

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A12/2019

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

[26 JUNE 2020]


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SIGNATURE

In the matter between:

ZULU, DAVID BINO

APPELLANT

And

THE STATE

RESPONDENT

J U D G M E N T

Summary: Sentence – section 280(2) of the Criminal Procedure Act 51 of 1977 (CPA) - appeal against sentence – court may interfere with a sentence imposed by a lower court – material misdirection by the sentencing court – may interfere even in the absence of a material misdirection - sentence imposed by the trial court shocking, startling or disturbingly inappropriate – discretion exercised injudiciously - order of court a quo varied

MUDAU, J:

- [1] This appeal against sentence only comes before us with the leave of the court a quo. The Regional Magistrate, Lulekani, convicted the appellant on 12

April 2016 in respect of five counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (CPA), read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 as well as four counts of attempted murder. Consequently, he was sentenced as follows:

- a) Count one: robbery with aggravating circumstances: 15 years' imprisonment.
- b) Count two: attempted murder: 10 years' imprisonment.
- c) Count three: attempted murder: 10 years' imprisonment.
- d) Count four: robbery with aggravating circumstances: 15 years' imprisonment.
- e) Count five: attempted murder: 10 years' imprisonment.
- f) Count six: robbery with aggravating circumstances: 15 years' imprisonment.
- g) Count seven: robbery with aggravating circumstances: 15 years' imprisonment.
- h) Count eight: robbery with aggravating circumstances: 15 years' imprisonment.
- i) Count nine: attempted murder: 10 years' imprisonment.

[2] In terms of section 280 (2) of the CPA the sentences in respect of counts 1, 2 and 3 were ordered to run concurrently. In addition, the sentences in respect of counts 4 and 5 were also ordered to run concurrently. The sentences in respect of counts 7, 8 and 9 were specifically ordered not to run concurrently. Effectively, the appellant was sentenced to 75 years' of imprisonment. Barring parole, the appellant would be released at approximately 107 years of age.

- [3] The trial arose from several separate incidents. Briefly stated, on 25 May 2012, the appellant and his co-accused targeted a supermarket at gunpoint and robbed the owner and shop assistants of goods and cash worth thousands in rands. During the course of the business robbery, two of the victims, a female and male person, were shot on the stomach and shoulder respectively. The incident laid the basis for counts 1 to 3.
- [4] About a month later, on 27 May 2012, the appellant and his co-accused targeted another supermarket. During the incident, several properties were stolen at gunpoint and the owner was shot on his left thigh. The incident formed the basis for the charges in respect of counts 4 and 5. Two days later, on 29 May 2012 the appellant, his co-accused and a third person who turned state witness pursuant to section 204 of the CPA robbed the complainant of his Toyota Hilux motor vehicle (count 6) at gunpoint. It was on this occasion that the appellant was shot but survived and evaded arrest, after a shootout with the police.
- [5] Subsequently, on 2 June 2012 another business premises (a general dealership) was targeted and the owners were robbed at gunpoint of several properties including R2 000.00 in cash (count 7). The appellant had supplied some of the firearms that were used in that incident and was accordingly convicted together with his co-accused. Three days later, on 5 June 2012 the appellant and his co-accused with the help of the section 204 witness targeted yet another business, this time an eatery wherein the complainants were robbed at gunpoint (count 8). In the process, one of the victims was shot on

her arm (count 9). Again, the appellant had supplied some of the firearms that were used during the course of the robbery and was on this basis convicted. His co-accused and the section 204 witness were arrested on their way to return some of the firearms to the appellant at his hideout in Nelspruit (Mbombela), Mpumalanga. Thus ended the spate of robberies in remote business premises in the villages involving the appellant and his gang.

- [6] At the time of his sentencing, the appellant was approximately 32 years old since he was 28 years of age on his first appearance, and an unmarried father to a six years old daughter. He had an informal business, a carwash as well as a tuck-shop. He remained in custody before he was convicted for these crimes. He admitted to a record of previous convictions that included robbery with aggravating circumstances part of which was suspended on customary conditions for a period of three years. The date of conviction and sentence is not apparent from the record. Later in 2008, he was released on parole conditions that expired in 2010.
- [7] In August 2009, the appellant was convicted by the Johannesburg Magistrate Court on three counts of possession of firearms without the required licences as well as ammunition. An effective sentence of 15 years' imprisonment was later on appeal overturned and replaced by three years' imprisonment suspended for five years on customary conditions. On 17 October 2012, he was convicted of possession of a firearm without license in respect of which a fine of R9 000.00 or three years' imprisonment was imposed by the Nelspruit Magistrate Court. In all his appearances, the appellant used various names. In sentencing the appellant, the learned magistrate had regard to the personal

circumstances of the appellant, the seriousness of the crimes as well as the interests of society.

