IN THE WESTERN CAPE HIGH COURT, TOWN

CASE NO: A 473/2012

In the matter between:

SIBONISO BHUTANA	First Appellant
MATHEMBA MDUDO	Second Appellant
MVUYISI MTUNDENE	Third Appellant

and

THE STATE	Respondent

Coram: GRIESEL J *et* DAVIS AJ

Heard: 9 November 2012

Delivered: 12 November 2012

JUDGMENT

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1. The appellants were each charged with one count of robbery with aggravating circumstances, as described in section 1 of the Criminal Procedure Act 51 of 1977 ("count 1"), and one count of murder, read with the provisions of sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1977 ("count 2"). They were tried in the Wynberg regional court before Mr. B. Langa.

2. The charges arose out of two separate, but related, incidents which took place on 22 December 2007, when Mr. Thomas Ramncwana ("the deceased") was robbed, and later murdered, at Browns Farm, Phillipi.

3. First appellant was found not guilty on count 1 and guilty as charged on count 2. Second and third appellants were convicted on both counts. On 26 October 2009 the magistrate handed down sentences of 25 years of imprisonment for all three appellants in respect of count 2. Second and third appellants also received a sentence of 15 years in respect of count 1, which was ordered to run concurrently with the 25 year sentence.

4. All three appellants were legally represented throughout the trial and each one testified in his own defense. The appellants all applied for leave to appeal against both conviction and sentence. The magistrate only granted leave to appeal in respect of sentence. Having been refused leave to appeal against his convictions, the third appellant petitioned this Court and was granted leave to appeal against his conviction on count 1 only.

The conviction on count 1

5. Two State witnesses gave evidence relevant to the count 1, namely Mr. Colin Mbeswene ("Mbeswene"), the brother of the deceased, and Inspector Prinsloo ("Prinsloo").

6. Mbeswene's testimony may be summarized as follows:

6.1 on the day in question, he saw the three appellants and the third accused (one Vido Sibuyiso ("Vido") who was acquitted on all counts) approaching his shack where he and the deceased were present;

6.2 first appellant and Vido entered the shack and drank cool drink, but second and third appellants stayed outside the shack;

6.3 shortly after first appellant and Vido entered the shack, the deceased left to go home to his own shack nearby, carrying a hammer and a saw with him;

6.4 he then noticed through the window of the shack that the second and third appellants were struggling with the deceased, but he did not go to his aid because he did not want to leave first appellant and Vido alone in his shack;

6.5 he saw that the third appellant grabbed the deceased's arm and that the third appellant had in his possession the deceased's hammer;

6.6 not long after he had noticed the struggle, first appellant and Vido left the shack;

6.7 moments later the deceased entered the shack and reported that he had been "mugged" by second and third appellants and robbed of money, his cell phone and his hammer;

6.8 the deceased also reported that first appellant had joined the fray and "smacked" him, but this particular act was not witnessed by him as the struggle had moved round the corner out of his line of sight;

6.9 he had not personally witnessed any of the items being taken from the deceased;

6.10 he was present later that day when second and third appellants were found together at a shebeen and searched by Prinsloo, and he saw that second appellant had the deceased's Nokia 3310 cell phone in his pocket.

7. Prinsloo testified that when he arrested the second and third appellants, second appellant had in his pocket a cell phone which he attempted to throw away, and Mbeswene identified as belonging to the deceased.

8. Third appellant's evidence in regard to count 1 amounted to a bald denial. He denied that he had been outside Mbeswene's shack on the day in question and that he had robbed the deceased, stating that he had spent the whole day at a shebeen called "Shepe". Second appellant similarly denied that he had robbed the deceased, and alleged that he had been drinking at the Shepe shebeen. He also denied that Prinsloo had found anything in his pocket except the keys to his shack.

9. The magistrate accepted the evidence of Mbeswene and Prinsloo and rejected the denials put up by second and third appellants, in particular second appellant's denial that he had been found in possession of the deceased's cell phone. He found that, although Mbeswene had not witnessed the taking of the deceased's property, there was sufficient circumstantial evidence to show that second and third appellants had indeed robbed the deceased of his cell phone. He accordingly found the second and third appellants guilty of *robbery* with no mention of aggravating circumstances, but when it came to sentencing, he passed sentence on a conviction of robbery with aggravating circumstances – a point of error to which I shall return.

