HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

14/9/16

Not reportable

Not of interest to other Judges

CASE NO: **A445/2015**

In the matter between:

CHARLES SEAPARO SEKWATI Appellant

and

THE STATE Respondent

JUDGMENT

MAKGOKA, J

[1] This is an appeal against sentence. The appellant was convicted by a Judge of this Division (the trial court) of three counts of housebreaking with intention to rob and robbery with aggravating circumstances. Those were counts 1, 5 and 8. He was acquitted of the rest of the initial eight counts he faced. Counts 1 and 5 were subject to the minimum sentence in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act), in terms of which the minimum sentence of 15 years' imprisonment had to be imposed, unless the court found substantial and compelling circumstances to exist, in which event, in terms of s 51(3) of the Amendment Act, lesser sentences could be imposed.

[2] The trial court found no such circumstances, and imposed the minimum sentences of 15 years' imprisonment in respect of each of counts 1 and 5. In respect of count 1, an additional 5 years' imprisonment was imposed. In respect of count 8, a sentence of 15 years' imprisonment was also imposed, purportedly in terms of s 51(1) of the Amendment Act. Thus, the appellant was sentenced to 50 years' imprisonment. However, with the order of concurrency, he was sentenced to an effective 35 years' imprisonment. The appellant does not join issue with the sentence imposed in respect of count 5, and the conclusion of the trial court that there are no substantial and compelling circumstances to warrant the imposition of lesser sentences.

[3] I briefly state the factual background and the specific facts which culminated in the conviction of the appellant in respect of count 1. The appellant was part of a gang which broke into private residences around Pretoria suburbs in May and August 2008. The break-ins occurred in the early hours of the morning, during which the occupants were robbed of valuable possessions. I shall briefly consider only the circumstances of the robbery in count 1, for the simple reason that there is no challenge to the sentence imposed in respect of count 5. With regard to count 8, I intend to set aside the sentence of 15 years for the reason that the appellant was not fore-warned that the State intended to invoke the minimum sentence as prescribed in s 51(1) of the Amendment Act. As a result, little purpose would be served by setting out the circumstances of the robberies in counts 5 and 8, save that in respect of count 8, there is a residual issue, to which I shall revert.

[4] The facts in count 1 are these. During the early hours of 21 August 2008, the complainant, a 57 year old woman, woke up to the presence of three assailants in her bedroom, who were all armed with firearms. The appellant was one of them. The complainant lived with her 38 year old son who suffers from a hearing impairment. She was pointed with a firearm and her hands were tied with a belt. The assailants demanded firearms from her. Her son, who was asleep in another bedroom, was dragged into her bedroom. He was tied up and his mouth was closed by a foreign object. They were both assaulted with open hands by the assailants, while she was also threatened with a screwdriver. She was also assaulted with the butt of a firearm,

with assailants demanding the car keys to her motor vehicle, a Ford Focus, which they mentioned by name, suggesting that they had previously kept her under surveillance. While the appellant and another assailant ransacked the house, the third assailant raped the complainant in full view of her son. The complainant sustained injuries to her head and her son sustained a swollen eye. Her motor vehicle, as well as several household items, was stolen. The motor vehicle was recovered later.

[5] The appellant's complaint against the sentence imposed in respect of count 1 is three-pronged. First, that the trial court over-emphasised the seriousness of the offence by exceeding the prescribed minimum sentence with 5 years. Second, that he was prejudiced by not being fore-warned that the trial court contemplated exceeding the prescribed minimum sentence of 15 years' imprisonment. Third, that the trial court did not properly motivate the reasons for that conclusion. There is no merit in any of the grounds. The second ground can be disposed of summarily. The short answer to the contention that the appellant was entitled to be fore-warned that the trial court contemplated a sentence in excess of the prescribed minimum, is *S v Mthembu* 2012 (1) SACR 517 (SCA) paras 14 and 15. There, the Supreme Court of Appeal rejected a similar contention. There remain the first and third contentions, which, in my view, can conveniently be considered together.

[6] In imposing the sentence in count 1, the trial court considered the circumstances of the commission of the offence, and the trauma that the complainant suffered. The trauma, the court noted, was still apparent during the court proceedings, some years after the incident. The complainant was receiving counseling at the time of the trial. The trial court also took into consideration the fact that the complainant was raped in the course of the robbery, although not by the appellant. It also noted that the complainant and her deaf son were terrorized by the appellant and his co-assailants for approximately two hours. On the above considerations, among others, the trial court was driven to the conclusion that a sentence exceeding the prescribed minimum was warranted.

[7] I do not find any misdirection in the manner the trial court considered the sentence in respect of count 1. The trial court did not elevate the rape as the determining factor in coming to 20 years. It considered a number of factors, some of which I have highlighted above - all admittedly aggravating, including the on-going trauma that the complainant suffered. There is no denying that of the three counts, count 1 had much more aggravating factors, even discounting the rape. The rape itself, while not committed by the appellant, is part of the circumstances accompanying the robbery. It can simply not be wished away. It is therefore clear from the trial court's reasoning why it differentiated the sentence from those in counts 5 and 8. I therefore take a view that the criticism of the trial court's approach in this regard is not warranted. Sitting as a trial court, I would probably not have exceeded the prescribed minimum sentence of 15 years' imprisonment. However, that is not the test.

[8] It is perhaps necessary to restate the trite principles governing an appeal court's power to interfere in the sentence imposed by a trial court. The imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A); *S v Snyder* 1982 (2) SA 694 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.

