

SOUTH AFRICA / JUDGMENT

Zulu v S (8/2017) [2017] ZAGPPHC 1250 (11 October 2017) [2017] ZAGPPHC 1250

COURT

North Gauteng High Court, Pretoria

BEFORE

L M Molopa-Sethosa, P M Mabuse, C J Collis

CASE / FILE NUMBER

8/2017

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REPUBLIC OF
SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE NO: 8/2017

11/10/2017

In

the matter between:

ZULUBOY

ZULU

Appellant

and

THE

STATE

Respondent

An appeal against an

effective sentence of 30 years' imprisonment imposed by the Regional

division of Gauteng, held at Pretoria,

respectively for the robbery

with aggravating circumstances of Mr Vuyo Njungweni and Ms Sibongile

Mthombeni.

Order
The
appeal against sentence is upheld.

JUDGMENT

MOLOPA-SETHOSA J (MABUSE J and COLLIS AJ concurring)

[1] The appellant, Mr Zuluboy Zulu was arraigned with a co accused, Lizwe Nkabinde (2nd accused in the court a quo), in the Regional Court for the Regional Division of Gauteng, held at Pretoria, on the following charges:

[1.1] Count 1: Robbery with Aggravating circumstances [Vuyo Njungweni];

[1.2] Count 2: Robbery with Aggravating circumstances [Sibongile Mthombeni];

[1.3] Count 3; Possession of unlicensed firearm;

[1.4] Count 4: Possession of unlicensed ammunition;

[1.5] Count 5: Possession of unlicensed firearm; and

[1.6] Count 6: Possession of unlicensed ammunition

[2] The appellant pleaded not guilty to all the charges and proffered no plea explanation. The appellant was subsequently convicted on counts 1, 2, 3 and 4 on the 18th of September 2008; he was acquitted on counts 5 and 6.

[3] The appellant was sentenced on the 19th of September 2008 as follows:

[3.1] Count 1 : 15 years imprisonment.

[3.2] Count 2: 15 years imprisonment

[3.3] Count 3: 15 years Imprisonment

[3.4] Count 4: 1 year imrisonment

[3.5] The appellant was sentenced to a total of 46 years' imprisonment. In terms of section 282 of the Criminal Procedure Act, Act 51 1977 ("The CPA"), the sentences in some counts were ordered to be served concurrently. It was ordered that the sentence imposed on counts 3 and 4 run concurrently with the sentence on counts 1 and 2.

[3.6] The effective term of imprisonment imposed accordingly on the appellant was 30 years' imprisonment.

[4] The appellant was legally represented during the proceedings in the court a quo.

[5] The appellant applied for leave to appeal against conviction and sentence. The presiding magistrate refused the application.

[6] The appellant then lodged a petition to the High Court against the refusal of his leave to appeal by the magistrate. Ledwaba DJP and Tuchten J dismissed the petition on 9 March 2010.

[7] The appellant applied for special leave to appeal to the Supreme Court of Appeal and on 25 February 2016 special leave to appeal against sentence was granted to the Supreme Court of Appeal.

[8] On 21 December 2016 the Supreme Court of Appeal upheld his appeal, and granted him leave to appeal against sentence only to the Full Court of this Division.

[9] The genesis of the convictions and the sentences arose from events which occurred on 26 May 2003. The appellant, together with his co-accused hijacked a motor vehicle; a BMW with registration letters and numbers SFJ 349 GP, belonging to Mr Vuyo Njungweni by the use of a firearm.

[10] At the time of the hijacking, the vehicle was parked in the street. Mr Vuyo Njungweni was seated inside his vehicle and Ms Sibongile Mthombeni was standing outside the vehicle. The two robbers, armed with firearms, compelled Mr Vuyo Njungweni to alight from his BMW vehicle. Ms Sibongile Mthombeni was pointed with a firearm whilst standing outside the vehicle by the appellant. The appellant demanded her handbag and threatened to shoot her if she screams. Ms Mthombeni first wanted to convince the appellant that her handbag was inside a big bag on the ground but later she did produce the handbag from behind her back and the appellant took the handbag from her hands. The appellant and his co-accused climbed into the BMW vehicle with the handbag with its contents, and drove off. They surely did not realize that the BMW vehicle was fitted with a tracker alarm and they were apprehended approximately a few hours later in Yeoville, Johannesburg. Both the BMW vehicle of Mr Njungweni and most of the stolen items, including the handbag of Ms Mthombeni were recovered following the arrest of the appellant and his co-accused.

