

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A56/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>08/08/2025</u> 	
DATE	SIGNATURE

In the matter between:

CLIFFORD MATHUTHU

First Appellant

MBIZO KHUMALO

Second Appellant

CHRISTOPHER SIBANDA

Third Appellant

BHEKIMPILO NDLOVU

Fourth Appellant

and

THE STATE

Respondent

Coram: YACOOB J et BOKAKO AJ

Heard: 14 October 2024

Delivered: 13 June 2025

Corrected Order: 08 August 2025

JUDGMENT

YACOOB, J:

Introduction

- [1] This appeal serves before this court with the leave of the Supreme Court of Appeal, which granted leave to appeal against the refusal of the appellants' petition by the High Court only in respect of sentence, and remitted the matter to this court to deal with sentence. The SCA refused leave to appeal against the refusal of the appellants' petition by the High Court in respect of conviction.
- [2] The four appellants were convicted, on 30 September 2015, in the Regional Court, Johannesburg on a number of counts including three counts of robbery with aggravated circumstances; one of attempted murder, and one or more contraventions of the Firearms Control Act, 60 of 2000, and sentenced on 5 October 2016 on those counts. The details of the convictions and sentences are set out later in this judgment. The sentences imposed by the Regional Court are, in the words of the SCA in its decision granting leave, "not clearly set out and require clarification for a definitive sentence to emerge".¹
- [3] It was submitted for the State that the SCA, in upholding the appeal against the refusal of the petition on sentence, and remitting the matter for this court to deal with the issue of sentence, intended for this court only to deal with the petition on sentence. That cannot be the case as such a course of action is not in the interests of justice. Firstly, the matter is set down on an appeal roll. Of course, that may not be determinative as the registrar may have erred. Second, however, if this court was to deal only with the petition on sentence, and grant it, the appellants would then have to wait approximately another year for the actual appeal on sentence to be heard. This is clearly antithetical to the interests of justice. Finally, the order of the SCA is that "[t]he matter is remitted to the high court in respect of sentence". Clearly the high court must then deal with sentence. Had the SCA intended us only to deal with the petition on sentence, the order

¹ *Mathuthu and Others v The State* [2024] ZASCA 50 (17 April 2024) at para 16.

would have said so. It is on that basis that this court heard the appeal on the merits of the sentences imposed.

Background facts

[4] The factual background is clearly set out in the judgment of the SCA. I cannot do better than quote the SCA's summary:

"[8] On 9 February 2015, Thatoya Malimo Molefe (Mr Molefe) was on his way home to Midrand, having attended a meeting in Parkmore when he was robbed of his Toyota Camry motor vehicle at gun point by the appellants. Following upon the aforesaid incident, on 17 February 2015 at 11h25 at the Worldware shopping mall, in Fairlands, the appellants entered an MTN store and robbed the store of cellphones at gun point, to the value of R380 000 and cash in the amount of R2000. In an attempt to flee from the MTN store, the appellants fired shots at the security personnel in the shopping mall and proceeded to their getaway vehicles, being the Toyota Camry, a Volkswagen Polo and a Kia Rio RS. This is the same Toyota Camry which was taken from Mr Molefe in Parkmore. Significantly, the cellphones were recovered in the vehicles at the scene of the shopping mall.

[9] A shoot out ensued between the security personnel and the appellants. In an attempt to flee the scene, one of the appellants was apprehended at the scene as he injured himself whilst trying to climb over a high wall. Another appellant fled into a nearby field, and was apprehended by the security personnel in the field after he shot at the security guard and eventually surrendered himself.

[10] Police on patrol, stationed at Fairlands, were informed of a Toyota Quantum fleeing the scene. They spotted the vehicle and gave chase. As the vehicle, which was in their sight at all times, attempted to evade the police on the N1, volumes of traffic hindered their progress. The driver and the passenger exited the vehicle and fired shots at the police. At some point, the driver of the vehicle got back into the vehicle and abandoned the passenger, who was eventually apprehended by the police.

[11] The last appellant to be arrested was apprehended when he pretended to seek assistance from a home in the area close to the scene. A security guard on patrol noticed the altercation between this appellant and the gardener of the home. A shoot out ensued between them and the security guard sought cover outside of his vehicle.

The appellant managed to drive away with the security guard's vehicle until he came to a cul de sac and was arrested by the security guards."²

[5] All four appellants were convicted on counts 1 to 5, and sentenced to imprisonment in accordance with the prescribed minimum sentence in terms of section 51(2) of the Criminal Law Amendment Act, 105 of 1997, as follows:

- a. Count 1: 15 years;
- b. Count 2: 15 years;
- c. Count 3: 15 years;
- d. Count 4: 5 years, and
- e. Count 5: 5 years.

[6] The fourth appellant, who was accused number four, was convicted in respect of count 6, possession of a specific firearm, and sentenced to 5 years imprisonment.

[7] The third appellant, who was accused number three, was convicted in respect of count 7, possession of a different firearm, and sentenced to 5 years imprisonment.

[8] All the appellants were acquitted of the remaining four counts.

[9] The learned magistrate stated regarding sentence::

"So in short accused 1 and 2 then [indistinct] 55 years imprisonment and accused 3 and 4 60 years imprisonment each In respect of count 1 and 3 the sentences to run concurrently, 10 years of the sentence to run concurrently with the sentence in respect of count 2. Count 4 and 5 taking together for the purpose of sentence, 5 years imprisonment I think your conduct clearly demonstrate that you can never be trusted with the [indistinct] of licenced firearms and therefore you remain unfit in terms of Section 102 of the Firearm Control Act."

² *Mathuthu (SCA)* above, paras 8-11.

