THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 876/2017

Not Reportable

In the matter between:

JACOB NDENGEZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndengezi v The State* (876/2017) [2017] ZASCA 174 (1 December 2017)

Coram: Navsa, Swain, Mathopo JJA and Mokgohloa and Ploos van Amstel AJJA

Heard: 1 November 2017

Delivered: 1 December 2017

Summary: Appeal against conviction and sentence – doctrine of common purpose improperly applied – conviction set aside – sentence reduced based on misdirections including failure to take into account considerable period spent in detention pending finalisation of trial.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J sitting as court of first instance):

1 The appeal in relation to the convictions on counts 1 and 2 and the related sentences is upheld. Those convictions and the related sentences are set aside.

2 The appeal against sentence in relation to the remaining counts is upheld to the extent reflected in the substituted order that follows.

3 The order of the court below in relation to sentence is set aside and substituted as follows:

'Count 3, sentenced to fifteen (15) years' imprisonment;

Counts 4 and 5 are taken together and the sentence is one of twelve (12) years' imprisonment;

Counts 6-9 taken together for purpose of sentence, twelve (12) years' imprisonment;

Counts 10 and 11 taken together for purpose of sentence, three (3) years' imprisonment.

The sentences in respect of counts 6, 7, 8, 9, 10 and 11 will run concurrently with the sentence imposed in respect of counts 4 and 5.

Accused three will serve an effective term of twenty seven (27) years' imprisonment.'

JUDGMENT

The Court:

[1] The appellant, Mr Jacob Ndengezi, was the third of five accused who faced charges in the court below, the High Court of South Africa (Circuit Local Division of the Northern Circuit Division held at Modimolle). The appellant and his four co-accused faced five counts of robbery with aggravating circumstances, four counts of attempted murder and two counts involving the unlawful possession of firearms and ammunition. In respect of the first two counts of robbery with aggravating

circumstances the appellant was convicted of theft. He was also found guilty, with all of his co-accused, on three further counts of robbery with aggravating circumstances and on four counts of attempted murder. Furthermore, the appellant and some of his co-accused were found guilty on two counts relating to a contravention of provision of the Firearms Control Act 60 of 2000. The appellant was sentenced as follows:
(i) Count 1: 6 years' imprisonment (theft).
(ii) Count 2: 4 years' imprisonment (theft).
(iii) Count 3: 16 years' imprisonment (robbery with aggravating circumstances).
(iv) Count 4 – 5: (Taken together for sentencing purposes): 12 years' imprisonment (two counts of robbery).
(v) Counts 6-9: (Taken together for sentencing purposes): 15 years' imprisonment (four counts of attempted murder).
(vi) Counts 10-11: (Taken together for sentencing purposes): 3 years' imprisonment (unlawful possession of firearms and ammunition).
(vii) The court ordered the sentence on count 2 to run concurrently with the sentence on count 1, and the sentences on counts 4-5 and 10-11 to run concurrently with the sentence on counts 6-9.
The effective sentence was thus 37 years' imprisonment.

[2] After his conviction and sentencing, the appellant applied for leave to appeal in the court below. On 24 November 2011, the application was refused. Subsequently, on 23 February 2015, this court granted three of the appellant's co-accused, namely accused one, two and four, leave to appeal to the full court in respect of their convictions and sentences. On 23 May 2016 the full court in Pretoria confirmed the convictions and sentences of accused 1, 2 and 4, except the convictions and sentences on counts 1 and 2, which were set aside. Consequently, with the deduction of the sentences related to counts 1 and 2 which had been set aside, accused 1 and 2 each had an effective sentence of 35 years' imprisonment and accused 4, 33 years' imprisonment. On 24 October 2016 the appellant was granted special leave to appeal by this court, only in respect of the convictions on counts 1 and 2 as well as the sentences imposed on all the counts. It is what the present appeal is concerned with. This appeal is one of two related appeals heard by us on the same day. The other, by accused one, two and four, under case number

296/2016, was directed against the full court's dismissal of the appeal against sentence.

[3] It is common cause that the complainants in respect of the first two counts of robbery with aggravating circumstances had indeed each been robbed of a motor vehicle, namely, a BMW and a Volkswagen Polo respectively. In respect of the first and second robbery, the appellant was not identified as one of the robbers. The motor vehicles were subsequently used in the bank robbery in respect of which the appellant and his co-accused were implicated. The other counts faced by the appellant and his co-accused were related to the bank robbery and its aftermath. The bank robbery occurred more than a week after the BMW had been taken and two days after the complainant in respect of the Volkswagen Polo had been robbed. In convicting the appellant of the robbery of the two vehicles, the trial court (Raulinga J), with reference to *S v Mgedezi & others* 1989 (1) SA 687 (A), said the following:

'I think all that refers to common purpose, all that would confirm that the five requirements in *Mgedezi* had been met and it, therefore, means that one or the other or all of the four accused were actually involved and participated in the commission of the offences.'

[4] I pause to note that the court below did not rely on the doctrine of recent possession to justify a conviction of theft on the counts of robbery with aggravating circumstances (counts 1 and 2), or of receiving property knowing it to have been stolen. Those would have been competent verdicts in terms of s 260 of the Criminal Procedure Act 51 of 1977. Instead, the court below relied on the doctrine of common purpose and *Mgedezi.* In relation to common purpose the court below placed reliance on the following passage from that case which reads as follows:

'In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa & others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased he must have intended

them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[5] The court below erred when it proceeded to apply the principles set out in *Safatsa* and *Mgedezi* to the facts of this case. The association in relation to a common purpose that manifested itself was in respect of the other counts, excluding counts 1 and 2, in respect of which the appellants were convicted. The bank robbery occurred some time after the complainants on counts 1 and 2 had been robbed of their vehicles.

