
SOUTH AFRICA / JUDGMENT

Zolile v S (A326/2016) [2017] ZAGPJHC 100 (27 March 2017) [2017] ZAGPJHC 100

COURT

South Gauteng High Court, Johannesburg

BEFORE

WHG van der Linde, E Molahlehi

CASE / FILE NUMBER

A326/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A326/2016

Not reportable

Of interest to other judges

Revised.

27/3/2017

In the matter between:

Zolile, Mzwandile Appellant

and

The State Respondent

Summary – Appeal against effective sentence of 20 years imprisonment on four counts: robbery with aggravating circumstances: fifteen years in terms of Act 105 of 1997, two counts of unlawful possession of fire-arms: effective imprisonment of four years each, and unlawful possession of ammunition: one year; appellant having spent 22 months awaiting trial.

Appellant's heads of argument initially comprising two and a half pages of unhelpful material – legal representative requested in advance to address court on why fees should not be declared forfeit – supplementary heads of argument of improved quality received – no penalty imposed.

Held

- overall effect of the sentences, viz 20 years direct imprisonment, induces a sense of shock: close link between four offences - elements of one closely bound up with elements of another
- concurrence of sentences ought to have been considered.

Held – notion supported that in such circumstances sentence to be imposed that is no more severe than that imposed for the most severe offence taken on its own.

Judgment

Van der Linde, J:

- [1] The appellant appeals only against the sentences imposed on him on four counts by the Regional Court sitting on 3 March 2010 at Orlando: robbery with aggravating circumstances; unlawful possession of a fire-arm; unlawful possession of ammunition; and a second count of unlawful possession of a fire-arm. The appeal is with leave granted on petition to the Judge President, the court a quo having refused an application for leave to appeal against both conviction and sentence. The petition was also for leave to appeal against both.
- [2] The appellant was legally represented in the appeal. In the two and a half partly double-spaced pages of heads of argument, which were filed late, there is only a passing reference to “the prescribed minimum sentences”. There is no discussion of the requirements of s.51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (“the Act”), in terms of which the minimum sentence for count 1 here is fifteen years, and which cannot be suspended by virtue of s.51(5) of the Act.
- [3] There is no reference to the definition of “aggravating circumstances” in relation to robbery as it appears in s.1 of the Criminal Procedure Act 51 of 1977. There is no reference even to the issue of “substantial and compelling circumstances”, as referred to in s.51(3)(a) of the Act, which is required to exist before a sentencing court may deviate from the prescribed minimum sentences.
- [4] In the heads of argument for the appellant, two cases are referred to. Both references are incomplete. There is no discussion of the cases, nor any submission of why they are relevant to this appeal. The heads of argument are replete with errors of alignment, paragraph numbering, spacing, syntax and grammar. They conclude incomprehensively: “Wherefore the appellant prays that he be granted leave to appeal against his sentence. In the alternative, this honourable court to reduce his sentence.”
- [5] The heads of argument were accompanied by an affidavit that explained why the heads were late. One explanation is that the legal

representative was waiting to be placed in fees. Paragraph 4 of that affidavit reads as follows: “I wish to inform this honourable court that I have been paid in full hence I have prepared the heads of argument.”

- [6] Courts in this division have before commented negatively on the poor quality of heads of argument in criminal appeals from the lower courts. I refer specifically to *S v Ntuli*, 2003 (4) SA 258 (W). There Marcus, AJ (with whom Mailula, J concurred) said with reference to heads of argument of the same brevity and character as these (at [15] ff) (emphasis supplied):

“[15] The judicial observations referred to above were made in the context of the right to legal representation in a criminal trial. The present case is not concerned with a trial but with an appeal. A right to appeal by a higher Court is a facet of the right to a fair trial guaranteed by s 35(3)(o) of the Constitution. Dealing with the equivalent right in the interim Constitution, Didcott J in S v Ntuli [1995] ZACC 14; 1996 (1) SA 1207 (CC) (1996 (1) SACR 94; 1996 (1) BCLR 141) observed in para [17] that the phrase 'recourse by way of appeal or review' envisages and implies at a minimum 'the opportunity for an adequate reappraisal of every case and an informed decision on it'. (See also S v Rens [1995] ZACC 15; 1996

