



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

Case Number: A30/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 14/02/2019

SIGNATURE: [Signature]

In the matter between:

JOHN BUTI TAU

Appellant

And

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted and sentenced in the Klerksdorp Regional Court on the following counts:

Count 1: Contravention of section 117(a) read with section 1 of the Correctional Services Act, 111 of 1998;	3 years' imprisonment
Count 2: Robbery with aggravating circumstances;	10 years' imprisonment
Count 3: Robbery with aggravating circumstances;	10 years' imprisonment
Count 5: Contravention of section 117(a) read with section 1 of the Correctional Services Act, 111 of 1998	10 years' imprisonment wholly suspended subject to certain conditions

- [2] In the result, the appellant received an effective sentence of 23 years imprisonment.

- [3] The court *a quo* granted the appellant leave to appeal against his conviction in respect of counts 1, 2, 3 and 5 and against his sentence in respect of counts 1, 2 and 3.

CONVICTION

- [4] Mr Thompson, counsel for the appellant, to his credit, submitted that he could not advance any legitimate grounds concerning the conviction in respect of

counts 1 and 3. In the result the appeal only proceeded in respect of the convictions on counts 2 and 5.

COUNT 2

Evidence

- [5] The conviction on count 2 emanates from an incident that occurred on 21 October 2013 at the Klerksdorp police cells. The two state witnesses, warrant officer Mahule and warrant officer Tshazibane were on duty on the day of the incident.
- [6] The conviction on count 2 relates to the evidence of warrant officer Mahule and the conviction in respect of count 3 to that of warrant officer Tshazibane.
- [7] Warrant officer Mahule testified that he heard a commotion from the cells and upon investigation determined that an inmate complained that the appellant does not belong in that cell because he is a gang member.
- [8] Warrant officer Mahule referred to the person who complained as the "reporter". Warrant officer Mahule testified that the reporter grabbed the appellant by his clothes and it seemed to him that a fight was imminent. He unlocked the cell and proceeded to the reporter and the appellant. Upon reaching them the reporter grabbed him around his neck and turned him

around. He testified that another accused, accused number 3, assisted in holding him, where after he was tied up with shoelaces. Whilst being tied up he heard someone saying "search him". Accused number 3, searched him and took his cell phone.

- [9] Warrant officer Mahule was then covered with a bedsheet. Prior to being covered with the bedsheet, warrant officer Mahule could see one of the inmates yielding a knife.
- [10] During cross-examination, it appeared that warrant officer Mahule confused the numbers of the accused in the dock. The person whose actions he attributed to accused number 3 was the person that was not supposed to belong in the cell. Warrant officer Mahule was clearly referring to the appellant and the confusion with the numbers was an honest mistake.
- [11] Warrant officer Tshazibane came to the cell after the attack on warrant officer Mahule and was also attacked and robbed of his possessions. Warrant officer Tshazibane identified the appellant as one of the people who was involved in the initial shuffle to get him into the cell, which explains the reason why the conviction on count 3 is not challenged.

- [12] The appellant did, thereafter, succeed in escaping from the cell, which led to his conviction on count 1.

Grounds of appeal

- [13] The grounds of appeal against the conviction on count 2 is set out in Mr Johnson's, counsel for the appellant, heads of argument as follows:

"12.7 In the premises it is submitted, firstly, that in respect of count 2, the robbery of Warrant Officer Mahule, the trial Court erred in finding that:-

- 1. the Appellant must have intended to make common cause with those perpetrating the assault; (my emphasis);*
- 2. the Appellant manifested the sharing of the common purpose by himself by performing some act of association with the conduct of the others; (my emphasis);*
- 3. the Appellant had the requisite mens rea.*

12.8 Secondly, it is submitted that the fact that the Appellant escaped on the 21st of October 2013, does not necessarily mean, on the facts proved, that the Appellant had formed the intention to escape at the time when Warrant Officer Mahule had been attacked.

12.9 It is submitted that on the facts, it is reasonable to infer that the Appellant formed that intention afterwards, when Warrant Officer Tshazibane and Warrant Officer Van Deventer were attacked."

Discussion

- [14] The only question in respect of the conviction on count 2 is therefore whether the appellant had the necessary intention to rob warrant officer Mahule of his cell phone.
- [15] In order to distance the appellant from the robbery, Mr Johnson submitted that the appellant most probably only searched and took warrant officer Mahule's cell phone, because he was still scared and ordered to do so by the reporter.
- [16] This submission does not account for the fact that the appellant freely and out of his own will participated in holding warrant officer Mahule before he was tied up. The court *a quo*'s finding that the appellant intended to make common cause with those perpetrating the assault is, in my view, in accordance with the facts presented to the court.
- [17] In the premises, the appeal against the conviction on count 2 must fail.

COUNT 5

Facts and discussion

- [18] The facts underlying the conviction on count 5 do not support the conviction.