10. Counsel for the third appellant contended that the evidence implicating third appellant in the robbery was not sufficiently clear to sustain a conviction of robbery. He submitted that, even if it was accepted that a struggle took place between the third appellant and the deceased, it was not clear that the third appellant had *robbed* the deceased.

11. To my mind the argument is misconceived as it fails to take into account the fact that the second appellant's act of appropriation of the cell phone can be imputed to the third appellant where it can be shown that they acted together in execution of a common goal. As is succinctly expressed in Burchell and Hunt *South African Criminal Law and Procedure* Vol I, 3 ed. p 316 - 317, *'Prior agreement, whether express or implied, to commit a crime or, where there is no such prior agreement,*

active association in the common design, makes the act of the principal offender the act of all. Participation in the common purpose constitutes the unlawful conduct.'

12. Although there is no direct evidence of a prior agreement to rob the deceased, I consider that there can be no reasonable doubt that there was such an agreement in this case where the evidence shows that both second and third appellants:

12.1 arrived and were present together at the scene of the robbery;

12.2 attacked the deceased simultaneously;

12.3 forcibly dispossessed the deceased of items of his property (in the case of second appellant, his cell phone, and in the case of third appellant, his hammer);

12.4 must have intended to rob the deceased of his property;

12.5 were still together later when they were arrested and second appellant was found with the cell phone in his possession.

13. In my view, therefore, third appellant was rightly convicted of robbery on the basis of the doctrine of common purpose.

14. The charge as framed in the charge sheet, however, was one of robbery *with aggravating circumstances*. The magistrate, in an apparent oversight, neglected to deal with the question of whether or not the evidence established the existence of aggravating circumstances as alleged, namely the use of a hammer to assault the complainant (i.e., the deceased).

15. The State concedes - correctly in my view - that the evidence does not support a conviction of robbery with aggravating circumstances. Mbeswene testified that he saw that third appellant was in *possession* of the deceased's hammer, he did not say that he saw any of the assailants wielding the hammer or using the hammer to assault the deceased. Indeed Mbeswene gave no indication that the deceased had sustained any serious bodily injuries following the assault, which one would have expected had the deceased been struck with the hammer. It follows that third appellant's conviction of robbery with aggravating circumstances cannot stand and must be set aside.

16. The magistrate refused to grant second appellant leave to appeal against his conviction on both counts, but granted him leave to appeal against his sentence. Second appellant did not petition this Court for leave to appeal against his convictions and his appeal is therefore before this Court in respect of sentence only. Counsel for the State has, however, asked this Court to exercise its inherent power to prevent an injustice by setting aside second appellant's

conviction of robbery with aggravating circumstances and replacing it with one of robbery. I consider it right and proper in the interests of justice so to do.

The sentence in respect of count 1

17. In the circumstances the sentence handed down in respect of count 1 falls to be reconsidered by this Court.

18. Second appellant had one previous conviction for theft committed in 2003, for which he received a sentence of six months imprisonment suspended for five years. He was 24 years old at the time of the commission of the crime and spent a period of one year and eight months in prison as an awaiting trial prisoner.

19. Third appellant had one previous conviction for an assault committed in 2005 for which he received a fine of R 100 or 10 days imprisonment. He was 22 years old at the time of the commission of the offence. During the course of *ex parte* submissions on sentence, third appellant's counsel stated that he was serving an eight year prison sentence for murder. As there was no detail and no proper proof regarding this conviction, I am of the view that it ought not to be taken into account for purposes of sentence.

20. The use of violence to steal from another is a serious crime; all the more so because it is so rife in our country and blights the life of so many of our law

abiding citizens who work hard to pay for their property. While it is so that there is no evidence that the deceased suffered any serious injuries as a result of the force used in the robbery, sight should not be lost of the fact that second appellant participated in what was clearly a concerted plan to rob the deceased, and that it was this robbery which set in motion the tragic chain of events which led ultimately to the death of the deceased.

21. All things considered, I am of the view that second and third appellants should be sentenced to four years imprisonment in respect of count 1.

