

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

CASE NO: A204/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
04-May-2017	
DATE	SIGNATURE

4/5/2017

In the matter between:

ISMAEL ZONDI MEKONDJO ASHIPEMBE

Appellant

and

THE STATE

Respondent

DATE OF HEARING : **04 MAY 2017**

DATE OF JUDGMENT : **04 MAY 2017**

JUDGMENT

MANAMELA, AJ

Introduction

[1] The appellant was convicted on 19 September 2011 on multiple counts, ranging from housebreaking with intent to steal and theft to robbery with aggravating circumstances, by the Regional Court for the Gauteng Regional Division, Pretoria. I will henceforth refer to that court as the Trial Court. He was sentenced to a cumulative prison term of 15 years. The appellant was about 26 years of age at the time of sentencing and committed the crimes between March and October 2004, when he was about 19 or 20 years of age.

[2] This appeal is with leave of both the Trial Court and this Court. The Trial Court granted the appellant leave to appeal against his conviction in respect of Count 1, for housebreaking with intent to steal and theft of a Sony digital camera, and Count 65, for housebreaking with intent to commit robbery and robbery of cash in an amount of R300.00 and cheques for unspecified value, with aggravating circumstances. On petition, this Court granted him leave to appeal his sentence on all counts, including in respect of Count 3, for theft of a Standard Bank Card and Counts 4 to 64, for multiple thefts of a total amount of around R60 000.00 through withdrawals made using the stolen bank card in Count 3. He was acquitted of two counts of rape and a further count of theft of gym gloves.

[3] He had pleaded not guilty to all the charges and had the benefit of legal representation throughout the proceedings. The Trial Court found him guilty and sentenced him to 3 years' imprisonment in respect of Counts 1 and 3, taken together for purposes of sentencing; 6 years for Counts 4-64 and another 6 years for Count 65, making up the 15 years' prison term, already mentioned.

Brief relevant background

[4] The brief background, in as far as it is relevant for current purposes is as follows. The appellant is a Namibian national and was in the country on a diplomatic visa due to a position held by his grandmother in the Namibian High Commission. He was prosecuted after losing diplomatic immunity. Although, his convictions are in respect of various dates in 2004, his arrest followed the events of the night of 12 October 2004. During that night, he entered the apartment of the complainant, adjacent to his grandmother's apartment. The appellant stayed with his grandmother. He had gained entry to the complainant's apartment through an open window with no burglar bars; threatened the complainant with harm; tied her hands behind her and later to a chair to subdue her; throttled and bit her, when she tried to defend herself; ransacked her house for valuables; made the complainant to write out cheques and escaped with property of the complainant, in the early hours of the morning. The police traced the appellant and after searching his place (his grandmother's apartment), they found the items robbed from the complainant and a Sony digital camera, and later a Standard Bank card, stolen by the appellant from the complainant earlier that year.

Ground of appeal and submissions (in brief)

[5] As stated above, the appeal is against conviction of the appellant in respect of counts 1 and 65, for which he was granted leave. Some grounds were raised against conviction of the appellant of the counts, but, it is not necessary to deal with those grounds. Counsel for the appellant conceded that, bearing in mind the totality of the evidence on record, no convincing argument can be made against conviction. In my view, the concession was correctly made, as there is overwhelming evidence sustaining the Trial Court's findings in this regard. Therefore, the appeal in respect of conviction will fail.

[6] Regarding appeal against the sentence imposed by the Trial Court, it is argued that, the Trial Court did not take into account the cumulative effect of the individual sentences it imposed as punishment of the appellant. The argument goes further to say that the 15 years' imprisonment is shockingly inappropriate. On the other hand, the State contends that the individual sentences on the counts making up the 15 years are "very lenient" and that nothing warrants interference by this Court with the sentence imposed by the Trial Court.

Cumulative effect of sentences imposed by the Trial Court

[7] The Trial Court had approached its sentencing exercise as follows. It found existence of substantial and compelling circumstances with regard to Count 65, for robbery and deviated from imposing the 15 years' prison term prescribed by legislation and ordered the appellant to serve a 6-year prison term, instead. This, the Trial Court stated, was based on consideration of the appellant's age. Further, the Trial Court took Counts 1 and 3 together for purposes of sentencing the appellant to a 3-year prison term. A further 6 years was imposed in respect of the multiple theft counts. With the aforesaid prison terms running concurrently the appellant was effectively sentenced to 15 years' imprisonment.

[8] As already indicated, it is submitted on behalf of the appellant that the Trial Court ought to have taken the cumulative effect of the individual sentences imposed into consideration when discharging its sentencing function. It does not appear from the record that, the Trial Court directly dealt with the issue of the cumulative effect of the sentences, save for taking together some of the counts for purposes of sentencing. In my view,

determining the cumulative effect of a sentence is essential for a determination of an appropriate effective sentence.