[6] Before us, the State rightly did not oppose the setting aside of the convictions on those two counts. The State was constrained to concede that the court below had erred in convicting the appellant on those counts and did not seek to justify it on any basis. It follows that on that score the appeal should succeed.

[7] Considering the sentences set out in para 1 above, it follows that if the sentences on counts 1 and 2 are left out of the equation, the effective sentence imposed by the trial judge would be one of 31 years' imprisonment. Before us it was submitted on behalf of the appellant that the sentence was too severe and should be reduced significantly in proportion to the nature and seriousness of the offences.

[8] Raulinga J's judgment on sentence was brief. In sentencing the appellant and his co-accused he rightly took into account that the peace in Modimolle, the town in which the bank robbery occurred, was disturbed in the most dramatic fashion by the robbers during and after the bank robbery. He noted that, in making their getaway, the appellant and his co-accused shot at the police, damaging their vehicles, and in the process hijacked two motor vehicles belonging to innocent bystanders. The court below recorded that innocent people were traumatised by the robbery and its aftermath. The appellant was 28 years old at the time of the commission of the offences in question and was a first offender. The court below, in sentencing the appellant and his co-accused, said the following:

'While the sentences that I am going to meter out now will also consider the circumstances of the accused, I want to say that it is more an emphasis on the rights of the victim and it is unfortunate that this *campaign* is starting when you are being sentenced because I believe

this campaign must be promoted from now on. The victims have to be protected over and above the rights of perpetrators and I must state again that our sentences have to be blended with mercy and that they have to be proportionate. It is for that reason that the following sentences are being meted out.' (Our emphasis.)

Earlier, Raulinga J had said the following:

'[I]t is high time that we should start to emphasise the rights of the victims more than emphasising the rights of the perpetrators.'

[9] The court below did not take into account the period of three years and seven months that the appellant had spent in detention pending the finalisation of the trial.

[10] The 'campaign' purportedly started by the court below is unhelpful and is against the preponderance of authorities which state that a balance should be struck between societal interests and the interests of an accused person. The failure to take into account the considerable period spent in detention is a further misdirection, entitling this court to interfere in the sentence imposed.[1]

[11] There is no rule of thumb that in determining an appropriate sentence, one should take into account the period of detention awaiting the completion of the trial and double it before subtracting it from what the sentence would otherwise have been. Put differently, there is no mechanical formula to determine the extent to which a sentence should be reduced by reason of the period of detention prior to conviction. In this regard see *S v Radebe* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) at para 11. In para 13 the following appears:

'In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22.) A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced.'

Part of para 14 reads as follows:

[1] See *S v Kgosimore* [1999] ZASCA 63; 1999 (2) SACR 238 (SCA), para 10.

‘A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed.’

[12] It was suggested on behalf of the appellant that an effective sentence of between 16 and 20 years would be appropriate. We disagree. Having regard to the brazen manner in which the bank was robbed and the getaway effected, including a shootout wild-west style with innocent bystanders being drawn into the robbers’ web of violence, a lenient sentence such as the one proposed would send out the wrong message. It must become clear to would-be perpetrators of offences such as the ones in question that they will be met with the full force of the law and that sentences will be appropriate to the offences they commit. However, the effective sentence imposed motivated by the court below on the basis of the ‘campaign’ referred to is severe. Moreover, the period of incarceration pending the finalisation of the trial was substantial and ought to have been taken into account by the court below in favour of the appellant. In our view, having regard to all the circumstances, including the time spent in detention pending the outcome of the trial, an effective sentence of 27 years’ imprisonment constituted in the manner appearing in the substituted order that follows, is appropriate.

[13] The following order is made:

1 The appeal in relation to the convictions on counts 1 and 2 and the related sentences is upheld. Those convictions and the related sentences are set aside.

2 The appeal against sentence in relation to the remaining counts is upheld to the extent reflected in the substituted order that follows.

3 The order of the court below in relation to sentence is set aside and substituted as follows:

‘Count 3, sentenced to fifteen (15) years’ imprisonment;

Counts 4 and 5 are taken together and the sentence is one of twelve (12) years’ imprisonment;

Counts 6-9 taken together for purpose of sentence, twelve (12) years’ imprisonment;

Counts 10 and 11 taken together for purpose of sentence, three (3) years’ imprisonment.

The sentences in respect of counts 6, 7, 8, 9, 10 and 11 will run concurrently with the sentence imposed in respect of counts 4 and 5.

Accused three will serve an effective term of twenty seven (27) years' imprisonment.'

_____

M S Navsa

Acting Deputy President

_____

K G B Swain

Judge of Appeal

_____

R S Mathopo

Judge of Appeal

_____

F E Mokgohloa

Acting Judge of Appeal

_____

J Ploos van Amstel

Acting Judge of Appeal

Appearances:

For the Appellant:	H Fraser Instructed by: Pieter Coetzee Attorneys, Pretoria Martins Attorneys, Bloemfontein
For the Respondent:	J P van der Westhuizen Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecution, Bloemfontein