

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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Case number: 06452/2015

In the matter between:

MAKWELA THABISO

Applicant

And

THE MINISTER OF JUSTICE

First Respondent

THE MINISTER OF CORRECTIONAL SERVICES

Second Respondent

**THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

Third Respondent

**THE REGIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

Fourth Respondent

**THE AREA MANAGER
(MEDIUM "C" LEEUWKOP)**

Fifth Respondent

**THE HEAD OF CORRECTIONAL CENTRE
(MEDIUM "C" LEEUWKOP)**

Sixth Respondent

**THE CHAIRPERSON OF PAROLE BOARD
(MEDIUM "C" LEEUWKOP)**

Seventh Respondent

THE CASES MANAGEMENT COMMITTEE

Eighth Respondent

(MEDIUM "C" LEEUWKOP)

THE SOCIAL WORKER

(MEDIUM "C" LEEUWKOP)

Ninth Respondent

SUMMARY: Section 280(2) of the Criminal Procedure Act permits a sentencing court to order one or more sentences of imprisonment to run concurrently, either in whole or in part. Where a shorter sentence is ordered to run concurrently with a longer sentence, the former is encapsulated within the latter. *In casu*, it appeared that a longer sentence was ordered to run concurrently with a shorter sentence and this led to the need for the determination as to the manner in which concurrent sentences were to be implemented and taken into account for purposes of consideration of early release on parole.

Applicant was sentenced to 15 years imprisonment in May 2004; he escaped from custody that day; he was apprehended in October 2007 and only then commenced serving his 15 year sentence; at the same time he was awaiting trial for charges of escape and of robbery with aggravating circumstances whilst he had escaped; he was convicted and sentenced on 4th April 2014 to serve a further term of 10 years imprisonment for the robbery which sentence was "to run concurrently with the sentence presently serving" as well as a further sentence of 3 years imprisonment in respect of the escape.

The Criminal Procedure Act is silent on computation or implementation of concurrent sentences. The ordinary meaning of "concurrent" is that sentences will run parallel at the same time. There is no requirement that the later sentence should be entirely subsumed within the earlier sentence. Comments in Anglo-American jurisprudence, although cautiously referred to, support this approach that the relevant consideration is the terminal date of the last sentence to expire.

In concluding that concurrency allows different sentences their own lifespan and although they may, partially, occupy the same time span and that they are not necessarily destined to expire together, the court held that it was the later 10 year sentence of imprisonment which would continue to operate even though the earlier sentence had been completed.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. The court is asked to decide how service of a sentence and eligibility for parole is to be calculated when a later sentence is ordered to run concurrently with the earlier sentence. The facts in this case are unusual but raise an issue which is commonplace

within the administration of the Department of Correctional Services – namely the import of a sentence which is to run ‘concurrently’.

2. The chronology is as follows:

- a. Applicant was convicted of robbery with aggravating circumstances and sentenced on the 11th May 2004 to serve a term of 15 (fifteen) years imprisonment.
 - b. Applicant escaped from custody on the date of his sentencing, 11th May 2004, and accordingly served no portion of his sentence.
 - c. Applicant was apprehended on 3rd October 2007 which is the date on which he commenced serving his 15 year sentence of imprisonment.
 - d. However, applicant was thereafter prosecuted, convicted and sentenced on 14th April 2014 on two further counts; firstly, for his escape and secondly, for another robbery with aggravating circumstances which he committed whilst he was on the run.
 - e. The sentence imposed upon him by the Regional Magistrate at Randburg was that of 3 (three) years imprisonment in respect of the escape and that of 10 (ten) years imprisonment in respect of the robbery. The latter sentence, 10 years for robbery, was ordered to run concurrently with the sentence he was then serving – i.e. the 15 year sentence imposed on 11th May 2004 for robbery but which he only commenced serving in October 2007.
3. In the ordinary course, the computation of the sentences to be served and calculation of eligibility for parole would not have been very difficult. Applicant was to serve a sentence of 15 years for robbery and a second sentence of 10 years for robbery imposed within that 15 year period would be encapsulated with the first robbery sentence resulting in an effective sentence of 15 years imprisonment. To that sentence of 15 years would then be added the additional period of 3 years imprisonment imposed in respect of the escape. The total period to be served would then be a period of 18 (eighteen) years imprisonment.
4. However, a complication has arisen. By the time the learned magistrate, on 4th April 2014, ordered that the 10 year sentence which he imposed “runs concurrently with the sentence presently servicing” there was only a period of some 8 ½ (eight and a half) years left to run on the first sentence. Accordingly, the later sentence of 10

years had now become the longer sentence and could not be encapsulated within the first (and originally the longer) sentence.

