

SOUTH AFRICA / JUDGMENT

Masiza v S (CA&R 315/2010) [2011] ZAECHGHC 44; 2013 (1) SACR 121 (ECG) (2 September 2011) [2011] ZAECHGHC 44

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D. Van Zyl, R. Griffiths

CASE / FILE NUMBER

CA&R 315/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN

Case

no: CA&R 315/2010

In

the matter between:

OSCAR

MASIZA

.....Appellant

and

THE

STATE

.....Respondent

APPEAL

JUDGMENT

D. VAN ZYL J:

The appellant was charged in the Port Elizabeth Regional Court with (i) robbery with aggravating circumstances (count 1); (ii) the unlawful possession of firearms (count 2); the unlawful possession of ammunition (count 3) and attempted murder (count 4). The charges arose from a cash-in-transit robbery which took place at Pier 14, a shopping complex in North End, Port Elizabeth on 24 November 2008. The appellant pleaded guilty to all four of the charges. According to the appellant's written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, on the day in question he was in the company of four other persons. They proceeded to the

Pier 14 shopping complex in two vehicles with the intention to “rob Fidelity Guards”. The appellant and two of his companions went into the building where they accosted a security guard as he was entering carrying a money trunk. The guard was “whipped” by one of the appellant’s companions, they took the trunk and made their escape. Police officers however arrived at the scene, causing the appellant and his companions to run into a furniture store. A shoot out followed during which the appellant also fired shots “with the intention of getting away.”

The State accepted the appellant’s plea of guilty and he was convicted accordingly. In sentencing the appellant the magistrate took the counts of robbery and possession of firearms and ammunition together for purposes of sentence and imposed a sentence of 20 years imprisonment. On the remaining charge of attempted murder the appellant was sentenced to 8 years imprisonment. He was accordingly sentenced effectively to 28 years imprisonment.

In deciding what an appropriate sentence would be in respect of the count of robbery the magistrate applied the provisions of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act). The reason therefor was the fact that the appellant was charged with and convicted of robbery with aggravating circumstances. Section 51(2) of the Amendment Act read with Part II of Schedule 2 thereof determines that in such event the Court must sentence an offender to a minimum of 15 years imprisonment in the case of a first offender, and to a sentence of not less than 20 years in the case of a second offender. In terms of section 51(3)

the Court may impose a sentence less than the prescribed minimum only if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Further, in terms of the proviso to section 51(2) where, as in the present matter, the Court which is tasked with the imposition of sentence is a Regional Court, the maximum term of imprisonment that may be imposed shall not exceed 20 years imprisonment.

The appellant has a number of previous convictions for robbery. However, as the magistrate quite correctly concluded, because it is not clear whether or not these previous convictions were in respect of robbery with aggravating circumstances and it being a necessary jurisdictional fact, the prescribed minimum sentence of 20 years imprisonment in respect of a second offender cannot find application in this case. The minimum sentence applicable was therefore 15 years imprisonment. The appellant’s previous convictions for robbery are however, like any other previous conviction, relevant to and must be considered in the Court’s assessment of whether substantial and compelling circumstances exist justifying a sentence less than the prescribed minimum sentence. How that assessment is to be made was dealt with by the Supreme Court of Appeal in *S v Malgas* 2001 (1) SACR 469 (SCA) at 481-482. Applying the principles set out therein to the present matter, the magistrate in my view quite correctly concluded

that there were no substantial and compelling reasons present to impose a sentence less than 15 years imprisonment.

The appellant was convicted of serious offences all of which have become very prevalent. Security personell responsible for the delivery of cash monies to banks and businesses are frequently the target of well armed perpetrators whose only aim is to steal

large sums of money. Such attacks are usually accompanied by the use of extreme violence and a disregard for the safety of others. It is not unusual for victims of these attacks to be killed or badly wounded. The robbery in which the appellant participated was no exception. Violence was used to dispossess the guard of the trunk containing the money and, when thereafter confronted by police officers, the appellant did not hesitate to use the firearm in his possession in an attempt to avoid arrest.

