IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No A71/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

September
~~AUGUST~~ 2017
DATE

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SIGNATURE

In the matter between:

MCHUNU, SIFISO M — **APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

R. FRANCIS, AJ:

[1] The appellant, Mr Mchunu, was charged in the Regional Division of Gauteng on five counts of robbery with aggravating circumstances, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. He was duly convicted and sentenced to 15 years imprisonment on each of the five counts, all of which were ordered to run concurrently. On the count relating to possession of a firearm he was sentenced to 15 years imprisonment and on possession of ammunition he received 5 years imprisonment. In effect he was sentenced to 35 years imprisonment and declared unfit to possess a firearm. Whether this sentence is strikingly inappropriate and induces a sense of shock falls to be decided. The appellant was granted leave to appeal against sentence only.

[2] In determining an appropriate sentence the court has to consider the offence, the offender and the interests of society as entrenched in *S v Zinn*[1]. The ideal outcome is to achieve a proper balance between the triad: the nature of the crime, the personal circumstances of the appellant and the interests of society. In *S v Rabie*[2] the court held that:

> "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

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[1] 1969 (2) SA 537 (A).
[2] 1975 (4) SA 855 (A) at 862G.

[3] In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court[3]. Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion.[4] Additionally the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers subject to the qualification formulated in *S v Pillay*[5] where the court held that:

> '...mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[4] The cumulative effect of sentencing must also be considered when dealing with multiple charges. In *S v Johaar and Another*[6] the court held that where multiple offences need to be punished, what the court needs to ask itself is, what is the appropriate sentence for all the offences together.

[5] In *Zimila v S*[7] it was argued that the court *a quo* did not have sufficient regard to the cumulative term of imprisonment. It was argued that therein laid the misdirection

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[3] *S v Skenjana* 1985 (3) SA 51 (A).
[4] *Director of Public Prosecution KZN v P 2006* (1) SACR 243 SCA.
[5] 2012 (1) SACR 517 (SCA).
[6] 2010 (1) SACR 23 (SCA).
[7] (1179/16 [2017] ZASCA 55 (18 May 2017).

which justified this court to interfere with the sentence by ordering that parts of the sentences run concurrently.

[6] In the present matter the sentencing court was cognizant of the cumulative effect of sentences and ordered that the sentences imposed on counts 1 - 5 to run concurrently, resulting in a 15 year prison sentence. Each of the counts attracted the minimum sentence prescribed in terms of Section 51(2) of the Criminal Law (Sentencing) Amendment Act 105 of 1997. The appellant was treated as a first offender attracting the minimum of fifteen (15) years imprisonment. I find no misdirection by the magistrate in imposing the sentence on counts 1 - 5. However, the effective sentence of 35 years imprisonment which includes the sentence on count 6 (15 years) for possession of a firearm and count 7 (5 years) for ammunition induces a sense of shock and appears to be disproportionate.

[7] Count 6 attracts a sentence of 15 years imprisonment in terms of the prescribed minimum sentencing regime. I am mindful that the minimum sentence should not be deviated from lightly. In *S v Nkunkuma and others*[8] the Supreme Court of Appeal held that:-

> "In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the

[8] [2013] JOL 30832 (SCA) at para 8.

> objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may."

In my view the effect of the cumulative sentence of 35 years imprisonment, is a substantive and compelling circumstance which entitles this court to reconsider the sentence afresh.

[8] The common cause facts emerging from the trial are as follows: as each employee entered the company house he or she was accosted by a gun wielding assailant. Their hands were tied and they were placed in the kitchen of the house. One of the witnesses testified that the appellant was one of the people who had a firearm. Later it was accepted when the police arrived that anyone in that house that was not tied up was a robber. The appellant had hidden himself in the bathroom when the police arrived. The police arrested him from the bathroom after a struggle. The appellant at all times had a 9 mm semi-automatic firearm with him. The firearm was found in the shower of the bathroom where he had hidden. It was apparent that he had no escape route when he was accosted by the police.

[9] The mitigating factors are that none of the victims were physically injured or had sustained any physical injuries. The firearms were used as a means to subdue the victims. There is no evidence that the appellant had discharged the firearm during the robbery. Therefore this robbery can be distinguished from other robberies where victims

have been injured. For instance in *Mahlamuza and Another v State*[9] delivered on 1 December 2014, the victims were assaulted, they were tied with ropes and sustained injuries. They had to be taken to hospital.

[10] The above view is commensurate with that expressed by Binns- Ward J in *S v Fortune*[10] where it was found appropriate for a sentencing court to have regard to the gradation in the manifestation of the offence of robbery with aggravating circumstances as follows:

> "...the fact that the complainant was threatened rather than physically assaulted and injured is a relevant factor to be taken into account, along with all the other factors that should be weighed in determining whether a departure from the prescribed sentence is warranted."

[11] The aggravating circumstances in this case are the high prevalence of the offence, the seriousness of the offence, and the fact that the appellant showed no remorse. The complainants were robbed in their place of employment as they were reporting for duty; they were tied with ropes and placed in the kitchen, pointed with firearms and robbed of their cell phones. It is a serious and prevalent offence.

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[9] 2015 (2) SACR 385 SCA).
[10] 2014 (2) SACR 178 (WCC) para 11.

[12] In balancing the mitigating and aggravating factors to reach an appropriate sentence, I have had regard to the case of *S v Young*[11] Trollip JA said:

> "Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."

[13] In my view the cumulative effect of the sentencing is disproportionate to the crimes in respect of the sentences imposed in respect of counts 1 - 5. Under these circumstances, I find it appropriate that count 6, being the unlawful possession of the firearm, is to run concurrently with the sentences imposed in respect of counts 1 – 5 so that the 15 years imposed in respect of count 6, runs concurrently with the sentences imposed in respect of counts 1 to 5. It would serve the interests of justice to mitigate the length of the sentence in this manner. I find that an appropriate sentence for all the offences is 20 years imprisonment.

[14] In the result:

14.1 The appeal is upheld.

14.2. The sentence in respect of counts 1 - 5 is confirmed.

14.3 The sentences imposed in respect of counts 6 and 7 are confirmed.

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[11] 1977 (1) SA 602 (A) at 610E-H.

14.4 The sentence imposed in respect of count 6 is to run concurrently with the sentences imposed in respect of counts 1 to 5.

14.5 The appellant is thus effectively sentenced to a term of 20 years imprisonment.

14.6 The declaration in terms of section 103 of Act 60 of 2000, remains unaltered.

R. FRANCIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

I. OPPERMAN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Date of Hearing:	10 August 2017
Date of Judgment:	12 September 2017