
SOUTH AFRICA / JUDGMENT

Cossa and Another v S (A200/2016) [2018] ZAGPPHC 759 (29 March 2018)

[2018] ZAGPPHC 759

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis, M.P Mdalana

CASE / FILE NUMBER

A200/2016

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT

OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE

NO: A200/2016

29/3/2018

In

the matter between: FRANCISCO
ANTON
COSSA
First
Appellant
HELMAN
SAMBO
Second
Appellant
and
THE
STATE
Respondent

JUDGMENT

DAVIS, J

[1] Nature of the matter

This is an appeal against sentence. The principal issues are the cumulative effect of sentences and the concurrency of multiple sentences.

[2] The convictions and their sentences

2.1 The first appellant was convicted of housebreaking and robbery with aggravating circumstances and sentenced to 15 years imprisonment. In addition, he was convicted of having been in possession of an unlicensed semi-automatic pistol and sentenced to a further 15 years imprisonment, resulting in an effective sentence of 30 years imprisonment;

2.2 The second appellant was convicted of possession of a .38 unlicensed firearm and sentenced to 10 years imprisonment · in respect thereof with an additional 2 years imprisonment for having been in possession of ammunition for that firearm. He was further convicted of having been in possession of a further unlicensed firearm, a semi-automatic pistol, for which he was sentenced to 15 years imprisonment with a further 2 years imprisonment added for possession of ammunition for the firearm. It was ordered that all these sentences run concurrently with each other;

2.3 The second appellant's second set of convictions were for a spate of three robberies conducted in an urban area on the day before

Christmas 2010. He was sentenced to 15 years imprisonment for each of the robberies and their sentences were all ordered to run

concurrently with each other;

2.4 In addition, it was ordered that the sentences of both the first set convictions (the firearm offences) and the second set of convictions

(the robberies) were to run concurrently, resulting in an effective joint imprisonment sentence of 15 years for all these sentences;

2.5 Lastly, the second appellant was convicted of a further crime of housebreaking and robbery for which he was sentenced to an additional

15 years imprisonment, resulting in his total incarceration period also being effectively 30 years.

[3] Leave to appeal

3.1 The appellants raised some concerns as to the quality of the various interpreters used from time to time and whether they had at all times been properly sworn in , but leave to appeal against their convictions and sentences was refused by the court a quo;

3.2 On petition, the appellants obtained leave to appeal against their sentences only;

[4] Basis of appeals

4.1 On behalf of both appellants it was argued that, although each individual sentence was correctly imposed in respect of each conviction and fitted the crime in each instance and that there were no compelling circumstances justifying an interference with the prescribed minimum sentences where applicable, the cumulative effect of the sentences were shockingly harsh and inappropriate and permitted interference on appeal;

4.2 In addition , the appellants argued that the four years' incarceration spent awaiting trial prior to their conviction and sentencing should also have been taken into account as proverbial "time served".

[5] Applicable general principles

5.1 On behalf of the appellants Mr Van As referred us to the following apposite dictum in S v Kruger 2012 (1) SACR 369 (SCA) at par [9]:

"The ... court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed on different times and at different places. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that this is a daunting exercise indeed".

5.2 In respect of the issue of how the time which the appellants had been incarcerated prior to finalization of their trial and the imposition and commencement of their sentences are to be dealt with, we were referred to the following dictum in S v Vilakazi 2009

(1) SACR 552 (SCA) per Nugent JA at para [60]

"There is one further consideration that must be brought into account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period in imprisonment while awaiting trial is not then brought into account in any custodial sentence that is then imposed." (the learned judge of appeal made an appropriate order, adjusting the date of expiry of the sentence);

5.3 To my mind the two cases which I have quoted adequately reflect the applicable principles and I do not therefore deem it necessary to quote other examples.

[6] Application

When the issue of sentencing was considered by the learned magistrate in the court a quo, it appears as if he treated the two appellants

almost equally. Appellant one had two prior convictions but was only convicted of a single robbery whilst appellant number two, although a first offender, was convicted of multiple robberies and, as they had been in cahoots in respect of one of the robberies, they both got 30 years effective imprisonment. Argument on appeal (on both sides) almost also strayed along this path. To do so would, to my mind, be manifestly unjust and run contrary to the trite principle of the individualisation of sentences to fit each particular convicted person. I shall therefore deal with the appellants separately.

6.1 The first appellant

6.1.1 The first appellant was 35 years old at the time of sentencing. He was a qualified panel beater doing ad hoc panelbeating jobs and selling bags to make a living at the time of his arrest. He is unmarried but has 4 minor children, of which 3 are in Mozambique. He himself was born in Mozambique. His father had passed away when he was six years old and he came to South Africa when he was 17 years old.

6.1.2 The robbery of which the first appellant was convicted was not a particularly violent one and took place at a residential address

where the first and second appellants, masked with balaclavas entered the house and held the occupants at gunpoint while relieving them of jewellery, cellphones, music and media equipment and a plasma screen TV. The threat of violence and the traumatic invasion of the secure environment as well as the planned nature of the robbery, motivated purely by greed justifies the prescribed minimum sentence without any limitation or interference therewith.

