

SOUTH AFRICA / JUDGMENT

Naki v S (A167/2019) [2020]

ZAGPJHC 46 (13 February 2020)

[2020] ZAGPJHC 46

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mudau, G C Wright

CASE / FILE NUMBER

A167/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A167/2019

DPP REF NO: 9/2/5/1-2019/139

In the matter between:

NAKI, XOLILE OSCAR APPELLANT

and

THE STATE RESPONDENT

J U D G M E N T

MUDAU, J:

[1] The appellant was on 28 January 2014 convicted by the Wynberg regional court of robbery with aggravating circumstances (read with the provisions of section 51(2) of the Criminal Law Amendment Act[1]) after pleading guilty. He was on the same day sentenced to six years imprisonment. At the time the appellant was serving 20 years

imprisonment for attempted murder, sexual assault and other offences imposed on 19 September 2013. The cumulative effect of the 6 years' imprisonment combined with the 20 years' imprisonment he was already serving had the consequence of him being obliged to serve a total of 26 years' imprisonment. The appellant is aggrieved with this cumulative sentence. The appeal against sentence only is with leave of the trial court. The issue in this appeal is whether the regional magistrate erred in not ordering that the six years' imprisonment should run

concurrently with the sentence that the appellant was already serving at that time.

- [2] The factual background of the matter is as follows. The complainant, Mrs Van Huyssteen, was on 23 May 2012 at the Centurion shopping mall robbed of her motor vehicle and jewellery at gunpoint. The appellant, who was legally represented admitted in his section 112 (2)[2] statement that he was at the shopping mall when he was contacted by persons involved in the actual robbery with whom he had formed common purpose to remove the tracker from inside the stolen vehicle. He was on his way to his premises with the stolen car when he was stopped by members of the SAPS and subsequently arrested. He knew that his conduct was wrong and constituted a criminal offence.
- [3] After conviction, in mitigation of sentence from the bar, the appellant's legal representative disclosed to the court that the appellant was serving 20 years' imprisonment for various charges which included attempted murder, sexual assault, and other undisclosed offences. The offence which is the subject matter of this appeal was committed when the appellant was 30 years of age. He was 31 years of age at the time of his sentencing and a father to a 12 year old child.
- [4] It is trite that sentencing is pre-eminently the domain of the trial court. This principle was aptly described by E M Grosskopf JA in *S v Blank*[3] as follows: 'It has repeatedly been emphasised by this Court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial Judge and that a Court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence. The principle in this regard is expressed as follows by Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 553E-F: "Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".[4]
- [5] In imposing a sentence of 6 years' imprisonment, the trial court correctly considered the triad as advocated in *S v Zinn*. [5] That court also found that there were substantial and compelling circumstances that justified its departure from the mandatory minimum sentence of 15 years imprisonment. The court had regard to the fact that the accused had pleaded guilty which it considered as a sign of remorse. Also, it was alive to the fact that the appellant was already serving a 20 year prison term. The fact that the appellant did not personally carry out the robbery counted in his favour.

[6] The Supreme Court of Appeal has in a number of decided cases held that excessive sentences are undesirable. In *S v Zondo*[6] which counsel relies upon Mbha AJA (as he then was) aptly stated: ‘This court has repeatedly warned against excessively long sentences being imposed by trial courts. In *S v Mhlakaza* the court had to consider whether sentences of imprisonment, which are cumulatively far in excess of 25 years, are proper. Harms JA, dealing with the element of deterrence, noted that although it remained, according to judicial precedent, an important consideration when imposing sentence, its effectiveness in deterring others from committing (similar) offences was unclear. He further stated that ‘(a)s far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length’ before going on to state that a lengthy term of imprisonment would serve none of the purposes of punishment and would simply serve to appease public opinion. He pointed out, accordingly, that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption.’[7]

[7] In *Zondo* (above) the cumulative effect of a sentence of a total of 39 years’ imprisonment in respect of the appellant, then 37 years old, involving two separate convictions for robbery committed with aggravating circumstances was the held to induce a sense of shock. The sentence was reduced effectively to 32 years of imprisonment. The learned judge cautioned that: “I am also wary of being seen to be creating an unacceptable precedent that an accused person could go on a criminal spree committing

separate instances of serious crimes, but effectively being punished for only one of them. For this reason, I am of the view that ordering the two sentences to run concurrently in their entirety would not only send out a wrong message. It would in effect defeat the purpose of adequately punishing the appellant for his conduct. At the same time, the approach I intend adopting in correcting the misdirection by both the trial and the court a quo will go a long way to assuage the cumulative effect of a 39 years period of imprisonment imposed on the appellant”.[8]I align myself fully with this reasoning.

[8] The regional magistrate not only emphasised on the seriousness of the crime of robbery, its prevalence and society's justified intolerance

concerning robberies, but as indicated above, considered the triad as a whole. In this case it is obvious from a reading of the appellant statement of plea that he was economical with the trial court with particular regard to the relevant circumstances of the offence. For example, the appellant was quiet with regard to the identity of his companions with whom he entered into a criminal enterprise. Also there is deafening silence with regard to when the common purpose was agreed upon.

[9] From the little facts that he disclosed, it is evidently clear that, the offence was pre-planned. He was the one found with the stolen motor vehicle not long after the incident of robbery. He, for that reason, had a lot of explaining to do. It is therefore no surprise that he pleaded guilty although the complainant at a subsequent ID parade could not place him at the scene

of robbery. In sentencing the accused the trial court was mindful of the fact that the offence was not only serious but prevalent in its area of jurisdiction as well as the adverse traumatic impact on victims. All the surrounding circumstances considered, an effective sentence of 26 years of imprisonment does not induce any sense of shock. I can find no material misdirection committed by the trial court. It accordingly follows that the appeal again sentence is without merit.

[10] The appeal against sentence is dismissed.

T P MUDAU

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree

G C WRIGHT

APPEARANCES

For the Appellant:

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For the Respondent:

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Date of Hearing:

11 February 2020

Date of Judgment:

13 February 2020

[1] 105 of 1997

[2] Of the Criminal Procedure Act 51 of 1977

[3] 1995

(1) SACR 62 (A)

[4] At 65H-66B

[5] 1969

(2) SA 537 (A)

[6] (627/12)

[2012] ZASCA 51 (28 March 2013)

[7] At para 9

[8] At para 11

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