



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. AR113/25

In the matter between:

QAPHELANI SHANDU
LUCKY NCUBE

First Appellant
Second Appellant

and

THE STATE

Respondent

ORDER

On appeal from: The Regional Court for the Regional Division of Durban held at Ntuzuma (Mrs E Le Grange sitting as court of first instance).

1. The appeal against sentence succeeds to the limited extent set out below.
2. The convictions and sentences imposed by the court *a quo* in respect of counts 1, 2, 3, 4, 5 and 6 are confirmed.
3. The order of the court *a quo* relating to the concurrency of the sentences in counts 3, 4, 5 and 6 is set aside and amended to read as follows:
'The sentences in counts 5 and 6 are ordered to run concurrently with the sentences imposed in counts 3 and 4.'
4. The effective sentence for each of the appellants is 20 years imprisonment and ante-dated to 28 January 2020.
5. Save as aforesaid, the appeal against sentence are dismissed.

JUDGMENT

Singh J (Henriques J concurring)

Introduction

[1] The appellants were convicted in the Ntuzuma Regional court on the following counts:

- (a) Two counts of robbery with aggravating circumstances read with the provisions of s 51(2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') read further with the provisions of ss 1, 262(1) and 260 of the Criminal Procedure Act 51 of 1977, ('the CPA').
- (b) Two counts of attempted murder read with Part IV of Schedule 2 of the CLAA.
- (c) One count of unlawful possession of a prohibited firearm with the serial number being altered in contravention of s 41(f)(iv) read with ss 1, 17, 19, 20, 103, 117, 120(1)(a), 121, 151 and Schedule IV of the Firearms Control Act 60 of 2000 ('the FCA') and further read with s 250 of the CPA.
- (d) One count of unlawful possession of ammunition in contravention of s 90 read with ss 1, 103, 117, 120(1)(a), 121, 151 and Schedule IV of the FCA and further read with s 250 of the CPA.

[2] On 28 January 2020, the appellants were sentenced as follows:

- (a) Fifteen (15) years imprisonment in respect of counts 1 and 2 which were taken together for the purposes of sentence.
- (b) Five (5) years imprisonment in respect of counts 3 and 4 which were taken together for the purposes of sentence.
- (c) Five (5) years imprisonment in respect of counts 5 and 6 which were taken together for the purposes of sentence.
- (d) The effective sentence was twenty-five (25) years direct imprisonment.

[3] Aggrieved by the outcome of the trial, the appellants sought leave to appeal to the court *a quo*. The first appellant sought leave to appeal in respect of sentence only. The second appellant sought leave to appeal in respect of the conviction and sentence. Leave to appeal for the second appellant was refused in respect of the conviction but was granted in respect of sentence. Both appellants' appeal relates to sentence only.

The facts

- [4] The court *a quo* in its judgment convicted the appellants on the following facts:
- (a) On the evening of 29 December 2017, and at KwaMashu, the two appellants who were in the company of three other suspects, held up the two complainants in counts 1 and 2 at gunpoint, and took a Toyota Tazz motor vehicle, and three cellphones from them.
 - (b) On the same evening, the two appellants still in the company of the three other suspects were pursued and apprehended by the two complainants in counts 3 and 4. The two complainants were police officers and the two appellants shot at the complainants.
 - (c) They were apprehended and the firearm and ammunition relating to counts 5 and 6 were found in their possession.
 - (d) The appellants were accordingly convicted, as charged.

The first appellant's personal circumstances

[5] The following personal circumstances, relating to the first appellant were placed before the court *a quo*:

- (a) He was 27 years old at the time of the commission of the offence.
- (b) He was a first offender with no previous convictions.
- (c) He had a five-year-old child and was unmarried. The child resided with his mother, who received a child care grant on behalf of the child.
- (d) At the time of his arrest, he was unemployed but was looking for employment.
- (e) He had been in custody for a period of two years and one month awaiting trial.

[6] A probation officer's report was also placed before the court *a quo*. In essence, the report was a repetition of the first appellant's personal circumstances as set out above.