- [8] There is no disputing that the appellant deserved a period of incarceration. The appellant contends that the cumulative effect of 75 years' of imprisonment is shocking. The 75 years' imprisonment is startling. Our law is settled on when an appellate court may interfere with a sentence imposed by a lower court. It can only do so when there was a material misdirection by the sentencing court.¹ However, it may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and that which the appellate court would have imposed, had it been the trial court, was 'so marked that it [could] properly be described as shocking, startling or disturbingly inappropriate'². Marais JA stated the following in *S v Sadler*³ when dealing with the distinction that exists between a non-custodial and a custodial sentence:

"However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate court which must prevail".

- [9] The cumulative effect of sentences must always be borne in mind and concurrently served sentences may prevent an accused from undergoing a

¹ *S v Motloung* 2016 (2) SACR 243 (SCA) at para 6

² *S v Sadler* 2000 (1) SACR (SCA) at para 9

³ *S v Sadler* above at para 10; see also *S v Motloung* note 1 above at para 8

severe and unjustified long effective term of imprisonment⁴. Usually, an order that sentences 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'⁵.

[10] In sentencing the appellant in this appeal, the learned magistrate remarked that the appellant attempted to kill a court orderly in his presence inside the courtroom. To my mind, there lies a material misdirection. In terms of section 35 (3) of the Constitution, the appellant like every other accused person, has a right to fair trial in relation to those allegations. The Bill of Rights, inter alia, guarantees him to be informed of the charge with sufficient detail to answer it; to a public trial before an ordinary court; to be presumed innocent and to adduce and challenge the evidence. Simply put, it was irregular for the learned magistrate to factor in during the sentencing process, an incident in respect of which the appellant had not been tried albeit witnessed by the learned magistrate in accordance with the basic notions of justice to justify the sentences imposed.

[11] In *S v Zondo*⁶ the Supreme Court of Appeal's interference was called for because the court *a quo* had allowed its sentence of 14 years' imprisonment to run consecutively with a sentence of 25 years' imprisonment that the accused was already serving. Given all the circumstances, this induced a 'sense of shock' (at [8]) because it left the 39-year-old accused with a

⁴ *S v Whitehead* 1970 (4) SA 424 (A) 438F-440; *S v Young* 1977 (1) SA 602 (A); *R v Abdullah* 1956 (2) SA 295 (A) 299-300

⁵ See *S v Mokela* 2012 (1) SACR 431 (SCA) at 11

⁶ [2013] ZASCA 51 (unreported, SCA case no 627/12, 28 March 2013; 2013 JDR 0653 (SCA))

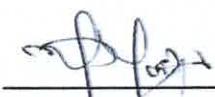
cumulative effective sentence of 39 years' imprisonment (at [7]), which meant that, upon completion of the period, the accused would have been 76 years old (at [8]). In *S v Muller & Another*⁷ it was held that '[a]n effective sentence of 30 years' imprisonment is an extremely severe punishment that should be reserved for particularly heinous offences'. An effective period of 50 years' imprisonment was found unacceptable in *S v Mahlatsi*⁸.

- [12] There is no denying that the crimes committed were not only serious, but also well-orchestrated by the appellant and his cohorts, and involved thousands of rands worth of property as well as gratuitous violence that accompanied the shooting of innocent victims. The victims in the attempted murder charges suffered bodily injuries. The various robberies were not only motivated by greed, but were well planned. Evidently, they were not the product of a sudden decision taken impulsively.
- [13] Crimes of armed robbery involving the use of firearms are unacceptably prevalent in this country. To the extent that the learned magistrate ordered that some of the sentences run concurrently, he did not go far enough, but paid lip service to our common law position. The attempted murder charges were committed in the course of the robbery incidents. The discretion he had was therefore exercised injudiciously. This court, on appeal, is completely justified in interfering with the sentences imposed by the trial court.
- [14] The appeal succeeds to the extent that the sentences are varied by the order that follows. In my view, the interests of justice would be served by ordering

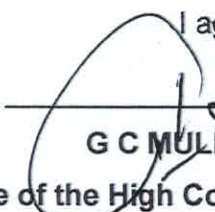
⁷ 2012 (2) SACR 545 (SCA) at para10

⁸ 2013 (2) SACR 625 (GNP)

that 15 years' of the sentences imposed on each count 4 and 5 to run concurrently with the sentence in respect of count 1. Furthermore, 15 years' of the sentences imposed on each count 7 and 8 are to run concurrently. Finally, 5 years of the sentence imposed in respect of count 9 is to run concurrently with sentence imposed in count 8. The effect of the foregoing is that, effectively, the appellant is to serve 35 years' imprisonment backdated to 12 April 2016, the date of the original sentence.



T P MUDAU
[Judge of the High Court]

I agree


G C MULLER
[Judge of the High Court]

Date of Hearing: 26 JUNE 2020

Date of Judgment: 26 JUNE 2020

APPEARANCES

For the Appellant: Adv. L Mohlaka

Instructed by: Legal Aid South Africa

For the Respondent: Adv. J J Kotze

Instructed by: DPP – Polokwane