SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 553/2012

Not Reportable

In the matter between:

JOSHUA MALEFANE DLAMINI **FIRST APPELLANT**

JOSEPH KHOSA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dlamini & another v The State* (553/12) [2012] 207 (November 2012).

Coram: Ponnan, Pillay JJA et Plasket AJA

Heard: **23 November 2012**
Delivered: **30 November 2012**

Summary: Sentence – Appellants convicted of robbery with aggravating circumstances, unlawful possession of firearms and ammunition and escaping from lawful custody – effective sentence of 36 years' imprisonment inappropriate – sentence reduced to 20 years' imprisonment.

ORDER

On appeal from: North Gauteng High Court, Pretoria (sitting as a court of appeal):

a. The appeal against sentence is upheld.

b. The order of the court below in respect of sentence is set aside and replaced with the following:

'1. Each accused is sentenced to terms of imprisonment as follows:

(a) On count 1 - 15 years;

(b) On count 4 - 2 years;

(c) On count 5 - 2 years;

(d) On count 6 - 3 years;

(e) On count 7 - 3 years;

(f) On count 8 - 2 years;

(g) On count 9 - 2 years;

(h) On count 10 - 2 years;

2 It is further ordered that in respect of each of the accused:

2.1 The sentences imposed in respect of counts 4 and 5 are to run concurrently with that imposed on count 1;

2.2 Two years of the sentence imposed on count 7 is to run concurrently with that imposed on count 6;

2.3 The sentence imposed in respect of count 8 is to run concurrently with that imposed on count 6;

2.4 The sentence imposed on count 9 is to run concurrently with that imposed on count 7;

2.5 One year of the sentence imposed on count 10 is to run concurrently with that imposed on count 1.

2.6 Each appellant is thus sentenced to an effective term of imprisonment of 20 years.'

The sentences are antedated to 7 March 2000.'

JUDGMENT

PILLAY JA (PONNAN JA ET PLASKET AJA CONCURRING)

[1] This appeal, with the leave of the North Gauteng High Court (Pretoria), is against sentence. The appellants, Joshua Malefane Dlamini and Joseph Khosa, were convicted and sentenced to terms of imprisonment by the regional court as follows:

Count 1 – Robbery with aggravating circumstances 15 years

Count 4 – Unlawful possession of a 9mm Walther Pistol in contravention of s 2 read with ss 1, 39(1)*(h)* and 39(2) of the Arms and Ammunitions Act 75 of 1969 3 years

Count 5 – Unlawful possession of a 9mm Browning Pistol in contravention of s 2 read with ss 1, 39(1)*(h)* and 39(2) of the Arms and Ammunitions Act 75 of 1969 — 3 years

Count 6 – Unlawful possession of a .357 Revolver In contravention of s 2 read with ss 1, 39(1)*(h)* and 39(2) of the Arms and Ammunitions Act 75 of 1969 — 3 years

Count 7 – Unlawful possession of a 9mm Star Pistol in contravention of s 2 read with ss 1, 39(1)*(h)* and 39(2) of the Arms and Ammunitions Act 75 of 1969 — 3 years

Count 8 – Unlawful possession of ammunition to wit 3 x .357 rounds in contravention of s 36 read with ss 1, 12 39 and 40 of the Arms and Ammunitions Act 75 of 1969 — 2 years

Count 9 – Unlawful possession of ammunition to wit 14 x 9mm rounds in contravention of s 36 read with ss 1, 12 39 and 40 of the Arms and Ammunitions Act 75 of 1969 — 2 years

Count 10 – Escaping from custody in contravention of s 48(1)(a) read with ss 1 and 52 of the Correctional Services Act 8 of 1959 — 5 years

The effect thereof was that the appellants were each sentenced to 36 years' imprisonment.

[2] The events giving rise to the charges upon which both appellants were convicted

and sentenced may be summarized thus: On 6 February 1998 at about 16h00, Mrs Van der Watt was alone at her home on Hartbeesfontein farm, in the district of Vereeniging, Gauteng, when she heard a noise. Upon turning, she saw three unknown men, one of whom, who later came to be referred to as 'Thomas' by his cohorts, was brandishing a firearm. She was grabbed and forcibly led from the kitchen into the main bedroom. Her hands and feet were bound. The intruders demanded the key to the safe. When she initially responded that her husband had taken it with him, she was hit on the back of her head with a firearm, which caused an open wound from which she bled profusely. She then pointed the key out to them. They opened the safe, from which they removed two firearms and some old coins.