6.1.3

The previous convictions, although for similar type of offences, namely housebreaking, need analysis. They were three in total, committed in September 2001, September 2003 and April 2005. In each of the instances, the appellant received a jail sentence and, if he had, for example been

convicted of the first housebreaking offence, served his sentence, then committed the second and had been convicted and served his sentence and then had the same happen with the third offence, one would have been more than justified in concluding that the sentences had no deterrent effect and that a longer (or very long) incarceration should be the only appropriate sentence in respect of the offences forming the subject of the appeal. Scrutiny of his SAP69 however, reveals that he was convicted and sentenced within a month after having committed the housebreaking in April 2005 and whilst still serving the 5 years imprisonment sentence imposed in respect thereof, was convicted on 19 September 2007 in respect of the housebreakings committed in September 2001 and September 2003. The four years imprisonment in respect of each were ordered to run concurrently with each other and the sentence then already served. What is important however, is that it did not take him a long time after having served his sentences to stray into the escalated crime of robbery;

6.1.4 In considering whether the sentence in respect of the robbery and the possession of the illegal firearm should run concurrently or not, I had regard to various other cases, notably *S v Dube* 2012 (2) SACR 579 ECG and the fact that the two offences are interrelated. An effective sentence of thirty years strikes me as excessive to the extent that appellate interference is warranted and in this case it will be reflected in the ordering of concurrency of sentences;

6.1.5 The next question is whether the effective period of incarceration should further be reduced as a result of the incarceration prior to sentencing. Both appellants were arrested on 18 January 2011 and were kept in custody for the duration for the trial which terminated on 21 January 2015. There were various reasons for the long trial period which included the calling of some 30 witnesses and trials-

within-a-trial. In the end, the appellants spent 4 years in detention pending the outcome of the trial;

6.1.6 As illustrated by the cases referred to above, in considering an appropriate sentence, some element of mathematical calculation is involved. In the court a quo this lead the magistrate to 30 years imprisonment whilst he had been aware of the pre-sentencing period of detention. In my view, this is disproportionately long and should be reduced as reflected in the order I propose at the conclusion of this judgment, after having duly taken the pre- sentencing period of detention in account.

6.2 The second appellant

6.2.1 The second appellant was 44 years old at the time of sentencing. He was then in a stable relationship for seven years. He also has three children of which one is in Mozambique. He was also born in Mozambique but has been in South Africa since 1999.

6.2.2 Although the second appellant is a first offender, he engaged in a series of housebreakings and robberies whilst armed with illegal firearms and ammunition. One robbery took place on 24 July 2010 whilst three robberies took place during a spree on 24 December 2010.

6.2.3 The sentences relating to the convictions concerning the firearms and those relating to the "spree" were ordered to run

concurrently and those orders are not attacked on appeal.

6.2.4 No concurrency was ordered in respect of the 15 years sentence of imprisonment imposed in respect of the robbery committed on 24 July 2010 (charge 11) resulting in an effective sentence of 30 years. When one considers that the second appellant has also spent a period of 4 years in detention prior to finalization of the trial, the cumulative effect of the sentence is so disproportionate that it should be mitigated;

6.2.5 As with the first appellant, I have taken the pre-sentencing period of detention into account in doing the mathematical exercise required in reaching an appropriate sentence in the circumstances of this case;

6.2.6 The second appellant is almost 10 years the first appellant's senior and although he was described by one of the complainants as apparently the "milder" of the robbers, his spree of robbery justifies a heavier sentence than that effectively imposed on the first appellant in respect of the joint robbery of which they had been convicted;

6.2.7 I am of the view that, whilst being mindful of the cumulative effect of multiple sentences, it must still follow that multiple offences

should attract a heavier penalty than singular offences. Not only would simple logic dictate this, but to hold otherwise might give licence to offenders to go on even longer sprees of criminal activities than the second appellant herein with the knowledge or expectation that, if convicted, it would not result in a heavier penalty. Such an approach in sentencing would not serve, but rather undermine the interests of society, being one of the pillars of sentencing considerations determined in the locus classicus case of *S v Zinn* 1969

(2) SA 537(A).

[7] Order:

I propose that the appeals against sentence of both appellants be upheld and that the orders of concurrency of sentences imposed by the court a quo be amended to read as follows:

"In respect of accused number 1:

The sentence in respect of count 5 (15 years) is to run concurrently with the sentence in respect of count 10 (15 years).

In respect of accused number 2

The sentences in respect of count 1 (10 years), count 2 (2 years), count 3 (15 years), count 4 (2 years), count 7 (15 years), count 8 (15 years) and count 9 (15 years) are all to run concurrently with each other and to run concurrently with the first ten years of the sentence in respect of count 11 (15 years), resulting in an effective sentence of 20 years imprisonment".

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

I agree and it is so ordered

M.P MDALANA

Acting Judge of the High Court

Date of Hearing: 22 March 2018

Judgment

delivered: 29 March 2018

APPEARANCES:

For the Appellants: Adv.

F Van As

Attorney for Appellants: Pretoria

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Pretoria

For the Respondent:

Adv. M Molatudi

Attorney for Respondent: Director Public Prosecution, Pretoria

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