REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: A191/2017
DPP REF NUMBER: 10/2/5/1-(2017/265)

(a) REPORTABLE: YES/NO
(b) OF INTEREST TO OTHER JUDGES: YES/NO
(c) REVISED.

10/11/2017
DATE

SIGNATURE

In the matter between:

SETSIBA, GEORGE NARE Appellant

and

THE STATE Respondent

J U D G M E N T

MANGENA, AJ:

[1] The appellant appeared before the Regional Magistrate's Court, Gauteng Division sitting in Johannesburg charged with 8 counts of attempted murder. He pleaded not guilty to the charges and offered no plea explanation.

The appellant was found guilty on 4 (four) counts. He was sentenced to 12 years' imprisonment on each count, which sentences were ordered to run concurrently.

[2] The appellant applied for leave to appeal against both the convictions and sentences imposed. The application was refused and the magistrate provided reasons in respect of conviction and failed to give any on sentence.

[3] The appellant petitioned the Judge President and leave to appeal was granted against sentence only.

[4] The background facts to the appeal are briefly as follows:-

The appellant, who was a police officer, was a respondent in a matter where the National Prosecuting Authority had obtained a restraint order against him compelling the surrender of property in terms of section 26 of Prevention of Organised Crime Act 121 of 1998. The appointed liquidators attended at the appellant's home, accompanied by the Sheriff of the court and police officers, to serve the court order. They found the appellant and explained to him the nature of the document and how the assets in his possession will be dealt with in order to comply with the court order. The appellant got agitated, went into his bedroom and came out with a gun. He shot randomly in the direction of the complainants and the victims. He left the house and was later, and on the same day, arrested and charged with 8 counts of attempted murder. It bears mentioning that the appellant was later exonerated in respect of the subject matter of the restraint order and all his property was released.

[5] Against the above background, we are required to make a determination on whether the sentence imposed is appropriate or not.

[6] It is trite that the imposition of sentence is pre-eminently a matter within the discretion of a trial court. Holmes JA explained the position succinctly in *S v Rabie*, 1975 (4) SA 855 (A) at 857D-E as follows:-

> "*1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal –*
>
> (a) *should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court; and*
>
> (b) *should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.*"

[7] In *S v Pillay*, 1977 (4) SA 531, the court explained the word "*misdirection*" to mean an error committed by the court in determining or applying the facts for assessing the appropriate sentence.

[8] Counsel for the appellant submitted before us that an effective sentence of 12 years' imprisonment is totally out of proportion to the gravity and magnitude of the relevant offences and accordingly evokes a sense of shock. He submitted further that the trial court did not exercise its discretion

properly and such failure constitutes a material misdirection justifying interference with the sentence imposed.

[9] Counsel for the state submitted with vigour that the appellant, being a man of law and order was expected to know better and how to relate with law enforcement officers. It was expected of him to be exemplary to the public on how to relate with police and other officers of the court. She urged us to find that there was no misdirection on the part of the trial court and that the sentence should not be interfered with.

[10] There is no doubt that the appellant has been convicted of serious offences. There is also no gainsaying the fact that his conduct as a police officer was reprehensible. Having said that, it does not mean that the sentence imposed is appropriate more so when one considers that the incident was not premeditated and that none of the victims suffered serious and severe physical injuries, albeit that it was not due to the appellant's doing.

[11] The trial court failed, in my view, to give due regard to, and attach the necessary weight to, the pre-sentencing report. If any consideration was given to it, same was perfunctory and much emphasis was placed on retribution and the protection of the interests of the society at the expense of other objectives and purposes of punishment. The trial court appears, in my view, to have approached the sentence proceedings with a mind closed to persuasion on other sentencing options. This constituted a misdirection.

[12] In *S v Mathe*, 2014 (2) SACR 298 at 312, the court stated that:-

> "In considering an appropriate sentence, it is necessary to bear in mind that, in providing for correctional supervision and a range of custodial sentences, the legislature has distinguished between offenders who ought to be removed from society and those who although deserving of punishment, do not ... The first duty of a sentencing court is to decide in which category the accused falls ..."

[13] Pre-sentencing reports provide valuable information for the determination of the appropriate sentence. The officers who prepare them do so with the sole purpose of placing facts before the court. It is therefore important that they should be accorded their premium status in the entire criminal justice system.

[14] In *S v Trichart*, 2014 (2) SACR 245, Vally J expressed the importance of the pre-sentencing reports as follows:-

> "[10] It is important for the courts to take these reports seriously and to give rational, even if only brief reasons for rejecting the recommendations contained therein. The probation officers who are officers of every court established under the Magistrate's Court Act 32 of 1944, and who compile these reports, perform a valuable task, one that is of huge assistance to judicial officers. The roles performed by the two enjoy a symbiotic relationship. The judicial officer considers factors such as the interests of the convicted individual, the nature and gravity of the crime(s) of which he or she has been convicted and the interests of society. In considering the interests of the individual, the judicial officer receives invaluable information gathered by the probation officer and has the benefit of the probation officer's expertise regarding the psychosocial and other conditions and circumstances

> concerning the offender. She places the offence in the context of these conditions and circumstances. ... They work with families and communities. They are required to place pertinent facts, which are supposed to be collected from a 'multiplicity of sources' before the court. These facts can often be very useful. Thus, the task of imposing an appropriate sentence, which in most cases is an anxiety-ridden one, is made easier when a carefully considered probation officer's report is placed before the court and the probation officer is available to attend to any queries or concerns the court may have. Of course, ultimately, the decision as to what an appropriate sentence should be remains the preserve of the judicial officer. This overriding power of the judicial officer allows for the judicial officer to overlook the probation officer's report, but must at least, furnish a rational reason for doing so." See also S v Magano, 2014 (2) SACR 423 at p 426.