[3] Mrs Van der Watt was then returned to the bedroom where Thomas kept a watch over her while the other two started to ransack the rest of the house. Thomas then looked through some of the drawers in the bedroom and found another of her husband's firearms as well as a knife. He took both. All three then demanded the keys to her motor vehicle which she felt constrained to give to them. They did not leave thereafter but instead lay in wait for her husband. When he finally returned he was confronted by the two appellants, both of whom were brandishing firearms. He was also bound and dragged into another bedroom where Thomas then kept watch over him. He was later locked in the bathroom. Thereafter, Ms Nhlapo, a lady who assisted the Van der Watts on the farm, arrived. She too was accosted and bound. She was taken to the main bedroom and made to sit on the floor next to the bed on which Mrs Van der Watt was seated. One of the attackers then poured two bottles of alcohol down her throat despite her attempts to avoid it. Ms Nhlapo was a teetotaler.

[4] The intruders had difficulty in getting Mrs Van der Watt's motor vehicle started. Mr Van der Watt suggested that they swop vehicles and take his Fiat (the Fiat) instead. They did so and made off with loot, valued at approximately R60 000-00, which included groceries, watches, a television set, and two firearms (they had left behind a shotgun which was in the safe). By then Mrs Van der Watt had managed to free herself and helped to free Ms Nhlapo. Mr Van der Watt had in the meanwhile broken through the door of the bathroom in which he had been locked. Mrs Van der Watt then called for help from her neighbours over the 'Marnet Radio', a short wave radio system. Once freed, Ms Nhlapo ran out of the house screaming. She attracted the attention of Mr Sekhoto, a

general assistant on the farm, who accompanied her back to the farm house.

[5] Mr Van der Watt then set off, in the company of Mr Sekhoto, after the robbers in another of his vehicles, a Land Rover. He discovered from the tyre marks left on the corrugated road, that the Fiat was being driven in the direction of Vereeniging. On the way, he maintained radio contact with his neighbour, Mr Malan who had also set out in his own vehicle in pursuit of the robbers. On Villiers Road, Mr Malan observed the Fiat at a robot near Fourways Motors. He managed to stop it when it had turned onto Blackwood Street and parked behind it. He armed himself with a rifle, got out of his vehicle, and ordered the occupants to sit still. There were three people in the Fiat – the driver, a front passenger and one sitting in the back seat behind the driver.

[6] Mr Malan's son, Jacobus, arrived soon thereafter as did another farmer, Mr Groenewald. Both parked behind Mr Malan's vehicle. Shortly thereafter, Mr Van der Watt arrived with Mr Sekhoto and parked about ten meters in front of the Fiat. The robbers were still in the vehicle. Mr Van der Watt got out of the Land Rover armed with a shotgun, and proceeded to walk towards the Fiat. He noticed that the passenger next to the driver had raised a firearm and was pointing it in his direction. He shot at this person. The shot pierced the windscreen of the Fiat and hit the front seat passenger in the face. The other two occupants were then ordered to get out of the Fiat. They did so. Members of the South African Police Service arrived thereafter and arrested them. The two who had alighted from the Fiat were the appellants, while the third person – Thomas - died at the scene soon after being shot.

[7] The police secured the Fiat and the body of Thomas was removed. The police found four hand guns in the Fiat. The other items taken during the robbery were identified by Mr Van der Watt as his property. Photographs of certain items found in the Fiat, in particular the firearms, were taken by the police before all of Mr Van der Watt's property was returned to him that same night. The appellants were taken into custody, formally arrested and charged. They remained in custody from that time onwards. Before a scheduled appearance in the magistrates' court on 23 March 1999 at Vereeniging, both bribed a policeman, in whose physical custody they were, in order to facilitate an escape. They were at large for about two months before they were re-arrested. They were finally arraigned in the regional court sitting in Vereeniging. Both were convicted and sentenced as set out above.

