



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

CASE NO: A22/2024

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

13 September 2024

DATE

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SIGNATURE

In the matter between:

NTULI, OSCAR VUMANI

Appellant

and

THE STATE

Respondent

JUDGMENT

Mkhabela AJ (Noko concurring):

- [1] This matter concerns an appeal against sentences that were imposed by the Lenasia Regional Court. The sentences imposed by the Court on 25 February 2013 are as follows:

- 1.1 Fifteen (15) years imprisonment on conviction of each of the two counts of robbery with aggravating circumstances (count 1 and 2) and also 15 years for unlawful possession of a firearm (count 3). The sentences in count 1 and 2 were ordered to run concurrently.
- 1.2 Ten (10) years imprisonment for attempted murder (count 5). The ten years imprisonment in respect of count 5 was ordered to run concurrently with the 15 years imposed for count 3. This means that the effective period for imprisonment was 30 years.
- [2] Leave to appeal against sentence was dismissed by the Regional Court. A subsequent application for leave in the form of a petition to appeal was dismissed by two Judges of this Court.
- [3] The matter now comes before us on appeal against sentence only, leave to do so having been granted on petition by the Supreme Court of Appeal pursuant to Section 16(1) of the Superior Courts Act, 10 of 2013.
- [4] The primary ground of appeal is that the Trial Court committed a misdirection because of its failure to take into account the time spent by the appellant in custody while awaiting trial.
- [5] I now turn to the merits of the present appeal against sentence. The appellant together with his cohorts attacked and robbed the complainant in Meadowlands of about R16 000.00 at gunpoint.
- [6] The appellant was identified as the person who was in possession of the firearm. In addition, the appellant and his cohorts robbed two Makro workers of their personal belongings whilst they were delivering goods at the complainant's premises.

- [7] Subsequent to the robbery, the appellant fled the scene with his cohorts in a Toyota Tazz. The police gave chase and a shootout ensued between the appellant, his cohorts and the police. The appellant shot at the Police and fortunately no officer was hit.
- [8] Ultimately, the appellant and his co-accused abandoned the vehicle and fled on foot but were arrested shortly after the incident.
- [9] The Trial Court imposed the sentences as prescribed by the minimum sentence legislation having found that there were no substantial and compelling circumstances to warrant a deviation from the applicable minimum sentence.
- [10] The appellant, both in the Trial Court and in his petition to the High Court, submitted that his personal circumstances in that he had been in custody for three and a half years was not taken into account.
- [11] The Supreme Court of Appeal in granting leave to appeal agreed and held that it was a misdirection for the Trial Court not to have taken the time spent by the appellant in custody.

The issue

- [12] The only issue therefore is to what extent should the imposed sentence be altered in the light of the material misdirection committed by the Trial Court.

The law

- [13] In the case of *S v Malgas*¹ the Supreme Court of appeal had the following to say about a misdirection of a sentence discretion by a Trial Court:

¹ 2001 SACR 496 (SCA) at para 13.

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”

[14] Marais JA continued as follows on the same paragraph in *S v Malgas*:

“It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[15] It follows therefore that in circumstances in which the Trial Court has misdirected itself when it was exercising its sentencing discretion, the Appellate Court has a clean slate on which to inscribe a new sentence *de novo* as it were.

[16] In my view, an Appellate Court even though it is at large to commence the question of sentence *de novo*, it is equally bound to have regard to the sentencing aims of retribution and deterrence and the rehabilitation of the appellant.

[17] The sentencing aim of retribution and deterrence should in my view take centre stage in cases of murder and attempted murder involving police

officers. This is because an attempt to kill a police officer whilst he or she is on duty and executing official duties is tantamount to treason against our democratic state.

[18] With these salient principles I now turn to consider what could be a just sentence taking into account the triad of factors that should be taken into account towards sentence as enunciated in the case of *S v Zinn*².

[19] In this case it is incontrovertible that the appellant and his cohorts conducted themselves with a flagrant disregard of the right of the complainant not to be deprived of her property. This includes the Makro workers. Significantly, the appellant attempted to kill police officers instead of surrendering himself to the rule of law and allow the police to arrest him.

[20] There is no doubt that the appellant and his cohorts deserve a severe punishment which is not incongruent with the one that the legislature had in mind when it enacted the minimum sentence legislation. Such sentence of course must factor in the three and a half years that the appellant had already spent in custody awaiting trial.

[21] The appeal against sentence should therefore succeed in the light of the misdirection in failing to take into account the three and half years already spent in prison.