[15] I have already mentioned that the trial court emphasised the interests of the community at the expense of the personal circumstances of the offender. The magistrate further failed to indicate in what respects the interests of society would be served by the long term incarceration of a 57 year old person who has served society loyally for more than 35 years. He disregarded the fact that he was a first offender and a mature adult man. These factors in my view constitute substantial and compelling circumstances and weigh heavily against the imposition of a 12 year sentence which, in my view, is disproportionate to the seriousness of the crime and strikingly harsh.

[16] In this regard it is worth remembering always that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy. Wrongdoers must not be visited with punishment to the point of being broken. Whilst it is necessary both to punish the appellant and

attempt to deter others from similar crimes, the effective sentence of 12 years is one that is likely to break rather than rehabilitate him. It would equally be wrong to sacrifice the appellant on the alter of deterrence. Our courts have held in numerous cases that mercy and not a sledgehammer is the concomitant of justice. See *S v Skenjana* 1985 (3) SA 51, *S v Harrison* 1970 (3) SA 684 (A) and S v V 1972(3) SA 611 (A).

[17] In *S v Samuels*, 2011 (1) SACR 9 the court said the following with regard to correctional supervision:

" An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well known triad of the crime, the offender and the interests of society. After all, any sentence must be individualized and each matter must be dealt with on its own peculiar facts. It must also, in fitting cases, be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck . It was urged upon us that correctional supervision would have been an appropriate sentence for the appellant. Sentencing courts should differentiate between those offenders who ought to be removed from society and those although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences". See also *S v Mabena*, 2012 (2) SACR 287 GNP.

[18] In argument before us, counsel for the state said that she had always believed that correctional supervision is not appropriate for violent crimes. It may well be so. Indeed there is generally an aversion on the part of the courts to impose correctional supervision as a sentence where it is not deserved, more especially in violent crimes. However, this does not mean that it is a law

of general application. The overriding principle is that the "*sentence must be individualized and each matter must be dealt with on its own peculiar facts*".

In *Maarohanye and another v S*, 2015 (2) SACR 337, the full court of this division led by Mlambo JP expressed the position as follows:

"[34] We must, however, still deal with appellants as humans who have the potential for rehabilitation and to lead responsible lives. We therefore must to an extent mitigate the sentence we impose with mercy" .

The learned Judge President continued to quote with approval from *S v Dodo* where the Constitutional Court said that:

"To attempt to justify any period of penal incarceration, let alone imprisonment as in the present case without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached, they are creatures with inherent and infinite worth, they ought to be treated as ends in themselves, never merely as means to an end".

The remark applies with equal force in this case. See also *Truyens v S*, (2011) ZASCA 110 where the court dealt with the misconception regarding correctional supervision as follows:

"[27] I should add that there is a misconception that a sentence under s 276(1)(i) of the Act is a softer option than an ordinary sentence of direct imprisonment. It is not. It merely grants the commissioner the latitude to consider an early release under correctional supervision after a sixth of the sentence is served - and only if the personal circumstances of the offender warrant it."

[19] During argument, we requested counsel to make available to us a copy of the pre-sentencing report, as the record contained only those portions of the report referred to by its compiler during his evidence being Mr J.N. Van der Merwe. The report was submitted to us in the afternoon of the same day and we thank counsel for their prompt response.

[20] Upon perusal of the report, it became clear that the appellant is not a violent person. This was confirmed by his wife, his colleague and his commander. He expressed regret for his actions on the day of the incident when he apologised to the officials. These facts stand undisputed.

[21] In the circumstances, and having regard to the appellant's personal circumstances, his relationship with the community and the fact that he devoted many years of his life to the protection of the community, should not be given sufficient consideration. A further factor not considered by the court *a quo* at all, are those flowing from section 36 of the Police Act 86 of 1995.

[22] From the surrounding facts, it is indisputable that he acted on the spur of the moment and has regretted his actions. The consequences of acting out of character and impulsively have been grave. An entire career in law enforcement was ruined during a fit of rage, the loss of which will also impact adversely on the extent of his pension benefits. These consequences must not be afforded too much weight as the appellant was the author of his own misfortune but equally, should not be disregarded completely.

[23] The expert report has clearly categorised him as a candidate for correctional supervision, see *S v Smith*, 1990 (3) SACR 130 (A). The offences were committed in close proximity of each other in respect of time and location and should be considered as one for purposes of sentence. In *S v Mthethwa*, 2015 (1) SACR 302 Makgoka J stated the approach to ordering sentences to run concurrently as follows:

"An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common

intent. Such an order may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment".

The facts in this case, in my view, justify an order that the running of the sentences are to be concurrent.

[24] In the premises, the sentence imposed by the trial court falls to be set aside and replaced with the following:-

24.1 The appellant is sentenced to five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act read with section 276A (2) (b) in respect of each count which sentences are to run concurrently.

24.2 In terms of S 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is antedated to 22 June 2016, being the date on which the appellant was sentenced.

M.I MANGENA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,JOHANNESBURG

I agree

I OPPERMAN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,JOHANNESBURG

Heard: 30 October 2017
Judgment delivered: 10 November 2017
Appearances:
For the Appellant: Adv N Makhubela
Mathonsi Attorneys
For the Respondent: Adv BS Masedi
Office of the Director of Public Prosecutions