

SOUTH AFRICA / JUDGMENT

Ngabase and Another v S (CA&R 86/2010) [2010] ZAECGHC 112; 2011 (1) SACR 456 (ECG) (25 November 2010)

[2010] ZAECGHC 112

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Conjwa

CASE / FILE NUMBER

CA&R 86/2010

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

Source record

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case No: CA & R

86/2010

In the matter between:

NATHA NGABASE

.....First

Appellant

MBULELO MXENGE

.....Second

Appellant

And

THE STATE

.....Respondent

Coram: Chetty J and Conjwa AJ

Date Heard: 10 November 2010

Date Delivered: 25 November 2010

Summary: Trial

– Record – Judgment – Reasons for – Court

obliged to provide reasons – Evidence – Assessment
and

evaluation – Only certain witnesses' evidence evaluated –

Appellants' evidence ignored – Where

no or insufficient

findings made on credibility, Court of Appeal has to do its best on

material before it – Dangerous Weapons

Act – No evidence

to support convictions – No reasons for convictions manifest

from judgment – Convictions set
aside – Sentence –
Globular sentence imposed – Undesirability of such practice –
Sentence amended

JUDGMENT

Chetty, J

- [1] The appellants were arraigned for trial in the Regional Court, Port Elizabeth on two counts of robbery with aggravating circumstances (counts one and three)¹ and two counts of possession of a dangerous weapon (counts two and four). The appellants pleaded not guilty to all the charges and proffered no plea explanation. During the course of the trial however, and during the cross-examination of the various state witnesses, the defence disclosed that the appellants bore no knowledge of the specified offences and denied any involvement therein. After the adduction of evidence from a host of witnesses called on behalf of the state and the appellants and their witnesses, the trial court not only had the benefit of having the triable issues fully debated before it but, moreover, the added advantage of sufficient time for deliberation. Notwithstanding, the judgment, handed down more than two weeks later, demonstrates quite unequivocally that the magistrate had forgotten much of the testimony adduced.
- [2] The judgment demonstrates a particular lack of understanding on the part of the magistrate of what is required of a judicial officer in pronouncing upon the guilt or otherwise of an accused person. The duty to provide reasons is fundamental to our system of law. It is apposite in this appeal to reproduce portion of an address titled, Writing A Judgment², where, under the rubric, The duty to give reasons, the learned former Chief Justice, Corbett JA said the following:-

“As a general rule, a court which delivers a final judgment is obliged to give reasons for its decision. This applies to both civil and criminal cases. In civil matters this is not a statutory rule but one of practice. In Botes & another v Nedbank Ltd the Appellate Division held that where a matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the judge’s decision. The court pointed out that a well reasoned judgment may well discourage an appeal by the loser; and the failure to state reasons may have the opposite effect, that is, encourage an ill-founded appeal. In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.

The same general rule of practice applied in criminal matters, both in regard to verdict and in regard to sentence. In regard to the former Davis AJA stated:

‘We are aware that there is no provision in the Criminal Procedure Code for the delivery of a judgment when a judge sits alone or with assessors; but in practice such a judgment is invariably given and we wish now to say that it is clearly in the interests of justice that it should be given’

After pointing to the absence of reasons in the case before the court, Davis AJA continued:

‘. . . we feel that it is unfortunate that the court should have been left, as it has been, to a considerable extent in the same position as if a verdict of guilty had been returned by a jury’

(This incidentally gives an interesting insight into the jury system)

In regard to sentence it has been stated:

‘It seems to me that, with regard to the sentence of the court in cases where the trial judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interests of justice. The absence of such reasons may operate unfairly as against both the accused person and the State. One of the various problems which may be occasioned in the Court of Appeal by the absence of reasons is that in a case where there is a plea of guilty but evidence has been led, there may be no indication as to how the court resolved issues of fact thrown up by the evidence or on what factual basis the court approached the question of sentence.’”

