REPUBLIC OF SOUTH AFRICA

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

CASE NO: A48/2019

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

5 AUGUST 2019 **FHD VAN OOSTEN**

In the matter between

DUBE NKOSANA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] On 20 March 2009 and in the Randburg Regional court, the appellant pleaded guilty to and was convicted of robbery with aggravating circumstances. He was sentenced to 15 years' imprisonment pursuant to the provisions of s 51(2) of Act 105 of 1997. The appeal before us is against sentence and is with leave of the court a quo, granted on 21 August 2018.

[2] The admitted facts of the matter are the following: On 16 August 2003 the appellant and his three companions, proceeded to the house of the complainants in

Randburg, with the intention to rob the contents of their house. Having arrived at the house, they waited for the occupants to arrive. They arrived in a vehicle and parked in front of the gate. The appellant and his cohorts entered the house armed with a firearm which was pointed at the complainants, who were tied up. The appellant and his cohorts then ransacked the house. Two persons arrived at the house and they were likewise tied up. Numerous items, including electrical goods, cell phones, jewellery, shoes and clothing were loaded into the vehicle of the complainants and they fled the scene. The vehicle was left abandoned in Diepsloot. Nothing was recovered. The total value of the robbed items, including the vehicle was approximately R65 000.

[3] Before this court, counsel for the appellant submitted that a failure of justice had occurred in that the Regional Magistrate had failed to explain the provisions on the minimum sentence legislation to the appellant at the commencement of the trial after having entered his plea. The charge sheet extensively referred to the minimum sentence legislation and the appellant was legally represented. No prejudice is either alleged or existed and the contention is rejected.

[4] After the appellant's conviction in the trial court, the State was unable to obtain and hand in the appellant's SAP 69 in respect of possible previous convictions. As a postponement had already been granted for obtaining the SAP 69, the trial court refused a further postponement and the sentencing stage of the proceedings continued. The State accordingly did not prove previous convictions and the Regional Court sentenced the appellant on the basis that he was a first offender.

[5] The Regional Magistrate duly considered the appellant's personal circumstances which were that he was 32 years of age, married with two minor children and HIV positive. The seriousness of the offence however overshadowed the appellant's personal circumstances and the court a quo in my view correctly found that no substantial and compelling circumstances existed for the imposition of a lesser sentence than 15 years' imprisonment. The appeal against sentence must accordingly fail.

[6] The matter however, does not end there. In the application for leave to appeal the appellant disclosed that he was arrested on the present matter on 16 October 2008, after his fingerprints had been taken in prison while serving a sentence of 18 years'

imprisonment imposed in 2005, in another case. Counsel for the State confirmed the correctness of the information. The appellant's fingerprint/s, I should add, tested positively and linked him to the crime. Regrettably, for some undisclosed reason this information was not disclosed to the trial court.

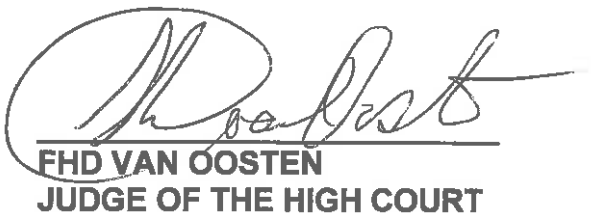
[7] I am satisfied that had the trial court been aware of the appellant's previous conviction, it would have been taken into account in the sentence that was to be imposed. This court accordingly, now that the information has been disclosed, is entitled to take the cumulative effect of the sentences into account. Counsel for the appellant referred us to the judgment of the Supreme Court of Appeal in *Zondo v S* (672/12) [2013] ZASCA 51 (28 March 2013), where it was held that such information, albeit disclosed subsequent to the conclusion of the trial, nevertheless had to be taken into account by the court of appeal.

[8] The appellant has presently served 14 years of the cumulative sentence of 33 years' imprisonment. The term remaining to be served is 19 years' imprisonment. The cumulative term of imprisonment of 33 years no doubt, is excessive (see *S v Mhlakaza* 1997 (1) SACR 515 (SCA) 519g) and accordingly falls to be reduced in ordering some concurrency as is reflected in the order at the end of this judgment.

[9] In the result the following order is made:

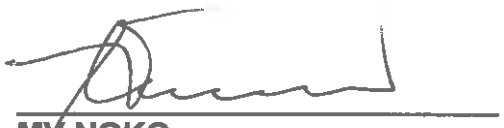
1. The appeal against sentence is dismissed.
2. A period of 7 years of the sentence of 15 years' imprisonment imposed on 20 March 2009 shall be served concurrently with the sentence of 18 years' imprisonment imposed on the appellant in 2005.

   The effective sentence in the present matter thus is 8 years' imprisonment and the cumulative sentence having regard to both matters in which the appellant has been sentenced, is 26 years' imprisonment.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.



MV NOKO
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT	***ADV LF MUSEKWA***
COUNSEL FOR RESPONDENT	***ADV VT MUSHWANA***
DATE OF HEARING	***5 AUGUST 2019***
DATE OF JUDGMENT	***5 AUGUST 2019***