

SOUTH AFRICA / JUDGMENT

Mtungwa v S (Appeal) (A156/2023)

[2025] ZAGPPHC 415 (30 April 2025)

[2025] ZAGPPHC 415**COURT**

North Gauteng High Court, Pretoria

BEFORE

M.M.D Lenyai, M.J Teffo, C.J Mc Aslin

CASE / FILE NUMBER

A156/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: A156/2023****(1) REPORTABLE: NO****(2) OF INTEREST TO OTHER****JUDGES: NO****(3) REVISED: NO****Signature****Date: 30 April 2025****In**

the matter between:

MZWANDILE

CLIFFORD

MNTUNGWA

Appellant

And

THE

STATE

Respondent

This

judgment is handed down electronically by uploading it to the electronic file of this matter on Case Lines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

The date for hand-down is deemed to be 30 April 2025 at 14:00

JUDGMENT

LENYAI J (TEFFO J and Mc Aslin AJ CONCURRING)

[1] The appellant appeared at Bronkhorstspuit Regional Magistrate Court on the 6th February 2018 on the following charges:

1.1 Count 1: Attempted robbery with aggravating circumstances of a truck, two trailers and load from E Ndunyanga on 9th April 2015;

1.2 Count 2: Kidnapping of E Ndunyanga on 9th April 2015;

1.3 Count 3: Robbery with aggravating circumstances of a truck, two trailers, load and other items from S Mofokeng on 10th April 2015;

1.4 Count 4: Robbery with aggravating circumstances of a truck, two trailers, load and other items from J Mzwandile on 8th May 2015; and

1.5. Count 5: Robbery with aggravating circumstances of a truck, two trailers, load and other items from S Mamba on 12th May 2015.

[2] Counts 3, 4 and 5 were read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997.

[3] The appellant was convicted on the 4th March 2019 and found guilty on all the charges except on count 4, where he was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977. He was sentenced as follows on the 11th March 2019:

3.1 Count 1 and 2 were taken together for sentencing purposes and a sentence of 8 years imprisonment was imposed;

3.2 Count 3: 15 years' imprisonment; and

3.3 Count 5: 20 years' imprisonment.

3.4 The trial court further ordered that the sentences on counts 3 and 5 will be served in such a way that it does not exceed 25 years of imprisonment.

[4] The appellant applied for leave to appeal his conviction and sentences on the 11 March 2019 before the Regional Magistrate Court, which application was denied. He then petitioned the Pretoria High Court for leave to appeal in respect of his conviction and sentences. On the 4th February 2021 his petition to the Pretoria High Court was refused. The Appellant thereafter petitioned the Supreme Court of Appeal for leave to appeal the conviction and sentences and on 14th April 2023, leave to appeal was granted to the Full Court of the Gauteng Division of the High Court, Pretoria, only in respect of the sentence.

- [5] The respondent made a substantial application for the condonation for the late filing of its Heads of Argument. The respondent submitted that its Heads of Argument were saved on a PDF file and placed twice on caselines on the 8th August 2024. The respondent then decided to delete one of PDF files on caselines. The respondent's counsel averred that he was then advised by counsel for the appellant that the respondent's Heads of Argument were not on caselines. It was only then that the respondent realised the mistake that had occurred in that instead of deleting one PDF file on caselines, it had accidentally deleted both. There was no opposition to the application and the Court granted the condonation as requested.
- [6] The appellant raised a point in limine, and submitted that the appeal record was incomplete. The evidence of Mr Lewis Nyanga was not transcribed. Both the appellant and the respondent agreed that the appeal can be finalised on the record as it is, as the appeal is directed only against the sentence and the evidence of Mr Lewis Nyanga is not required or relevant in respect of sentencing. See the matter of *S v Zondi* 2003 (3) SACR 227 (W), where the court held that "the adequacy of an appeal record therefore depends on the basis and grounds of the particular appeal".
- [7] The appellant contends that the sentence of 33 years direct imprisonment is harsh and inappropriate especially because:
- 7.1. The court did not consider the substantial and compelling circumstances of the appellant when imposing the sentence;
- 7.2. The court did not take into consideration the fact that the appellant was a first time offender when imposing the sentence, with specific reference to count 5; and
- 7.3. The cumulative effect of the sentence is harsh and it could not have been the intention of the court.
- [8] During the trial the State called 7 witnesses to prove its case. The first witness, Mr Sipho Piet Mofokeng, testified that he was a driver for the Company Ni-Da Transport. On 10 April 2015 he was transporting soya beans with a truck and two trailers. Along the road he picked up the Appellant, who was wearing the same uniform as him and he recognised him as a co-worker for the same Company he worked for. Mr Mofokeng testified that he had stopped to buy food and was approached by the Appellant requesting a lift. The Appellant was accompanied by another male person. While Mr Mofokeng ate his food, the Appellant was driving the truck. Along the way, he was attacked with a knife and was stabbed in the arm and shoulder. He was ordered to alight from the truck and was robbed of his personal belongings as well as the truck and the trailers.

