REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

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

19/04/2016
DATE

SIGNATURE

10/5/16

APPEAL NO: A526/15

In the matter between:

ALVINO MOODLEY **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOLOPA-SETHOSA J (RABIE and MEYER JJ concurring)

Case Summary: An appeal against a sentence of 43 years' imprisonment imposed by the High Court of South Africa, Gauteng Division (Circuit Local Division of Vereeniging Circuit Division), held at Vereeniging (Snyders J).

Order

The appeal against sentence is upheld.

[1] The appellant in this matter, Alvino Moodley (1st accused in the court *a quo*), together with his co-accused, Nishan Garieb (2nd accused in the court *a quo*) and Grant Buchenroder (3rd accused in the court *a quo*), appeared in the High Court of South Africa, Gauteng Division, (Circuit Local Division of Vereeniging Circuit Division), held at Vereeniging, on the following charges:

[1.1] Count 1: Kidnapping;
[1.2] Count 2: Murder;
[1.3] Count 3: Robbery with aggravating circumstance;
[1.4] Count 4: Unlawful possession of firearm; and
[1.5] Count 5: Unlawful possession of ammunition.

[2] On the 20th of February 2004 the appellant pleaded not guilty to all charges. During the course of the trial the appellant amended his plea in respect of counts 4 and 5 to guilty on both counts. The appellant was subsequently convicted of all charges on the 12th of March 2004.

[3] On the 13th April 2004 the appellant was sentenced as follows:

[3.1] Count 1: 5 years' imprisonment;

[3.2] Count 2: 20 years' imprisonment;

[3.3] Count 3: 15 years' imprisonment;

[3.4] Count 4: 3 years' imprisonment;

[3.5] Count 5: 1 year imprisonment;

[4] The sentences in counts 4 and 5 were ordered to run concurrently. The effective sentence of the appellant is therefore 43 years' imprisonment. The erstwhile accused 2 and 3, who were adults, were *inter alia* sentenced to life imprisonment for murder [count 2].

[5] The appellant was legally represented during the proceedings in the court *a quo*.

[6] On the 20th August 2008 the appellant brought an application for leave to appeal against his convictions and sentences before the learned judge *a quo* (Snyders J). The application for leave to appeal was refused by the learned judge *a quo*. The appellant petitioned the SCA and on the 24th April 2015 leave to appeal against the sentences imposed upon the appellant only was granted. The appellant now appeals against his sentences only, and the factual findings of the court *a quo* are therefore accepted.

[7] The genesis of the convictions and the sentences arose from events which occurred on 26 May 2003. The appellant, together with his co-accused and other persons, hijacked the motor vehicle of the deceased [a Toyota

sedan]; using a firearm. The deceased was kidnapped at gunpoint and taken to a secluded/ deserted place where he was shot and killed. Thereafter the perpetrators removed sound equipment, as well as the other personal belongings from the deceased's vehicle and distributed it amongst themselves.

[8] It is so that during the trial none of the accused was completely candid with their versions and the court *a quo* found that each accused attempted to diminish his role in the offences. The trial court relied on the doctrine of common purpose to attribute the actions of the different perpetrators to the individual accused.

[9] The appellant admitted that he had procured the firearm from his uncle's room, but claimed that it was for an innocuous purpose. The appellant belatedly amended his plea to guilty in respect of counts 4 and 5, i.e. possession of firearm and ammunition respectively.

[10] The appellant claimed that the erstwhile accused 2 took possession of the firearm and threatened the deceased to surrender control of his motor vehicle, *inter alia* by discharging a gunshot in the vehicle. Thereafter they first collected a person by the name of Bruce, who in turn collected the erstwhile accused 3 from his place of employment. Bruce then drove the vehicle to a secluded spot where accused 2 and 3 removed the deceased from the vehicle and took him away. The deceased did not return to the vehicle before they drove away. It is common cause that his body was later found at that spot.

[11] The erstwhile accused 2 attributed the actions the appellant claims to have been performed by him (accused 2) to the person known as Bruce.

Accused 3 also claimed that Bruce removed the deceased from the vehicle without his involvement, although he admitted in his confession that it was done by him and accused 2, whereupon accused 2, according to accused 3, shot the deceased.

