



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : **A120/2018**

In the matter between:-

SIPHIWE NDABA

Appellant

and

THE STATE

Respondent

CORAM: DAFFUE, J *et* MOLITSOANE, J

HEARD: 6 AUGUST 2018

JUDGMENT BY P.E. MOLITSOANE

DELIVERED: 23 AUGUST 2018

[1] The appellant was convicted and sentenced in the Regional Court held at Harrismith on a charge of robbery with aggravating circumstances. He was sentenced to 15 (fifteen) years imprisonment. Leave to appeal against his sentence was dismissed by the trial court. This appeal on sentence is with leave of this court.

[2] The facts surrounding this appeal are briefly as follows:

On the 9th November 2012 the appellant was at Harrismith. He robbed the complainant of his truck and stock valued in total at R477 174.00. He used a firearm to commit this robbery. The appellant then drove the truck to Mooi River where he offloaded the stock. He dumped the truck and the driver on the road. He was later apprehended and charged. He was convicted on the strength of his guilty plea.

[3] In sentencing, the court *a quo* found that the appellant was a second offender as envisaged in s51(2)(a)(ii) of the Criminal Law Amendment Act 105 of 1997. The offence which is the subject of this appeal was committed on the 9th November 2012. The 'previous conviction' referred to by the court was committed on the 20th December 2012 and thus this offence, which is the subject of this appeal, was committed prior to the 'previous conviction'. "A previous conviction may be described as one which occurred before the offence under trial."- See *S v Zonele and Others* 1959(3) SA 319(A) at 330 C-D. Ms. Moroka on behalf of the respondent conceded, in my view rightly so, that the court a

quo erred in finding that the appellant was a second offender and thus the minimum sentence of 20 years was applicable to him.

[4] Ms. Kruger who appeared for the respondent contended that the offence was not premeditated and was committed in the spur of the moment. She further submits that the court *a quo* erred by not ordering that the sentence herein should run concurrently with the sentence of 30(thirty) years imprisonment the appellant is already serving.

[5] On the other hand, Adv. Moroka aligns herself with the finding of the court *a quo* that this offence was not committed in the spur of the moment. She submits that the court *a quo* did not err when it did not order the sentence herein to run concurrently with the sentence the appellant is already serving. She submits that there is no close connection between this conviction and the one the appellant is already serving. She argues that the two differ in time and place.

[6] Appellant relies on the following grounds of appeal:

1. That the Court *a quo* erred in finding that no compelling and substantial circumstances are present to deviate from the prescribed minimum sentence;
2. That the Court *a quo* erred by not ordering that the sentence imposed *in casu* should run concurrently with the sentence the Appellant is currently serving.

- [7] Punishment is pre-eminently in the discretion of the trial court. The court exercising appellate jurisdiction will not lightly interfere with the said discretion unless such a discretion is vitiated by irregularity or is disturbingly inappropriate. See *S v Rabie* 1975(2) SA 855(A) at 857 D-F; *S v Fhetani* 2007 (2) SACR 590 (SCA) at para [5].
- [8] The appellant was charged with robbery with aggravating circumstances read with the provisions of s51 (2) (a) of Act 105 of 1997. The appellant was a first offender as alluded above. The court was obliged to impose an imprisonment term of 15 years imprisonment unless the court found that there existed substantial and compelling circumstances warranting the imposition of a lesser sentence. The court *a quo* started with an erroneous finding that the accused was a second offender and that it was incumbent to impose a minimum sentence of 20 years imprisonment.
- [9] The court in its judgment on sentence said the following:
"The Court having noted that you have pleaded guilty, in spite the fact that there was a strong case against you that is another way of showing remorse. Furthermore that the driver in question is not injured; items were recovered. The court is of the opinion that it will take a note that substantial and compelling." [This sentence seems to be incomplete]
- The above quoted paragraph, save for the submissions by Counsel seem to be the only reference concerning substantial and compelling circumstances.

- [10] Section 51(3) of Act 105 of 1997 obliges the court where substantial and compelling circumstances are found to exist to minute them on record. The court *a quo* must have found that such circumstances existed in this case hence it deviated from imposing the prescribed sentence of 20 years imprisonment and imposed 15 years imprisonment. I am unable to agree with the finding of the court *a quo* that there are substantial and compelling circumstances in this case.
- [11] Contrary to the submission that this offence was committed in the spur of the moment, the inference sought to be drawn is difficult to sustain on the objective facts of this case. It is apparent that the appellant was armed with a firearm. He saw this truck full of baby nappies. On his version he decided to rob it as he wanted to make a profit. After the robbery he drove it to Mooi River to deliver them and thereafter he dumped the driver and the truck. It is clear that he already had a market for these stolen properties. Harrismith is well known for its traffic of trucks. One is tempted to draw an inference that the appellant knew that trucks pass the area and he took advantage of an unsuspecting truck driver. There must have been a measure of planning to successfully pull this robbery. I am thus unable to agree that this offence was committed in the spur of the moment.
- [12] If one weighs the aggravating circumstances against the mitigating ones and taking them cumulatively I find that no

substantial and compelling circumstances exist herein warranting the imposition of a lesser sentence.