[11] In sentencing the appellant, it appears *ex facie* the record that the learned magistrate took into account the personal circumstances of the appellant [albeit scanty], the nature and seriousness of the offence as well as the interests of society. The findings of the learned magistrate that this was a premeditated

offence cannot be criticized.

[12] The state proved no previous convictions against the appellant.

[13] From the judgement on sentence the following personal circumstances of the appellant appear to have been placed on record: the appellant:

[13.1] was 25 years old at the time he was sentenced;

[13.2] was unmarried, although he had a minor child, who was 5 years old at the time of sentence;

[13.3] went to school up to standard 10;

[13.4] was employed as a taxi driver earning R600.00 per week at the time of the commission of the offences;

[13.5] was a first offender.

The record itself does not reflect what was actually placed on record. At page 149 line 9 of the record it merely states "Mr Madiba (the appellant's legal representative) addresses the court"; same with the appellant's co-accused. In my view the address before sentence, by both parties, should have been fully transcribed. What is set out in para [13.1] to [13.5] is all that the learned magistrate mentioned in her sentence, and this appeal court does not have the benefit of what all was placed on record on behalf of the appellant. Nothing is mentioned about the appellant's family background. Be that as it may, this court will have to do with what is before it.

[14] The appellant's attack against the sentence is effectively that the sentence is shocking and not justified in the circumstances; that an effective term of 30 years' imprisonment is shockingly disproportionate in the circumstances of the case.

[15] Counsel for the appellant submitted that the Court a quo erred by not ordering in terms of the Section 282 of the CPA that the sentence imposed on count 2 run concurrently with the sentence

imposed on count 1; further, that although the Court a quo considered the concurrent imposition of the sentences, it did not sufficiently

consider the cumulative effect of the sentence and erred by not properly considering the long term effect of 30 years imprisonment.

In his heads of argument counsel for the appellant submitted that the effective term of imprisonment which was imposed on the appellant is effectively longer, compared to a sentence of life imprisonment which is generally an effective term of 25 years imprisonment.

[16] Counsel for the appellant further submitted that the Court a quo did not properly consider the cumulative effect of the sentences imposed, in particular in the light of the fact that the commission and execution of the two robberies occurred at the same place on the same day and during the same incident.

- [17] Counsel for the respondent on the other hand submitted that both complainants were threatened separately and their properties were taken from them individually; that unlawful threat of violence and taking of the property were thus perpetrated separately in relation to each of the complainants; that since the appellant was convicted of two counts of robbery with aggravating circumstances, and sentenced to 15 years imprisonment on each count, that therefore the sentence cannot be faulted and that these sentences must be confirmed.
- [18] Counsel for the respondent however conceded, correctly so, that the effective term of 30 years' imprisonment was harsh and indeed a heavy one, but implored this Court to order that part of the sentences on count 2 must run concurrently with count 1 and that the sentences imposed on Count 3 and count 4 must be confirmed to run concurrently with the sentences imposed on count 1 and 2.
- [19] The circumstances of the robbery with aggravating circumstances in counts 1 and 2 brought the sentencing within the purview of s 51(2) of the Criminal Law Amendment Act 105 of 1997 ("The Minimum Sentences Act"), in terms of which 15 years' imprisonment is prescribed for a first offender, which appellant is.
- [20] The appellant in essence appeals against the severity of the sentence and as already, stated above, submits that the Court a quo should have ordered that the sentence in count 2 run concurrently with the sentence in count 1, 3 and 4; that the effective term of imprisonment should be 15 years.
- [21] The offences, it hardly bears mentioning, are most serious, prevalent and atrocious. The trial court duly took cognisance thereof as well as the appellant's personal circumstances [albeit scantily], set out above. In the present case, the appellant had spent close to three years in custody awaiting finalisation of the trial.
- [22] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In *Makela v The State* 2012 (1) SACR 431 (SCA) para [9], Bosielo JA stated the following:
- 'This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G; *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Malgas* 2001 (1) SACR 469 (SCA) para [12]; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para [11]; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d. '
- [23] Evidently sentencing must attach due weight to the gravity of the crimes for which the appellant has been convicted. The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences.