The appellant is a repeat offender. He has five previous convictions relating to the unlawful possession of a firearm and ammunition, ten convictions for robbery and three for escaping from lawful custody. According to the appellant's legal representative in his address on sentence in the trial Court, the appellant was released from prison in 2008, the very same year in which he committed the offences which form the subject matter of this case. As correctly pointed out by Mr Henning for the State, that the appellant had previously been sentenced to serve long periods of imprisonment for similar offences quite clearly had no rehabilitative effect. This is an instance where, in considering what an appropriate sentence would be in the circumstances of the case, the objects of deterrence and retribution must come to the fore. It is a matter where the interests of the community dictate that the sentence must adequately reflect the seriousness of the offences and the prevalence thereof. In weighing the appellant's

personal circumstances and the mitigating circumstances placed before the trial Court against the seriousness of the offences

concerned and the interests of society, I am satisfied that the magistrate correctly concluded that a long term of imprisonment is the only appropriate sentence and that there exists no reason to deviate from the minimum sentence prescribed by the Amendment Act.

Mr de Jager for the appellant from the outset quite properly conceded that the Magistrate's finding that there were no substantial and compelling reasons present cannot be faulted. Counsel instead chose to direct his attack at the decision of the trial Court to impose the maximum sentence authorised by the proviso to section 51(2). He submitted, with reliance on the decision in *S v Maake* 2011 (1) SACR 263 (SCA) that the magistrate committed a misdirection in that he imposed a further term of 5 years imprisonment in addition to the prescribed minimum sentence of 15 years imprisonment without inviting the appellant's legal representative to make submissions in regard thereto. In the *Maake* judgment relied upon the following was said at page 270 c-d:

“In any event, there is a further fatal problem in respect of the sentence of 15 years’ imprisonment imposed by the magistrate. In respect of minimum sentence provisions, our courts have insisted that, particularly, unrepresented accused be informed of their implications. Although the appellant was represented, it is clear from the record that there is no indication at all that the magistrate considered imposing the maximum sentence. The appellant’s legal representative could consequently not have been invited to make submissions in this regard.”

Mr Henning acknowledged that Mr de Jager is correct in his reliance on the Maake decision on the facts of the present matter. There is however another, and less contentious problem with the trial Court’s decision to impose a sentence of 20 years imprisonment. As stated, this sentence was imposed as a globular sentence by taking counts 1, 2 and 3 together for purposes of sentence. Whilst the imposition of a globular sentence does not in itself constitute a misdirection which would without more justify interference with the sentence (*S v Keulder* 1994 (1) SACR 19 (A) at 102 b-c), it has repeatedly been emphasised that the imposition of a composite sentence should only be done in exceptional cases. The reason is that it presents difficulties on appeal and review when the convictions on some, but not all, of the offences are set aside. (See for example *S v Immelman* 1978

- (3) SA 726 (AD) at 728F-729A.) The imposition of a composite sentence should in my view particularly be avoided when the provisions of the Amendment Act relating to minimum sentences find application in any particular case. The reason therefor is simply the fact that in such cases there also exists the added possibility that it may be found on appeal that the finding of the Court a quo that there were no substantial and compelling circumstances present justifying the imposition of a sentence less than the prescribed minimum sentence cannot stand and should be set aside. A more preferred method of mitigating the cumulative effect of separate sentences is to order that they run concurrently or to proportionally reduce the sentence imposed on those counts which do not attract a minimum sentence so as to meet the exigencies of the case. (*S v Nkosi* 1965 (2) SA 414 (C) at 415 H and *S v Mafokeng* 1977 (2) SA 447 (O) at 449 G).

A more fundamental problem with the imposition of a composite sentence effecting its validity arises when a sentence is imposed which is competent on one charge and incompetent on another (*S v Leith* 1972 (4) SA 262 (C); *S v Van Zyl* 1974