- [3] The magistrate’s cursory summation of only some of the evidence indicates that, having concluded that the evidence adduced on behalf of the state established the guilt of the appellants beyond reasonable doubt, it would be superfluous to evaluate and analyse the evidence adduced, including that of the appellants. This approach to the task at hand has, particularly in the case of the convictions on counts two and four (possession of a dangerous weapon), produced the unfortunate result that this court is unable to determine the basis upon which the aforesaid convictions were founded. The magistrate’s reasoning for accepting the testimony of the witnesses called by the state, is extremely brief. It amounts to merely the following:-

“The witnesses called by the State gave satisfactory evidence and their demeanour was satisfactory. A further thing, the State in addressing the Court regarding the Section 204 witness the State informed the Court that she was deliberately not warned, that is Xoliswa Mthana, not warned because there was no charge pending against her, that she was just a witness, an ordinary witness like the other witnesses. One of the counsel stated that Xoliswa Mthana was an untrustworthy witness but that point was never taken at length. The witnesses that have been called by the Court satisfied the Court in every respect and they were reliable witnesses. The evidence of Xoliswa Mthana is accepted by this Court and accused 1 is FOUND GUILTY on all the counts.

Accused 2 GUILTY on count 3 and 4”

- [4] The paucity of reasons and the complete absence of any finding concerning the evidence of the appellants is tantamount to a situation where no reasons for a conviction are given. The magistrate's judgment in casu is analogous to that which was the subject matter in *S v Franzenburg and Others*³ where the learned judge, Leach J, deprecated the unfortunate practice of some judicial officers failing to make findings concerning the mendacity of witnesses where factual issues require resolution. The learned judge stated the following⁴:-

"It is clearly in the interests of justice that a Judge, either sitting alone or with assessors, should give reasons for the finding of the trial Court - S v Immelman 1978"

- (3) SA 726 (A) at 729A - B and the cases there cited. This is now enshrined in s 146 of the Criminal Procedure Act 51 of 1977, which imposes on a trial Judge the duty to give the reasons for the decision or the finding of the Court on questions of fact, including where the Judge sits with an assessor or assessors and there is a difference of opinion, the reasons for the decision of the member of the Court in the minority. The importance of complying with this duty was recently emphasised by Howie JA, as he then was, in *S v Calitz en 'n Ander* 2003

- (1) SACR 116 (SCA) in para [12], when he said:

'Hoe dit ook al sy, dit moet beklemtoon word dat die behoorlike beskerming, enersyds, van 'n appellant se grondwetlike reg tot appèl

en, andersyds, die gemeenskap se belang dat oortreders behoorlik gestraf word, van 'n regterlike amptenaar vereis dat deeglike aandag gegee word aan die formulering en verstrekking van vonnisredes. Daarsonder word gesonde strafregpleging belemmer.'

In casu, notwithstanding the provisions of s 146, no credibility findings were made in respect of the various witnesses who testified nor were reasons given for the factual conclusions that were reached. That this was unfortunate, to say the least, is self-evident, particularly bearing in mind that there were substantial factual disputes in the testimony of the witnesses which had to be resolved. An appeal is not a re-hearing in the full sense of the word but is, to use the language of Innes CJ in *Estate Kaluza v Braeuer* 1926 AD 243 at 256, 'a re-hearing upon special lines' as the Court of appeal lacks the advantage of judging the credibility of witnesses by observing them in the witness-box. Consequently, it would generally be contrary to well-recognised principles for a Court of appeal to express its own view, unaided by the findings of the trial Court, as to the F credibility of material witnesses whom it has never seen (*R v Abel* 1948

- (1) SA 654 (A) at 659). In the instant case, however, the question which arises is how this Court should approach the disputes of fact which are apparent from the record without the trial Court's reasons for making the findings which it did.