- (1) SA 1218 (CC); 1996 (1) SACR 105; 1996 (2) BCLR 155) at para [21].) Whether this right also embodies a right to legal representation on appeal in appropriate cases is not a matter to which I address myself. However, whatever the precise boundaries of the right created by s 35(3)(o) of the Constitution may be, it certainly cannot be 'the right to a meaningless ritual' (per Justice Douglas in *Douglas v California* [1963] USSC 85; 372 US 353 (1963)).
- [16] Unless counsel properly represents his or her client, the right to a fair trial and the right to a fair appeal may be negated. At issue is simply the basic proposition that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard. In *S v Steyn* 2001 (1) SA 1146 (CC) para [24] at 1160C - 1161A (2001 (1) SACR 25 at 38e - 39c [2000] ZACC 24; ; 2001 (1) BCLR 52) at the Constitutional Court stressed the importance of oral argument in the context of criminal appeals. The same holds true for written argument.
- [17] This judgment is intended to provide guidance for the conduct of criminal appeals in the future. Where inadequate heads of argument are filed, a Court may adopt a variety of remedial measures, either on their own or in combination with each other. Thus, a Court may direct that proper heads of argument be filed. The Court may postpone the hearing of the appeal until proper heads of argument are filed. Legal practitioners who do not fulfil their duty in this regard may be deprived of the right to charge any fee. Finally, the matter may be referred to an appropriate authority for the institution of disciplinary proceedings.”

- [7] The appellant has a fundamental right in terms of s.35(3)(f) of the Constitution to be represented by a legal practitioner of his choice, whose concomitant duty it is to ensure that the appellant is afforded full enjoyment of his fair trial rights under sub-section 35(3), including the right to an appeal under sub-section 35(3)(o) which right must afford the 'the opportunity for an adequate reappraisal of every case and an informed decision on it'. A client who engages a legal practitioner, particularly in a criminal case, is entitled to accept that the latter will ensure that this duty will be discharged.
- [8] In the circumstances here pertaining we accordingly gave the appellant's legal representative written advance notice that we wished to hear him specifically on this issue. Shortly before the commencement of the hearing, we received additional heads of argument from him. These traversed the issues in the appeal far more comprehensively than before.
- [9] It was explained to us in court that this was the legal representative's first appearance in an appeal in the High Court. We add too that in advancing the appellant's case, his legal representative in oral argument fully acquitted himself of the duties resting on him. Consequently we were persuaded not to make any order concerning the fees.
- [10] With this issue out of the way, I can now turn to the merits of the appeal against the sentence. The court a quo sentenced the appellant to an effective 20 years imprisonment: four years for the two possession of fire-arm counts, to run concurrently; one year for the possession of ammunition count; and fifteen years for the robbery with aggravating circumstances count.
- [11] The facts are of a narrow ambit. The two complainants, both security guards, were robbed by the appellant and another at about 02h00 in the morning of the first complainant's pump action shotgun, and the second complainant's phone and hand radio. The robbery involved "aggravating circumstances" as defined, because the appellant "wielded a fire-arm" during the robbery.
- [12] The real issue in this appeal is not so much the absence of substantial and compelling circumstances necessitating the imposition of the fifteen years for the robbery count by dint of s.51(2)(a)(i) of the Act, read with s.51(3)(a); sentences of fifteen years are regularly confirmed in such instances. Compare *S v Mabunda* 2013 JDR 0577 (SCA); *S v Luvuno* 2015 JDR 0653 (GP).
- [13] The court a quo was clearly well-informed of this issue of substantial and compelling circumstances; see record p171 lines 11 – p171 in fin. But the court a quo rightly stressed the seriousness of the crime of robbery, and in my view rightly concluded that there were no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum of fifteen years.

- [14] Nor do the individual sentences elicit legitimate objection. The real issue is rather whether the overall effect of the sentences, namely whether 20 years direct imprisonment, induces a sense of shock. The appellant had been incarcerated since 4 May 2008, just short of two years before sentencing. If that were added to the fifteen years, the effect is already seventeen years.
- [15] Clearly the court a quo took the pre-sentencing incarceration into account. However, what is puzzling is that the court a quo seemed to set out not wishing to impose a sentence that would have the appellant spend more than fifteen years in jail; see record p174 lines 20 – 22: “Because accused 1 is a first offender and because of the period of time that you have already spent in custody the Court will not exceed the period of 15 years imprisonment.”
- [16] I accept that these remarks may have been made exclusively in the context of count 1, but it does seem contradictory to keep down the sentence on count 1 for the reason that the appellant had already spent two years incarcerated before sentencing, and then to allow the sentences on the remaining counts to sweep that away.
- [17] Specifically, when the sentences for the fire-arm and ammunition counts were imposed, the question of concurrency of the three lesser counts with the robbery count did not seem to weigh with the court, since the court very deliberately imposed a sentence of 20 years direct imprisonment: “You are therefore sentenced to 20 years imprisonment.”
- [18] In this very context there are three matters that do not appear to have weighed with the court a quo. The first is that possession of the very instrument that defined this robbery as one with aggravating circumstances, being the fire-arm, thereby importing the minimum sentencing regime, was also being punished, but punished separately, under count 2. I do not suggest that splitting of charges and subsequently a duplication of convictions are involved, but the ostensible overlap may invite concurrency in sentencing, when the cumulative effect of the sentences is considered.
- [19] In this regard it has been held authoritatively that when the offences are connected in some way, the need for the cumulative effect to be reduced is generally greater:[1]
- “[22] An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' (S v Mokela 2012*
- (1) SACR 431 (SCA) ([2011] ZASCA 166) para 11). Put differently, where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered (S v Mate 2000
- (1) SACR 552 (T)).”
- [20] Terblanche[2] reasons that this judgment supports the notion that in those circumstances a sentence should be imposed that is no more severe

than that which is imposed for the most severe offence taken on its own. The learned author finds support for this approach in the Supreme Court of Appeal:[3]

