



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

Case no: A48/2022

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED. [REDACTED]
 23/08/2023
 DATE [REDACTED] SIGNATURE [REDACTED]

In the matter between:

VUSI NTULI

Appellant

and

THE STATE

Respondent

JUDGMENT

MAGARDIE AJ

1. The Appellant, an adult male person who at the time of the incident was 27 years of age, was arraigned in the Pretoria Regional Court on the charge of robbery with aggravating circumstances, read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997.
2. The Appellant was legally represented throughout the proceedings. On 07 May 2019, the Appellant pleaded guilty to the charge of robbery with aggravating circumstances. The Appellant gave a concise plea explanation in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977, in which he admitted to having committed the crime.
3. At the end of the trial, and on 07 May 2019, the Appellant was found guilty on the charge of robbery with aggravating circumstances. On 07 May 2019, the Appellant was sentenced to 10 (ten) years imprisonment.
4. From the record it appears that, on 22 October 2018, the Appellant was sentenced to 5 (five) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, Act 51 of 1977, for another crime (common robbery). At the time of sentencing by the court of first instance, the Appellant was therefore already serving a 5 (five) year sentence.
5. The court of first instance did not make an order that, in terms of section 280 of the Criminal Procedure Act, 51 of 1977, the 10 (ten) year sentence should run

concurrently with the 5 (five) year sentence the Appellant had already been serving at the time. The Appellant successfully sought leave to appeal against the 10 (ten) year sentence, with leave from the court below.

6. From the record it is clear that it was not the intention of the court below to have the Appellant serve a cumulative sentence of 15 (fifteen) years. However, after the pronouncement, the court below was *functus officio* and could not rectify its own sentence hence this court is seized with the revisiting of the sentence.
7. The following is evident from the record, at pg 33, lines 7 to 14:

“The accused application indeed has merit in what he is saying and the court would have had it known about the full length of the sentence, would have ordered that the sentences run concurrently. As much as I would like to correct the sentence now, I do not have the authority to do so, however the only thing that I can do in this instance is allow leave to appeal, which is granted on sentence.”

8. In addressing sentence one must be mindful of the principles as set out in **S v Rabie**.¹
9. It is trite that sentencing falls primarily within the discretion of the trial court. In considering sentence, the trial court should take into account the crime, the criminal and the interest of society, the one not outweighing the other. The

¹ 1975 (4) SA 855 (A) at 862G-H

approach of the triad consisting of the crime, the offender and the interest of society was enunciated in **S v Zinn**.² The appeal court may only interfere with the sentence when it is demonstrated that the trial court has not properly and reasonably exercised its discretion in imposing sentence. The court of appeal is entitled to interfere with sentence if same is disturbingly inappropriate and so totally out of proportion with the offence or vitiated by misdirection showing that the trial court exercised its discretion unreasonably.³

10. Khampepe J stated the following in **Bogaards v S**:⁴

“An appellate court’s powers to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have it imposed.”

11. In the present matter, the question that must be answered is whether there was an irregularity that resulted in the failure of justice or can it be said that the court below misdirected itself by not ordering the concurrent running of sentences. From the record it is clear that the court below misdirected itself and did not properly and judicially exercise its discretion regarding the issue of the

² 1969 (2) SA 537 (A) at 540G

³ S v Pillay 1977 (4) SA 531 (A) at 535E-G, S v Ncheche 2005 (2) SACR 386 W, S v Salzwedel & Others 1999 (2) SACR 586 SCA

⁴ 2013 (1) SACR 1 CC

concurrency of the sentences. Having arrived at this conclusion, it follows that this court is entitled to interfere with the sentence of the court below.

12. Section 280 of the Criminal Procedure Act, Act 51 of 1977 provides that:

“(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

13. In sentencing an offender, where more than one punishment is involved, or where the offender is already serving another sentence, a court has a duty of ensuring that the cumulative effect of the sentence does not result in excessive punishment. This the court can do by ordering that the sentences or a portion thereof run concurrently.

14. On the conspectus of the facts and argument before me, I am inclined to agree with the submissions of the Appellant’s counsel (and conceded by counsel for the State), that the sentence imposed by the court below should run

concurrently with the 5 (five) year sentence imposed on the Appellant on 22 October 2018. As already stated, the court below conceded that, had it known the full length of the sentence, it would have ordered that the sentences run concurrently.

15. In the result, the following order is made:

15.1 The appeal against sentence is upheld.

15.2 The sentence of 10 (ten) years is confirmed.

15.3 In terms of section 280 of the Criminal Procedure Act, 51 of 1977, it is ordered that the sentence of 10 (ten) years imprisonment, run concurrently with the sentence of 5 (five) years in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977, which was handed down on 22 October 2018.

15.4 In terms of section 282 of the Criminal Procedure Act, 51 of 1977, the sentence is antedated to 07 May 2019.

15.5 The Appellant is declared unfit to possess a firearm



MAGARDIE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



MOSOPA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

18 October 2022

DATE DELIVERED:

23 August 2023

APPEARANCES

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