REPUBLIC OF SOUTH AFRICA

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

CASE NO: A256/14

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

5/3/2013 DATE

SIGNATURE

In the matter between:

SIPHO NDLOVU **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MAHALELO A J:

[1] This is an appeal against a sentence of 15 (fifteen) years imprisonment imposed upon the appellant on 20 May 2010, leave to appeal having been granted on petition.

[2] The appellant and a co-accused were arraigned before the Regional Magistrate sitting at Alexander on a charge of robbery with aggravating circumstances as intended in Section 1 of the Criminal Procedure Act 57 of 1977 (the Act) read with section 51 Act 105 of 1997 in that on or about 15 June 2008 at or near Parkmore in Gauteng they unlawfully and intentionally assaulted Clint Jansen and Linda Jones and with force take from them jewellery , cellular phones, a notebook and a digital camera, the total value thereof being R145 200.00, their property or property in their lawful possession. Aggravating circumstances being that a fire-arm was used during the commission of the offence.

[3] The appellant and his co-accused were legally represented. They both pleaded not guilty. At the closure of the state case, the co-accused was acquitted. The appellant was subsequently convicted as charged and sentenced to 15 years imprisonment. No order was made in terms of Section 103 Act 60 of 2000.

[4] This appeal, save for the general grounds as set out in the heads of appeal , raises the issue of whether the sentence of 15 years imprisonment imposed upon the appellant, a 27 year old offender, not married with two minor children, not employed and currently serving a 15 year imprisonment sentence for a similar offence is appropriate.

[5] Section 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of schedule 2 to the Act prescribes a minimum sentence of not less than 15 years imprisonment in the case of a first offender, 20 years imprisonment for a second offender and 25 years for a third or subsequent offender. A lesser sentence can only be imposed if compelling and substantial circumstances are found to exist.

[6] The seriousness of the offence, the interest of the accused as well as the interest of the society ought to be considered. It is submitted by counsel for the appellant that the magistrate overemphasised the seriousness of the offence and the interest of of the community and did not give the necessary consideration to the interest of the accused resulting in a sentence which is shockingly harsh and inappropriate.

[7] The crux of this appeal is whether the sentence of 15 years imprisonment or part thereof should have been allowed to run concurrently with the 15 year imprisonment sentence the appellant is already serving (imposed on 5 October 2010).

[8] It is trite principle of our law that the imposition of sentence is a matter falling within the discretion of the trial court. The appeal court can only interfere with sentence if there is an irregularity , misdirection or when the sentence is disturbingly inappropriate.

[9] Counsel for the appellant contended that the fact that the sentence of 15 years imprisonment imposed or part thereof was not ordered to run concurrently with the sentence the appellant is currently serving renders the sentence shockingly inappropriate. Counsel also submitted that the *court a quo* attached insufficient weight to the fact that the appellant was already serving a 15 year sentence.

[10] The offence the appellant is convicted of is serious and prevalent .It has not been shown that there are any compelling and substantial circumstances. The only suitable sentence in the circumstances of this case is direct imprisonment. However, I have observed what was held in S v Sparks and Another 1972 (3) SA 396 (SA) at 410G that "wrongdoers must not be visited with punishment to the point of being broken" further in S v Moswathupa 2012 (1) SACR 259 (SCA) that" the court must not lose sight of the fact that the aggregate penalty must not be unduly severe when dealing with multiple offences."

[11] The cumulative effect of sentences is an issue which has received the attention of courts over a period of time. See S v Muller 2012 (2) SACR 545 (SCA); S v Mahlatsi 2013 (2) SACR 625 (GNP)

[12] In my view the cumulative effect of sentences imposed does have an extremely harsh effect. An effective sentence of 30 years' imprisonment is an extremely severe punishment which should be reserved for particularly

heinous offences. Although severe, the offence is not associated with extreme violence or loss of life that unfortunately all too often occurs in armed robberies. I am therefore of the considered view that the court is justified in interfering with the sentence imposed by the trial court."

[13] Taking into account the appellant's personal circumstances, the seriousness of the crime and the interest of the society, it is my considered view that part of the sentence imposed should be ordered to run concurrently with the sentence of 15 years the appellant is currently serving.

In the result, I propose the following order:-

[1] The appeal against sentence is upheld.

[2] The sentence imposed by the court a quo is set aside and replaced with the following sentence, Accused is sentenced to 15 years imprisonment 10 years of which is ordered to run concurrently with the sentence he is presently serving.

The sentence is antedated to 20 May 2010

MAHALELO M B

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I Agree

WEPENER W L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 5 MARCH 2013

DATE OF JUDGMENT: 5 MARCH 2013