

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A496/2011

5 **DATE:** 18 NOVEMBER 2011

In the matter between:

XOLANI XHAPHA Appellant

and

10 **THE STATE** Respondent

J U D G M E N T

15 **DESAI, J:**

The appellant was convicted in the Regional Court at Swellendam on several serious charges and sentenced to an effective term of 15 years' imprisonment. The appeal is
20 against the sentence only and it comes before us with the leave of two judges of this division.

Incidentally the appellant was convicted and sentenced in respect of these offences more than five years ago. His initial
25 application for leave to appeal was against the conviction only

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and it was refused by the trial court. It was only in September 2010 that the appellant first launched this application challenging his sentence.

5 In any event the appellant was one of five accused who appeared before the magistrate on a charge of robbery with aggravating circumstances, three charges of attempted murder and the theft of a motor vehicle. They were all convicted on the said charges and received similar sentences.

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The facts which underpin these offences illustrate their serious nature. This was a gang attack upon an isolated farmhouse, the farm of the Dunn family, which the appellant and his co-accused, acting with a common purpose, attacked with knives
15 and other sharp objects, causing relatively serious injuries to three members of the family and inflicting terror upon the entire household.

Ms N McKenzie, who appeared on behalf of the appellant,
20 contended, certainly in her heads of argument, that the effective sentence is shockingly inappropriate and that the circumstances of this matter warrant extending some mercy to the appellant, something which the trial court failed to do. On the contrary the sentences imposed do not induce any shock
25 and I fail to appreciate what greater mercy, than is the norm,

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should have been extended in this instant.

The conduct of the appellant and his associates was particularly repugnant, especially the gratuitous violence
5 inflicted upon three members of the Dunn family. The offences themselves were planned. They drove down from Cape Town and waited for the appropriate time to launch the attack upon the unsuspecting family. The appellant at no stage disassociated himself from the rest of the gang and quite
10 patently was an active participant in the execution of these offences.


Insofar as the court's sentencing discretion is concerned, it appears to have been properly exercised and counsel has not
15 alerted us to any real misdirection on the part of the trial court, nor am I startled or shocked by its severity, especially in the light of the prevalence of this type of offence in contemporary South Africa. The 15 year sentence for the robbery is the so called minimum sentence and the court was obliged to impose
20 the sentences unless, of course, there were substantial and compelling circumstances which warranted a lesser sentence.

It is true that the appellant was relatively young, 28 years old when the offence was committed, but as our courts have
25 recently again pointed out, at 28 he was already an adult and

the age in this instance could hardly be a significant mitigating factor. It also counted in his favour that he was a first offender and for a variety of reasons he was an awaiting trial prisoner for about three years. However, as substantial and
5 compelling factors, if such, these considerations are outweighed by the sheer brutality and cowardice of the attack upon the victims.

I am unpersuaded that the magistrate erred in any respect
10 whatsoever with regard to sentence and, if anything, I am of the view that the effective sentence is entirely appropriate in all the circumstances. In the result, **THE APPEAL IS DISMISSED AND THE APPELLANT'S CONVICTIONS AND SENTENCES ARE CONFIRMED.**


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DESAI, J

I agree:

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STEYN, J