[8] By the time the magistrate considered sentence, on 7 March 2000, the appellants had dismissed their legal representative and opted to deal with the rest of the proceedings unrepresented. First appellant was 32 years old at the time of the offence, was a first offender and asked the magistrate to take into consideration that he was married with three minor children aged three, seven and 11 years respectively and that his household had been without any income since his incarceration on 6 February 1998. Second appellant was 36 years old at the time of the offence and was also a first offender. He asked the magistrate to take the following into consideration: that he was married and the father of two minor children aged seven and 11 years old respectively; that his wife was unemployed; and, at the time of the commission of the offences, he was a casual worker. In addition both of the appellants, save for the period that they were at large following their escape, spent almost three years in custody until the finalisation of their trial.

[9] In assessing sentence, the magistrate considered, as she had to do, the triad of the seriousness and nature of the offences, the interests of society and the interests of the appellants. She concluded that the frequency of the commission of such crimes together with the seriousness of the nature of the offences far outweighed the interests of the appellants. She found that in these circumstances, there was a need to reflect public abhorrence of such crimes and that the emphasis should be on deterrence. She based this on the need to deter, not only the accused but others with similar intentions from committing such crimes in the future.

[10] Both appellants appealed against their convictions and sentences to the high court. Their appeals were dismissed and their convictions and sentences were confirmed. The high court considered the merits very briefly and in its judgment it concluded that the magistrate was correct in relying on the evidence of the state witnesses and rejecting the evidence of the appellants as false. The high court consequently confirmed all the convictions. With regard to the sentences, the high court stated as follows:

‘Wat die oplegging van vonnis aanbetref, is dit so dat die Landdros nie gelas het dat die gevangenisstraf wat opgelê is vir die onwettige besit van ‘n vuurwapen, saam loop met die gevangenisstraf wat opgelê word vir die onwettige besit van ammunisie nie. As ek as ‘n Hof van

die eerste instansie vonnis moes oplê, sou ek dit dalk anders gelas het, maar ek meen nie daar is voldoende gronde om aan te dui dat die Landdros hom in die opsig, in enige opsig wanvoorgelig het nie. Hy het inderdaad die kumulatiewe effek van die vonnisse in ag geneem en dienooreenkomstig vonnis opgelê. Gevolglik meen ek ook is daar wat die oplegging van vonnis aanbetref, geen gronde waarop die Hof van Appél kan inmeng met die vonnis wat die Landdros opgelê het nie.'

The appeal against the sentences was accordingly dismissed as well. But leave was thereafter granted by the high court (differently constituted to that which had dismissed the appellants' appeal) to appeal to this court against sentence only.

[11] The appellants submitted that an effective term of 36 years' imprisonment induces a sense of shock. They argued that the magistrate in imposing the maximum sentences permitted on each count, misdirected herself in not tempering the cumulative effect of the sentences especially in respect of those offences that were closely related in respect of time and place. Accordingly, so the argument goes, the harshness of the effective sentence ought to have been ameliorated by ordering some of the sentences to run concurrently.

[12] In *S v Mhlakaza & another,*[1] Harms JA dealt with a sentence of imprisonment which cumulatively exceeded 25 years. He pointed out [2] that 'there is no reason to believe that the deterrent effect of a prison sentence is *always* proportionate to its length'. He went on to state that a lengthy term of imprisonment is the effective removal of a serious offender from society. And while sentences would vary form case to case, there is a threshold beyond which imprisonment would serve none of the purposes of punishment but would simply serve to appease public opinion. According to Harms JA '. . . sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption. . .'. [3]

[13] Our courts have generally been slow to embrace inordinately long terms of imprisonment. In *S v Skenjana* [4], Nicholas JA put it thus:

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[1] *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA)
[2] At 519 g
[3] At 524 a
[4] *S v Skenjana* 1985 (3) SA 51 (A) at 55C-D

'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).'

[14] In my view, given the circumstances of this case, the cumulative effect of the sentence imposed is so inappropriate that this court is permitted to intervene and substitute its discretion for that of the trial court. This clearly was one of the worst kinds of house robberies. It must have been a particularly brutalizing experience for both Mrs Van der Watt, who unbeknown to the appellants, was sexually assaulted by Thomas whilst he kept guard over her in her bedroom, and Ms Nhlapo, who was forced to drink copious amounts of alcohol. It was thus conceded by counsel on appeal that the appellants were deserving of a sentence of 15 years' imprisonment for the robbery (count 1), the maximum sentence that the magistrate could have imposed.