[22] In order to ameliorate any potential harshness and taking into account the three and half years that the appellant had already spent, it would be necessary to order some of the sentences to run concurrently and others to run consecutively given how they were committed and their heinous nature. In my view the sentence in respect of the possession of firearm should be served consecutively because it was committed separately and

² 1969 (2) SA 537 (A) at 540G-H and repeated in the case of *S v Malgas* 2011 (1) SACR 469 (SCA) at 482C.

independently of the two counts of robbery with aggravating circumstances and the attempted murder.

- [23] In other words, even if the robbery was not committed, the appellant was guilty of possession of the firearm. It follows therefore that the possession of firearm and ammunition was a separate standalone crime that was committed prior to the two counts of robbery and attempted murder.

- [24] The attempted murder was also committed separately and at a different location than the two counts of robbery because it happened after the robbery, this was after the appellant and his cohorts were being chased by the Police and had the temerity to shoot at the Police.

- [25] It is important to appreciate that had the attempted murder been committed against the complainant, it would have been absolutely required that the whole of the sentence imposed for the two counts of robbery to run concurrently with the sentence imposed for attempted murder.

- [26] Nevertheless and as already allude to above it worth reiterating that, in order to ameliorate the sentences from being seen as exceedingly harsh or disturbingly inappropriate, it would be in the interest of justice to order that part of the sentence imposed in respect of the attempted murder be also ordered to run concurrently with the two counts of robbery.

- [27] In my view, it is necessary that courts should show no mercy to convicted criminals who took arms against the Police and attempt to kill them when they exercise what the Constitution obliges them to do. The time has come for the courts to treat attempted murder committed against police as seriously as other serious crimes like rape and murder. The courts dare not flinch to be firm in dealing with such kind of attempted murders in the light the prevalent murders of the men and women in blue.

- [28] There is nothing inimical to the rule of law and justice for the courts to take judicial notice of Police killing or the attempt to kill them in the same way as the courts have taken judicial notice of the prevalence of the killing and rape of women and children.
- [29] Equally, it is not repugnant to the interest of justice and fairness for the courts to take judicial notice that the appellant would probably not even serve the full effective imprisonment since the appellant has a legal right to be considered and even be granted parole subject to certain conditions.³⁴
- [30] I am aware and appreciate the remarks of Harms JA to the effect that “ the function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served”.⁵
- [31] In my respectful view, a sentencing court should have regard that there is a parole regime in our country and that the sentence it has determined as the maximum term of imprisonment will probably not be served in full and to factor that probability when imposing sentence in the absence of an order in terms of section 276B of the Criminal Procedure Act 51 of 1977.⁶
- [32] It is for these reasons that the appellant should also serve part of the sentence imposed in respect of attempted murder consecutively after serving the sentences for the two counts of robbery. This would send a

³ The right to be considered for parole has been elevated to an almost a constitutional right in our country if the appellant becomes an exemplary prisoner as could be gleaned from case law in particular the case of *Walus v Minister of Justice and Correctional Service and Others* 2023 (2) SA 473 (CC) at para 47. See also section 73(4) of the Correctional Service Act 111 of 1998 (CSA) which authorises the placement of a prisoner before the expiration of his or her term of imprisonment.

⁵ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 521 D-I

⁶ Section 276B of the Criminal Procedure Act 51 of 1977 Act allows a sentencing court to fix a non-parole period before a prisoner could be considered for parole.

clear message to likeminded criminals that the courts would be firm when dealing with cases of attempted murder against Police officers.

Order

[33] In the result, I make the following order:

1. The appeal in respect of sentence succeeds.
2. The sentence imposed by the Trial Court in respect of counts 1, 2, 3 and 5 is set aside and in its stead is substituted by the following:
 - 2.1. In respect of count 1 robbery with aggravating circumstances, the accused is sentenced to 15 (fifteen) years imprisonment;
 - 2.2. In respect of count 2, robbery with aggravating circumstances, the accused is sentenced to 15 (fifteen) years imprisonment;
 - 2.3. In respect of count 3, the unlawful possession of a firearm, the accused is sentenced to 6 (six) years imprisonment.
 - 2.4. In respect of count 5, attempted murder, the accused is sentenced to 10 (ten) years imprisonment.
 - 2.5. Sentences imposed in count 2 and the five years of the sentence imposed for count 5 are ordered to run concurrently with the sentence for count 1.

- 2.6. The accused will therefore serve a cumulative period of 26 years imprisonment.

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R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I concur.


M V NOKO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **13 September 2024**.

FOR THE APPELLANT:

E A Guarneri

FOR THE STATE:

E A F Le Roux

DATE OF THE HEARING:

10 June 2024

DATE OF JUDGMENT:

13 September 2024