



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: **A55/2023**

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

[REDACTED]

25 October 2023

.....
SIGNATURE

.....
DATE

In the matter between:

VUSI ELIAS DLAMINI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Leso AJ (Munzhelele J concurring)

INTRODUCTION

1. The appellant brought an appeal against the sentence imposed on him by Magistrate Voogt sitting at Nigel Regional Court. He had been sentenced to 15 years for robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act¹, read with section 51(2) of the Criminal Law Amendment

¹ 51 of 1977

Act² and 10 years imprisonment for possession of a firearm in contravention of the provisions of Section 3 read with Section 1, 103, 117, 120(1)(a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, of 2000 read with section 250 of the Criminal Procedure Act 51 of 1977. Furthermore, an order declaring the appellant unfit to possess a firearm was made. The appellant was, in essence, sentenced to an effective 25 years of imprisonment.

GROUND FOR APPEAL

2. The grounds of appeal raised by the appellant herein are as follows:
 - 2.1 that the Magistrate misdirected himself in ordering the sentences as stated above to run cumulatively.
 - 2.2 that the learned magistrate failed to justify the imposition of the minimum sentence in count one.
 - 2.3 that the learned Magistrate failed to state during judgment on sentence, whether Substantial and Compelling circumstances existed and which circumstances would have justified the imposition of a lesser sentence.
 - 2.4 that the court a quo misdirected himself by failing to accord due weight to the fact that the appellant spent a period of over 18 months in custody awaiting trial. The appellant has not appealed against his conviction.
3. In this judgment I will not discuss the merits or evidence which led to the appellant's conviction save to state that this court is alive to the fact that the factors or circumstances relating to the crime play a role in determining or considering the proportionality of the sentence.
4. It is trite that in criminal appeals the appeal court should be cautious about interfering with the sentence imposed by the court *a quo*, mainly because sentencing rests within the jurisdiction of the court *a quo*, which exercises unconstrained discretion concerning the sentence. In this case, the court found the accused guilty of robbery aggravating and imposed the minimum sentence

² 105 of 1977

of 15 years' imprisonment as prescribed by the Act. During judgment the court *a quo* commented that "*the Act on minimum legislation prescribes minimum sentences, and the court must adhere to this Act, the court can only detract the prescription if there are substantial and compelling circumstances that warrants a lesser sentence; clearly, the motive was greed*". The appellant's counsel argued that the Act places a duty on the court *a quo* to find the substantial and compelling circumstances and the Court's finding on their non- existence must be clear.

5. Section 51 (3)(A) of the Criminal Law Amendment Act 105 of 1997 provides for the circumstances when the courts find substantial and compelling to exist as follows;

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose a lesser sentence.

6. I am of the view that the above provision does not require the court to categorically deal with the circumstances, enter those on the record and make a finding as to why it will not deviate from imposing minimum sentence. Consequently, the counsel's submission cannot stand.

7. Having said the above, this court is of the view that the court *a quo* correctly imposed the prescribed minimum sentence for robbery aggravating. and another sentence of 10 years for possession of a firearm. This court will not tamper with 15 years' imprisonment sentence for armed robbery and 10 years' imprisonment for possession of firearm without licence imposed by the court *a quo*. There are two main reasons for this decision. Firstly, the sentence of armed robbery falls within the ambit of section 51 of the Criminal Law Amendment act 105 of 1997 which provides for discretionary minimum sentences for certain serious offences. Secondly, the sentence of 10 years' imprisonment for contravention of section 3 falls within the ambit of schedule 4 of the Firearms Control Act³ which allows for a discretionary sentence of up to the maximum of 15 years.