[12] From the evidence on record it seems that Bruce was a known gangster and an intimidating unsavoury character. He was, in addition, older than any of the accused. The trial court however did not find that Bruce had any influence on the appellant and his co-accused.

[13] The court *a quo* found that the inference is justified that all the members of this group actively participated in the robbery, kidnapping and murder; and held that their intention in the form of *dolus directus* had been proved.

[14] In the judgement on sentence the court *a quo* correctly mentioned the fact that none of the accused provided any context to their motive, reasoning or feelings pertaining to the events, and this left the court *a quo* at a disadvantage in establishing each accused's moral blameworthiness.

[15] The state proved no previous convictions against the Appellant.

[16] The following personal circumstances of the Appellant were placed on record:

[16.1] the appellant was 17 years old at the time of the commission of the offences, and about a month away from his 18th birthday at the time he was sentenced;

[16.2] the appellant was not married but had a young child;

[16.3] the appellant went to school up to grade 9 during 2001 (he did not continue with his studies as he had impregnated his girlfriend and he wanted to look for a job to provide for his baby but he was registered for grade 12 at the time of his arrest);

[16.4] the appellant was employed at Sappi as a filing clerk on a part time basis at the time of the commission of the offences;

[16.5] he lived with his mother. His parents divorced when he was 4 years old. The parents remarried and both have two children each in their second marriages. He did not have a good relationship with his father.

[16.6] he and his family belonged to the Hindu religion and they attended and practised their religion regularly; and

[16.7] the appellant was a first offender.

[17] The Appellant in essence appeals against the severity of the sentences and submits that the sentence is shocking and not justified in the circumstances; that an effective term of 43 years' imprisonment is not in harmony with the notion that a custodial sentence should be the last resort

in the case of juvenile offenders and should then only be imposed for the shortest appropriate period.

[18] Counsel for the appellant submitted that the court *a quo* misdirected itself in not having sufficient regard to the fact that the appellant was a child at the time of the commission of the offences; with specific reference to the severity of the individual sentences, which he submitted were excessive and shockingly inappropriate considering the appellant's age.

[19] Further that the court *a quo* misdirected itself in not ameliorating the cumulative effect of the sentences; particularly considering that the offences were closely related in time and place and had their origin in the same continuous transaction.

[20] Counsel for the respondent, on the other hand, submitted that the court *a quo* found substantial and compelling circumstances to exist in the age of the appellant, and thus did not impose life imprisonment, as it did with the appellant's co-accused.

[21] Counsel for the respondent further submitted that the appellant, at that age of 17 years, acted like an adult; that the appellant is the one that brought the firearm and the ammunition that was used to commit the offences herein; and that the appellant did not show any remorse.

[22] However, although counsel for the respondent did not formally concede that 43 years' imprisonment was too excessive for a youthful offender like the appellant, he correctly acknowledged that 43 years' imprisonment

was too harsh, and that the court *a quo* could have ordered the sentences imposed to run concurrently, to ameliorate the cumulative effect of the sentences.

[23] The imposition of a sentence is pre-eminently for the sentencing court. It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance; see *R v Lindley* 1957 (2) SA 235 (N). A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence. In *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G it was held that:

> *"A court of appeal was entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."*

[24] The general approach to be followed by a Court of Appeal with regards to sentence is set out as follows in *S v Pieters* 1987 (3) SA 717 (A) at 727:

> *"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike*

wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers."

Therefore the issue of sentence is always a matter for the discretion of the trial court. In *Kgosimore v S* 1999 (2) SACR 238 (SCA) at par [10], the Supreme Court of Appeal held that:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry.... Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so. I can accordingly see no juridical basis for the stricter test suggested by counsel; nor is there anything in section 316B of the Criminal Procedure Act, or for that matter section 310A, to suggest otherwise... It follows that, in my view, whether it is the attorney –general (now the Director of Public Prosecutions) or an

accused who appeals against a sentence, the power of a court of appeal to interfere is the same."

[25] It became clear that the main issue in this appeal is whether the court *a quo* erred in not further taking into account the young age of the appellant in imposing a harsh sentence of 43 years' imprisonment to the 17 year old appellant, as he then was, [though the court did find that because of the youthful age of the appellant at the time of the commission of the offences, it could not impose life imprisonment, as it did with the appellant's co-accused].