The second appellant's personal circumstances

[7] The following personal circumstances relating to the second appellant were placed before the court *a quo*:

- (a) He was 25 years old, at the time of the commission of the offence.
- (b) He was employed as a taxi driver and had three children.
- (c) He maintained his three children and maternal family.
- (d) He had a previous conviction for robbery, for which he was convicted on 3 July 2006, when he was 15 years old.

The judgment of the court *a quo*

[8] The court *a quo* in its judgment took cognisance of both appellants' personal circumstances. In relation to the first appellant, it also took cognisance of the fact that he was shot during the commission of counts 3 and 4 and had a bullet lodged in his jaw. The court *a quo* did not expressly make reference to the probation officer's report.

[9] In relation to the second appellant, it stated that the second appellant was convicted of robbery approximately 11 years ago and that such previous conviction, was 'indicative of the fact that accused 2 cannot be rehabilitated because he has been convicted of robbery and the offences that he now has been convicted of has escalated to being more serious than being the first offence of robbery, but for the minimum sentence in legislation, the accused will be seen as a first offender'.¹

[10] The court *a quo* further held that despite the overwhelming evidence against both appellants, they showed no remorse and still maintained their innocence.² It took into account that the courts were inundated with robberies where innocent road users were robbed of their motor vehicles, as well as the degree of violence used by the appellants in the commission of the offences.

[11] It further found that an aggravating feature of the appellants' conduct that was that the two counts of attempted murder were committed when the appellants shot at the two police officers, who were attempting to apprehend them. The police officers were merely acting in their line of duty and their conduct was unacceptable.

The first appellant's submissions

[12] The first appellant, who at the hearing was represented by Mr P *Daniso*, submitted that:

- (a) the effective sentence of 25 years imprisonment was shockingly inappropriate and that the court *a quo* erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence in respect of counts 1 and 2. The court *a quo* failed to take into account the personal circumstances of the first appellant, which were contained in the

¹ Record, lines 10 to 16, page 355

² Record, lines 13 to 15, page 352

probation officer's report, thus ignoring that probation officers in compiling reports, performed a valuable task for the court.

- (b) none of the complainants were injured and that the court *a quo* failed to take this into account in imposing 15 years imprisonment in respect of counts 1 and 2.
- (c) the court *a quo* ought to have made an appropriate order regarding the concurrency of the sentences and that the total period of imprisonment to be served by the first appellant ought to be 15 years imprisonment.

The second appellant's submissions

[13] The second appellant who was represented by Ms D *Barnard* submitted the following:

- (a) Counts 1 and 2 were correctly ordered to run concurrently in that both counts were committed at the same time and at the same place. In so doing, the court *a quo* exercised mercy and leniency to the appellant.
- (b) That the court *a quo* ought to have however found that there were some substantial and compelling circumstances in relation to counts 1 and 2 and for that matter, counts 3 and 4, as this was not one of the worst cases faced by the court *a quo* as no one was injured in the commission of counts 1, 2 3 and 4 nor was there the use of gratuitous violence. In this regard, Ms *Barnard* referred the court to *S v Mabunda*³, where the Supreme Court of Appeal ('the SCA') ordered that 12 years of a sentence of 15 years imprisonment in count 2 was to run concurrently with a 15 year sentence in count 1.
- (c) The court *a quo* incorrectly took into account the second appellant's previous conviction, which was more than ten years ago. The previous conviction influenced the court *a quo* because it went on to state that in light of the previous conviction the second appellant was not capable of rehabilitation.
- (d) That the court *a quo* ought to have taken into consideration that the second appellant spent time in detention awaiting trial.
- (e) The gravest misdirection was that the cumulative effect of the sentences was 25 years and that the court *a quo* ought to have taken into consideration that counts 3 and 4 were committed with a relatively short time of counts 1 and 2. The sentences in counts 2, 3, 4, 5 and 6 ought to therefore have been ordered

³ *S v Mabunda* 2013 (2) SACR 161 (SCA), para 8 - 10

to run concurrently with the sentence in count 1 and that a cumulative sentence of 18 to 20 years imprisonment would have been most appropriate.