The problem is not a new one. In *Van Aswegen v De Clercq* 1960

- (4) SA 875 (A) at 881G - 882E, Schreiner JA said the following:

'As I have already indicated we are on these issues without the benefit of any findings by the learned Judge as to the acceptability of the witnesses. In regard to the first issue the learned Judge did not treat it as an issue at all. And in regard to the second there was no finding as to whether Kellermant's version was to be believed or not, and only a conclusion, based on probabilities which this Court is in as good a position as the trial Court to assess, that the plaintiff had not brought du Bruyn to the stage of being wholly willing to buy. In the absence of findings by the trial Judge on the merits of witnesses to crucial incidents a Court of appeal is, of course, severely handicapped. There are many cases in which this Court, in common with other appellate tribunals, has dealt with the question of the circumstances in which the findings of a trial Court may properly be overridden. But counsel informed us that they found no direct authority on the question of the appellant tribunal's proper approach where the trial Court has reached no finding at all on the credibility of witnesses to vitally important incidents, and my own researches have fared no better. This is not the case in which the trial Judge merely omitted to mention a witness or witnesses who had given relevant evidence on an issue. In such cases there may conceivably have been an overlooking of the witness, either at the time of decision or at the time of recording the Court's reasons (see *Watt v Thomas* [1947] AC 484 at 492, per Lord Simonds; *R v Piek* 1958

- (2) SA 491 (A)). In the present case the learned Judge's view on the effect of the money-raising scheme led him away from a decision on the two issues now in question. It happens, of course, even where a trial Court has made findings of fact, that on appeal those findings

are shown to have been wrongly arrived at, and in such cases the appellate tribunal may have to decide the appeal on the record

without regard to the findings. It seems to me that the position is similar where, as here, no findings have been made. The appellate

Court has to do its best on such material as it had before it. The importance that the onus may assume in such cases is pointed out in *R v Dhlumayo and Another* 1948

- (2) SA 677 (A) at 703.

"If the appellate Court . . . is left in doubt, then . . . the result of the appeal must be such as to give effect to the non-discharge of the onus."

By "left in doubt" was meant . . . "is ultimately unable to come to a definite conclusion on the evidence". The onus should not be allowed to operate in such a case unless and until, after all the relevant evidence has been examined to see whether there is a sufficient balance of probabilities on one side or the other, the state of inability to decide is reached.'

In applying this dictum in *Twigger v Starweave (Pty) Ltd* 1969 (4) SA 369 (N) at 372B - C Harcourt J, with whom Leon J concurred, said:

'However, where, as here, the court a quo has reached no finding at all on the credibility of witnesses to vitally important incidents, then an appeal court has to do its best on such material as is before it. In such an event, although the initial onus in the court a quo is obviously of importance, it should not be allowed to operate decisively unless and until, after all the relevant material has been examined to see whether such onus has been discharged . . . on one side or the other, a state of inability to decide the issue has been reached by the trial court.'

Of course, should a trial court, without giving reasons, prefer the version of one set of witnesses above that of another, it does not mean that the preferred version is to be accepted, especially if there is no clear justification for the trial court's choice of versions. As Miller J (as he then was) remarked in *Wakefield & Sons (Pty) Ltd v Anderson* 1965

(4) SA 453 (N) at 455D:

'It does not follow because the trial Court had advantages it made proper use of them and it is not for the Court of appeal in cases of this nature, where the trial Court has not indicated in its reasons why it preferred the evidence of one witness to that of another, to assume that it did so for cogent reasons of which there is no

indication on the record.'

See further *S v Masuku and Others* 1985 (3) SA 908 (A) at 912H, where Nicholas AJA, after commenting that the trial Judge had failed to comply with s 146, said:

'As a result . . . this Court does not have before it material which might have shown that the trial Court overlooked an important feature or misdirected itself. But that does not, I think, mean that this Court is obliged to assume that there was no misdirection or irregularity in the process in reaching the decision: to make such assumption might well have the result of a failure of justice.'