[24] In *S v Scott-Crossley* 2008 (1) SACR 223(SCA) at para [35] the following was stated with regard to the purpose of sentence:

" Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones... It is true that it is in the interests of justice that crime should be punished. however, punishment that is excessive serves neither the interests of justice nor those of society. "

[25] In sentencing the appellant, the court a quo correctly held that no substantial and compelling circumstances existed to justify a deviation from the various determinate minimum sentences. In our considered view, and as stated in *S v Mahlatsi* 2013 (2) SACR 625 (GNP) at para [8]

"...it cannot be argued with any measure of conviction that the sentences imposed on each count individually could be regarded as so shockingly heavy that interference is warranted. [My emphasis]

It is the trial court's consideration of sentence following that finding [that no substantial and compelling circumstances existed to justify a deviation from the various determinate minimum sentences], which is considered here, more specifically the cumulative effect of the sentence imposed.

[26] The court a quo further correctly considered the cumulative effect of the sentences and, in the interest of showing mercy to the appellant, ordered various sentences to be served concurrently. Refer: *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para [8].

[27] The trial court had to consider a totality of factors, including the traditional triad, consisting of the nature of the offence, the personal circumstances of the appellant and the interests of the society. As much as the sentence of 15 years imprisonment on each count of robbery with aggravating circumstances (count 1 and 2), cannot be faulted, in our considered view, some weight should have also been given to the fact that the appellant had spent close to three years in custody awaiting finalisation of the trial, in determining the cumulative effect of the sentence. The Supreme Court of Appeal ("SCA") in *S v Zuluboy Zulu* (226) 216

[2017] ZASCA December 2016, per Wallis JA, held that the Court a quo clearly misdirected itself by not taking into account the time the appellant was in prison awaiting trial; we concur.

[28] What is more, because there is more than one count for which the appellant had to be sentenced, the court had a duty to properly consider the cumulative effect of the sentences. It is to be recalled that the trial court ordered only the sentence in counts 3 and 4 to run concurrently with the sentence in count 1 and 2. No concurrency is mentioned with regard the sentence of 15 years in count 2. In this regard the position can be summarized as follows. Where an accused person is convicted of more than one offence, it is a salutary practice for a sentencing court to consider the cumulative effect of the respective sentences.

In this regard, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment (*S v Whitehead* 1970 (4) SA 424 (A); *S v Kwenamore* 2004 (1) SACR385 (SCA)).

[29] 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 Makela* 2012 (1) SACR 431 (SCA) 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, refer *S v Mate* 2000

(1) SACR 552 (T).

[30] In the present case, there was indeed an inextricable link between the 2 offences of robbery with aggravating circumstances (count 1 and

2) in terms of the locality, time and the protagonists. There was also a substantial overlap in the overall intent in respect of the crimes. In my view, the failure of the trial court to take these factors into consideration resulted in the cumulative effect of sentence being disturbingly inappropriate. These factors justified an order of concurrence in the sentences in counts 1 and 2. The SCA in *Zuluboy Zulu* supra held in this regard that the court a quo clearly misdirected itself by not taking into account the fact that both offences constituted a single criminal occurrence and that

it is justified that the sentences are to be served concurrently.