The State's submissions

[14] The State represented by Ms B *Mbambo*, submitted as follows:

- (a) In relation to the first appellant, the probation officer's report was not binding on the court and even if the court *a quo* did not state that it considered the probation officer's report, all the personal circumstances of the first appellant were considered and the court *a quo* found that none of the personal circumstances constituted substantial and compelling circumstances.
- (b) The fact that none of the complainants were injured did not mean that there ought to have been a deviation of the prescribed minimum sentence. Though there were no physical injuries to any of the complainants, the experiences of the complainants in counts 1 and 2 would nonetheless have been mentally and emotionally traumatic.
- (c) In relation to counts 3 and 4, she submitted that those counts were already ordered to run concurrently and that the fact that only the first appellant was armed with a firearm did not reduce the second appellant's blameworthiness as both appellants were charged with common purpose.
- (d) Counts 3 and 4 were not closely linked to counts 1 and 2 as the police were performing patrol duties when they came across the appellants and were not pursuing them as potential suspects in counts 1 and 2.
- (e) In relation to whether the court *a quo* took into account the second appellant's previous conviction, it was submitted that although the court made mention of same, it was clear that the second appellant was sentenced as a first offender in relation to counts 1 and 2.
- (f) It was submitted that the time spent in detention by both appellants could not on its own amount to a substantial and compelling circumstance and that the court correctly did not take it into account.
- (g) Overall, the State submitted that this court ought not to interfere with the issue of sentence.

The law

[15] It is trite that sentencing or punishment is pre-eminently in the discretion of the trial court. When exercising its appellate function, the appellate court will not in the

absence of a 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 simply because it prefers it. Having stated the test on appeal, this court must consider whether there was any material misdirection by the court *a quo*. In considering whether there was any material misdirection, one of the points raised by the appellants was that this court must consider the issue of why the sentences in counts 3 to 6 were not ordered to run concurrently with the sentences in counts 1 and 2.

[16] Section 280(2) of the CPA which relates to cumulative or concurrent sentences, provides as follows:

'Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.'

[17] The aforesaid provision confers a discretion to the sentencing court to make such an order. It is trite that in exercising its discretion, a sentencing court must do so judicially to ensure that the cumulative effect of multiple sentences is not disproportionate to the overall criminality. In *Moswathupa*⁴, the SCA held that concurrency is particularly appropriate where offences are factually and contextually linked, and treating them separately would exaggerate the gravity of the offender's overall conduct. Furthermore in *S v Vilakazi*⁵, the SCA articulated the principle of proportionality and warned against the effect of disproportionately harsh sentences.

Application of the law to the facts

[18] It is clear from the record that the court *a quo* was alive to all the personal circumstances of both appellants. The criticism by the first appellant was that the court did not take cognisance of the probation officer's report. The personal circumstances of the first appellant, which were contained in the probation officer's report, were also laid before the court *a quo* by the appellants' legal representative in argument on mitigation of sentence. The fact that the court *a quo* in its judgment did not specifically refer to the probation officer's report, therefore was not a material misdirection.

[19] In relation to the second appellant, the crux of his complaint was that the court *a quo* took cognisance of his previous conviction which was more than ten years old

⁴ *Moswathupa v S* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA), para 8 (*Moswathupa*)

⁵ *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) (*Vilakazi*)

and did not treat him as a first offender.⁶ In this regard, I am of the view, that whilst the court *a quo* stated that the second appellant had previous convictions, it did not in fact sentence the second appellant as if he was a second offender. I am therefore of the view that the court *a quo* did not materially misdirect itself in arriving at a sentence of 15 years imprisonment in respect of counts 1 and 2 in relation to the second appellant.

[20] With regard to the submission that the sentence of 15 years imprisonment in respect of counts 1 and 2, was harsh as no one was injured, regard must be had to the fact that both appellants were charged in terms of the provisions of s 51(2) and Schedule 2 of the CLAA. The said charges attract a prescribed minimum sentence of 15 years imprisonment, unless there are substantial and compelling circumstances to warrant a deviation.