[13] At the time of sentencing, appellant was already serving an effective term of 30 years imprisonment. It is contended on his behalf that if the court does not order that this sentence should run concurrently with the sentence the accused is already serving, the effect thereof will be severe and thus shockingly inappropriate.

[14] Section 280(2) of the Criminal Procedure Act 51 of 1977 provides that a punishment consisting of imprisonment shall commence one after the other unless the court directs that such sentences of imprisonment shall run concurrently. The rationale for ordering the sentences to run concurrently is to obviate the severity and harshness of the sentences if their cumulative effect is not taken into consideration.

[15] It has been submitted on behalf of the respondent that because the conviction and sentence the appellant is already serving differs in time and place, this court should not order that the sentence the accused is serving should run concurrently with the sentence to be imposed herein. This argument seems to ignore the fact that the appellant is already serving 30 years imprisonment and it ignores what the cumulative effect of the sentence would be if this court does not order these sentences to run concurrently. The previous conviction of an appellant is part of his personal circumstances and it cannot be ignored.

[16] There is a general scepticism that lengthy prison terms can deter or rehabilitate criminals from committing further offences. The court in *S v Mhlakaza* 1997(1) SACR 515 at 519 f-g said the following:

“Deterrence has two aspects: deterring the prisoner and deterring others. The effectiveness of the latter is unclear (Walker & Padfield *Sentencing Theory, Law and Practice* 2 ed(1996) at 101) but, according to judicial precedent, it remains an important consideration(R Swanepoel 1945 AD 444 at 453-5 and the debate in *S Nkambule* 1993(SACR(1) 136 (A) .As far as deterring the accused is concerned ,it should be borne in mind that ‘there is no reason to believe that the deterrent of a prison sentence is *always* proportionate to its length(*S v Skenjana* 1985(3) SA 51(A) at 54I-55A.(My emphasis).Whether long-term imprisonment has any rehabilitative effect, has also been doubted.”

In *S v Muller* 2012(2) SACR 545 at 550 par [11] the court further said:

“There is nothing to show that a lengthy period of imprisonment will not bring home the error of their ways. It would be unjust to impose a sentence, the effect of which is more likely to destroy than to reform them. However, the cumulative effect of the sentences imposed on the appellants smacks of the use of a sledgehammer: it seems designed more to crush than to rehabilitate them.”

[17] The need to avoid unnecessary lengthy prison terms should not be seen as a licence for an accused person to commit serious offences believing that the courts will, as of routine, order that sentences shall run concurrently. Society expects the courts to sentence the accused appropriately and to send out clear messages that certain conduct will not be tolerated.

[18] I am not aware of the circumstances pertaining to the sentence of 30 years imprisonment the appellant is serving. I am, however, of the view that imposing a sentence of 15 years in this case will not be shockingly inappropriate. If the entire sentence in this case is ordered to run concurrently with the sentence the accused is already serving, that exercise will send out a wrong message to society at large. To ameliorate the harshness of the effect of the length to be spent in prison by the appellant, I am of the view that part of this sentence should run concurrently with the sentence the appellant is already serving.

[19] Having regard to the triad of the personal circumstances of the accused, the crime, the interest of society as well as the cumulative effect of the sentence I am of the view that the following sentence is not disproportionate and I accordingly make the following order:

ORDERS

[20] The following orders are made:

1. The appeal against the sentence is upheld and the sentence imposed is altered as follows:

- 1.1 The sentence of 15 years imprisonment is confirmed;

- 1.2 In terms of s280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that 10(ten) years of this sentence shall run concurrently with the sentence the accused is already serving.
- 1.3 An order made in terms of s103(1) of the Firearms control Act 60 of 2000 is confirmed.
- 1.4 The sentence is deemed to have been imposed on the 6 December 2013.

P.E. MOLITSOANE, J

I concur

J.P DAFFUE, J

On behalf of appellant : Ms S Kruger
Instructed by:
Legal Aid, South Africa
Bloemfontein

On behalf of the respondent : Adv M M M Moroka
Instructed by:
Director of Public Prosecutions
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