[15] In so far as the sentences in respect of the firearms are concerned: the magistrate appeared to lose sight of the fact that of the four firearms, in respect of which the appellants were convicted, two, being the .357 revolver (the subject of count 6) and the 9mm Starr pistol (the subject of count 7) were taken to the scene by the group to perpetrate the robbery, and the other two, being the Walther 9mm pistol (the subject of count 4) and the 9mm Browning pistol (the subject of count 5) constituted part of the loot taken during the robbery. That justified a differentiation in the determination of an appropriate sentence on those counts. It needs also to be added, that in so far as the former are concerned, that their use and possession was already taken into account in concluding that aggravating circumstances were present in the robbery conviction (count 1). In an analogous situation in *R v Cain,*[5] the following was stated –

'. . . it would, no doubt, be appropriate, when assessing the sentence to be imposed for the separate charge of shooting, to pay regard to the fact that such shooting had already operated to make the sentence on the robbery charge more severe; but this would not affect the "presence" of the shooting as an aggravating circumstance in the robbery'.

[5] *R v Cain* 1959 (3) SA 376 (A) at 383D and followed in *S v Moloto* 1982 (1) SA 844 A.

[16] As I have already stated the two pistols – the Walther and the Browning - had been taken from the Van der Watts's safe as part of the loot during the robbery. Possession of those firearms was not deserving of the maximum sentence prescribed by the Arms and Ammunitions Act. I would thus set aside the 3 years' imprisonment imposed on each of those counts and substitute in its stead a sentence of 2 years' imprisonment. Moreover, as those offences were committed as part of the same criminal transaction it would be fair to order those sentences to run concurrently with that imposed on the robbery in count 1. The other two firearms – the .357 revolver and the 9mm Starr pistol - were taken to the scene of the robbery by the appellants. The robbery was pre-planned and the firearms were obviously at hand to intimidate the occupants or, worse still, overcome any resistance. Those offences were thus deserving of the maximum penalty. I would thus not interfere with the 30 years' imprisonment imposed on each of those counts. But I would order two years of the 3 years' imprisonment imposed on count 7 to run concurrently with the sentence on count 6. In respect of the unlawful possession of the ammunition, I would substitute the sentence of one year for that of the two years imposed in respect of counts 8 and 9. The ammunition forming the subject matter of count 8 was obviously for the revolver in count 6 `and the ammunition in count 9 was for the pistol in count 7. I would thus order the sentence of 1 year imprisonment on each of counts 8 and 9 to run concurrently with those on counts 7 and 8 respectively.

[17] There remains the escaping from custody: The magistrate was correct in taking into account as an aggravating feature that a law enforcement officer was bribed. That notwithstanding, this is by no means the worst kind of escape that one is likely to encounter, particularly because no force or violence was employed by the appellants to secure their freedom. It was thus not deserving of the maximum sentence prescribed by the legislature. I would thus set aside the sentence of 5 years' imprisonment imposed on count 10 and substitute in its place a sentence of 2 years' imprisonment. I would furthermore order one year thereof to run concurrently with the 15 years imposed on count 1, the robbery.

[18] In the result I make the following order:

a. The appeal against sentence is upheld.
b. The order of the court below in respect of sentence is set aside and replaced with

the following:

‘1. Each accused is sentenced to terms of imprisonment as follows:

(a) On count 1 - 15 years;

(b) On count 4 - 2 years;

(c) On count 5 - 2 years;

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(e) On count 7 - 3 years;

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2.6 Each appellant is thus sentenced to an effective term of imprisonment of 20 years.'

The sentences are antedated to 7 March 2000.'

R. PILLAY
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	MR H. L. ALBERTS Instructed by: Legal Aid South Africa, Pretoria; Legal Aid South Africa, Bloemfontein
FOR RESPONDENT:	ADV J. P. VAN DER WESTHUIZEN Instructed by: The National Director of Public Prosecutions, Pretoria The National Director of Public Prosecutions, Bloemfontein