In a similar vein, in *Makhudu v Director of Public Prosecutions* 2001

(1) SACR 495 (SCA) in para [10] at 499, in a case where a magistrate had not given and was unable to recollect his reasons for sentence, the Court observed that the possibility that the judgment suffered from misdirections or a failure to properly exercise a proper sentencing discretion 'cannot simply be arbitrarily excluded'. (Further reference may be made to *S v Khaile* 1975

(3) SA 97 (O) at 99D - F and *S v Calitz en 'n Ander* (supra).)

To summarise, as the trial Court made no findings as to the credibility of the witnesses who testified, this Court, on appeal, (a) has to do its best on the material on record;

- (b) cannot proceed on the assumption that there was no misdirection or irregularity in the process of reaching the decision that was reached by the Court a quo ; (c) cannot assume that the Court a quo had cogent reasons for seemingly accepting the witnesses who implicated the appellants; and (d) should have regard only to the question of the onus of proof once all the relevant evidence has been examined to see whether there is any doubt as to which version is acceptable.”

I have reproduced this prolix extract from the judgment to emphasize the duty resting on judicial officers to provide reasons for their decisions.

- [5] In the light of the trial magistrate’s dereliction of his obligation to provide adequate reasons for the convictions, it behoves this court to consider the evidence afresh. It is not in issue that on 11 January and 14 January 2006, employees of Lubners and Russels Furnishers respectively, were robbed of furniture and appliances en route to delivering same to the purchasers in New Brighton, Port Elizabeth. Mr. Arno Van Wyk (Van Wyk) was employed by Lubners as a delivery driver and stopped at a house to deliver furniture. He and his assistant alighted from the delivery vehicle when shots suddenly rang out.
- [6] When Van Wyk turned around to ascertain the direction of the gunshots, he stared into the barrel of a firearm brandished by a male person. The person screamed at him but being unfamiliar with the language usage, Van Wyk remained motionless. Intuitively however, he and his assistant picked up the television set which they had already unloaded and placed on the road and replaced it onto the flatbed delivery bakkie. The gunman’s two cohorts then searched him and found the vehicle keys whereupon all three climbed into the vehicle, the gunman occupying the driver’s seat. He could however not start the vehicle and Van Wyk was ordered, at gunpoint, to start the vehicle and, on so doing, was unceremoniously pulled out of the vehicle and hit on the shoulder

with the firearm. The robbers drove off with the vehicle and Van Wyk then telephoned the police on the cell phone hidden on his person and which those searching him had not uncovered.

- [7] The police responded with alacrity. After making a report to them and en route to the police station, he was informed that the delivery vehicle had been found, albeit without the consignment of goods, viz a television set, a lounge suite and a fridge. Under cross-examination by the first appellant’s attorney, Van Wyk stated that all three robbers were armed with firearms. It is common cause that Van Wyk was unable to positively identify either of the appellants as part of the group who robbed them.
- [8] A few days later, on 14 January 2006, a similar fate befell a Lubners delivery vehicle, Mr. Francois Dyer (Dyer) and Mr. Mzwandile Roneli (Roneli), the driver and assistant respectively. Dyer stopped the vehicle at 116 Vuku Street and whilst seated in the vehicle doing administrative chores felt something against his head and when he turned, felt the door opening and noticed a gun pointed at his head. This person, whom he identified in court as the first appellant, and described as “that one sitting there with the bald head” then pointed the firearm at his neck, pulled him by his t-shirt and ordered him to alight from the

vehicle. Simultaneously, two shots rang out but not from the firearm brandished by the first appellant. Dyer was ordered to the rear of the vehicle and told to stand there. Roneli was in the meantime pulled from the passenger seat by the first appellant's two cohorts, one of whom demanded Dyer's cell phone. When Dyer replied that the cell phone was in the vehicle he was searched and robbed of his wallet containing his bank card and approximately R68, 00 in cash.