- [9] The second witness, Mr Jacobus Lodewicus Maritz, testified that he was employed by Ni-Da Transport during the robbery incidents. He was the operations manager in charge of the trucks and trailers and the daily operations of the company. He testified about all the robbery incidents which were reported to him by the drivers. He further testified that the Appellant was employed at his company for approximately one month. He was dismissed after he had abandoned one of the company's trucks.
- [10] The third witness, Constable Naledzani Edwin Tshikumbu, testified that on 10 April 2015, he assisted in the tracking of a hi-jacked truck. The truck was traced but he did not approach the truck as there were many people at the truck. These people were transferring the load from the hi-jacked truck onto another truck. When the unknown truck left, he followed the truck and eventually stopped the truck. The truck driver, Jan Dlamini was arrested for possession of suspected stolen goods.
- [11] The fourth witness, Mr Lewis Nyanga, testified that on 9th April 2015 there was an attempted hi-jacking of the truck that was in his possession. He identified the Appellant as one of the perpetrators. The Appellant and another person had pretended that they wanted to charge a cell phone, whereafter the witness was attacked. He was threatened with a knife, and his hands and feet were tied. The Appellant did not manage to take the truck.
- [12] The fifth witness, Mr Sabelo Friday Mamba, testified that he was driving the company's truck on the 12th May 2015 and he stopped along the road to buy food. He was then approached by two men who pointed a firearm at him and hi-jacked him. A white Mercedes Benz had parked in front of the truck in such a way that he was unable to move his truck. He was initially instructed to drive the truck and follow the Mercedes Benz because the robbers were unable to drive the truck. He memorised the registration number of the Mercedes Benz. After the load in the truck was off-loaded, he was taken to the N4 and left there with the truck.
- [13] The sixth witness, Constable Phumzile Josephine Mahlangu, testified that she took down the statement of Mr Ndyanga.
- [14] The seventh witness, Sergeant Gaile Samuel Mpholo, testified that he received instructions to investigate two hi-jackings that occurred on the 11th April 2015 at Bronkhorstpruit. He had established that the Mercedes Benz was lent to the Appellant. He had also received the contact number of the Appellant, and found that this contact number was a common link between four hi-jacking cases that had been reported to the police.
- [15] The statement of Mr Sibusiso Mduduzi Mkhonza was handed in as Exhibit F, wherein he declared that he was the owner of the Mercedes Benz and had borrowed it to Mr Mzwandile Ndlangamandla.

[16] The appellant was represented in the proceedings of the court a quo and he testified in his own defence and denied any involvement in any of the incidents. No witnesses were called to testify in his defence.

[17] The appellant contends that he is a first offender and the court a quo did not take this into consideration when it sentenced him. The respondent conceded this ground of appeal.

[18] The other ground of appeal is that the court a quo did not consider the the substantial and compelling circumstances of the appellant when imposing the sentence. The following personal circumstances of the appellant were placed before the court:

18.1 The appellant was 28 years old;

18.2 He is single;

18.3 He has 5 children aged 5, 4 (twins) and 2 (twins) years;

18.4 The one set of twins resided with the appellant and the other set of twins resided with the appellant's aunt. The 5 year old child resided with the biological mother;

18.5. All the children received social grants;

18.6 He was employed by Open Cube, but had not yet received his first salary;

18.7 He had passed grade 12 and

18.8 He was a first offender.

[19] The respondent again conceded that the court a quo did not refer to the substantial and compelling circumstances which were placed before it when it imposed the sentence. Instead the court a quo only focused on the aggravating circumstances. The aggravating circumstances being that the offences were planned, the appellant had information about the itinerary of the drivers, the appellant made use of the fact that he previously worked at the company to commit the offences, the offences were escalating at an alarming rate and the appellant only stopped because he was arrested and he showed no remorse. A fire-arm

was used to threaten the complainants in counts 3 and 5 to co-operate and work with the perpetrators while the complainant in count 3 was also stabbed with a knife.

