

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: A85/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

VUYISILE MQATHULI

Appellant

and

THE STATE

Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 13 SEPTEMBER 2023

DELIVERED ON: 14 DECEMBER 2023

[1] This an opposed application for appeal against the sentence which was imposed by the Regional Court on 01 March 2018. The appellant was convicted and sentenced on the following counts:

1.1 Contravention of section 3 of Act 60 of 2000, read with section 51 of Act 105 of 1997 (Possession of semi-automatic fire arm), and sentenced to a

term of 15 years' imprisonment;

1.2 Robbery with aggravating circumstances read with the provisions of section 51(2)(a) of the Criminal Law Amendment Act, 105 of 1997, and sentenced to a term of 15 years' imprisonment;

1.3 Attempted murder and sentenced to a term of 6 years' imprisonment.

1.4 The court *a quo* ordered that the sentences imposed should not run concurrently and the appellant was therefore sentenced to an effective term of 36 years' imprisonment.

[2] The following is a synopsis of the grounds of appeal that the appellant relies on:

2.1 That the court *a quo* erred in find that no substantial and compelling circumstances are present to deviate from the prescribed minimum sentence.

2.2 That the court *a quo* erred by ordering that the sentences should not run concurrently.

2.3 That the sentence of 36 years' imprisonment is shockingly inappropriate.

[3] The appellant was born on 27 August 1987 and was therefore 29 years' old at the time of the commission of the offences. He is unmarried, with 2 children aged 6 and 1 year old. He was a first offender and was employed at the time sentencing as he worked for a farm providing gardening services. He progressed until standard 7 at school. He pleaded guilty to the charges whereupon he was convicted.

[4] The offences were committed at the complainant's home where she was assaulted by the appellant who used a semi-automatic fire arm to threaten the complainant who was pregnant at the time. The complainant sustained serious injuries and both she and young son had to undergo trauma counselling

thereafter.

- [5] The respondent submitted that the approach to an appeal on sentence imposed in terms of the minimum sentence legislation should be different to an approach to other sentences imposed under the ordinary sentencing regime because of the minimum sentences to be imposed are ordained by the Act. Consequently, a proper enquiry on appeal is whether the facts which were conceded by the sentencing court are substantial and compelling or not.¹ The appellant was serving an effective sentence of 36 years' imprisonment and the cumulative effect if the sentences imposed was so excessive that the imposed sentence is disturbingly inappropriate. Consequently, it was contended that the court *a quo* erred in finding that the sentences should have run concurrently.
- [6] It was contended furthermore that it was generally accepted that in ornately long terms of imprisonment did not contribute to the reform of an accused person. On the contrary they had the negative effect of the denuding the accused of all hope of rehabilitation.² When an accused is convicted of more than one offence, it is salutary for a sentencing court to consider the cumulative effect the respective sentences to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment by ordering that such sentences should run concurrently.³
- [7] Mr Lencoe, on behalf of the respondent, postulated that the issue for determination was whether the trial court erred in finding that there were no compelling and substantial circumstances in favour of the appellant in order to deviate from the prescribed minimum sentences. He referred to the well known case of *State v Rabie*⁴ where the following was stated:

"1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-

¹ State v PB 2013 (2) SACR 533 SCA at para 20.

² Itani Thomas Modau v The State (419/12) [2011] ZASCA 191 at para 5.

³ State v Mthetwa 2015 (1) SACR 302 (GP) at para 21.

⁴ 1975 (4) SA 855 (A) at 857D-F.

(a) *should be guided by the principle that punishment is*

"pre-eminently a matter for the discretion of the trial Court"; and

(b) *should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".*

2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.*

[8] He argued that the trial court extensively dealt with the personal circumstances of the appellant in arriving at the conclusion that they did not constitute compelling and substantial circumstance to deviated from the minimum sentence. It also articulated its reasoning in arriving at the conclusion that the aggravating circumstances outweighed the personal circumstances of the appellant.

[9] He submitted that question that might arise was whether the trial court should not have ordered that the sentence of 6 years' imprisonment imposed on the attempted murder charge should run with the sentence of 15 years' imposed on the robbery with aggravating circumstances charge, given that the two charges arose from the same incident. He was of the view that a trial's sentence cannot be charged merely because the court of appeal preferred a different sentence in the absences of misdirection by the trial court in exercising its discretion in sentencing. Relying on *State v Hewitt*⁵ he submitted that such interference is justified only where there exist a "*striking*" or "*startling*" or "*disturbing*" disparity between the trial court's sentence and that which the appellate court would have imposed. In such instances the trial's discretion is regarded as having been unreasonably excised.

⁵ 2017 (1) SACR 309 (SCA) at para 37.

[10] In judgment of the court *a quo*, it was state that the three sentences imposed in the three counts should run separately because the appellant failed to desist from inflicting grievous bodily injury to the complainant after she had transferred the money to his account. In *State v Mthetwa*⁶ it was stated that an order that sentences should run concurrently is called for where the evidence showed that the relevant offences where in inextricably linked in terms of the locality, time, protagonist, importantly, the fact that they were committed with one intent.

[11] Having considered the above, I am of the view that the appeal should succeed and the sentences be allowed to run concurrently. I therefore make the following:

[12] I therefore make the following order:

Order:

1. The appeal succeeds.
2. The sentence of 36 years' is set aside and replaced with the following:
 - 2.1 Count 2: 15 years' imprisonment.
 - 2.2 Count 3: 15 years' imprisonment.
 - 2.3 Count 4: 6 years' imprisonment.
 - 2.4 The sentence imposed on count 2 should run concurrently with the term of imprisonment imposed on count 3.
 - 2.5 That the appellant be sentenced to an effective sentence of 21 years' imprisonment.
 - 2.6 That the sentence be antedated to 01 March 2018.

⁶ *Supra*.

JJ MHLAMBI, J

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