SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1296/2016

In the matter between:

MILTON ZWANE	**FIRST APPELLANT**
STEVE MNCUBE	**SECOND APPELLANT**
DHUMISANE KHUMALO	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Milton Zwane & others* v *The State*, (1296/2016) [2017] ZASCA 179 (1 December 2017)

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

Heard: 01 November 2017

Delivered: 01 December 2017

Summary: Appeal against sentence – misdirections by the court a quo, including failure to take period of incarceration into account pending finalisation of the trial – sentences reduced.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw, Fabricius and Hughes JJ, sitting as Court of Appeal):

1. The appeals against the sentences are upheld to the extent reflected hereunder.
2. The sentences imposed by the trial court are set aside and replaced with the following:

'Accused 1 and 2:
Count 3: Each of the accused is sentenced to 15 years' imprisonment.
Counts 4 and 5 (taken together for purposes of sentence): Each of the accused is sentenced to 12 years' imprisonment.
Counts 6 – 9 (taken together for purposes of sentence): Each of the accused is sentenced to 10 years' imprisonment.
Counts 10 and 11 (taken together for purposes of sentence): Each of the accused is sentenced to 3 years' imprisonment.
The sentences in respect of counts 6, 7, 8, 9, 10 and 11 will run concurrently with the sentences on counts 4 and 5.
The effective sentence for each of the first and second accused is imprisonment of 27 years;

(ii) Accused 4:

Count 3: The accused is sentenced to 15 years' imprisonment.
Counts 4 and 5 (taken together for purposes of sentence): The

accused is sentenced to 12 years' imprisonment.

Counts 6–9 (taken together for purposes of sentence): The accused is sentenced to 10 years' imprisonment.

The sentences in respect of counts 4 and 5 will run concurrently with the sentence on count 3.

The effective sentence is imprisonment of 25 years.'

JUDGMENT

Mokgohloa AJA (Navsa, Swain and Mathopo JJA and Ploos van Amstel AJA concurring):

[1] This is an appeal by Messrs Milton Zwane, Steve Mncube, and Dhumisane Khumalo, who were accused 1, 2 and 4 respectively in the Gauteng Division of the High Court, Pretoria. They were, together with their co-accused, charged with five counts of robbery with aggravating circumstances, four counts of attempted murder and two counts involving the unlawful possession of firearms and ammunition.

[2] On 7 April 2010 the appellants were convicted as charged, except that on counts 1 and 2 they were convicted of theft. Accused 4 was acquitted on counts 10 and 11. The trial court (Raulinga J) sentenced the appellants as follows:

1. Accused 1 and 2:

Count 1: ten years' imprisonment.

Count 2: eight years' imprisonment.

Count 3: twenty years' imprisonment.

Counts 4 and 5 (taken together for purposes of sentence): 15 years' imprisonment.

Counts 6–9 (taken together for purposes of sentence): 15 years' imprisonment.

Counts 10 and 11 (taken together for purposes of sentence): 3 years' imprisonment.

The trial court ordered the sentence in respect of count 2 to run concurrently with the sentence in respect of count 1 and the sentences relating to counts 6–9 and counts 10 and 11 to run concurrently with the sentences in respect of counts 4 and 5.

The first and second appellants were thus each sentenced to an effective sentence of 45 years' imprisonment.

Accused 4

Count 1: ten years' imprisonment

Count 2: six years' imprisonment

Count 3: 18 years' imprisonment

Count 4 and 5: (taken together for purposes of sentence): 15 years' imprisonment.

Count 6–9: (taken together for purposes of sentence): 15 years' imprisonment.

The court ordered the sentence in respect of count 2 to run concurrently with the sentence in respect of count 1 and the sentences relating to counts 6–9 to run concurrently with the sentence in respect of counts 4 and 5.

The third appellant was sentenced to an effective sentence of 43 years' imprisonment.

[3] The appellants' application for leave to appeal was dismissed on 24 November 2011 by Raulinga J.

[4] On 23 February 2015 their joint application for leave to appeal against conviction and sentence, was granted by this Court to the full court of the Gauteng Division of the High Court, Pretoria. On 23 May 2016 the full court confirmed the convictions and sentences except the convictions and sentences on counts 1 and 2, which were set aside. Consequently the effect was that accused 1 and 2 each had an effective sentence of 35 years' imprisonment and accused 4 had an effective sentence of 33 years' imprisonment.