- [9] Whilst the robbers were conversing with each other, Roneli, speaking in Afrikaans said that he i.e. Dyer should run and, when he did so, heard two shots. He ran into a nearby home and sought refuge from his assailants. The elderly occupants obliged and locked the door. About five minutes later he heard his assistant's voice at the door and when he opened it was informed that the robbers had taken the bakkie. He confirmed that the stolen goods comprised a mattress, a fridge, a wall mounted television set in a box and a telefunken home theatre system. At the

conclusion

of his evidence in chief and in response to a question from the prosecutor as to the identity of the person who drove the bakkie from Vuku Street Dyer replied that it was the first appellant.

- [10] During cross-examination by the first appellant's attorney Dyer admitted that when he was initially questioned by the police he did not give a description of the person who pointed the firearm at him but volunteered the information that he told the police that he would be able to recognize the person if he saw him again. Dyer further admitted being taken by the police to a house where he saw a photograph of the first appellant mounted on the wall. He further stated that thereafter he was being taken to an office, presumably at the police station, where he identified the goods spirited away by the robbers when they stole the bakkie. Dyer further admitted that he saw the appellant in person for the second time at court when he testified. Dyer's dock identification of the first appellant seems to have escaped the magistrate entirely. Although such evidence must be cautiously approached given the vagaries of memory, there are sufficient safeguards to accept Dyer's evidence of identification as reliable.
- [11] Roneli's account of the heist accords in broad detail with Dyer's evidence. He too identified the first appellant as the person who first approached their vehicle and who forcibly removed Dyer therefrom and corroborated Dyer's evidence concerning the goods which were stolen. The uncontroverted evidence of Ms. Sindiswa Maxam (Maxam) was that whilst visiting her former boyfriend's home, the police arrived, conducted a search and removed a number of items from the house including a home theatre system and a television set, both of which were displayed in the front room. She testified that she was present in the house when the first appellant arrived with the home theatre system but was unable to state how the television set found its way there.

[12] Maxam's boyfriend, Luvuyo Maneli (Maneli) described the circumstances in which the fridge and home theatre system happened to be in his home. According to him he was telephoned by the first appellant who offered to sell him some goods. He admitted that the fridge and home theatre system found its way into his home courtesy of the first appellant. Although it must have been obvious that the goods were stolen, he proffered the implausible explanation that he merely kept it at his home as security for a loan of R1500, 00 advanced to the first appellant. It was not placed in issue that the house was in fact the home Dyer had been taken to by the police as adverted to earlier. It is apparent from both Maxam and Maneli's evidence that they were friends of the first appellant, and that neither of them had any motive to falsely implicate him in the

transactions involving the sale of the items as aforesaid.

[13] The crucial evidence implicating both appellants in the commission of the two heists, was that of Ms. Xoliswa Mthana (Xoliswa), a former girlfriend of the first appellant. The circumstances in which she came to testify require some explanation. When she was called to the stand, the prosecutor requested that a warrant for her arrest, which had been authorized the previous Monday, be cancelled. It is common cause that the first appellant and Xoliswa were involved in a relationship and that prior to her testifying in court the first appellant had been incarcerated. Although it is not clear from the record, it would appear that her absence from court on the Monday precipitated an application for the authorisation of a warrant for her arrest. She outlined the reasons for her absence from court as follows – She was approached by a person who apprised her of the fact that she was a key witness for the prosecution against the first appellant. She was issued with a veiled threat that it would accordingly not be in her interests to testify against the first appellant. The latter himself telephoned her a few days prior to the Monday she was due to testify, warned her of his imminent release and sought her assurance that she would absent herself from court the Monday. The threat had the desired effect and the warrant was authorised. On Thursday he once more telephoned her, sought to assuage her fears that a warrant had been authorised and attempted to suborn her to say that the content of her police statement was false and emanated from Inspector Mandla and not her. With that prelude, I turn to an analysis and evaluation of her evidence.

