

SOUTH AFRICA / JUDGMENT

Mutsweni and Others v S (A39/2021) [2021] ZAGPPHC 532 (19 August 2021)

[2021] ZAGPPHC 532

COURT

North Gauteng High Court, Pretoria

BEFORE

T.P Bokako, PP Strydom

CASE / FILE NUMBER

A39/2021

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

Source record

REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: A39/2021
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
19 AUGUST 2021
In

the matter between:

THABO
MUTSWENI FIRST
APPELLANT
THULANI
KHUMALO SECOND
APPELLANT
JUSTICE
MASILO THIRD
APPELLANT
and
THE
STATE RESPONDENT

JUDGMENT

Delivered: 19 August 2021- This judgement was handed down electronically by circulation to the parties' representatives via email, by being uploaded to the Caselines system. The date for hand down is deemed 19 August 2021.

BOKAKO, AJ

INTRODUCTION

- [1] This is an appeal against sentence only. The appellants filed a petition against the dismissal of their Leave to Appeal application and leave was granted to appeal the sentences imposed. The three Appellants were convicted in the Regional Court sitting at Springs of Robbery with aggravating circumstances read with the provisions of section 51(2) of Criminal Law Amendment Act 105 of 1997; attempted murder; unlawful possession of a firearm and unlawful possession of ammunition. This court had to consider whether the cumulative effect of the sentences was too severe.
- [2] The multiple offences, were committed on various occasions, with the appellants acting as part of a group and using the same *modus operandi*. The *modus operandi* followed involved the use of firearms to rob people of their vehicles and personal items. This spate of robberies, which were, no doubt, premeditated and well executed, took place between the period September 2015 and July 2017. The appellants were apprehended on 7 July 2017.
- [3] Ms Augustyn counsel for the Appellants, conceded that appellants were convicted of serious offences and that a long term of imprisonment is unavoidable. On behalf of the appellants it was further conceded that the sentences, when considered individually, are unassailable.

However, it was submitted on their behalf that the court *a quo* did not sufficiently take into account the cumulative term of imprisonment. It was argued that therein laid the misdirection which justifies this court to interfere with the sentences by ordering that more parts of the sentences run concurrently, thereby reducing the effective term of imprisonment.

- [4] On behalf of the respondent, Ms Mahomed cautioned that this court should not send a wrong message to the lower courts by interfering with the sentences considering the seriousness of these offences. It was submitted that the Appellants were convicted of serious crimes and that the community needs to be protected. She argued further that the sentences imposed were appropriate, considering that no substantial and compelling circumstances were found to exist. On behalf of the appellants it was conceded that substantial and compelling circumstances were not shown to deviate from the prescribed minimum sentences. She urged this court to confirm the sentences imposed and submitted that the cumulative effect of the sentences was not shockingly inappropriate and therefore no misdirection occurred in the court *a quo*.

BACKGROUND

FACTS

- [5] I now turn to deal with the facts of this case and the applicable principles.
- [6] Pertaining to count 1: On 10 September 2015 Mr Peacemaker Zondi was on duty as a Chubb Security response officer. He responded to an alarm at Etwatwa. Mr. Zondi was driving a Toyota Etios vehicle. When he arrived at the address, four men approached him while he was still in the vehicle. The four men were armed with firearms and ordered him to hand over his own firearm. The men took his firearm and also his bulletproof vest and robbed him of his vehicle.
- [7] Pertaining to counts 2 and 3: On 20 June 2017 Mr Bonginkosi Nala was sitting with Gugu in his vehicle when two men approached him at the driver's side window. The door was open and a man holding a knife then searched him and took his phone. When Mr. Nala resisted he was shot by the one robber who he identified as the second appellant.
- [8] On 7 July 2017 three police officers were on duty. They observed the taxi stopping at the N12 on-ramp and four people boarded the taxi. The police officers stopped the taxi and ordered the passengers to exit. The three appellants were arrested and each of the appellants were in possession of a firearm with ammunition. The first appellant was convicted on counts 6 and 7. The second appellant on counts 4 and 5 and the third appellant on count 8 and 9.
- [9] The court a quo found that the three appellants were the perpetrators who committed the armed robbery of Mr Zondi and that the second appellant was proven to be part of the group that robbed Mr Nala and that he was the person who shot him.
- [10] The first appellant was sentenced to 15 years imprisonment on count 1, 7 years imprisonment on count 6 and 1 year imprisonment on count 7. It was ordered that the sentence on count 7 should run concurrent with the sentence on count 6. The effective sentence to be served by the first appellant is 22 years imprisonment.
- [11] The second appellant was sentenced 15 years imprisonment on count 1, 15 years imprisonment on count 2, 5 years imprisonment on count 3, 15 years imprisonment on count 4 and 1 year imprisonment on count 5. The reason why the second appellant was sentenced to 15 years imprisonment on the possession of the firearm was because this was the prescribed minimum sentence for being in possession of a semi-automatic firearm. It was ordered that the sentences on counts 3, 4 and 5 should run concurrent with the sentence on count 2. The effective sentence to be served by the second appellant is 30 years imprisonment.
- [12] The third appellant was sentenced to 15 years imprisonment on count 1, 7 years imprisonment on count 8 and 1 imprisonment on count