[5] On 24 October 2016 they were granted special leave by this Court to appeal against the sentences in respect of counts 3–11.

[6] The basic facts are that on 28 September 2006 the appellants, together with their co-accused, armed with firearms, proceeded to Modimolle where they robbed a bank and fled the scene driving in two getaway motor vehicles i.e a BMW and a Volkswagen Polo, which were reported stolen a week before the bank robbery. Whilst fleeing, the police gave chase and the appellants shot at them. The appellants hijacked two more motor vehicles belonging to innocent bystanders. The appellants were arrested and charged with robbery with aggravating circumstances, attempted murder and unlawful possession of firearms and ammunition.

[7] In sentencing the appellants, the trial court took into consideration the seriousness of the offences and the impact they had on the community of Modimole. It noted that, in making their getaway, the appellants shot at the police, damaged their vehicles, and hijacked two

motor vehicles which belonged to innocent bystanders. The court recorded further that innocent people were traumatised by the robbery and its aftermath.

[8] It was argued on behalf of the appellants that the trial court erred in relying on the provisions of s 51(1) of the Criminal Law Amendment Act (the Minimum Sentence Act)[1], because the appellants were not informed of the applicability and implications of the provisions of the Act. Second, that the trial court failed to take into account the period of almost three years and seven months that the appellants had spent in detention pending the finalisation of the trial. Third, that the sentences were too severe and should be reduced significantly to be proportionate to the nature and seriousness of the offences.

[9] As regards the applicability of the Minimum Sentence Act, the appellants relied on *Machongo v S*[2] where this Court stated that:
'It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence.'

[10] In the present matter, the provisions of the Minimum Sentence Act were stated in the indictment. At the commencement of the trial and when the charges were put to the appellants, they were informed that the State would rely on the provisions of the Act. The appellants were legally represented and the indictment was brought to their attention to enable them to prepare and conduct their defences. I therefore find that the appellants were well appraised of the applicability of the Minimum

[1] Criminal Law Amendment Act 105 of 1997.
[2] *Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014); 2014 JDR 2472 (SCA) para 10.

Sentence Act. In my view, their right to a fair trial had not been infringed.

[11] Regarding the severity of the sentence, the appellants suggested that an effective sentence of between 16 and 20 years' imprisonment would be appropriate. I 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 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 period of incarceration pending the finalisation of the trial was substantial and ought to have been taken into account in favour of the appellants.

[12] In sentencing the appellants Raulinga J stated that:

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

[13] The above statement offends against the triad enunciated in *S v Zinn*[3] which remain instructive to every sentencing court. A court should, when determining sentence, try to balance evenly the nature and circumstances of the offence, the characteristics and circumstances of the offender, and the impact of the crime on the community, its welfare and concern. A court should strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. Regrettably, the court a quo failed to strike this balance but chose to accentuate the interest of the victims more than that of the appellants. This, in my view, is a misdirection that warrants interference by this Court.

[14] The failure by the trial court to take into consideration the considerable period spent in prison is a further misdirection, entitling this Court to interfere with the sentences imposed.[4]

[15] Having stated the above, I am of the view that an effective sentence of 27 years' imprisonment is appropriate in respect of the first and second appellants and an effective 25 years' imprisonment in respect of the third appellant.

[16] The following order is made:

1. The appeals against the sentences are upheld to the extent reflected hereunder.
2. The sentences imposed by the trial court are set aside and replaced

[3] *S v Zinn* 1969 (2) SA 537 (A) at 540G.
[4] *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

with the following:

'Accused 1 and 2:
Count 3: Each of the accused is sentenced to 15 years' imprisonment.
Counts 4 and 5 (taken together for purposes of sentence): Each of the accused is sentenced to 12 years' imprisonment.
Counts 6 – 9 (taken together for purposes of sentence): Each of the accused is sentenced to 10 years' imprisonment.
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The sentences in respect of counts 4 and 5 will run concurrently with the sentence on count 3.
The effective sentence is imprisonment of 25 years.'

FE MOKGOHLOA
ACTING JUDGE OF APPEAL

APPEARANCES

For the Appellants:	Mr Mujuto
Instructed by:	Legal Aid South Africa, Pretoria
	Legal Aid South Africa, Bloemfontein
For the Respondent:	J P van der Westhuysen
Instructed by:	Office of the Director of Public Prosecutions, Pretoria