[14] Xoliswa's involvement in the two heists was more than peripheral. Although she was not warned as an accomplice in terms of section 204 of the Criminal Procedure Act⁵, her evidence must, given the extent of her participation in the two heists, be treated with caution. Although Xoliswa's evidence that she witnessed and participated in the heists was disputed only to the extent that the first and second appellants neither had knowledge of nor participated therein, the entire body of her testimony requires analysis and evaluation in order to determine whether she was a credible and reliable witness.

[15] Xoliswa's account of the first heist accords in broad detail with Van Wyk's evidence. Unlike the latter, who was unable to identify any of the robbers, Xoliswa attributed the leading role to the first appellant. Her evidence concerning the circumstances in which she met the first

appellant and his two cohorts are detailed and clearly not contrived. So too, their movements after the heist. According to her the first appellant telephoned her and asked her to pick him up at the home of the second appellant whence he returned to his own home to effect a change of clothing, ostensibly to preclude any possible identification of him by his apparel. Her detailed evidence concerning the sale of the stolen goods and the manner in which the transactions were conducted, coupled with the fact that she ascribed no role to the second appellant in the first heist, militates against any suggestion that her implication of the first appellant is false.

- [16] Her reliability is further compounded when regard is had to her evidence concerning the second heist. Her detailed description of the events as they unfolded finds corroboration in the evidence of Dyer and Roneli, both of whom stated that they were robbed by three persons. Xoliswa's evidence that the first appellant was one of the trio is corroborated by both Dyer and Roneli. Although Dyer admitted having seen a photograph of the first appellant on the wall of Maneli's home, he remained steadfast that it played no role in his identification of the first appellant as one of the perpetrators. The criticism directed at his evidence on this score, is entirely unwarranted. The submission that Dyer was shown a photograph of the first appellant is wrong. Dyer's evidence was that he accompanied the police to a house in order to identify some of the stolen goods and fortuitously saw a photograph of the first appellant mounted on the wall. The latter's image was indelibly imprinted in his mind and that notwithstanding the passage of time which had elapsed since the heist and seeing him in court, he was satisfied that the first appellant was one of the trio. That evidence finds corroboration in the testimony of both Roneli and Xoliswa.
- [17] The only evidence implicating the second appellant in the second heist is that of Xoliswa. She was subjected to long, arduous and, at times, quite meaningless cross-examination. Her evidence that the second appellant was an active participant in the second heist was given in a clear and forthright manner and although she acquiesced in various suggestions put to her by the second appellant's attorney concerning her testimony of the second appellant's apparent unwillingness to participate in the heist, the clear impression to be gained is that whilst the second appellant may have entertained some reservations about the gangs modus operandi, he was nonetheless an active participant who shared in the spoils of their nefarious activities. Xoliswa's veracity was further sought to be impugned on the basis that, being a woman scorned by the first appellant, she had a motive to falsely implicate both appellants. Even though we did not have the advantage of hearing and observing the witness, her reaction

at the suggestion, one of incredulity and mirth, which emerges from the transcript, dispels any notion that she had a motive to falsely implicate the appellants.

- [18] The appellants' denial of any involvement in the heists is clearly false. They were poor witnesses, contradicted themselves and each other and in the overall assessment of the evidence adduced, their versions must be rejected as patently false. The first appellant's attempt to garner support for his version from the witness Nompumelelo Zememo failed

dismally. She was a particularly poor witness and examination of her evidence compels the conclusion that she had been schooled to tailor her evidence. The quality and weight of the evidence adduced by the state far outweighs the evidence adduced by the appellants.

The probabilities moreover favour the state's version and there is more than sufficient reason to reject the appellants'

evidence as not being reasonably possibly true. On a conspectus of the totality of the evidence, I am satisfied that the first appellant was properly identified as the main perpetrator in both heists. Although the second appellant appeared to have had no direct involvement in the first heist, the weight of the evidence establishes that he was an active participant in the second heist.

Their appeal against their convictions on the robbery counts must accordingly fail.