[21] In interfering with sentence, this court must consider whether the court *a quo* erred in finding that there were no substantial and compelling circumstances in respect of counts 1 and 2. In *S v Malgas*⁷, Marais JA said at paragraph 25:

‘...If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust, in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’

[22] This approach survived constitutional scrutiny in *S v Dodo*⁸. Subsequently in *Vilakazi*⁹, the SCA explained that factors whether they are aggravating or mitigating ought not to be taken individually but rather upon a consideration of all circumstances of the particular case.

[23] Much was made on behalf of the second appellant that the court *a quo* misdirected itself in failing to take into account that the appellants had been in custody pre-trial for two years. In *S v Radebe and Another*¹⁰, the SCA stated:

‘...the test is not whether on its own that a period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the

⁶ Record, lines 22 to 23, page 355

⁷ *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (1) SA 1222(SCA); [2001] 3 All SA 220 (SCA)

⁸ *S v Dodo* 2001 SACR 594 (CC); 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC)

⁹ *Vilakazi* para 15

¹⁰ *S v Radebe and Another* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) (*Radebe*), para 14

crime or crimes committed; whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[24] The court in *Radebe* went on to state:

'...the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified...'

[25] The commission of counts 1 and 2, involved the taking of a motor vehicle and the use of a firearm. In my view, it was fortuitous that no one was injured during the commission of these counts. Likewise, it was also fortuitous that none of the police officers involved in apprehending the appellants in counts 3 and 4 were killed or injured. Against that background, I do not believe that any of either of the appellants' personal circumstances constituted substantial and compelling circumstances in respect to counts 1 and 2. Insofar as the sentences in counts 3, 4, 5 and 6 are concerned, I consider that these too are fully justified.

[26] In my view, the gravity of the offences far outweighs both appellants' personal circumstances. The sentences imposed do not induce a sense of shock. It may well be that both the appellants spent two years in detention before they were convicted but this factor does not outweigh the aggravating circumstances in respect of all six counts. There is no reason to interfere with the length of the sentences imposed by the court *a quo* and the appeal to that extent therefore fails.

[27] With regard to the issue of the court *a quo* failing to make an order that counts 2 to 6 run concurrently with count 1, this court takes into account that the offences committed in counts 3 and 4 were independent criminal conduct from that of counts 1 and 2. Counts 3 and 4 were committed after the commission of counts 1 and 2. They involved separate complainants, and were, in my view separate incidents and not linked to each other. As held in *Moswathupa*, concurrency is appropriate where the offences are factually and contextually linked. In *casu*, this was not so. I am satisfied however that counts 5 and 6 being the charges of unlawful possession of a firearm and ammunition were used in the commission of counts 3 and 4. It is therefore appropriate that the sentences imposed in counts 5 and 6 ought to be ordered to run concurrently with counts 3 and 4. To that extent, it is appropriate to interfere with

sentence imposed by the court *a quo*. To that limited extent, the appeal succeeds. Each of the appellant's effective sentence is therefore twenty (20) years imprisonment.

Order

[28] In the circumstances, I propose the following order:

1. The appeal against sentence succeeds to the limited extent set out below.
2. The convictions and sentences imposed by the court *a quo* in respect of counts 1, 2, 3, 4, 5 and 6 are confirmed.
3. The order of the court *a quo* relating to the concurrency of the sentences in counts 3, 4, 5 and 6 is set aside and amended to read as follows:
'The sentences in counts 5 and 6 are ordered to run concurrently with the sentences imposed in counts 3 and 4.'
4. The effective sentence for each of the appellants is 20 years imprisonment and ante-dated to 28 January 2020.
5. Save as aforesaid, the appeal against sentence are dismissed.



SINGH J

I agree



HENRIQUES J

CASE INFORMATION

Date of Hearing	:	12 June 2026
Judgment Delivered	:	10 July 2026
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