The sentence in respect of count 2

22. As regards the sentence imposed in respect of count 2, it is evident that the magistrate misdirected himself in a material respect in that he failed to appreciate that he was dealing with an offence referred to in Part II of Schedule 2, and not Part I of Schedule 2 of the Act, with the result that the relevant prescribed minimum sentence was one of 15 years.

23. The magistrate was apparently led astray by the prosecutor's argument that this particular murder charge fell under Part I (d) of Schedule 2 because the appellants had acted in the execution of a common purpose, and that the magistrate was therefore obliged to hand down a sentence of life imprisonment unless he found that there were substantial and compelling circumstances which

justified the imposition of a lesser sentence. The magistrate went on to find that that there were substantial and compelling circumstances to justify a sentence lesser sentence than life imprisonment and thus arrived at a sentence of 25 years imprisonment in respect of count 2.

24. Given that the appellants had not been charged with an offence referred to in Part I of Schedule 2, but with an offence referred to in Part II, it is clear that the magistrate exceeded his jurisdiction in imposing the sentence of twenty five years imprisonment in respect of those of the appellants who were first offenders in relation to the offence of murder.

25. Thus the sentence handed down in respect of count 2 was vitiated by misdirection and this Court is therefore at large to consider the sentence afresh. (*S v Malgas* 2001(1) SACR 469 SCA at 478 e – f)

26. In terms of section 51(2)(a) of the Sentencing Act, this Court is obliged to apply the prescribed minimum sentence unless it is satisfied that there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

27. As regards the question of substantial and compelling circumstances, I consider that this Court is not in any way bound by the magistrate's finding that there were substantial and compelling circumstances to justify a lesser sentence. It is self-evident that the enquiry into substantial and compelling circumstances takes

place in the context of and is dependent on the relevant prescribed sentence. The magistrate's view that there were substantial and compelling circumstances to justify a lesser sentence than *life imprisonment* has no bearing on the enquiry before this Court where a lesser prescribed sentence is under consideration. The relevant question is whether there are substantial and compelling circumstances to impose a sentence of less than *fifteen years* in the particular circumstances of this case.

28. The State produced evidence of the previous convictions of the appellants which showed that none of them had previously been convicted of murder. As I have indicated, although it was admitted by third appellant's counsel that third appellant was serving a sentence of eight years for murder, I consider that this conviction should not be taken into account and that the third appellant should be treated as a first offender in respect of murder for present purposes.

29. I have had careful regard to the evidence of the personal circumstances of the appellants placed on record during the sentencing phase in the trial court. I have also taken into consideration that the murder was committed in response to the fact that the deceased set alight and destroyed the shack of first appellant. In my view the killing of the deceased was a brutal act of vengeance in response to the torching of first appellant's shack, an act which had been precipitated by the appellants' own unlawful conduct. The appellants have shown no remorse whatsoever for this heinous act.

30. All things considered, I can find no substantial and compelling circumstances to warrant the imposition of a lesser sentence than the minimum of fifteen years prescribed in section 51(2)(a)(i) of the Sentencing Act. In my view a sentence of fifteen years imprisonment is an entirely appropriate sentence for this crime.

31. It follows in my view that the appellants are liable to be sentenced in terms of section 51(2)(a)(i) of the Sentencing Act to fifteen years imprisonment in respect of count 2.

Conclusion

32. In the result I would make the following order:

Ad first appellant:

(i) The appeal is upheld.

(ii) The sentence of twenty five years imprisonment in respect of count 2 is set aside and replaced with a sentence of fifteen years imprisonment.

Ad second and third appellants:

(iii) The appeal is upheld

(iv) The conviction of robbery with aggravating circumstances in respect of count 1 is set aside and replaced with a conviction of robbery.

(v) A sentence of four years imprisonment is imposed in respect of count 1.

(vi) The sentence of twenty five years imprisonment in respect of count 2 is set aside and replaced with a sentence of fifteen years imprisonment.

(vii) The sentences of four and fifteen years in respect of counts 1 and 2 shall run concurrently.

D M DAVIS

Acting Judge of the High Court

GRIESEL J: I agree.

B M GRIESEL

Judge of the High Court