REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A140/2020
DPP REF. NO: SA53/2020

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED: YES/NO
03 March 2022

In the matter between:

ARMANDO HLONGO	**1ST APPELLANT**
STEVE MASINGA	**2ND APPELLANT**
LAPITO NYALUNGE	**3RD APPELLANT**
JITO ARTUK NYAMASHE	**4TH APPELLANT**

and

THE STATE	**RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] This is an appeal against the sentence imposed by the Benoni Regional Court on 2 November 2018. The appellants who were legally represented during

the trial proceedings were convicted of two counts of robbery with aggravating circumstances (ie. counts 1 and 2) and count 3 for contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002.

[2] The first, third, and fourth appellants were each sentenced to fifteen (15) years' imprisonment on counts 1 and 2 respectively, and six (6) months' imprisonment on count 3. The court ordered that ten (10) years of the sentence on count 2 and the sentence on count 3 should run concurrently with the sentence on count 1, giving an effective sentence of twenty (20) years imprisonment for each appellant. The second appellant was sentenced to twenty (20) years' imprisonment on counts 1 and 2 respectively, and six (6) months' imprisonment on count 3. It was ordered that the sentences on counts 2 and 3 should run concurrently with the sentence on count 1, also giving an effective sentence of twenty (20) years imprisonment. This appeal comes with leave granted by the trial court on sentence only. Leave to appeal in respect of sentence is also confirmed by the Notice of Appeal filed on behalf of the appellants.

[3] As this appeal is against sentence only, the factual findings of the trial court must be accepted, and it is therefore not necessary to deal in detail with the evidence on the merits. However, one needs to have a background of the facts in order to appreciate the ultimate sentence. It should be noted that all the appellants tendered a plea of guilty in respect of count 3 for contravening the provisions of the Immigration Act in that on 28 June 2017, they entered and remained in the Republic of South Africa without being in possession of the required valid documents.

[4] The offences for which the appellants were convicted and sentenced as regards counts 1 and 2 occurred on 28 June 2017, at or near Daveyton in the regional division of Gauteng. The State alleged that the appellants acted in the furtherance of a common purpose and robbed D[....] N[....] ("D[....]") and Busisiwe Sesoko ("Busisiwe") of their properties. The aggravating circumstances being that

a firearm and a knife were used when D[....] was robbed and a knife was used when Busisiwe was robbed.

[5] On the day of the incident around 4:30, D[....] and her 16-year-old cousin B[....] N[....] were on their way to catch a taxi to where D[....] work as a vendor. As they were walking, a silver motor vehicle coming from the same direction as them, passed them and suddenly made a u-turn coming to their direction. They crossed the road next to an Indian shop and two men alighted from the vehicle and also crossed the road. One of these men took out a knife and placed it on B[....] N[....]'s neck and the other pointed a firearm at D[....], by placing it on her neck. D[....] and her cousin dropped the bags they were holding and the men demanded all their items. D[....] took out the money she had on her breast and cellphone and gave it to the man who was pointing her with a firearm. The men took their bags from the ground and went back to the motor vehicle.

[6] As D[....] and her cousin were still standing there, they noticed a woman coming from one of the premises about 20 meters away, further down the street. This woman was robbed by the same people driving in the same vehicle which robbed them. She went to the police station to report the matter and informed the police that she was able to recognise appellants 2 and 3 who were accused 2 and 3 respectively at the court a quo. She explained that she knew them from Eskwereni at the Daveyton Mall. She stated that she and the second appellant knew each other very well and that they attend the same church.

[7] After she opened the case, she went with her husband to the Mall to try and trace the appellants. She spotted them and noticed that they were in the same silver motor vehicle they were travelling in on the day she was robbed. They went to the police station to inform the police that the people who robbed her were at the mall. The police went with them to the mall and some of her robbed items were found in the vehicle of the appellants.