[19] For reasons best known only to the magistrate, the appellants were convicted on counts two and four, i.e., possession of a dangerous weapon in contravention of section 2

(1) read with sections 1 and 3 of the Dangerous Weapons Act⁶. Save for the pronouncement that the appellants were guilty of these offences, no reasons were furnished to justify the convictions. The absence of reasons is, with recourse to the transcript of the proceedings, understandable, for there is not a tittle of evidence to support the convictions. At the hearing before us neither Mrs. McCullum nor Ms. Phiti were able to tell us whether the requirements of section 4 (3) (a) of the Dangerous Weapons Act had been complied with nor does it appear so from the record⁷. However, even, on the assumption that the section had been complied with, the offence had clearly not been proven.

[20] Section 2 (1) of the Act provides as follows-

"Any person who is in possession of any dangerous weapon, or of any object which so resembles a firearm that, under circumstances such as those under which such person is in possession thereof, it is likely to be mistaken for a real firearm, shall be guilty of an offence, unless he is able to prove that he at no time had any intention of using such weapon or object for any unlawful purpose, and shall on conviction be liable to a fine or imprisonment for a period not exceeding two years."

A dangerous weapon is defined in section 1 as meaning "any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit an assault."

[21] None of the witnesses testified that the second appellant had anything in his possession whilst Dyer, Roneli and Xoliswa all testified that the first appellant fired a shot from his firearm. The definition section of the Dangerous Weapons Act specifically excludes a firearm as a dangerous weapon and by convicting the appellants on these counts, it is clear that the magistrate paid no heed to either the legislative provisions or the evidence. The convictions on these counts must accordingly be set aside.

Sentence

[22] The magistrate treated all the offences of which the appellants had been convicted as one and sentenced them to terms of imprisonment of 18 and 15 years respectively. The setting aside of the appellants' convictions on the dangerous weapons charges must result in the composite sentences being set aside. It is apparent from the sparse judgment on sentence, that the magistrate intended imposing punishment in respect of each conviction, but was influenced to impose a globular sentence by the first appellant's attorney's plaintive cry for mercy. The Supreme Court of Appeal has repeatedly emphasized that separate counts may be taken together for purposes of sentence only in exceptional cases. This is precisely the type of case where a globular sentence presents problems on appeal.

[23] The trial court's judgment on sentence reads as follows:-

"This is disappointing accused. I notice that you have both previous convictions and it would seem that you are not deterred by these

previous convictions. Instead you continue making offences, breaking the law. Now this makes the sentence that is going to be passed a very difficult occasion. I must state that the Court also tried to look at the evidence and your personal circumstances to see whether there are substantial and compelling personal circumstances but I must be honest, I found none. However, the defence of accused 1 had pleaded with the Court that the counts be treated as one for purposes of sentence otherwise you would have been subjected to a very long term of imprisonment if I were to treat each count separately. You are both declared unfit to possess a firearm.

Accused 1, you are sentenced to undergo 18 years imprisonment, all counts treated as one for the purpose of sentence.

Accused 2, you are to undergo 15 years imprisonment, both counts treated as one for the purpose of sentence."

[24] Commenting upon the lamentable practice of imposing globular sentences, the learned judge, Corbett JA, said the following in *S v Immelman*⁸

"The practice of taking more than one count together for the purpose of sentence (ie the imposition of what I shall, for convenience, term a "globular sentence") was recently commented upon by this Court in the case of S v Young 1977

(1) SA 602 (A) where TROLLIP JA stated at (610E - H):

"That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg, *S v Nkosi* 1965

- (2) SA 414 (C) where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review especially if the convictions on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable. However, in the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; H and in the ultimate result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant."

(See also S v Mofokeng 1977

- (2) SA 447 (O) at 448 - 9 where some of the more recent cases are collected.) The present case was tried under the new Criminal Procedure Act 51 of 1977 but that does not affect the appositeness of the above-quoted remarks. In my view, difficulty can also be caused on appeal by the

imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this. This difficulty is further compounded in the present case by the extreme brevity of the Court's judgment on sentence which gives no indication as to why or upon what basis of fact the learned Judge arrived at the sentence imposed by him."