[31] Clearly the offences the appellant was convicted of were properly planned; hence, as already stated, the findings of the learned magistrate that this was a premeditated offence cannot be criticized. The only attack against the sentence imposed against the appellant, which has some merit, in our considered view, is that the cumulative

effect thereof [30 years imprisonment], could arguably be perceived to be heavy. Indeed it is crucial to note that the ultimate sentence under the Minimum Sentences Act is life imprisonment, which in actual fact translates to at least 25 years imprisonment barring substantial and compelling circumstances.

[32] The length of the individual sentences "might be legally unassailable" but the effective term of imprisonment might tend to shock, justifying interference on appeal." Vide *Mahlatsi* supra.

[33] The power of this Court of Appeal to interfere with the imposed sentence is derived from Section 322(2) of the CPA, which states that:

"Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial. "

- [34] It is so that the appellant and his co-accused surely planned to commit the offences they have been convicted of and that these were pre- mediated as found by the trial court.
- [35] The only question here is whether the cumulative sentence is shockingly inappropriate. As already stated, the effective gaol term, thirty (30) years imprisonment is an exceptionally long time in the circumstances of this case.
- [36] The courts are there to protect the society by imposing appropriate sentences and thereby send a clear message that there is no room for criminals in our society, This also enhances the confidence of the public in the judicial system. However, as stated in Scott-Crossley supra, punishment that is excessive serves neither the interests of justice nor those of society. The effective sentence of thirty years' imprisonment in the circumstances herein by any standard, induces a sense of shock, and makes it incumbent upon the appeal court to interfere with the sentence of the court a quo in so far as the cumulative effect of the sentence is concerned.
- [37] As much as the court a quo may have taken into account, the cumulative effect of the sentence, taking into account all factors in this matter, the resultant sentence remains disturbingly harsh and inappropriate.
- [38] However, as correctly submitted by counsel for the respondent, both Mr Njungweni and Ms Mthombeni were threatened separately and their properties were taken from them individually, the unlawful threat of violence and taking of the property were thus perpetrated separately in relation to each of the complainants. It can only be fair, in our considered view, that only a part of the sentence in count 2 should be ordered to run concurrently with the sentence in count 1.

THE FATE OF ACCUSED 2

- [39] As indicated in paragraph 1 supra, the appellant appeared in the trial court with the said Lizwe Nkabinde, accused 2. Both of them were charged with the same offences but accused 2 was convicted only in respect of counts 1, 2, 5 and 6. Accordingly accused 2 was found not guilty and acquitted in respect of counts 3 and 4.
- [40] Upon Conviction the court a quo sentenced accused 2 as follows:
- [40.1] count 1: 15 years' imprisonment;
- [40.2] count 2: 15 years' imprisonment;
- [40,3] count 5: 15 years' imprisonment; and
- [40.4] count 6: 1 year imprisonment.

The court a quo made an order, in terms of s 280(2) of the CPA that the sentences it had imposed on accused 2 in respect of counts 5 and 6 should run concurrently with the sentences imposed on accused two in respect of counts 1 and 2. To the extent that the court a quo did not order the sentences imposed on accused 2 in respect of counts 1 and 2 to run concurrently there was, in our view, a misdirection.

Accordingly there is no clarity as to the effective sentence to which accused two had been sentenced.

[41] On 24 February 2009, the accused 2, together with the appellant, applied for leave to appeal against both conviction and sentence to the court a quo. The application for leave to appeal was refused on the basis that the result of the trial and the sentence would, if they were granted leave to appeal, remain the same even if the application for leave to appeal was granted. There were, in other words, no reasonable prospects of success if the application for leave to appeal was granted. The fate of accused 2 was buried there while the appellant took steps to obtain leave to appeal until the Supreme Court of Appeal granted him leave to appeal against sentence only. When we heard the appellant's appeal accused 2 was not before us simply because, unlike the appellant, he did not persist with his application for leave to appeal. We took the matter up with counsel. The initial view was that accused 2 was not before Court; he had not been granted leave to appeal, and for that reason we could not deal with his case. It was only after we had pointed it out to them that

we could use the Court's review powers in terms of s 304(4) of the CPA that they are relented.

