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

CASE NO: A243/2016

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

20 APRIL 2017 **JS NYATHI**

In the matter between

NCUBE, VUSIMUZI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NYATHI AJ:

[1] The appellant (Accused 1) and his co-accused (Accused 2) were charged in the regional court sitting at Newlands on the following charges:

1.1 Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 **(Counts 1 and 2)**

1.2 The contravention of section 49(1)(a) read with sections 1, 9 - 24, and 48 of Act 13 of 2002 **(Count 3)**

[2] On 8 June 2015 the appellant was found guilty as charged and sentenced as follows:

Count 1: Fifteen (15) years imprisonment;

Count 2: Fifteen (15) years imprisonment;

Count 3: Three (3) months imprisonment.

[3] The court further ordered that ten (10) years imprisonment in respect of the sentence imposed on count 2 run concurrently with the sentence imposed on count 1. The effective period of imprisonment imposed on the appellant was therefore twenty (20) years and three (3) months.

[4] The trial court refused him leave to appeal his convictions and the sentence imposed. He petitioned the Gauteng local division of the high court and was granted leave to appeal his sentence only.

His appeal is before this court today as a consequence.

[5] The court *a quo* found no substantial and compelling circumstances enabling it to deviate from the prescribed minimum sentences as contemplated in section 51(2) of the Criminal Law Amendment Act 105 of 1997[1].

[6] In meting out sentence, the regional magistrate had placed reliance on the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 as amended, (hereinafter referred to as "the Act").[2]

[7] Seemingly unbridled proliferation of serious and increasingly violent crime in South Africa at the time, was the undoubted antecedent to parliament's response of promulgating minimum sentencing legislation in 1997. The stated intention being to curb same, and demonstrate and ensure a firm, standardized and consistent response from all three spheres of government to the commission of such heinous crimes.

[8] Robbery with aggravating circumstances is singled out among other serious crimes for inclusion in schedule 2(c) (ii) of the 1997 Act as deserving severe punishment.

[9] The appellant and his co-accused are undocumented Zimbabwean nationals. The two complainants had been seated inside a motor vehicle outside the campus of the University of Johannesburg's main campus at 12:00 in the evening. They were

---

[1] P50 trial court record
[2] P50 Record

accosted and robbed of their belongings at gunpoint by the appellant and his accomplices

[10] The two counts of robbery were thus one continuous transaction. These constituted the most serious counts against the appellant.

[11] Our sentencing regime rests on the fundamental premise that the trial judge is vested with the discretion to decide on a suitable sentence[3]. This is subject only to control exercised by the appellate courts, and mandatory minimum sentences enacted by the legislature for certain serious offences such as robbery in which a firearms or firearms are used.

[12] Courts of appeal may only interfere with the sentencing discretion of the trial court, if it is not judicially exercised. The court of appeal will then consider whether the sentence imposed by the trial court is shockingly inappropriate or vitiated by misdirection and irregularity.

[13] The cumulative period of imprisonment imposed on the appellant was twenty (20) years and three (3) months. Only part of this sentence was ordered to run concurrently.

[3] S v. Pieters 1987 (3) SA 717

[14] In **S v. Mthetwa**[4], Makgoka J, stated that "...Where an accused person is convicted of more than one offence, it is a salutary practice for a sentencing court to consider the cumulative effect of the respective sentences. In this regard, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment."

[15] Our courts recognize the need to order sentences to run concurrently where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, the protagonists and importantly, the fact that they were committed with one common intent.[5]

[16] The effective 20 years imprisonment seems very severe when viewed against the backdrop of how the offences were committed, and taking into account the fact that appellant was a first offender.

[17] Charges 1 and 2 were for all intents and purposes a single charge and should for purposes of sentencing have been treated as one. The sentences should have been ordered to run concurrently.

[18] In the result I propose the following order:

---

[4] 2015 (1) SACR 302 (GP)
[5] S v. Mokela 2012 SACR 431 (SCA) par 11; S v. Mthetwa (supra)

18.1 The order of the court *a quo* is set aside and is replaced with the following:

18.2 The accused is sentenced as follows:

(a) Count 1: 15 years imprisonment

(b) Count 2: 15 years imprisonment

(c) Count 3: 3 months imprisonment

18.3 It is further ordered that the sentence on count 2 and 3 are to run concurrently with the sentence imposed on count 1.

18.4 The sentences are antedated to the 08 June 2015 (The date of sentencing by the court *a quo*)

It is so ordered

J.S. Nyathi

Acting Judge of the High Court Gauteng, Johannesburg

I agree

E.J. Francis

Judge of the High Court Gauteng, Johannesburg

Counsel for the appellant: Self

For the appellant: Adv M Buthelezi

Instructed by: Legal Aid Board

011 870 1480

For the respondents: Adv P Nel

Instructed by: Office of the Director of Public Prosecutions

Date of hearing: 20 April 2017

Date of Judgment: 20 April 2017