“[33] Finally, and assuming that there was no duplication of convictions, the magistrate's most serious misdirection was his failure to consider the cumulative effect of the sentences. Only the sentences imposed on the firearm and ammunition counts were ordered to run concurrently, the effect of which was to reduce the total sentence to be served by just one year. All the other sentences, including the theft of the motor vehicle, were ordered to run consecutively. The total of 45 years' imprisonment was a sentence of 15 years more than even the state thought it could legitimately ask for. It seems that the magistrate's unexplained premise for ordering the sentences to run consecutively was his erroneous assumption that the minimum sentence regime required this. So even if Mr Dlamini had committed three offences, they were perpetrated 'at the same time and place, and in a single, unbroken sequence'. Here too common sense and fairness suggest that he ought to have been punished as if only one offence was committed.

...

- [36] In approaching the issue in this manner the high court seems to have laboured under the same misapprehension as the magistrate did — that the minimum sentence regime required these sentences to be served consecutively. What also weighed with the high court was, as the magistrate similarly found, that this 'was a slick and professional operation' justifying the severest sentence. As I indicated earlier, there was simply no evidence, circumstantial or otherwise, to support this inference. Ms Watt, who appeared for the state in this appeal, to her credit did not seek to defend this flawed reasoning.”
- [21] The second is that counts 3 and 4 relate to the subject-matter of the theft aspect of the robbery. Without the theft, there would have been no robbery. Although I accept that a robbery of items the possession of which do not of themselves constitute a crime may be less morally blameworthy than the robbery in this instance, I incline to the view espoused by Terblanche, already alluded to above, that that difference dissolves within the substantial minimum sentences that are laid down by the Act. Again, there is no splitting of charges or duplication of convictions, but concurrency is strongly indicated.[4]
- [22] The third is that often lengthy sentences have a diminishing return: the first half of a lengthy prison sentence might be far more effective than the second half.[5] An effective period of 22 years spent incarcerated for a first offender of 27 years where no-one was injured in any way, really negates the consideration of the court a quo itself when it decided to impose fifteen rather than 20 years imprisonment in count 1.
- [23] In my view, having regard to these considerations, as well as to the relative youth of the appellant, his status as first offender, the fact of no injuries suffered by the complainants, the fact of just short of two years' incarceration, the cumulative effect of a period of direct imprisonment of 20 years does induce a sense of shock. There has, to this extent, been a misdirection by the court a quo. It seems to me that the sentences on counts two, three and four should have run concurrently with the sentence on count one.

[24] In the result I propose the following order:

- (a) The appeal against sentence succeeds, and the sentence imposed by the court a quo is set aside.
- (b) The following sentences, backdated to 3 March 2010, are imposed on the appellant:
 - (i) On count one, a period of imprisonment of fifteen years;
 - (ii) On count two, a period of imprisonment of fifteen years of which eleven years are wholly suspended for a period of five years, on condition that the appellant is not convicted of contravening the provisions of s.3 of the Fire-Arms Control Act 60 of 2000 in respect of an offence committed during the period of suspension;
 - (iii) On count three, a period of imprisonment of one year;
 - (iv) On count four, a period of imprisonment of four years;
 - (v) The sentences in respect of counts two, three and four are to run concurrently in terms of s.280 (2) of the Criminal Procedure Act 51 of 1977 with the sentence imposed on count one;
 - (vi) The appellant is declared, in terms of s.103 of the Fire-Arms Control Act 60 of 2000, unfit to possess a fire-arm.

WHG van der Linde

Judge, High Court

Johannesburg

I agree.

E Molahlehi

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Gauteng Local Division

2000

Matter argued: Thursday, 23 March 2017.

Judgment:

Monday, 27 March 2017.

- [1] S v Mthetwa, 2015 (1) SACR 302 (GP) at [22].
- [2] SS Terblanche, A Guide to Sentencing in South Africa, 3rd Ed, LexisNexis, p199.
- [3] 2012(2) SACR 1 (SCA) at [33] and [36], Cachalia, JA (with Farlam, JA) for the minority, approved by the majority at [43].
- [4] Terblanche op cit refers also to S v Maseola, 2010 (2) SACR 311 (SCA) at [12] and S v Mhlakaza, 1997 (1) SACR 515 (SCA) at 523.
- [5] Compare Terblanche, at p256 ff.

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