- [10] The court commented that there was a possibility of a total of 80 years' imprisonment if it decided to impose more than the prescribed minimum, and appeared to consider it relevant that the appellants' chances of surviving the sentence were remote to say the least. This is presumably why the court made an order regarding sentences running concurrently. Unfortunately that order is both unclear and not necessarily consistent with the concern.
- [11] The sentence as reflected in the annexures to the charge sheet is further cause for confusion, as, rather than ordering that the sentences in counts 1 and 2 are to run concurrently, the court records that counts 1 and 3 are taken together for the purpose of sentence. There is no basis made out in the judgment of the trial court for this, and it is inconsistent with what is stated in the judgment.
- [12] The order that the sentences on counts 1 and 3 run concurrently with ten years to run concurrently with the sentence on count 2 appears to mean that the total period of imprisonment contemplated for counts 1, 2 and 3 is 20 years (15 years for counts 1 and 2 and an extra 5 years remaining from count 3). Then counts 4 and 5 are apparently to run together, although the court states at this point that they are taken together for purposes of sentence, rather than to run concurrently, where previously the court stated that the sentence was 5 years each. Either way, this then means that appellants 1 and 2 would serve a maximum of 25 years each. The court fails to state that the additional sentences imposed on appellants 3 and 4 should run concurrently with any other sentence, which has the result that they are each to serve a maximum sentence of 30 years.
- [13] It was submitted on behalf of the appellants that the sentences imposed are disturbingly inappropriate and that the court overemphasised the seriousness of the offence, the interests of society and the retributive aspects of sentencing, while only considering deterrence, prevention and the possibility of rehabilitation. It was not submitted that the individual sentences per count be tampered with,
- [14] Counsel for the state submitted that the trial court properly considered all relevant circumstances and imposed proper sentences. It was submitted for the state (further evidence of the lack of clarity in the order of the trial court) that the

sentences imposed were 25 years each for the first and second appellants and 30 years each for the third and fourth appellants.

- [15] The trial court did indeed consider properly the circumstances of each of the appellants before deciding that the prescribed minimum sentence was not to be deviated from. It is also not submitted for the appellants that the failure to deviate was inappropriate. It also properly considered that it was appropriate to take the appellants' ages into account in determining whether the sentences run concurrently, as the sentences otherwise amount to life sentences or more. However this is not reflected in the sentence ultimately imposed.
- [16] I am satisfied that, as it stands, the sentences imposed will probably result in more time being served in prison than in a life sentence. Where a life sentence is imposed, it is automatically run concurrently with other sentences, for obvious reasons. But a court must be careful when considering concurrency for sentences less than life, to ensure that the resulting time in prison is appropriate.
- [17] It may well be appropriate for a court to order that sentences run cumulatively, so that there is a cumulative period that amounts to a life sentence. This is especially the case when there are numerous convictions of serious offences, demonstrating that the convicted person has taken to a life of crime with no compunction for the effect on other human beings. This is not the case here.
- [18] The offences of which the appellants have been convicted all stem from one event, or one related series of events, and although the court is right to have commented on the brutality of the appellants' actions, I do not think that a sentence amounting to a life sentence is appropriate.
- [19] For these reasons, I consider that it is appropriate to order that all the sentences run concurrently.

Order

- [20] We order as follows:

1. The appeal succeeds.

2. The sentence imposed by the Regional Magistrate, Newlands, on 05 October 2016 is set aside in its entirety and replaced with the following:

a. Accused 1:

- i. Count 1: Fifteen years' imprisonment.
- ii. Count 2: Fifteen years' imprisonment.
- iii. Count 3: Fifteen years' imprisonment.
- iv. Count 4: Five years' imprisonment.
- v. Count 5: Five years' imprisonment.
- vi. The sentences on counts 1 – 5 are to run concurrently, and with effect from 05 October 2016.
- vii. Accused number 1 is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

b. Accused 2:

- i. Count 1: Fifteen years' imprisonment.
- ii. Count 2: Fifteen years' imprisonment.
- iii. Count 3: Fifteen years' imprisonment.
- iv. Count 4: Five years' imprisonment.
- v. Count 5: Five years' imprisonment.
- vi. The sentences on counts 1 – 5 are to run concurrently, and with effect from 05 October 2016.
- vii. Accused number 2 is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

c. Accused 3:

- i. Count 1: Fifteen years' imprisonment.
- ii. Count 2: Fifteen years' imprisonment.
- iii. Count 3: Fifteen years' imprisonment.
- iv. Count 4: Five years' imprisonment.
- v. Count 5: Five years' imprisonment.
- vi. Count 7: Five years' imprisonment.
- vii. The sentences on counts 1 – 5 and count 7 are to run concurrently, and with effect from 05 October 2016.
- viii. Accused number 3 is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

d. Accused 4:

- i. Count 1: Fifteen years' imprisonment.
- ii. Count 2: Fifteen years' imprisonment.
- iii. Count 3: Fifteen years' imprisonment.
- iv. Count 4: Five years' imprisonment.
- v. Count 5: Five years' imprisonment.
- vi. Count 6: Five years' imprisonment.
- vii. The sentences on counts 1 – 5 and count 6 are to run concurrently, and with effect from 05 October 2016.

- viii. Accused number 4 is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.



S. YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree.



T. BOKAKO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgement was prepared and authored by the 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 for hand-down is deemed to be xx June 2025.

APPEARANCES

For the Appellants: Mr Khunou (Attorney), instructed by Legal Aid South Africa

For the State: Mr Masina

Date of hearing: 14 October 2024

Date of judgment: 13 June 2025

Corrected order: 08 August 2025