³ 60 of 2000

8. I am of the view that the fact that the appellant was a single and 34 years old at the time of sentence, a first offender who had three minor children and he was employed as a sub-contractor for ESKOM is not compelling circumstance for the court to deviate from the prescribed sentence. While the 18 months' period which the appellant has spent in custody awaiting trial could in my view be a consideration for the presiding officer to deviate from the prescribed sentence, unfortunately in this case there are no facts placed before this court regarding the history on the incarceration of the appellant during trial. It is however apparent from the record that the magistrate did consider the period spent by the appellant in custody during trial as he remarked as follows '*you have been in custody since the date of your arrest, July 2018 therefore in all likelihood you have lost your employment*'.
9. This court is of the view that the magistrate erred or misdirected himself by failing to consider that the offence of contravention of section 3 of act 60 of 2000 which is unlawful possession of firearm without a licence is closely connected to the offence of robbery. According to the appellant, the firearm concerned was part of the loot that was robbed from the victims and therefore it is only sensible that the sentences should run concurrently.
10. In *S v Dlamini and Others*⁴ the accused had been charged with and convicted on three counts of robbery. the central question was of duplication of convictions. In paragraph 15 Pillay J held a view that '*in so far as the sentences in respect of the firearms are concerned: the magistrate appeared to lose sight of the fact that of the four firearms, in respect of which the appellants were convicted, two, being the .357 revolver (the subject of count 6) and the 9mm Starr pistol (the subject of count 7) were taken to the scene by the group to perpetrate the robbery, and the other two, being the Walther 9mm pistol (the subject of count 4) and the 9mm Browning pistol (the subject of count 5) constituted part of the loot taken during the robbery. That justified a differentiation in the determination of an appropriate sentence on those counts. It needs also to be added, that in so far as the former are concerned, their use and possession was already taken into account in concluding that aggravating circumstances were present in the robbery*

⁴ (553/2012) [2012] ZASCA 207

*conviction (count 1)'. The court in imposing sentence on individual sentence for different offences committed in pursuance of a single crime should not be an issue however it is unfair and unjust when the sentences cumulate to a long term of imprisonment. Also in S v Mthetwa⁵, the court said 'that *when the offences are connected in some way, the need for the cumulative effect to be reduced is generally greater*'.*

11. I am of the view that the court did not consider the cumulative effect of the two sentences imposed on the appellant as the court in S v WV⁶ found that 'the sentencing court has to be aware of the cumulative effect. In this case, the court further said that *when the accumulation is not "taken into account" such failure might cause a court of appeal to find the trial court to have committed a misdirection*'.
12. The court a quo erred in its view that sentencing the appellant to long-term imprisonment will rehabilitate the appellant. on the contrary, in my view, a longer term of imprisonment might deprive the appellant of an opportunity for rehabilitation outside prison.

CONCLUSION

13. The court a quo erred by making an order for the sentences to run cumulatively. Consequently, the court a quo committed a misdirection in not making an order for the sentences on count 1 and count 4 to run concurrently.

IN THE CIRCUMSTANCES, THE FOLLOWING ORDER IS MADE:

1. The appeal against the sentence is upheld and the imposed sentence is amended to read, from the date of the original imposition thereof, which is 29 January 2020, as follows:
 - 1.1 Count 1 15 years' imprisonment and Count 4 10 Years imprisonment in terms of section 208 of the Criminal Procedure Act 51 of 1977.

⁵ 2015(1) SACR 302 at para 22

⁶ 2013(1) SACR 204 para 45

- 1.2 The sentences in respect of charges 1, and 4 are to run concurrently, resulting in an effective sentence of 15 years' imprisonment.
- 1.3 The appellant is deemed to be unfit to possess a firearm in terms of section 103 of the Firearms Control Act, act No. 60 of 2000.



Leso JT

Acting Judge of the High Court

I AGREE AND IT IS SO ORDERED.



Munzhelele M

Judge of the High Court

Date of hearing: 10 October 2023.
Date of delivery of judgment: 25 October 2023.

APPEARANCES

For the appellant: ADV. JL. Kgokane

Instructed by Legal Aid South Africa, Pretoria

TEL: 012 401 9200

CELL: 064 542 0908

EMAIL: LetauK@legal-aid.co.za

For the respondent: ADV J Cronje

Instructed by The Director of Public Prosecutions, Pretoria

Email: jcronje@npa.gov.za

Contacts; 012 351 670