5. The applicant approached this court because he is of the view that he should have been considered for release on parole based on the fact that he has served a substantial portion of the (2007) 15 year sentence. It is common cause that a prisoner sentenced in 2004 would be subject to the provisions of the previous Correctional Services Act 8 of 1959 which would normally have entitled him to be considered for release on parole after he had served one-third of his sentence. In the circumstances, I understand why the policy of Correctional Services militates against giving consideration for release on parole where an offender is still awaiting trial for other offences. After his rearrest in 2007, the applicant was awaiting trial and it would not have been appropriate for him to be considered or released on parole once he had served 1/3 of his sentence in either 2012, 2013, or 2014 because the authorities did not know what would be the result of the impending trials.
6. At the first hearing before me on Monday 29th February 2016, counsel for respondent had failed to furnish heads of argument in accordance with the provisions of the Practice Manual and directives issued in regard thereto. I accepted his heads of argument but stood the matter down until the next day in order to consider them and asked him to be prepared to argue why he should not bear the wasted costs of this postponement and why he should be paid any fees for the wasted day. On the following day, it was apparent that counsel for respondent had not considered the meaning or import of the use of the word “concurrent” by the learned sentencing magistrate and had merely repeated, almost *verbatim*, the phrasing of various paragraphs in the respondents’ answering affidavit. He was unable to assist me with the issues with which I was confronted.
7. I am enormously grateful to Advocate Rusty Mogagabe SC of the Constitutional Group of the Johannesburg Bar whom I phoned asking for assistance from counsel. He arranged for Advocate Reuben Mbuli of the Duma Nokwe group to meet with me. I did so in the presence of respondents’ attorney, Mr Reginald Pooe. I made it clear that I have not taken it upon myself to replace the counsel of respondents’ choice. I have decided that I need the assistance of an *amicus curiae*. Both Advocate Mbuli and Mr Pooe understand that his position is that of an *amicus*. I am most grateful to Advocate Mbuli who has undertaken this task and devoted time and effort to this dispute on a *pro deo* basis.

CONCURRENT SENTENCES

8. Section 280(2) of the Criminal Procedure Act No 51 of 1977 provides that punishments consisting of imprisonment shall commence one after the other “unless

the court directs that such sentences of imprisonment shall run concurrently". The usual rationale for such orders is that a sentencing court should be mindful of the cumulative (and sometimes harsh) impact of the imposition of more than one sentence.

9. In the present case, the learned sentencing magistrate had regard that the accused before him had already been sentenced to serve a term of imprisonment and that same was actually in the process of being served. He must therefore have been mindful that some portion of the first sentence of imprisonment (15 years) had already been served and that only some portion remained still to be served – in this case some 8 ½ years of the first sentence.
10. The learned magistrate ordered that the sentence which he imposed was to "run concurrently with the sentence presently serving". At issue is whether or not the 10 years is encapsulated within the remaining 8 ½ years of the first sentence or whether it runs from 2014 parallel with the remaining portion of the first sentence but continues beyond that first sentence which terminates earlier than the later sentence.
11. The Criminal Procedure Act contains no definition of the word "concurrent" and the commentary on section 280(2) mainly deals with the impact of sentencing, therefore the rationale for ordering sentences of imprisonment to run concurrently. I have been unable (and so have Advocates Mbuli and Phanyane) to find any decisions of our courts which deal with the manner in which shorter and longer concurrent sentences of imprisonment are to be implemented.
12. The Oxford English Dictionary (2 ed, vol II) provides definitions of 'concurrent' as

"Adj: running together in space, as parallel lines; going on side by side, as proceedings; occurring together, as events or circumstances; existing or arising together; conjoint, associated."

"Law: covering the same ground."

"Concurrent Lease: a lease made before another is expired, and so existing for part of the time side by side with the other".
13. I had always understood that where one entity runs "concurrently" with another there is considered to be a parallel relationship running in tandem. In the case of a sentence of imprisonment this has usually meant that a shorter sentence runs at the same time as the longer sentence, is encapsulated within and is usually bounded by the beginning and the ending of the longer sentence. However, in the present case,

the later and longer sentence cannot be encapsulated within and bounded by the termination date of the earlier and shorter sentence.

14. I do take note of the submissions of Advocate Mbuli that there has been neither appeal nor review of the sentences imposed by the learned magistrate and that this court should be careful not to interfere with that which was ordered by the sentencing magistrate. I am in agreement with his approach but do not find that my reasoning either interferes or changes that which was ordered by the learned magistrate.
15. I cannot find that the later sentence of 10 years is to terminate when the remaining portion of the earlier sentence of 8 ½ years ends.
16. Firstly, the learned magistrate was alive to the fact that the accused had already served 6 ½ years of the first 15 year sentence and therefore had only 8 ½ years to serve. One cannot assume that a judicial officer was ordering an absurd result - i.e. that 10 years should fit within 8 ½ years.
17. Secondly, the Criminal Procedure Act does not provide that the later sentence must be entirely subsumed within the earlier sentence.
18. Thirdly, the clear meaning of the word “concurrent” indicates that the two sentences run in parallel while they operate at the same time. However, when one sentence is complete there is nothing to suggest that the remaining sentence must or should also then terminate. It simply has nothing further with which to run in tandem – it now stands on its own. The offender has certainly benefitted by the court order of concurrency – since the first portion of the later and longer sentence ran with the remaining portion of the earlier and shorter sentence; the sentences did not run consecutively.
19. In the present case, the applicant would serve 15 years of the first sentence and thereafter the remaining 1 ½ years of the 10 year sentence instead of 15 years of the first sentence and thereafter 10 years of the later sentence. The impact of the subsequent sentence has certainly been ameliorated by the learned magistrate.
20. My registrar has helpfully explored the Anglo-American jurisdictions for assistance. One must always be careful of placing any reliance upon the law of foreign jurisdictions especially when it relies upon its own statutes and is also not the common law of the Republic of South Africa.