[42] We had, as it would become clearer hereinafter, reconsidered the appellant's appeal; that we have decided to interfere with the sentence that the court a quo had imposed on the appellant. Accordingly it would be a travesty of justice if this appeal tribunal dealt fully with the appellant's appeal against sentence, granted it and folded our arms in respect of the sentence imposed by the trial court on accused 2 when they were both sentenced for the same offences. In the premises it would only be fair if accused 2 enjoyed the benefit of the results of the appellant's appeal.

[43] The starting point in our view is that:

"A reviewing court should not hesitate to intervene and reduce a sentence imposed on an accused person where justice so requires. "

[44] Section 304(4) of the CPA provides that:

"If in any criminal case in which a magistrate court has imposed a sentence which is not subject to review in ordinary cause in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such Court or a Judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such Court or Judge in terms of section 303 or this section. "

[45] There is no doubt in our minds that, when considering the fact that the appellant and accused 2 faced similar offences in the court a quo; that they were both convicted of such offences and having been convicted they were similarly both sentenced to the same terms of imprisonment, if accused 2 had been fortunate enough to petition the Supreme Court of Appeal for leave to appeal against sentence,

such application would have been granted. We can only speculate on the reasons for his inability or failure to doggedly pursue his application for leave to appeal in the same way as the appellant has done.

[46] As we pointed out it came to our notice during the hearing of the appellant's appeal, firstly, that the proceedings in the lower court might not have been in accordance with justice; that for that reason we might have had to interfere with the sentence that the court a quo had imposed on the appellant; that if we interfered with the sentence favourably that would affect the fate of accused 2 who was

not before Court and who had filed no papers for reasons unknown to us, and finally that there would be injustice or we would be sending a wrong message out to the society if we, as an Appeal Court, reduced the appellant's sentence but failed to do likewise with accused 2's sentence. As far as we are concerned nothing prevents the Court from similarly reducing accused 2's sentence as this Court is enjoined by the provisions of s 304(4) of the CPA to use its powers to do so.

[47] This Appeal Court can use its review powers as set out in section 304 of the CPA to interfere with the sentence imposed on accused 2 if it is satisfied about the existence of the circumstances set out in the preceding paragraph.

[48] Having considered both arguments before this court, and taking into consideration all factors; and in the light of what is stated above, it is proposed that the appeal succeeds to the extent set out below, and that an order in the following terms be made:

1. The appeal on sentence is upheld to the extent set out below ;
2. The sentence of 15 years imprisonment in Count 1 is confirmed;
3. The sentence of 15 years imprisonment in Count 2 is confirmed, 10 years of the sentence in Count 2 shall run concurrently with the 15 years' imprisonment in Count 1;
4. The sentences imposed on Count 3 and 4 are confirmed to run concurrently with the sentences imposed on count 1 and 2;
5. The appellant remains unfit to possess a firearm.
6. The appellant is thus to serve an effective sentence of 20 years imprisonment. In terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended, the sentence is ante-dated to 19 September 2008, being the date on which the appellant was sentenced.

[49] With regard to accused 2 the following order is thus made:

1. The sentences imposed by the trial court on the accused 2 in respect of counts 1, 2, 5 and 6 are hereby confirmed.
2. Ten years of the sentence imposed by the court a quo on accused 2 in respect of count 2 shall run concurrently with the sentence of fifteen years imposed in respect of count 1.
3. The sentences imposed by the trial court on accused 2 in respect of counts 5 and 6 shall run concurrently with the sentence imposed in respect of count 1.
4. Accused 2 remains unfit to possess a firearm
5. Accused 2 is thus to serve an effective sentence of 20 years imprisonment. In terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended, the sentence is ante-dated to 19 September 2008, being the date on which accused 2 was sentenced.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

P M MABUSE

C J COLLIS

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

Appearances:

For the Appellant

:Adv.P F Pistorius

Instructed by

:Johan Van Zyl Attorneys

For the Respondent :Adv. P Vorster

Instructed by

:Director of Public Prosecutions

Pretoria

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