IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A753/15

REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO

29/11/16 ..... E M Kubushi .....
DATE SIGNATURE

29/11/2016

In the matter between:

HERMAN NOYI POOE
APPELLANT

And

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J:

[1] The appellant was convicted by the regional magistrate, Nigel, of two counts, namely, count 1 - housebreaking with intent to commit an offence unknown to the state and count 3 - conspiracy to commit robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act").

[2] Consequent to such convictions the appellant was sentenced to eight (8) years imprisonment on each count. He was further deemed to be unfit to possess a firearm; and in terms of section 120 (4) of the Children's Act 38 of 2005 ("the Children's Act"), he was deemed to be unfit to work in an environment where there are children.

[3] The trial court did not order the two imprisonment sentences to run concurrently. The effect thereof was an effective term of imprisonment for sixteen (16) years.

[4] The appellant is not satisfied about the imprisonment sentences imposed and the sentence in terms of s 120 (4) of the Children's Act and is, with leave of this court, before us appealing the sentences.

THE IMPRISONMENT SENTENCES

[5] The appellant's main ground of appeal is that the effective term of sixteen (16) years imprisonment imposed on him is shockingly harsh and inappropriate. The submission is that the trial court ought to have taken due regard to the cumulative effect of the imprisonment sentences, and ordered the two imprisonment sentences to run concurrently in terms of s 280 of the Criminal Procedure Act. Having not done so the trial court erred and, as such, the sentences should be looked at afresh.

[6] The contention why the trial court should have ordered the two imprisonment sentences to run concurrently is, according to the appellant, that the offences are closely linked to each other. The appellant was sentenced to eight years imprisonment for conspiring to commit robbery and another eight years imprisonment for housebreaking when he wanted to execute the planning, so it was argued. In this regard the appellant's counsel referred us to a passage in the judgment in *S v Kruger* 2012 (1) SACR 373 (SCA) para 9.

[7] The respondent is not opposing the appeal on the imprisonment sentence and contends that the offences in both charges stem from a single transaction. The two offences are closely related to each other, the one being the planning and the other being the execution of the plan. Based on that, the respondent's counsel is also of the view that there is justification for the appeal court to have a re-look at the sentences as imposed.

[8] As is trite, sentencing is generally a matter that lies exclusively in the domain of the trial court. The court on appeal has limited powers to interfere unless there are irregularities, misdirection by the trial court or the sentence imposed is a sentence which a reasonable court will not impose.

[9] In argument before us at the hearing of the appeal, the respondent's counsel proposes that only six (6) years of the sentence in count 3 be ordered to run concurrently with the sentence in count 1, the effect thereof to be ten (10) years imprisonment. He further requested the sentence to be antedated to 26 August 2014.

[10] The appellant's counsel, however, insists in his argument before us that the two sentences must run concurrently the effect thereof to be eight (8) years imprisonment. His contention is that the two offences are closely linked and actually

happened at the same time and as such the sentences should be allowed to run concurrently.

[11] 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.[1]

[12] The current case is on point with the *Young*-judgment above. The circumstances in this instance are that the appellant and three other gentlemen conspired with the complainant's employee to rob the complainant at his house. The employee informed the complainant who in turn informed the police. The appellant and the three gentlemen were apprehended by the police after entering the complainant's house but before the robbery could take place.

[13] I am in agreement with the submissions by both counsel that the sentences imposed in respect of count 1 and count 3 should be interfered with. The offences were committed at the same place and at the same time and, as such, the trial court ought to have ordered the sentences to run concurrently. In not doing so, the trial court misdirected itself. This court is, thus, at large to interfere with the sentences imposed by the trial court.

[14] I am, however, of the view that the two sentences must run concurrently, the effect thereof to be eight (8) years imprisonment as argued by the appellant's counsel. The argument by the appellant's counsel that the two offences are closely linked and that they actually happened at the same time is correct. The appellant was sentenced to eight (8) years imprisonment for conspiring to commit robbery and

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[1] See S v Young 1977 (1) SA 602(A) at 610E – H.

thereafter another eight (8) years imprisonment for housebreaking when he wanted to execute the plan.

[15] In terms of s 282 of the Criminal Procedure Act, whenever a sentence of imprisonment is set aside on appeal or review and any other sentence of imprisonment is thereafter imposed, the latter sentence may, if the court is satisfied that the person concerned has served any part of the first sentence, be antedated to a specified date not earlier than the date on which the first sentence was imposed. The result is that the sentence so imposed shall be deemed to have been imposed on the date so specified.

[16] In this instance the sentence appealed was imposed on 26 August 2014. The appellant has from that date been in custody. He has as such served part of the sentence he is appealing. It is therefore proper that the sentence that this court is now to impose should be antedated to the 26 August 2014.

SENTENCE IN TERMS OF S 120(4) OF THE CHILDREN'S ACT

[17] Section 120 (4) provides as follows:

> '(4) In criminal proceedings, a person must be found unsuitable to work with children –
>
> (a) on conviction of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child; or
>
> (b) if a court makes a finding and gives a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which

or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child.'

[18] I am in agreement with the appellant's submission that he was not convicted of any offence referred to in this section. The trial court was as a result not entitled to impose a sentence in terms of this section. Having done so, it misdirected itself and this court is thus entitled to have this sentence set aside.

[19] In the circumstances I make the following order:

[19.1] The appeal is upheld.

[19.2] The sentences imposed by the trial court are set aside and replaced by the following:

a. 'Count 1 (housebreaking with intent to commit a crime unknown to the state) 8 years imprisonment.
b. Count 3 (conspiracy to commit robbery with aggravating circumstances) 8 years imprisonment.
c. Both sentences will run concurrently, the cumulative effect thereof to be 8 years imprisonment.
d. The sentences are in terms of section 282 of the Criminal Procedure Act 51 of 1977, antedated to 26 August 2014.
e. The accused is deemed unfit to possess a firearm.'

E.M. KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

H.F. JACOBS
(ACTING)JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Instructed by:	THE DIRECTOR OF PUBLIC PROSECUTION
Date heard:	21 November 2016
Date of judgment:	~~28~~ 29 November 2016