

SOUTH AFRICA / JUDGMENT

Made v S (A81/2023) [2024] ZAGPPHC 761 (29 July 2024) [2024] ZAGPPHC 761

COURT

North Gauteng High Court, Pretoria

BEFORE

Basson, Lenayi, Mpshe

CASE / FILE NUMBER

A81/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case No: A81/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE: 29 JULY 2024

SIGNATURE: In

the matter between: VUSI
SIDWELL MADE
APPELLANT
and
THE
STATE
RESPONDENT

Coram: Basson, J, Lenayi J and Mpshe AJ
Heard
on: 22 July 2024

Delivered: 29 July 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 29 July 2024.

ORDER

It

is Ordered: The

appeal against sentence
is upheld and replaced
with the following:

"1. The sentences imposed in respect of count 2,3 and 4 are to run concurrently with the sentences imposed in respect of count
1. The accused is thus sentenced to an effective 35 (thirty-five) years' imprisonment.
2. In terms of s 282 of the Criminal Procedure Act, 51 of 1977 the sentence is antedated to 18 May 2010 being the date he was sentenced by the trial court."

JUDGMENT

BASSON, J (LENYAI, J AND MPSHE, AJ CONCURRING)

[1] The appellant was convicted and sentenced by the High Court of South Africa (Eastern Circuit Local Division of the Eastern Circuit District) on 8 and 18 May 2010 respectively ("the trial court") on the following charges:

Count 1: Murder read with section 51 of the Criminal Law Amendment Act "the Act"). [1]

Count 2: housebreaking with the intent to rob and robbery with aggravating circumstances read with section 51 of the Act.

Count 3: Unlawful possession of a firearm.

Count 4: Unlawful possession of ammunition.

[2] On 8 May 2010, the appellant was convicted on all charges by Kgomo, J and on 18 May 2010 the following sentences were imposed:

Count 1: 35 years' of imprisonment.

Count 2: 20 years' of imprisonment.

Count 3: three years' of imprisonment.

Count 4: one year of imprisonment.

- [3] The trial court ordered that only the sentences in respect of counts 3 and 4 be served concurrently with that in respect of count 1 - the effective sentence being 55 (fifty-five) years' imprisonment.

Brief

background

- [4] The appellant (accused no 1 in the trial court) was one of three accused. He, together with the second accused were found guilty on all three charges. Accused no 3 was discharged on all counts.
- [5] The charges emanated from an incident that took place on or about 29
- 30 January 2009, when the appellant and his co-accused broke into the shop of Mr Wilson Shongwe (the brother of the deceased) and murdered Mr Jan Zacharia Shongwe ("the deceased") who was a security guard at his brother's shop. They murdered him and robbed the shop of various items.
- [6] The state called 10 witnesses. The stolen goods, that had peculiar price markings on them, were found in the possession of the appellant (and accused no 2). The firearm that was used in the murder was subsequently retrieved from accused number 2's possession and was also positively linked to the murder
- [7] The appellant's application for leave to appeal his conviction and sentence was refused by the trial court. Following a petition, the appellant was granted leave to appeal to this court by the Supreme Court of Appeal ("SCA") against both conviction and sentence. The appellant has now abandoned the appeal on conviction and had instructed Legal Aid SA to only pursue the appeal on sentence.

Submissions

- [8] It was submitted on behalf of the appellant firstly that the sentence of 35 years imposed in respect of count 1 (murder) should be reduced to 25 years. Secondly, the court must order 10 years of the 20 years' prison sentence imposed in respect of count 2 to run concurrently the 25 years' imprisonment imposed in respect of count 1 bringing the total effective sentence to 35 years instead of 55 years, effective prison sentence.

Ad sentence

- [9] Section 51(1) of the Act provides for a minimum sentence of life imprisonment, while section 51(2) provides for a minimum sentence of 15 years of imprisonment for a first offender robbery with aggravating circumstances. In terms of section 51(3) a court must impose a lesser sentence when substantial and compelling circumstances are found to exist by a trial court.

[10] No previous convictions were approved against the appellant. At the time of conviction, the personal circumstances of the appellant were placed before the trial court. He was a 24 at the time when the crimes were committed. He also has no children and was mostly unemployed.