- [19] It is common cause that the appellant was detained on 3 October 2013 at the Klerksdorp Police cells with four other detainees. The cell was locked by Sergeant Modisadife. Upon Sergeant Modisadife's return to the cell, he discovered that the appellant and two of the other detainees were no longer in the cell. The cell was, however, still locked.
- [20] One of the remaining detainees informed sergeant Modisadife that the appellant and the two other detainees were removed by a police officer, which obviously accounts for the fact that the cell was still locked upon sergeant Modisadife's return.
- [21] Notwithstanding a thorough search of the police station, the appellant could not be found.
- [22] No evidence was led to suggest that the appellant played a role in his removal from the cell. To the contrary, on the State's own version, the appellant was removed from the cell by a police officer. The aforesaid evidence does not support a finding that the appellant *"unlawfully escaped"* from custody and the appeal against conviction on count 5 should succeed.

SENTENCE

- [23] The prescribed minimum sentence in respect of counts 2 and 3 is, in terms of the provisions of the Criminal Law Amendment Act, 105 of 1997 ("the Act"), 15 years' imprisonment. The court *a quo* took the fact that the appellant is already serving long term imprisonment into account and deviated, in terms of section 51(3) and (6) of the Act, from the prescribed minimum sentence by imposing the lesser sentence of ten years' imprisonment.
- [24] The court *a quo*, further stated: *"To prevent an undue long term of imprisonment, the Court will order that the sentence in respect of count 2 and count 3 run concurrent."*
- [25] In, what appears to be an oversight, the court did not in its order, order that the sentence on count 2 and count 3 should run concurrently. In the result, the sentence should be amended to rectify the aforesaid patent mistake.
- [26] In respect of the sentence imposed on count 1, the court held that it could not order that the sentence run concurrently with the sentence imposed on count 2 and count 3. The applicable portion of the judgment reads as follows:
"However in terms of the Correctional Services Act, Act 111/1998 any sentence that is imposed would commence only after the sentence in respect of escaping, has been served."

- [27] Chapter XV of the Correctional Services Act, 111 of 1998 creates several statutory offences and sets out the applicable penalties to be imposed upon a conviction on one of the offences.
- [28] To this end, section 117(a) states that any person who escapes from custody will be guilty of an offence and further provides that such a person will be liable to a fine or imprisonment for a period not exceeding ten years or to imprisonment without the option of a fine or both.
- [29] Section 117 does not stipulate that any term of imprisonment imposed in terms of the section should be served prior to the serving of any other sentence.
- [30] Mr Johnson referred to section 39 of the Correctional Services Act, *supra* which deals with the commencement, computation and termination of sentences.
- [31] The relevant portion of section 39 reads as follows:
- "(1) Subject to the provisions of subsection (2) a sentence of imprisonment takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the sentenced person is released on bail pending a decision of a higher court, in which case the sentence takes effect from the day on which he or she submits to or is taken into custody.*

...

(2)(a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but-

[32] The court *a quo* did not refer to a specific section in the Correctional Services Act, *supra* as authority for his finding that a sentence imposed on an escape conviction cannot run concurrently with any other sentence imposed. I could find none.

[33] In the premises, there is no legal impediment to order that the sentence imposed on count 1 to run concurrently with the sentence imposed count 2.

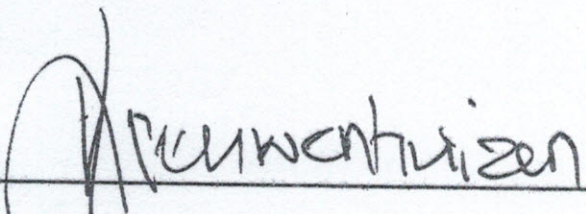
[34] The convictions on counts 1, 2 and 3 emanate from the same series of events and I am of the view that the sentence imposed on count 1 should run concurrently with the sentence imposed on count 2.

ORDER

[35] In the premises, I propose the following order:

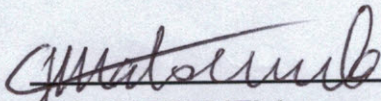
1. The appeal against the conviction on count 2 is dismissed.

2. The appeal against the conviction on count 5 succeeds and the conviction is set aside.
3. The appeal against sentence on counts 1, 2 and 3 succeeds and the sentences are set aside.
4. The appellant is sentenced as follows:
 - 4.1 Count 1: Contravention of section 117(a) read with section 1 of the Correctional Services Act, 111 of 1998; 3 years' imprisonment
 - 4.2 Count 2: Robbery with aggravating circumstances; 10 years' imprisonment
 - 4.3 Count 3: Robbery with aggravating circumstances; and 10 years' imprisonment
5. The sentences imposed on counts 1 and 3 to run concurrently with the sentence imposed on count 2.
6. The sentence is ante-dated to 3 September 2015.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree

A handwritten signature in dark ink, appearing to read 'J.M. Matsemela', is written over a horizontal line.

J.M. MATSEMELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It so ordered

DATE HEARD:

22 November 2018

DATE DELIVERED:

14 February 2019

APPEARANCES

Counsel for the Appellant:

Advocate A. Thompson
(076 072 6093/012 424 4336)

Instructed by:

Legal Aid South Africa
Pretoria Justice Centre
(012 401 9200)

Counsel for the Respondent:

Advocate S. Scheepers
(084 520 0593/012 315 6773))

Instructed by:

State Attorney's Office
(012-351 6700)