (Cape Town) (Desai J and H J Erasmus AJ sitting as a court of appeal):

The order of the court a quo is set aside and replaced with the following:

'(a) The appeal succeeds only to the extent set out in (b) below.

(b) In respect of counts two and three, it is ordered that six years of the period of ten years' imprisonment imposed on each such count is to run concurrently with the ten years' imprisonment imposed on count one.

(c) The sentences are otherwise confirmed.'

J U D G M E N T

LEACH JA (CLOETE and PONNAN JJA concurring)

[1] This case provides proof of the truth of the old adage that 'the wheels of justice grind exceeding slow'. Arising from incidents which occurred in mid-1995, the two appellants were tried in the regional court on three charges of robbery with aggravating circumstances. On 15 May 1996, they pleaded guilty to all charges and were convicted on their plea. The following day they were each sentenced to 10 years' imprisonment on each count, resulting in an effective sentence of 30 years' imprisonment.

[2] The appellants unsuccessfully appealed against the severity of their sentences to the High Court, Cape Town. Their appeal was dismissed on 3 December 1996. Subsequently, after considerable delay and in

circumstances unnecessary to detail for purposes of this judgment, the first appellant launched an application in the high court in December 2006, seeking leave to appeal to this court against his sentence. His application, heard on 23 January 2007, was successful. A year later the second appellant, having learnt of the success of the first appellant, also applied for leave to appeal. Although no explanation was offered for his delay in seeking such leave, the high court, in granting the application, reasoned that as the first appellant was to appeal, no harm would be done in allowing the second appellant to do so as well. Be that as it may, a further three years passed before the appeal was eventually heard in this court. I do not know the cause of this further delay although it seems, at least in part, to have been due the record having gone missing at some stage.

[3] In these circumstances, the appellants now appeal to this court solely against their sentences more than 15 years after they were imposed and more than 14 years after their appeal was dismissed in the high court. However, as the outcome will show, it is for them a case of better late than never.

[4] The three robberies committed by the appellants were carried out within a period of less than a month 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. Details of each robbery are as follows:

(a) The first incident, although the subject of count three of the indictment, occurred on 13 May 1995 at the SR Factory Shop in Salt River to which access was gained when the first appellant asked if he could be allowed in to use the toilet. The person in charge, Paul October,

who was some 68 years of age, was then threatened with a firearm and tied up. The appellants proceeded to steal clothing to the value of approximately R33 400 before fleeing from the scene in a motor vehicle that was waiting for them.

(b) Eleven days later, on 24 May 1995, the appellants stole electronic equipment valued at R62 000 from the Victoria Road, Woodstock premises of a private company, Tecnotronics, after the employee in charge, Mohammed Gaibie, had been threatened with a firearm and then tied up with n electrical flex. This incident was the subject of count two of the indictment. The owner and director of the company testified that he had experienced severe cash flow problems due to his stock having been stolen. Suppliers who he had been unable to pay as a result had refused to supply him, and this had led to his financial ruin with concomitant strain on his family life.

(c) Finally, on 10 June 1995, the appellants robbed a shoe shop in Woodstock owned by Mr Barnett Joffe. They did so after they had gained access through a locked security gate on the pretext of wishing to buy shoes. Once inside, they proceeded to manhandle Joffe, wrapped a scarf around his face, punched him about the head, threw him to the floor, kicked him in the ribs and threatened to shoot him. Joffe, who was not only 77 years old but was also recovering from broken ribs sustained in an accident a few weeks earlier – which he told his assailants but to no avail and they continued kicking him – was unable to offer any resistance. Terrified, he pleaded for mercy and offered to open his safe. Fortunately, before he could do so, the second appellant accidently shot himself in the thigh which caused the appellants and their accomplice to panic and flee. They took with them R250 in cash, Joffe's wrist-watch valued at R1 300 and shoes valued at R2 275. Understandably, Joffe was traumatised by his experience and was still suffering from regular

nightmares as a result at the time of the trial a year later. This incident formed the subject of count one of the indictment.

[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.[1] 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.

[8] Accordingly, although counsel for the appellants referred to certain minor misdirections on the part of the trial magistrate, he was constrained to limit his argument to the contention that the cumulative effect of the three sentences, viz 30 years' imprisonment, was shockingly inappropriate.

[9] When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when

1 See *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 518a-f.

imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy and not a sledgehammer is the concomitant of justice.[2] And while a judicial officer must not hesitate to be firm when necessary 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'.[3] In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence. As Nicholas JA observed in *S v Skenjana*:[4]

'A sentence of 20 years' imprisonment is undoubtedly very severe . . . My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant . . . Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken". (*Per* Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G.)'

[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

2 *S v Harrison* 1970 (3) SA 684 (A) at 686A.
3 Per Corbett JA in *S v Rabie* 1975 (4) SA 855 (A) at 866B-C.
4 1985 (3) SA 51 (A) at 54I-55E.

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. This will be reflected in the order below.

[14] In the result, the appeal succeeds. The order of the court a quo is set aside and replaced with the following:

‘(a) The appeal succeeds only to the extent set out in (b) below.

(b) In respect of counts two and three, it is ordered that six years of the period of ten years’ imprisonment imposed on each such count is to run concurrently with the ten years’ imprisonment imposed on count one.

(c) The sentences are otherwise confirmed.’

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L E Leach
Judge of Appeal

APPEARANCES:

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