[8] With regards to Busisiwe Sesoko, she explained that around 4:30 she was standing outside her gate waiting for a taxi to go to work when she noticed a

silver TSI Polo motor vehicle approaching. The vehicle drove past her and suddenly reversed and two men alighted from the back of the vehicle. She dropped her bag when she heard the sound of knives and saw the manner in which they were approaching that they were going to rob her. The men searched her and took her cellphone and the jacket she was wearing. She screamed and her mother came outside and the two men picked up her bag from the ground and got into the vehicle and drove off. She went to the police station around 5:00 to report the matter and told the police that she would be able to point out the people who robbed her and gave a description of their clothing.

[9] At the police station she met D[....] who also came to report her matter and explained that D[....] saw when she was robbed. She testified that the day the appellants were arrested, she found them already arrested, handcuffed, and lying on the ground next to the silver Polo TSI motor vehicle they were driving on the day of the incident, and were also wearing the same clothes which they were wearing when she was robbed. She identified the first and fourth appellants as the people who robbed her. It was not in dispute that some of the robbed items belonging to the two complainants were found where the appellants were arrested and some were found at the homes of the first and third appellants respectively.

[10] The grounds of appeal as noted in the notice of appeal on behalf of the first and third appellants is that the trial court failed to take into consideration that the appellants were first offenders and that substantial and compelling circumstances existed which justified a deviation from the imposition of the prescribed minimum sentence. It was submitted that the effective sentence of twenty (20) years imprisonment is strikingly inappropriate and induces a sense of shock. On behalf of the second appellant, it is averred that the trial court misdirected itself in finding that the appellant is a second offender, and that the effective sentence of twenty (20) years imprisonment is strikingly inappropriate and induces a sense of shock.

[11] With regards to the fourth appellant, it is averred that an effective term of twenty (20) years imprisonment is strikingly inappropriate, and that the trial court erred in not imposing a shorter term of imprisonment, coupled with community service and further suspended sentence.

[12] In order to deal with the grounds of appeal relating to the alleged misdirection by the trial court, it is important to restate the legal principles on sentencing. It is trite law that the imposition of sentence falls within the discretion of the court burdened with the task of imposing the sentence and the appeal court will only interfere with the sentence if the reasoning of the trial court was vitiated by misdirection, or the sentence imposed induces a sense of shock, or can be said to be startling inappropriate. Nonetheless, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not exercise its sentencing discretion at all, or exercised it improperly, or unreasonably. This court must also determine, as a court of appeal, whether the sentence imposed on the appellants was justified.

[13] In dealing with the court's approach in appeals against sentence, Boshielo JA in **Mokela v The State**[1] stated that:

> "It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte balance to interfere with sentences which have been properly imposed by a sentencing court. This includes the terms and conditions imposed by a sentencing court, on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in manyjudgments of this Court". (See: S v Pieters 79876) SA 717 (A) at 727F-H; S v Malgas 2001 (7) SACR 469 (SCA), (2001 (2) SA 7222; [2007] 3 All SA 220) para 72;

[1] 2012 (1) SACR 431 (SCA) at para 9.

Director of Public Prosecutions v Mngoma 2070 (7) SACR 427 (SCA) para 77).

[14] Mr Kgokane argued on behalf of the first and third appellants that the two counts of robbery were committed not far apart in terms of time and place, and that the trial court should have considered that both robberies were part and parcel of one action or one offence, where the principle of single intent should be applicable to warrant a cumulatively sentence to be served. He submitted in his heads of argument that the effective sentence of 20 years' imprisonment imposed on the appellants is startlingly harsh and inappropriate, in that it serves the same deterrent purpose as would the minimum sentence set for repeated offenders of a similar offence of robbery with aggravating circumstances. Put differently, that the sentence imposed treats the first and third appellants as repeated offenders because there are no glaring aggravating circumstances that were applied or stated by the trial court that justify the imposition of the sentence in excess of the minimum sentence set by the legislature.

[15] Mr Kgokane further submitted that as opposed to the second appellant who is a repeated offender for the offence of robbery with aggravating circumstances, the trial court erred in finding that the personal circumstances of the appellants taken together with the surrounding circumstances of the case do not constitute substantial and compelling circumstances. He also submitted that the trial court misdirected itself in not ordering that the whole sentence imposed on count 2 should run concurrently with the sentence imposed on count 1, taking into account that the trial court clearly indicated during trial proceedings that there should be a line of distinction drawn between appellants 1, 3, and 4 from appellant 2.