9. It was ordered that the sentences on counts 8 and 9 should run concurrent. The effective sentence to be served by the third appellant is 22 years imprisonment.

APPLICABLE LAW

- [13] There are a number of reported cases dealing with sentencing in general and the cumulative effect thereof in particular. In *S v Rabie* 1975 (4) SA 855 (A) at 857 D-F Holmes JA observed that:

“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.”

- [14] The above quoted statement is the starting point and the test to be applied when dealing with an appeal against sentence generally. Upon finding that the sentence is vitiated by a misdirection or is disturbingly inappropriate, the appeal court must interfere and consider sentence afresh.

- [15] The charges against the appellants warranted the prescribed minimum sentences. But the question remains whether the cumulated effect of the sentences were not too harsh. The effective sentence of the first appellant is tantamount to imposing a sentence which has the effect of totally removing the appellant from society for a very long time. He would be released at age of 54 years. The second appellant would be released at the age of 65 years and the third appellant would be released at the age of 57 years.

- [16] I am mindful that the powers of the court of appeal to interfere with the sentence imposed are limited insofar as it can only interfere

where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.[1]

ARGUMENTS AND SUBMISSIONS

- [17] In argument on the papers and before us it was contended by counsel for the appellants that the effective sentences imposed on each appellant were unduly harsh and shockingly inappropriate under the circumstances, despite conceding that the appellants were indeed convicted of serious crimes and that the community needs to be protected.

- [18] It is further contended that, it was important for the court a quo during sentencing to have taken into consideration the key objectives of punishment, namely retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. None of the elements must be over or under emphasized when punishment is meted out. Punishment must fit the crime, the criminal and the circumstances of the case.
- [19] This court is asked by the appellant to interfere with a sentence imposed by a trial court contending that the court erred in over emphasizing the interest of the community when she imposed the sentences that were disturbingly inappropriate. The court a quo ordered some sentences to run concurrently but not sufficiently so.
- [20] The respondent contended that the appellants were sentenced in respect of offences that occurred on three different occasions. The count 1 incident occurred during September 2015, counts 2 and 3 incidents occurred on 20 June 2017 and counts 4 to 9 occurred on 7 July 2017.
- [21] Counsel for the appellant in essence, contended that the cumulative effect of the sentence of the trial court was unjust and that justice would have been served better if all the sentences were to have been ordered to run concurrently.
- [22] It is trite that sentencing is the most challenging part of a criminal trial, especially where there are multiple charges and the trial court has to consider the cumulative effect of the sentences.
- [23] It is necessary to examine the origin, interpretation and present application of Section 280 of the Criminal Procedure Act 51 of 1977.

Terblanche[2] described the purpose of Section 280 as that of preventing a too severe cumulative effect where more than one sentence is imposed. He described it as follows:

“When a sentence is imposed for each offence, a cumulative effect may develop. In other words, the combined punishments may become too severe. This was well explained by Reynolds J in S v Mpofu[3] :

“in all multiple crime cases the courts pay regard to what Thomas describes as ‘the totality principle’. (The Court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.’ ... In effect, the accused normally receives a ‘discount’ for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole.”

- [24] S 280(1) determines that:

“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.”

