THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 852/2010

In the matter between:

LANGA FAKUDE First Appellant

STHEMBISO MTHETHWA Second Appellant

and

THE STATE Respondent

Neutral citation: *Fakude v The State* (852/10) [2011] ZASCA 183 (30 September 2011)

Coram: PONNAN, THERON and SERITI JJA

Heard: 08 September 2011

Delivered: 30 September 2011

Summary: Appeal – sentence - conviction in the Regional Court of robbery with aggravating circumstances – Trial court misdirecting itself by imposing sentences in excess of its jurisdiction.

ORDER

On appeal from: KwaZulu Natal High Court, Pietermaritzburg (Balton J and Lopes AJ sitting as court of appeal):

1. The appeal is allowed.

2. The order of the court below is set aside and substituted with the following:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds. The sentence imposed upon each accused is set aside and replaced with:

'Each accused is sentenced to 15 years' imprisonment.'

JUDGMENT

SERITI JA (PONNAN and THERON JJA concurring):

[1] The appellants, Messrs Fakude and Mthethwa were arrested on 17 January 2000, and appeared in the Pinetown Regional Court facing one charge of robbery with aggravating circumstances. After their arrest, they were not released on bail and on 1 November 2000 they were convicted

as charged. On 1 December 2000 the appellants were sentenced to 20 years' and 25 years' imprisonment respectively.

[2] Each appellant appealed against both conviction and sentence and on 17 November 2005, the KwaZulu-Natal High Court (per Lopes AJ, Balton J concurring), dismissed the appeal and confirmed the convictions and sentences. On 24 February 2010 the high court granted the appellants leave to appeal to this court against sentence only.

[3] The facts leading to conviction are: On Friday 14 January 2000, at about 18h00, the complainant Mr Daharaj Hurdial (complainant) drove driving home in his Volvo S40 motor vehicle. His teenage son and daughter were passengers in the vehicle. On arrival at their home, he drove into the garage. At that stage, two men, each armed with a fire-arm came running into the garage. One of the men took the motor vehicle keys, and ordered the complainant and his children to get back into the motor vehicle. One of the two men took to the driver's seat and the complainant's son was forced to occupy the front passenger seat. The complainant and his daughter and one of the assailants occupied the back seat. The motor vehicle went out of the yard, drove towards the N2 highway. They drove towards the airport and just before the Spaghetti Junction, the motor vehicle stopped. The complainant and his minor

children were ordered to run into the bush. The two assailants drove off with the motor vehicle. The two assailants took the complainant's cellular phone, wallet, watch and pens. Inside the wallet there were credit cards and about R500 cash. The value of the motor vehicle was about R206 000, the cellular phone was worth about R2000 and the watch about R400. The matter was reported to the police. Having been informed by the complainant that his hijackers had used his cellular phone, the police were able to identify the number that had been called and in turn make telephonic contact with someone called Richard. The police posed as robbers who were planning a heist for which, so they informed Richard they required a fast car such as a BMW. Richard told them that he did not have a BMW but a Volvo. They agreed on a purchase price of R10 000 and a meeting was arranged for the handing over of the vehicle for the following Monday, 17 January 2000 the complainant's. A trap was set by the police and the motor vehicle was recovered and the appellants were arrested. When the motor vehicle was recovered, its CD shuttle, spare wheel and floor mats were missing.

[4] In mitigation of sentence, the trial court was informed from the bar that the first appellant was at that stage 24 years old, had an 8 year old daughter, and that at the time of his arrest was a taxi driver earning R250 per week. The court was also informed that he had been in custody from

the time of his arrest, being 17 January 2000 until the day of his conviction, on 1 November 2000. The first appellant confirmed his previous conviction which according to the SAP69 form, was theft committed on 17 November 1993 and for which he was sentenced to 7 strokes with a light cane.

[5] As far as the second appellant is concerned, the trial court was informed that he was 26 years old, he had two minor children aged 10 years and 5 years. He was self-employed and was earning R850 per month. He had also been in custody from the date of his arrest until the date of his conviction. The second appellant confirmed his previous convictions. According to the SAP69 form, on 11 July 1988 he was convicted of theft and in terms of section 297(i)*(a)(*ii) of the Criminal Procedure Act 51 of 1977 the passing of sentence was postponed for 3 years. On 31 March 1993 he was convicted of robbery and was sentenced to 3 years' imprisonment.

