



SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 01219/16

In the matter between:

TOVEY HLOGI JEROME MOGOBA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mogoba v The State* (01219/2016) [2017] ZASCA
104 (06 September 2017)

Coram: Shongwe AP, Seriti JA and Mokgohloa AJA

Heard: 16 August 2017

Delivered: 6 September 2017

Summary: Criminal Procedure - Appeal against sentence - whether substantial and compelling circumstances exist to justify deviation from prescribed life sentence - whether misdirection by trial court and full court - no misdirection found - appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ranchord J, Polson and Msimanga AJJ sitting as Court of Appeal):

The appeal is dismissed.

JUDGMENT

Mokgohloa AJA (Shongwe AP and Seriti JA concurring):

[1] The appellant, Mr THJ Mogoba was convicted by the Limpopo Local Division of the High Court (for the Northern Circuit District, Polokwane) on two counts of murder, one count of robbery with aggravating circumstances, and one count of unlawful possession of a firearm and ammunition. The appellant was sentenced to life imprisonment on each of the two counts of murder, 15 years' imprisonment on the count of robbery with aggravating circumstances, three years' imprisonment on the count of unlawful possession of a firearm, and one year imprisonment on the count of unlawful possession of ammunition. The trial court ordered that the sentences in respect of the other counts run concurrently with the life sentences.

[2] Subsequent to the sentence, the appellant applied for leave to appeal and leave was granted to the full court of the Gauteng Division of the High Court, Pretoria against his sentence only. The full court dismissed the appeal. However this court granted appellant special leave

to appeal to this court on 31 August 2016 against sentence only.

[3] It is pertinent at this juncture to note that the appellant was initially charged and convicted along with two co-accused. The sentence of one of the co-accused was reduced by this court on 1 December 2015.

[4] The issue in this appeal is whether the trial court erred in its conclusion that there existed no substantial and compelling circumstances that justified the deviation from the prescribed sentence of life imprisonment in respect of the conviction on both counts of murder.

[5] Before turning to consider whether the sentence imposed on the appellant was appropriate, a brief consideration of the background facts is necessary. On 14 January 2005 the appellant, together with his accomplices, proceeded to Ga–Raoleka Supermarket, Lebowakgomo, in the district of Thabamoope to commit a robbery. The group met at one of the co-accused’s home to plan the robbery and the appellant provided the group with two firearms which were kept in a red bag. The appellant then entered the shop under the pretext of buying Grandpa headache medication. Mr Aslam Mohammad and Mr Foster Mashimbye were shot during the robbery and died at the scene. During the robbery an undisclosed amount of cash was stolen.

[6] Sentencing rests pre–eminently in the discretion of the trial court. A court of appeal hearing argument on sentence should always guard against eroding the trial court’s discretion and should only interfere when the discretion was not exercised judicially and properly.¹ In determining

¹ *S v Barnard* 2004 (1) SACR 191 (SCA); *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10. *S v Giannoulis* 1975 (4) SA 867 (A) at 868G–H.

the sentence the trial court took a number of factors into account: the appellant was the eldest of the co-accused and matured at the time of the commission of the crime; the appellant produced the firearms; the appellant made false pretenses to commit the crime.

[7] In refusing leave to appeal against sentence, the full court said that:

‘ In my view he was fully aware of the fact that weapons and the possibility that weapons could be used either to persuade people into submission to depart with their assets or in some form of defence or offence and he reconciled himself with that possibility in the planning and his attendance at the time.

...

This Court has not been persuaded that circumstances exist which allow this Court to interfere or to deviate from the judgment given by the Court a quo’.

[8] The appellant’s conviction made him liable for punishment under s 51 (1) of the Criminal Law Amendment Act read with Part 1 of Schedule 2.² In relation to his conviction for murder, which was committed during the robbery the court is obliged to impose a sentence of life imprisonment unless there exist substantial and compelling circumstances that justify a deviation from the prescribed sentence.³

[9] Counsel for the appellant submitted that the full court misdirected itself in confirming the trial court’s finding that there existed no substantial and compelling circumstances that justified the deviation from the prescribed sentence. It was submitted that the appellant’s age, the fact that he lost his father when he was 16 years old, the role that he played during the commission of the offences and the fact that he spent two and a half years in custody before he was sentenced, taken cumulatively,

² 105 of 1997.

³ *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

constitute substantial and compelling circumstances.

[10] It is clear from the evidence that the appellant was 24 years and some 8 months old at that time, having been born on September 1980. He was the eldest in the group. He played an active role during the planning and execution of the robbery. The group met at one of the accused's home to plan the robbery. The appellant provided them with two firearms which were kept in a red bag. He was the one who entered the shop under the pretext of buying Grandpa headache medication. He was the one who took the money and put it in the red bag before he could hand it over to one of the group members.

[11] The trial court took all relevant factors into consideration and found, correctly so in my view, that there exist no substantial and compelling circumstances justifying deviation from the prescribed sentence. I can find no misdirection by the trial court or the full court that warrants interference by this court. Therefore this appeal cannot succeed. Accordingly the following order is made. The appeal is dismissed.

FE MOKGOHLOA
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: LM Manzini

Instructed by: Justice Centre, Polokwane

Justice Centre, Bloemfontein

For Respondent: No Appearance