[26] In arriving at the sentence she imposed the learned judge *a quo* did give cognizance to the principles set out in *S v Nkosi* 2002 (1) SA 135 (W) at 136F – 137E. The principles informing the sentencing of child offenders have now been crystalized [after the sentence herein was imposed]. See *S v B* 2006 (1) SACR 311 (SCA); *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (6) SA 632 (CC).

[27] The principle that a child offender should only be deprived of his liberty as a measure of last resort; and then only for the shortest possible time is now well entrenched in our law and the application thereof militates against lengthy terms of imprisonment for child offenders. Where imprisonment is unavoidable not only the duration, but also the form of imprisonment should be tempered. See: *S v N* 2008 (2) SACR 135 (SCA) para [39].

[28] In arriving at an appropriate sentence however, even in cases where the offender is under the age of 18 years old, as in this case, it is still appropriate that aggravating factors also be taken into account. The court *a quo* correctly found that the appellant and his co-accused had direct intent to murder the deceased. The court *a quo* also correctly found that the offences were pre-planned. The firearm that was used in the commission of the offences was obtained by the appellant. The appellant knew the deceased. The deceased, who was 20 years old at the time he was murdered, was executed with a bullet to the head. It can only be correct that these aggravating factors should also be taken into account in arriving at an appropriate sentence; of course balancing all the factors and taking into account the youthful age of the appellant at the time of the commission of the offences herein.

[29] No doubt, 43 years' imprisonment is harsh and excessive, especially for a 17 year old boy; also taking into account that the convictions originate from the same events, which was a continuous transaction. This alone, should have ameliorated the cumulative effect of the sentences imposed.

[31] I now consider whether the sentences should be ordered to run wholly concurrently. It is to be recalled that the trial court ordered only the 1 year sentence in count 5 to run concurrently with the sentence in count 4. In this regard the position can be summarised as follows. 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. See *S v Whitehead* 1970 (4) SA 424 (A); *S v Kwenamore* 2004 (1) SACR 385 (SCA).

[32] 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'; see *S v Mokela* 2012 (1) SACR 431 (SCA) para [11]. Put differently, where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered. See *S v Mate* 2000 (1) SACR 552 (T).

[33] In the present case, there was indeed an inextricable link between all the offences in terms of the locality, time and the protagonists. There was also a substantial overlap in the overall intent in respect of the crimes. In my view, the failure of the trial court to take these factors into consideration resulted in the cumulative effect of the sentences being disturbingly inappropriate. These factors justified an order of concurrence in the sentences. This on its own is a basis for interference by this court. In my considered view the learned judge *a quo* misdirected herself in not taking into account the cumulative effect of the sentences imposed; especially also taking into account the age of the appellant at the time of the commission of the offences.

[34] Where more than one offence is committed during the same incident, the court should already have regard to the aggravating features when imposing sentence for the primary offence, including other offences being

committed at the same time; and that the sentences for these attendant offences should be ordered to run concurrently with the sentence for the primary offence. See *S v Moloto* 1982 (1) SA 844 (SCA) at 854 E – H

[35] In the circumstances the appeal on sentence should be upheld. Regard being had to all the relevant factors present in this case, including the age of the appellant at the time of the commission of the offences herein, the aggravating and mitigating circumstances, the following order is made:

1. The appeal against sentence is upheld and the sentences of the court *a quo* are set aside and replaced with the following order:

"[1.1] Count 1: 5 years' imprisonment;

[1.2] Count 2: 18 years' imprisonment;

[1.3] Count 3: 15 years' imprisonment;

[1.4] Count 4: 3 years' imprisonment;

[1.5] Count 5: 1 year imprisonment.

2. The sentences in counts 1, 3, 4 and 5 are ordered to run concurrently with the sentence in count 2. The effective sentence of the appellant is therefore 18 years' imprisonment".

3. In terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended, the substituted sentence is ante-dated to 13th April 2004, being the date on which the appellant was sentenced.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

CP RABIE

JUDGE OF THE HIGH COURT

I agree

P A MEYER

JUDGE OF THE HIGH COURT