[6] Before us Counsel for the State conceded that the trial court had misdirected itself by imposing sentences of imprisonment on the appellants that were substantially in excess of its jurisdiction. That concession was well made. Section 92(1)*(a)* of the Magistrates' Court Act 32 of 1944 restricts the ordinary penal jurisdiction of the regional

court to imprisonment for a term not exceeding 15 years'. The High Court appeared not to appreciate that the trial court had exceeded its ordinary penal jurisdiction. Had it done so, it could hardly have confirmed the sentence.

[7] In *S v Ingram* 1995 (1) SACR 1 (A) at 8i-9b, Smalberger JA said:

'It is trite that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy…. Circumstances, however, vary and the punishment must ultimately fit the nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment.'

See also *S v Samuels* 2011 (1) SACR 9 (SCA) para 9.

[8] Counsel for the State submitted that an appropriate sentence in respect of each appellant was a term of imprisonment of 15 years. When considering sentence, the trial court said: 'This is the worst kind of hijacking one can imagine.' This court has held that in cases of an armed robbery of a motor vehicle with the obvious danger of abduction, serious assault and murder of the driver and passengers, the courts could not avoid imposing heavy sentences. The commission of this offence had become so common, especially in and around our large cities, that

innocent men and women used the road with great fear and anxiety. The brutal acts of robbers cause enormous damage to our country and cast a dark shadow over the confidence of a community in policing, prosecution and administration of justice. (See *S v Khambule* 2001 (1) SACR 501 (SCA).)

[9] In order to determine an appropriate sentence, the court must, inter alia, carefully evaluate all the mitigating and aggravating factors. There are certain mitigating factors in this matter and they are the following: both appellants have young children; they were employed at the time of their arrest; and they were in custody for a period of almost two years at the time of their sentence. Counsel for the appellants submitted that no one was injured during the hijacking and that the vehicle was recovered constituted mitigating factors. I do not agree. The fact that no one was injured was fortuitous and the fact that the vehicle was recovered was due to excellent detective work. Those two factors are therefore neutral factors.

[10] Counsel for the appellants further submitted that the ages of the appellants constitute mitigating factors as they were relatively young. I do not agree. In *S v Matyityi* 2011 (1) SACR 40 SCA para 14, Ponnan JA said:

'Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.'

In this matter, the appellants did not testify under oath. We are not aware of the level of their maturity and they did not disclose to the court why they acted in the manner in which they did. Their ages therefore do not constitute mitigating factors.

[11] As against the mitigating factors there are aggravating factors. They are the following: the previous convictions of the appellants; the appellants were motivated by greed as they were both employed at the time of the commission of this offence; both appellants had fire-arms at the time of the robbery; while the complainant and his two children were not physically injured, the incident inevitably caused them serious trauma and psychological harm; both appellants showed no remorse; and when the motor vehicle was recovered various items were missing.

[12] In my view, the aggravating factors far outweigh the mitigating factors. It is trite that robbery with aggravating circumstances is a serious offence, especially when it involves the taking of a motor vehicle. Here there is an additional consideration. The police investigation appears to have uncovered that the appellants are involved in the business of hijacking and selling vehicles. When the nature of the crime committed, personal circumstances of the appellants, interest of society and the mitigating and aggravating circumstances are taken into account, it is clear to me that a substantial custodial sentence is the only appropriate type of sentence that can be imposed. A period of 15 years' imprisonment will be fair in all of the circumstances of this case.

[13] In the result:

1. The appeal is allowed.

2. The order of the court below is set aside and substituted with the following:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds. The sentence imposed upon each accused is set aside and replaced with:

'Each accused is sentenced to 15 years' imprisonment.'

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W L Seriti

Judge of Appeal

APPEARANCES:

For Appellants:	TP Pillay
	Durban Justice Centre, Durban KwaZulu Natal

For Respondents:	C Kander
	The Director of Public Prosecutions, Pietermaritzburg