[25] In *S v Madikane*[4] the court aptly stated that ‘the value of human dignity lies at the heart of the requirement that a sentence must be proportionate to the offence’. It has been said that: “there is no principle which could justify, for the sake of deterrence, a sentence clearly in excess of what all the relevant circumstances

require in respect of the individual offender.” (See: *S v Collett*[5] and *S v Maseko*[6]).

[26] In cases like *S v Dzukuda & Others* and *S v Tsilo* the Constitutional Court stressed the constitutional importance of the right to a fair trial. The court held that, ‘the right to a fair trial is, amongst other things, “a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed, from being considered by the sentencing court.”’

[27] In this matter the court a quo found correctly that the offence of robbery with aggravating circumstances was a serious offence and that it was prevalent in our

communities. There was a very sound reason for Court to consider the cumulative effect but in my view the court should have ordered more of the individual sentences to be served concurrently.

[28] In my view, the approach of the court a quo on the individual sentences cannot be faulted as such. The facts of the present matter cried out for a sentence which fit the offence of robbery with aggravating circumstances. The circumstances in which the complainants were robbed warranted the imposition of the minimum sentence of 15 years.

[29] Upon taking all the facts into account, the interests of society, the personal circumstances of the appellants, the seriousness of the offences and the cumulative effect of the sentences imposed by the trial court, I conclude that the individual sentences imposed by the court a quo should not be set aside but the sentences should be served concurrently as ordered below.

ORDER

In the result the following order is made: -

1. First Appellant:
 - a. On count 1 the first appellant is sentenced to 15 years imprisonment.
 - b. On count 6 the first appellant is sentenced to 7 years imprisonment.
 - c. On count 7 the first appellant is sentenced to 1 year imprisonment.
 - d. The sentences on counts 6 and 7 are ordered to be served concurrently and 4 years of the sentence on count 6 is to be served concurrently with the sentence on count 1. The effective term of imprisonment for the first appellant is therefore 18 years imprisonment.
2. Second Appellant:

- a. On count 1 the second appellant is sentenced to 15 years imprisonment.
- b. On count 2 the second appellant is sentenced to 15 years imprisonment.
- c. On count 3 the second appellant is sentenced to 5 years imprisonment.
- d. On count 4 the second appellant is sentenced to 15 years imprisonment.
- e. On count 5 the second appellant is sentenced to 1 year imprisonment.
- f. The sentences on counts 3,4 and 5 are ordered to be served concurrently with the sentence on count 1 and 5 years of the sentence imposed on count 2 is also ordered to run concurrently with the sentence on count 1.
- g. The effective imprisonment for the second appellant is therefore 25 years imprisonment.
3. Third Appellant:
 - a. On count 1 the third appellant is sentenced to 15 years imprisonment.
 - b. On count 8 the third appellant is sentenced to 7 years imprisonment.
 - c. On count 9 the third appellant is sentenced to 1 year imprisonment.
 - d. The sentences on counts 8 and 9 are ordered to run concurrently and 4 years of the sentence on count 8 is ordered to be served concurrently with the sentence on count 1.
 - e. The effective imprisonment for the third appellant is therefore 18 years' imprisonment.

T.P BOKAKO

Acting Judge of the High Court,

Gauteng Division, Pretoria

I agree, and it is so ordered.

PP STRYDOM

Judge of the High Court,

HEARING: 22

JULY 2021

JUDGMENT: 19

AUGUST 2021

Appearances:

For the Appellants: Adv. L Augustyn

Instructed by: Justice

Centre, Pretoria

For the Respondent: Adv. S Mahomed

Instructed by: Director

of Public Prosecutions, Pretoria

[1] (See *S v Pieter*'s 1987(3) SA 717 (A)).

[2] The Guide to Sentencing in South Africa (2013), Chapter 7 at para 2.2.1

[3] 1985 (4) SA 322 (ZHC) at 324 G.

[4] 2011 (2) SACR 11 (ECG)

[5] 1990 (1) SACR 465 (A)

[6] 1982 (1) SA 99 (A).

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/ZAGPPHC/2021/532.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mutsweni-and-others-v-s-unknown-topic-agpphc-2021>

Prepared on 11 October 2026 · Esheria