[16] While Mr Tshole on behalf of the fourth appellant indicated that the foundation of his submissions is based on conviction, he conceded that since the notice of appeal only relates to sentence, he shares the same sentiments as Mr Kgokane regarding sentence. He also submitted that the trial court erred in not considering the personal circumstances of the appellant as not constituting

substantial and compelling circumstances justifying a deviation from the imposition of the prescribed minimum sentence of fifteen (15) years imprisonment.

[17] The respondent on the other hand submitted that the appellants were correctly sentenced because the trial court was obliged to impose the prescribed minimum sentence in respect of counts 1 and 2 of robbery, having found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence. In support of Mr Kgokane's submission, Mr Maritz further submitted that in respect of the first, third, and fourth appellants, the trial court should have ordered the whole sentence on count 2 to run concurrently with the sentence on count 1, giving an effective sentence of 15 years' imprisonment, taking into account that the trial court indicated that there should be a distinction between these appellants and the second appellant whom the court already ordered his sentence on count 2, to run concurrently with the sentence on count 1, making it an effective term of 20 years imprisonment. Counsel also submitted that the trial court should have ordered that the sentence of 15 years imposed on the second appellant on 2 November 2017, and is currently serving, should run concurrently with the 20 years' sentence, because the trial court had had a duty to make such an order.

[18] It is clear from the record of the trial proceedings that the appellants were warned of the provisions of Minimum Sentences Act. In considering the appropriate sentence to impose, the trial court took into consideration the appellant's personal circumstances, and was also mindful of the 'triad' factors pertaining to sentences as enunciated in **S v Zinn**[1] namely: 'the crime, the offender and the interests of society. With that in mind, it is important to heed to the purpose for which legislature was enacted when it prescribed sentences for specific offences which falls under section 51 (2) for which the appellants were convicted and sentenced for.

[1] 1969 (2) SA 537 (A)

[19] The contention that the trial court erred in not imposing a shorter term of imprisonment coupled with community service and a further suspended sentence on behalf of the fourth appellant, is in my view, misplaced. The offence of robbery which the fourth appellant was convicted and sentence for, falls under the purview of the Act 105 of 1997 which carries a prescribed sentence of fifteen (15) years imprisonment and cannot be deviated from lightly and for flimsy reasons, as enunciated by the Supreme Court of Appeal in the case of **S v Malgas**[1]. This principle was reaffirmed by the court in **S v Matyityi**[2] when it held that a court imposing a sentence in terms of Act 105 of 1997 is not free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation.

[20] It is on record that when the trial court imposed the sentence on all the appellants, and having found no substantial and compelling circumstances which warranted a deviation from the imposition of the prescribed minimum sentence of fifteen (15) years imprisonment on appellants 1; 3; and 4, and twenty (20) years imprisonment on appellant 2, it held that as a measure of mercy, it will consider ordering the sentences to run concurrently.

[21] It is common cause that the trial court ordered ten years in count 2 to run concurrently with the sentence in count 1. This having been done, meant that the first, third and fourth appellants received the same sentence as the second appellant who is a repeated offender, and thus showing no distinction between the appellants. In the circumstances, I am inclined to agree with the submissions made by Messrs. Kgokane and Maritz that the trial court should have ordered the whole sentence in count 2 to run concurrent with the sentence on count 1, in respect of the first, third, and fourth appellants, rather than a part of it, having regard to the fact that the two counts of robbery were committed not far apart in terms of time and place, as argued by Mr Kgokane.

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[1] 2001 (1) SACR 469 (SCA).
[2] 2011 (1) SACR 40 (SCA).

[22] Section 280 of the Criminal Procedure Act 51 of 1977 ("CPA") provides the sentencing court with a discretion, when sentencing an accused to several sentences, to make an order that such sentences run concurrently to have cumulative effect of such sentences.[1] It follows that a court of appeal can only interfere with the exercise of such a discretion by the sentencing court where it is satisfied that the sentencing court did not exercise its discretion properly or judicially, and where the sentence imposed is not justified.