[9] In this matter, the Trial court found on the robbery count, the existence of substantial and compelling circumstances. The robbery count is arguably the most serious of all the counts, although crime by its nature is serious due to the impact that it has on the victims and society at large. The Trial Court found reason to deviate from imposing the prescribed minimum sentence of 15 years and cited the appellant's age for the deviation. However, there are other circumstances of this matter which warranted a closer look for purposes of sentencing. For example, the appellant is a first offender; was still at school or of school-going age, when he committed the crimes; has spent 18 months in custody awaiting trial and prospects of his rehabilitation. Further, the probation officer's report and testimony indicated that the appellant was immature; motivated by immaturity in the commission of the crimes and had good chance of rehabilitating. This is not to state that there were no aggravating factors. The appellant came from a privileged background and was therefore motivated, as the Trial Court correctly found, by greed. Further he subjected the complainant to long ordeal during the robbery.

[10] However, it is my view that, the cumulative effect of the sentence imposed was not sufficiently or reasonably taken into consideration by the Trial Court. Section 280(1) of the Criminal Procedure Act permits the court to impose as many sentences as the Court is competent to impose in respect of the counts in hand, and such sentences are to run concurrently, unless directed otherwise by the Court. Therefore, a sentencing Court has discretion to order or not to order sentences to run concurrently. This is a direct task of a sentencing Court imposing multiple sentences. In *S v Mthetwa and Others* 2015 (1) SACR 302

(GP), a Full Court of this Division held at paragraph 14 of its judgment that, the sentencing or trial court "had a duty to consider the cumulative effect of the sentences". In *S v Mpofo* 1985 (4) SA 322 (ZHC) at 324G-J Reynolds J held that "in all multiple crime cases the courts pay regard to what *Thomas* describes as 'the totality principle'. The court must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences." Therefore, applying the "totality principle" suggested above, the Trial Court's ought to have had regard of the total or all the circumstances of this matter. This is well articulated by Professor SS Terblanche on pages 199 to 205 of the third edition of his book *Guide to Sentencing in South Africa*, in which he confirms on page 200 that the cumulative effect of a sentence may be prevented in three ways; "namely, by ordering the sentences to run concurrently, by reducing the sentences, or by taking the various counts together for purposes of sentencing".

Conclusion

[11] Therefore, in my view, the Trial Court did not sufficiently consider the cumulative effect of the sentences it imposed on the appellant. This, as already mentioned is a duty of a sentencing Court and was material to its sentencing discretion and the judicious exercise of such discretion. The absence of such consideration, in my view, amounts to misdirection, entitling this Court to interfere on appeal. [See *S v Malgas* 2001 (1) SACR 469 (SCA) 478c-h.] It is my further view that the unjustified accumulation of sentences in this matter can be avoided by ordering the 6 year terms on counts 4 to 64 and the robbery count, being Count 65, to run concurrently. The rest of the sentences will remain unaffected. Therefore, the appellant's effective prison term will be 9 years which will be antedated.

Order

[12] In the result, I propose that the following order be made:

[12.1] the appeal against sentence is upheld;

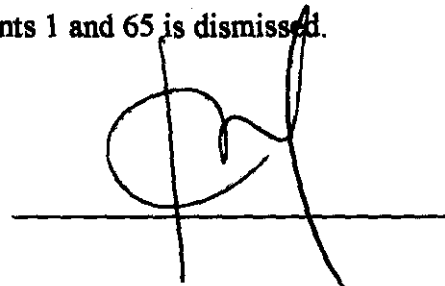
[12.2] the sentence of the Regional Court for the Gauteng Regional Division, Pretoria is set aside and the following is substituted for it:

"1. The accused is sentenced to imprisonment as follows:

- (a) 3 years in respect of counts 1 and 3;
- (b) 6 years in respect of counts 4 to 64, and
- (c) 6 years in respect of count 65.

- 2. the sentences in Counts 4-64 and Count 65, both of which are 6 years, shall run concurrently;
- 3. the orders in 1 and 2 hereof are antedated to the 19 September 2011.
- 4. The effect of the orders in 2 and 3 is that the appellant is sentenced to imprisonment for 9 years from 19 September 2011.

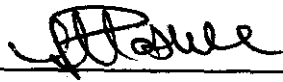
[12.3] the appeal against conviction in Counts 1 and 65 is dismissed.

A handwritten signature in black ink, appearing to be 'K. La M. Manamela', is written over a horizontal line.

K. La M. Manamela

Acting Judge of the High Court

04 MAY 2017



SP MOTHLE J

Judge of the High Court

I agree and it is so ordered

Appearances:

For the Appellant : Adv L Augustyn
: Justice Centre, Pretoria

For the Respondent : Adv Rossouw
: Director of Public Prosecutions
Gauteng Division, Pretoria