[9] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

'Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitled the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that is shows, directly or inferential, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence'

[10] The upshot of the principles referred to above is that the trial court's exercise of a discretion in imposing a sentence is not easily disturbed, unless in the proscribed instances. In the present case, I do not find any misdirection or irregularity on the part of the trial court in how it approached the sentence. The trial court closely reasoned its conclusion for exceeding the prescribed sentence. To my mind, none of the considerations mentioned in the authorities referred to above as constituting a basis for interference, are present here. I would therefore not interfere with that sentence.

[11] With regard to count 8, there is a related preliminary issue. The indictment mentioned the use of a pair of scissors during the robbery. The evidence established that the complainant in that count was only threatened to keep quiet, otherwise she would be shot. This aspect was not raised by the appellant in either his application for leave to appeal, the notice of appeal, heads of argument or oral submissions before us. It was raised by a member of this court during the hearing as possibly being relevant to whether the appellant was properly convicted of robbery with aggravating circumstances. In my view, nothing turns on this aspect. In terms of s 1(iii) of the Criminal Procedure Act 51 of 1977 (the Act) a threat to inflict serious bodily injury constitutes aggravating circumstance. See *Ex parte Minister of Justice: In Re: R v Gesa; R v de Jongh* 1959 (1) SA 234 (A). The conviction in respect of count 8 is therefore in order, to the extent that whatever defect in the indictment had been cured by evidence in terms of s 88 of the Act which provides that a defect in a charge may be cured by evidence. See also *S v Kuse* 1990 (1) SACR 191 (E) at 196g-h.

[12] I turn now to the substantive contention in respect of count 8. The indictment made no reference to the State's intention to rely on the provisions of s 51(1) of the Amendment Act. For that reason alone, the trial court was not competent to impose a sentence in terms of that section. As part of the constitutional right to a fair trial it is now established that, generally, where the state wishes to invoke the provisions of section 51 of the Act the provisions of section 51 must be brought to the attention of the accused in such a way that the charge can be properly met before conviction. This means that from the outset of the trial the accused must be placed in a position

to appreciate properly the charge that he faces as well as its possible consequences. See *S v Legoa* 2003 (1) SACR 13 (SCA) para 23; *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12; *S v Tshabalala* 2008 (1) SACR 486 (T) para 14; *S v Motlhakane; S v Sehlake; S v Van Heerden van Oudshoorn* 2011 (1) SACR 510 (GNP) para 3. None of the above prescripts were followed in the present case, hence the sentence imposed was incompetent, and should be set aside and replaced with an appropriate sentence outside the purview of s 51(1) of the Amendment Act.

[13] Lastly, as a general ground of appeal, the appellant contends that the trial court failed to take into consideration the cumulative effect of the sentences imposed. This argument has somewhat become academic, since I intend to interfere in the sentence imposed by the trial court. It is a salutary practice that if an accused is sentenced in respect of two or more related offences, a sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which the accused has to be sentenced. See *S v Sevenster* 2002 (2) SACR 400 (C). It must be emphasised that in the present case, the three offences in respect of which the appellant was convicted, are totally unrelated. They are separate in terms of time and space. However, that does not mean that the cumulative effect of the sentences should not be considered. In the present case, the total sentence of imprisonment I intend imposing is 45 years, but effective 25 years, with the order of concurrency.

[14] A court should not shy away from imposing an appropriate sentence on the fear of being accused of meting out a so-called Methuselah sentence. If the specific facts of the case call for such sentence as an appropriate one, it should be imposed. Indeed, there are cases where one cannot do otherwise but impose such a sentence. This is especially with multiple, unrelated, counts. The Supreme Court of Appeal has confirmed such sentences on appeal to it, in appropriate cases. See for example, *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA). In any event, an effective sentence of 25 years' imprisonment, which I propose in the present case, while lengthy, can hardly be described as a Methuselah type. In my view, it reflects the seriousness of the offences, while balancing that with the appellant's personal

circumstances and adequately expressing the community's indignation at the nature of the crimes.

[15] To summarise. In respect of count 1, I dismiss the appeal against the sentence. In respect of count 5, where there is no appeal against the sentence, the sentence of 15 years' imprisonment should be retained. In respect of count 8, I uphold the appeal against the sentence of 15 years' imprisonment and replace it with one of 10 years' imprisonment. 10 years of the sentence in respect of count 5 should be ordered to run concurrently with the sentence imposed in respect of count 1. The whole of the substituted sentence in respect of count 8 should be ordered to run concurrently with the sentence imposed in respect of count 1. Thus, the effective period of imprisonment is 25 years.

[16] The following order is made:

1. The appeal against the sentence imposed in count 1 is dismissed;

2. The sentence of 15 years' imprisonment imposed in count 5 is retained;

3. The appeal against the sentence imposed in respect of count 8 is upheld, and that sentence is set aside and in its stead the following sentence is substituted:

   'The accused is sentenced to 10 years imprisonment'

4. It is ordered that 5 years of the sentence in count 5, and the whole of the substituted sentence of 10 years in respect of count 8, are to run concurrently with the sentence in count 1.

   The effective period of imprisonment is therefore 25 years.

5. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is ante-dated to 14 October 2011, being the date on which the appellant was sentenced.

T.M. Makgoka
Judge of the High Court

I agree

Z. Carelse
Judge of the High Court

I agree

N. Ranchod
Judge of the High Court

Judgment delivered: 14 September 2016

Appearances

For the Appellant: Advocate F Van As

Instructed by: Pretoria Justice Centre, Pretoria

For the Respondent: Adv. A.J. Rossouw

Instructed by: Director of Public Prosecutions, Pretoria