[23] It has been indicated by our courts in a number of cases that sentences should be ordered to run concurrently when there is a close link between offences, and where the elements of one are closely bound up with the elements of another. In the case of **S v Mthetwa And Other**[2], the accused committed two separate armed robberies, 30 minutes apart, and the appeal court found that the robberies were sufficiently closely linked in terms of the locality, time and the overall intent in respect of the crimes to satisfy the need for concurrent running of sentences.

This court stated as follows:

> "[22] An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' (S v Mokela 2012 (7) SACR 437 (SCA), (12017] ZASCA 766) para 7 7). Put differently, where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered (S v Mate 2000 (7) SACR 552 (T)).

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[1] Section 280 - Cumulative or concurrent sentences:
(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[2] 2015 (1) SACR 302 (GP).

> [23] In the present case there was indeed an inextricable link between the offences in terms of the locality, time and the protagonists. There was also a substantial overlap in the overall intent in respect of the crimes. The failure of the trial court to take these factors into consideration resulted in the cumulative effect of the sentence being disturbingly inappropriate. These factors justified an order of concurrence in the sentences. This is a further basis for interference by this court".

[24] The question whether the trial court misdirected itself in not directing that the whole sentence imposed on count 2 in respect of the first, third and fourth appellants should run concurrently with the sentence imposed on count 1, gives rise to the same issue which every court of appeal sitting on appeal against the sentence has to decide, namely, whether the sentence imposed is an appropriate sentence.

[25] In light of the circumstance of this case, and the fact that the first, third and fourth appellants, are first offenders, I am of the view that the trial court did not exercise its discretion properly or judicially. Consequently, the trial court misdirected itself in not making an order of full concurrence in the sentences as the circumstances justify an order of concurrence in the sentence, which is the basis upon which this court is entitled to interfere with the decision of the trial court. Be that as it may, the interests of justice demand an interference with the trial court's decision in this regard.

[26] With regards to the submission made by the respondent that the effective sentence of twenty (20) imposed on the second appellant should have been ordered to run concurrently with the sentence of fifteen (15) years that he is currently serving, section 280 of the CPA also makes specific provision that the later sentence can be served concurrently with a sentence previously imposed by another court. I am inclined to agree with the submission because if no such order is made, the effect of such sentences will be such that when a person who is already convicted and is serving sentence is sentenced again for another offence, such sentence will commence after the expiration of the sentence he is

already serving. The statutory expression in section 280(1) and (2) of the CPA applies whether the offender is still serving a sentence for the earlier conviction.

[27] Having given proper and due consideration to all the circumstances in as far as the second appellant is concerned, I am of the view that failure by the trial court to order the sentence of twenty (20) years to run concurrently with the sentence of fifteen (15) years imprisonment which the second appellant is already serving, was a travesty of justice. In the ultimate, this is a further basis for interference by this court.

[28] In the circumstances, the following order is made:

1. The appeal succeeds to the extent that the sentences are varied by the order in the following terms:

1.1 In respect of the first, third and fourth appellants, the sentence of fifteen (15) years on count 2 and six (6) months on count 3, shall run concurrently with the sentence of fifteen (15) years on count 1.

1.2 The effective term of imprisonment to be served by the first, third and fourth appellants is fifteen (15) years.

1.3 In respect of the second appellant, the effective sentence of twenty (20) years shall run concurrently with the sentence of fifteen (15) years imprisonment imposed on the second appellant on 2 November 2017.

1.4 The effective sentence to be served by the second appellant is a period of (20) years imprisonment.

1.5 The sentences are antedated to 2 November 2018 in terms of section 282 of the CPA.

PD. PHAHLANE
OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

M. MOTHA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For Appellants 1, 2 and 3	Advocate JL. Kgokane
Instructed by	Legal Aid South Africa Locarno House Francis Baard Street, Pretoria Email: Letauk@legal-aid.co.za
For Appellant 4	: Advocate ME. Tshole
Instructed by	: Wiseman S Khalishwayo Attorneys Email: mtshole@webmail.co.za
For the Respondent	: Advocate GJC Maritz
Instructed by	Director of Public Prosecution, Pretoria Tel: 012 351 6832 Email: gicmaritz@npa.gov.za
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