

1 J U D G M E N T
IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A447/2006

DATE: 11 APRIL 2008

5 In the matter between:

LOOD HERWILL Appellant

And

THE STATE Respondent

10 J U D G M E N T

MEER, J:

15 [1] On 24 April 2002 appellant, as accused number 3, was
convicted in the Bellville Regional Court on two counts of
robbery committed on 23 August and 24 August 1998
respectively and on two accompanying counts pertaining
to the unlawful possession of a firearm on the occasion
of each of the aforementioned robberies, in contravention
20 of the relevant provisions of Act 76 of 1969.

[2] Appellant, who represented himself in the court *a quo*,
was sentenced to the minimum sentence of 15 years'
imprisonment prescribed in Act 105 of 1997 on each
25 count of robbery. He was, in addition, sentenced to five

years' imprisonment on each count for the unlawful possession of a firearm. Appellant was accordingly sentenced to an effective period of 40 years' imprisonment. Appellant appeals against his sentence only.

[3] The grounds of appeal in essence are that the sentence of 40 years' imprisonment was grossly disproportionate, that substantial and compelling circumstances for departing from the prescribed minimum sentences ought to have been found, that the magistrate erred in not considering a sentence of correctional supervision and, moreover, in not considering the consecutive serving of the sentences.

[4] Ms Allie for respondent was contending there to be no substantial and compelling circumstances warranting a departure from the minimum sentence, nonetheless conceded that the cumulative effect of the sentences totaling 40 years was excessive.

[5] The magistrate, in sentencing the appellant, took cognisance of and distinguished the pivotal role he had played in both robberies as opposed to the roles played by his two co-accused. She noted that appellant was

instrumental in the planning of both robberies, was the person who bore the firearms in both robberies, issued the threats and took a share of the spoils in both instances. The fact that accused 1 and 2 did not actually handle the firearms was a factor considered in the imposition of the respective sentences, resulting in accused 1 and 2 getting lesser sentences than appellant.

10 [6] Substantial and compelling circumstances were found to exist in respect of accused 1. Whilst the judgment refers to consideration being taken of appellant's personal circumstances, these circumstances are not apparent from the judgment. Cognisance was taken also of appellant's previous conviction in 1994 for housebreaking with the intention to steal and theft, for which he was given a four year suspended sentence during which period the instant offences were committed. The learned magistrate moreover aptly emphasised the serious nature and impact of armed robbery, the interest of society and rated appellant's prospects for rehabilitation as slim. In the case of appellant there were found to be no substantial and compelling circumstances.

25 [7] I am unable to fault the magistrate's reasoning for distinguishing the respective sentences imposed on the

appellant and each of his co-accused, taking into consideration their respective roles in the commission of the offences. It would, however, seem that notwithstanding the serious nature of the offences, cognisance was not taken of the fact that appellant had already spent four years in prison which, together with his personal circumstances, a man of 23 years with one previous conviction ought, at the very least, to have resulted in the concurrent operation of the sentences imposed, an option which the magistrate considered but did not exercise. The cumulative effect of the sentences, namely 40 years' direct imprisonment, can be said to be excessive in all of the circumstances. The learned magistrate ought to have provided for the concurrent running of the sentences. I note that the magistrate correctly pointed out that a sentence of correctional supervision was not permissible given the application of the minimum sentence legislation to the offences.

20 [8] Regard being had to the above I would, on appeal, accordingly substitute the sentence imposed upon the appellant with a sentence as follows:

Count 1 – 15 years' imprisonment

25 Count 2 – five years' imprisonment

Count 3 – 15 years' imprisonment

Count 4 – five years' imprisonment

The sentences in respect of counts 1 and 3 shall run concurrently.

5 The sentences in respect of counts 2 and 4 shall run concurrently.

The appellant is accordingly sentenced to an effective term of 20 years' imprisonment.

10 [9] Having interfered with the sentence of the appellant on appeal, the circumstances of this case require in accordance, *inter alia*, with the authority granted to me on appeal in terms of section 22(b) of the Supreme Court Act 59 of 1959, I adjust the sentences of his co-accused
15 in the court *a quo* given my endorsement of the magistrate's reasons for distinguishing the sentences of appellant from that of his co-accused on the basis of their respective roles in the commission of the offences.

20 [10] In respect of accused 1, Peter Moosak, I substitute the sentences imposed with the sentence as follows:

"Accused 1

Count 1 – 10 years' imprisonment

25 Count 2 – five years' imprisonment

Count 3 – 10 years' imprisonment

Count 4 – five years' imprisonment

The sentences in respect of counts 1 and 3 shall run concurrently.

The sentences in respect of counts 2 and 4 are suspended for four years on condition that accused 1 is not found guilty of the contravention of section 2 of Act 75 of 1969 committed during the period of suspension.

Accused 1, Peter Moosak, is accordingly sentenced to an effective period of 10 years' imprisonment".

[11] In respect of accused 2, Mario Meyer, I substitute the sentence imposed with the sentence as follows:

"Accused 2

Count 1 – 15 years' imprisonment

Count 2 – five years' imprisonment

Count 3 – 15 years' imprisonment

Count 4 – five years' imprisonment

The sentences in respect of counts 1 and 3 shall run concurrently.

The sentences in respect of counts 2 and 4 are suspended for four years on condition that accused 2 is not found guilty of the contravention of section

2 of Act 75 of 1969 committed during the period of
suspension.

Accused 2, Mario Meyer, is accordingly sentenced
to an effective period of 15 years' imprisonment".

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MEER, J

GOLIATH, J: I agree.

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GOLIATH, J