Test on appeal

[11] It is trite that a court sitting in an appeal may only interfere with the sentence imposed by the trial court if the court on appeal is satisfied that the trial court had misdirected itself in respect of the sentence imposed, or if the sentence imposed is so disturbingly inappropriate or disproportionate that "no reasonable court would have imposed it". It is trite that the test is not whether the trial court was wrong or whether the appeal court would have imposed a different sentence, the test is whether the trial court has exercised its discretion properly.[2] These principles are succinctly set out by the court S v Rabie:[3]

"1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

- (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2 The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[12] I have considered the sentences imposed in respect of counts 1 and 2. Although this bench may have arrived at a lesser sentence than those imposed in respect of counts 1 and 2, this is not the test. As already pointed out, in order to interfere with the sentences imposed in respect of counts 1 and 2, this court must first find that the trial court has misdirected itself in imposing the sentences in respect of these two counts. Having regard to the sentences imposed on the different charges and the reasoning for doing so, I cannot find that the trial had misdirected itself in imposing the sentences it did on the different charges. But, the enquiry does not end here.

Cumulative effect of the sentences

[13] The remaining issue in this appeal against sentence is whether the cumulative effect of the effective sentence of 55 years' imprisonment is unduly harsh, induce a sense of shock and/or is disproportionate to the offenses committed by the appellant.

[14] On any interpretation a sentence of 55 years is extremely lengthy. Ultimately, however, the question of sentence must be considered in the circumstances of this particular case[4] and bearing in mind that the imposition of sentence lies primarily within the discretion of the court.[5]

[15] Whilst I agree that the trial court correctly took into account the seriousness of the crime of murder and robbery. I am of the view that the cumulative effect of the imposed sentences was not properly considered and is shockingly disproportionate and too harsh in the circumstances. Proportionality is determined by considering the circumstances of a particular case as explained by the court in *S v Vilakazi*: [6]

"[16] It was submitted before us that in *Malgas* this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in *Malgas*. The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter 'conscious [of the fact] that the Legislature has ordained [the prescribed sentence] as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances' ... In the context of the judgment as a whole, and in particular the 'determinative test' that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite 'weighty justification' for the imposition of a lesser sentence."

[16] I am of the view that the trial court did not attached sufficient weight to the harsh effect the imposition ear's imprisonment would have on the appellant. Although the robberies and the particular heinous nature of the violence that accompanied it, should by no means be diminished, I am not persuaded that it warranted an effective prison sentence of 55 years' imprisonment.[7] On that basis, this court is at liberty to interfere and reconsider the cumulative effect of the sentence afresh.

[17] I am thus persuaded that there was a misdirection by the trial court in that the cumulative effect of the sentence induces a sense of shock and warrants interference insofar as the length of time of such incarceration is concerned. In my view, the court a quo ought more appropriately to have ordered that all the sentences run concurrently.

[18] I therefore propose the following order:

"1. The sentences imposed in respect of count 2,3 and 4 are to run concurrently with the sentences imposed in respect of count

1. The accused is thus sentenced to an effective 35 thirty-five) years' imprisonment.
2. In terms of s 282 of the Criminal Procedure Act, 51 of 1977 the sentence is antedated to 18 May 2010 being the date he was sentenced by the trial court."

A BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

M LENYAI

M MPSHE

ACTING JUDGE OF THE HIGH COURT

HEARD ON: 22 JULY 2024 JUDGMENT DELIVERED ON: 29 JULY MAY 2024 COUNSEL FOR THE APPELLANT: ADV. L VAN WYK INSTRUCTED BY: LEGAL AID COUNSEL FOR THE RESPONDENT: ADV K GERMISHUIS INSTRUCTED BY: OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

[1] Act 105 of 1997.

[2] S v Romer 2011 (2) SACR 153 (SCA) paras [22] - [23].

[3] 1975 (4) SA 855 (A) at 857 D-F.

[4] See S v Rabie 1975 (4) SA 855 (A) at 857 D-F: "1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal – (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised". 2 The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[4] See S v Rabie 1975 (4) SA 855 (A) at 857 D-F: "1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2 The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[5] S v Romer 2011

(2) SACR 153 (SCA).

[6] 2009 (1) SACR 552 (SCA).

[7] See also S v Matlala 2003 (1) SACR 80 (SCA) at para 9 and 10 and the cases cited therein.

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Prepared on 11 October 2026 · Esheria