- [25] By convicting both appellants on the dangerous weapons charges the magistrate, as adumbrated hereinbefore, misdirected himself. The globular sentence imposed in respect of the convictions of the first and second appellants must accordingly be set aside and sentence imposed afresh. The first appellant can indeed consider himself fortunate. Each of the robbery offences attracted a minimum sentence of 15 years imprisonment absent a finding of substantial and compelling circumstances. None of the factors relied upon by his attorney pass muster nor can it be contended that the ordained sentence is disproportionate to the crimes, thereby rendering the prescribed sentences unjust. The two robberies were separate and distinct crimes and a sentence of 15 years imprisonment on each count, with part of the second sentence ordered to run concurrently with the first, would have been entirely appropriate. Sitting as an appellate tribunal however, and in the absence of the first appellant being afforded an opportunity to be heard on whether or not the sentence should be increased, we are not at liberty to impose a sentence in excess of that imposed. Given the seriousness of the offences however, a lengthy term of imprisonment is imperatively called for.

- [26] Although the second appellant was convicted only in respect of counts three and four the disparity between his sentence and that imposed on the first appellant is three years. During the second appellant's attorney's address on sentence he laid emphasis on a number of mitigating factors which he contended amounted to substantial and compelling

circumstances and in addition, informed the magistrate that the second appellant had been in custody awaiting trial for three and a half years. This, no doubt, accounts for the disparity in the sentences imposed on the two appellants. Although the factors enumerated by the second appellant's attorney do not, in my view, constitute substantial and compelling circumstances, allowance must be made in the sentence to be imposed on him for the period spent awaiting trial. In the result therefore the following orders will issue:-

The appeal in respect of the appellants' convictions on counts one and three is dismissed.

The appeal in respect of the convictions of the appellants on counts two and four is upheld and the convictions are set aside.

The sentences imposed on the appellants is set aside and replaced by the following:-

On count one the first appellant is sentenced to imprisonment for 15 years;

On count three the first appellant is sentenced to imprisonment for 15 years. It is however ordered that 12 years of the sentence is to run concurrently with the sentence imposed in respect of count one.

The sentence imposed on the second appellant is set aside and replaced by the following:-

The second appellant is sentenced to 12 years imprisonment;

5. The sentences are ante dated to 23 October 2009.
6. The Registrar is directed to forward a copy of this judgment to the President of the Regional Court, Port Elizabeth.

D. CHETTY

JUDGE OF THE HIGH COURT

Conjwa AJ

I agree.

N. CONJWA

ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellants: Mrs. H.L McCullum

Instructed by the Grahamstown Justice Centre

69 High Street

Grahamstown

Tel: (046) 622 9350

Ref: H.L McCullum

On behalf of the Respondent: Adv N. Phiti

Instructed by the Director of Public Prosecutions

High Street

Tel: (046) 602 3000

Ref: Ms Phiti

1The alternative charge in respect of count 3 was one of possession of stolen property in contravention of section 36 of the General Law Amendment Act 62 of 1955

2Address at the first orientation course for new judges – South African Law Journal 1998 Volume 115 at p 116-128

3 2004

(1) SACR 182 (ECD)

4At p 186j-188c

5Act No 51 of 1977

6Act No 71 of 1968

7The section provides that the provisions of subsections (1) and (2) shall apply only in respect of an offence referred to in subsection

(1) which is committed in an area in which the Minister of Justice has, by notice in the Gazette, declared such provisions to be applicable.

8 1978

(3) SA 726 (AD) at 728E-729A

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/2010/112.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ngabase-and-another-v-s-unknown-topic-aecghc-2010--6a3ea51e3b1caa9129814676>

Prepared on 10 October 2026 · Esheria