21. In *R v Governor of Brockhill Prison, ex p. Evans* [1997] 2 W.L.R. 236 the court had to decide whether or not several sentences of imprisonment, whether consecutive or concurrent, were to be treated as a single term. The Lord Chief Justice held that
“in the case of concurrent sentences, the single term would in effect be the longest of the terms except where those sentences had been imposed on different occasions when the term would expire on the terminal date of the last sentence to expire” [page 282] and also “If concurrent sentences are imposed on the same occasion, the single term will in effect be the longest of the concurrent terms because that will be the last sentence to expire. Where concurrent sentences are imposed on different occasions they must still be treated as a single term, but the terminal date of the sentence pronounced by the court will not necessarily be that of the longest of the concurrent terms; it will, however, be the terminal date of the last sentence to expire, which may or may not be the longest of all the sentences. In the case of concurrent sentences it is not, obviously, a question of adding the relevant sentences together but of seeing which expires last” [at page 298].
22. The Legal Aid Society of the United States of America’s commentary on the New York Penal Code comments that “the time to be served on concurrent sentences is determined by the longest of the concurrent sentences” which is often referred to as “the controlling sentence”. Since “concurrent does not mean retroactive ... two identical sentences imposed at different times may result in different release dates” whilst “concurrent sentences, even if they are for the same length of time, will not necessarily begin and end at the same time if they are imposed on different dates”.
23. Although these comments come from different jurisdictions and in relation to different statutes and issues, the point made is the same. Concurrency allows different sentences their own lifespan and although they may, partially, occupy the same time span they are not necessarily destined to expire together.
24. In the result, I am in agreement with the calculations of respondent as set out in the answering affidavit which indicate that the 10 year sentence runs until 3rd April 2024 and thereafter the 3 year sentence (for escape) runs until 3rd April 2027.
25. Applicant complained of the failure of either the learned magistrate or the Department to have antedated one or more or all of the sentences imposed on the grounds that he should have been considered an awaiting trial prisoner during the period from his re-arrest in 2007 until his conviction and sentence in 2014. There is no merit in this submission. Firstly, sentencing courts are precluded from antedating

sentence; secondly, the sentencing court determines an appropriate sentence taking into account time spent in custody awaiting trial; thirdly, applicant was not awaiting trial but was serving his initial 15 year sentence imposed on him in 2004 which he commenced serving in 2007.

ELIGIBILITY FOR CONSIDERATION OF RELEASE ON PAROLE

26. It is common cause that the applicant was first sentenced in 2004 and therefore that sentence is subject to the provisions of the previous Correctional Services Act 8 of 1959.
27. In the ordinary course, applicant would have been eligible for consideration for release on parole after he had served one third of the sentence of 15 years imprisonment. Since he only commenced serving that sentence on 3rd October 2007, he was only eligible for consideration on 2nd October 2012. However, he was not so considered. No parole hearing was held in either 2012 or 2013 or 2014. This was perhaps an irregularity on the part of respondents who should have convened the usual hearing but I can appreciate that they were in a difficult position. The offender was facing further charges and they did not know the outcome of that prosecution. In addition they must have had regard to the escape by the offender which would have militated against favourable consideration of early release on parole.
28. Once the applicant was sentenced in 2014 the situation did change. He was still serving 15 years under the 1959 Act but he was now also serving a new sentence of 10 years imprisonment which was subject to the provisions of the Correctional services Act 111 of 1998 which came into operation on 11th July 2004. In terms of the new legislation, an offender is eligible for consideration for early release on parole after he has served one half of the sentence imposed.
29. Accordingly, the applicant will only have served one-half of his 10 year sentence on 3rd April 2019. Of course, that calculation does not take into account that there is still the sentence of 3 years imprisonment to be served – of which he must serve 18 months before he can be considered for release on parole. The upshot is that the applicant is only eligible to be considered for release on parole once he has served half of the total of 13 years imprisonment, namely 6 and ½ years, which is on or about 3rd October 2020.
30. I make no comment on whether or not the applicant should at any stage be considered for early release on parole. He must realise that the respondents will have regard to the further serious offence committed during the period he had escaped and while he was not serving the first sentence imposed upon him.

CONCLUSION

31. Insofar as costs are concerned, I order that Advocate Panyane charge no fees in respect of the wasted costs of 29th February 2016.

32. The application is dismissed.

DATED AT JOHANNESBURG 1st APRIL 2016

SATCHWELL J

Counsel for Applicant: Appeared in Person

Amicus Curiae: Adv R. Mbuli

Counsel for Respondent: Adv Panyane

Attorneys for Respondent: Office of the State Attorney

Dates of hearing: 29th February, 1st March, 4th March, 29th March 2016.

Date of judgment: 1st April 2016