- (1) SA 113 (T); *S v Hayman* 1988

- (1) SA 831 (NC)). This difficulty, which finds application in the present matter, is that the imposition of the sentences prescribed by the Amendment Act may result in the Court exceeding its penal jurisdiction in regard to some of the charges which were taken

together for the purposes of sentence. As stated earlier, the appellant’s conviction for having contravened the relevant

provisions of the Firearms Control Act 60 of 2000 were, for purposes of sentence, taken together with the conviction on the charge of robbery with aggravating circumstances. In terms of sections 3 and 90 read with sections 121, 151 and Schedule 4 of the Firearms Control Act, the magistrate's penal jurisdiction in respect of both counts 2 and 3 was limited to a period of imprisonment not exceeding 15 years. It is not competent for a Court to impose a sentence which exceeds the jurisdiction of that Court in regard to one or more of the charges. The sentencing Court must accordingly ensure that the composite sentence which it decides to impose is a competent sentence for each of the offences of which the accused in any particular case had been convicted. Put differently, "... the Court's jurisdiction is limited as if the Court were sentencing in respect of only one offence, namely the offence for

which the smallest jurisdiction applies." (See Terblance Guide to Sentencing in South Africa 2nd ed at page 182. See also Hiemstra's Criminal Procedure at page 28-41 and du Toit et al Commentary on the Criminal Procedure Act at page 28-30; *S v Chiciozie Oysius Ogbona* Eastern Cape High Court, Grahamstown [unreported] case no. CA&R 336/2010).

Accordingly, while the trial Court in the present matter may have had jurisdiction by virtue of the provisions of the Amendment Act (section 51(2) and the proviso thereto) to impose a sentence of 20 years imprisonment for count 1, namely robbery with aggravating circumstances, that sentence exceeded the Court's penal jurisdiction as determined by the provisions of the Firearms Control Act of 2000 in respect of counts 2 and 3. As such, the sentence of 20 years imprisonment *de jure* and without more constitutes a nullity and must be set aside. (*S v Ntuli* 1975 (1) SA 429 (A) at 435 (C); *Trade Fairs and Promotions (Pty) Ltd v Thompson and Another* 1984 (4) SA 177 (W) at 183 C-F; *S v Hayman* 1988 (1) SA 831 (NC); *S v Meyers en Andere* 1988 (3) SA 917 and *S v Chiciozie Oysius Ogbona* supra.)

Both counsel for the appellant and the State urged this Court to impose sentence itself in respect of counts 1 to 3 as opposed to referring the matter back to the trial court to impose sentence afresh. Counsel were of the view not only that this Court

has sufficient information on record to do so, but also that it would cause an undue delay in the finalisation of the matter. The

reason for this is that the trial magistrate is no longer stationed in Port Elizabeth. I agree with these submissions.

As stated earlier, counsel for the appellant quite correctly did not contend that in the circumstances of the case the magistrate was wrong in finding that there were no substantial and compelling circumstances justifying the imposition of a sentence of less than 15 years. Counsel were *ad idem* that although custodial sentences would be appropriate in respect of the remainder of the counts, it may be appropriate in order to reduce the cumulative effect of the separate sentences, to order that portions thereof are to run concurrently. I agree with counsel for the State that in making an order to that effect it must be ensured that the effective sentence should reflect the aggravating features of the case referred to earlier.

For these reasons the appeal is upheld and the following order is made:

1. The sentence imposed in respect of counts 1, 2 and 3 is set aside and it is substituted with the following sentences:
 - (a) On count 1 the appellant is sentenced to undergo 15 (fifteen) years imprisonment.
 - (b) On count 2 the appellant is sentenced to undergo 4 (four) years imprisonment of which 2 years imprisonment is to run concurrently with the sentence imposed on count 1;
 - (c) On count 3 the appellant is sentenced to undergo 2 years imprisonment of which 1 year imprisonment is ordered to run concurrently with the sentence imposed on count 1;
2. The sentence imposed on count 4 is confirmed but it is ordered that 3 years thereof is to run concurrently with the sentence imposed on count 1.
3. The aforementioned sentences are ante-dated to 15 September 2010.

The appellant will accordingly effectively serve 23 years imprisonment.

D. VAN ZYL

JUDGE OF THE HIGH COURT

Griffiths J : I agree.

R. GRIFFITHS

Matter heard on : 10 August 2011

Judgment delivered on : 2 September 2011

Counsel for Appellant : Adv De Jager

Instructed by : Legal Aid Board

Counsel for Respondent : Adv Henning

Instructed by : Director of Public Prosecutions

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2011/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/masiza-v-s-unknown-topic-aecghc-2011--6a3ea5133b1caa912980ab7a>

Prepared on 11 October 2026 · Esheria