[20] The appellant submitted that a minimum sentence of 15 years' imprisonment in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997, is provided for in respect of counts 3 and 5 for a first time offender for robbery with aggravating circumstances.

[21] He further contended that in terms of section 51(3) of the Criminal Law Amendment Act 105 of 1997, a court must impose a lesser sentence than the prescribed minimum sentence when it finds substantial and compelling circumstances to justify the imposition of a lesser sentence. The appellant argued that the court did not consider both the Act and the substantial and compelling circumstances that were placed before it when it sentenced him.

[22] The respondent agreed with the submissions of the appellant and further stated that the appeal record does not reflect that the court aquo considered the substantial and compelling circumstances of the appellant when imposing the sentence.

[23] In *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 Marais JA said the following regarding appeal on sentence:

“...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[24] In terms of the Criminal Law Amendment Act 105 of 1997 section 51(3)(a) provides that:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence”

[25] The Constitutional Court endorsed the principles set in *S v Malgas* in the matter of *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC), where it was held that it is incumbent upon a court in every case before it imposes a prescribed sentence to assess upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the offence in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If the court is satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed

sentence, then the court is bound to impose that lesser sentence.

[26] The record shows that the court a quo did not consider whether there are substantial and compelling circumstances to justify a lesser sentence than the one prescribed

for offences in counts 3 and 5. Be that as it may, having regard to the totality of the evidence, the nature of the offences committed

and the seriousness thereof, the interests of society and the personal circumstances of the appellant, I cannot find any substantial and compelling circumstances that justify the imposition of lesser sentences than prescribed. I am of the view that the court a quo was correct in imposing the sentence of 15 years' imprisonment in count 3. I am of the view that the sentence imposed in counts 1 and 2 is disproportionate to the offences committed. There is therefore a material misdirection by the court a quo and this court has to interfere.

[27] The court a quo further misdirected itself in not following the sentencing provisions imposed by the Act in terms count 5, where the court imposed a sentence of 20 years' imprisonment without explaining its reasoning for imposing such a sentence which clearly is contrary to the provisions of the Act.

[28] With regard to the cumulative effect of the sentence, the appellant contends that it is shocking and excessive and does not comply with the law. The court a quo ordered as follows: 'It is the order of the court that the imprisonment imposed on count 3 and 5 will be served in such a way that it does not exceed 25 years' imprisonment.'

[29] The appellant submitted that what the order actually means is that, a maximum of 25 years is to be served in respect of counts 3 and 5, plus another 8 years in respect of counts 1 and 2, which is a cumulative amount of 33 years' imprisonment.

[30] There was no serious opposition from the respondent, and actually agreed with the submissions of the appellant.

[31] Section 280(2) of the Criminal Law Amendment Act 105 of 1997 provides as follows:

"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."

[32] Under the circumstances I propose the following order:

1. The application by the respondents for the condonation of late filing of the Heads of Argument is granted;
2. The appeal is upheld and the sentence imposed by the Regional Court is set aside and substituted with the following:
 - 2.1 The sentence imposed in counts 1 and 2 is reduced to 3 years imprisonment;
 - 2.2 The sentence imposed in count 3 remains at 15 years;

2.3 The sentence imposed in count 5 is reduced to 15 years;

2.4 All the sentences are to run concurrently;

2.5 Effectively the appellant is sentenced to 15 years' imprisonment;

2.6 In terms of the provisions of section 282 of the Criminal Procedure Act, the substituted sentence is ante dated to the 11 March 2019, being the date the appellant was sentenced.

M.M.D LENYAI

JUDGE OF THE HIGH COURT

I agree

C.J Mc ASLIN

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M.J TEFFO

Appearances

Counsel for Appellant :

Adv F van As

Instructed by

:

Legal Aid South Africa

Counsel for Respondent :

Adv C Pruis

Instructed by

:

Director of Public Prosecutions

Date of Hearing

:

09 September 2024

Date of Judgement :

30 April 2025

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