THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 226/2016

In the matter between:

ZULUBOY ZULU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zulu v S* (226/2016) [2017] ZASCA 207 (21 December 2016)

Coram: Theron, Wallis, Willis and Mbha JJA and Coppin AJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 21 December 2016

Summary: Sentence – leave to appeal – misdirections by trial court – failure to take account of time in prison awaiting trial – failure to make allowance for the fact that both offences constituted a single criminal occurrence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ledwaba J and Tuchten J sitting as court of first instance).

1 The appeal is upheld.

2 The order of the high court dismissing the applicant's petition for leave to appeal is set aside and replaced by the following order:

'The applicant is granted leave to appeal against sentence to the Full Court of the Gauteng Division, Pretoria of the High Court.'

JUDGMENT

Wallis JA (Theron, Willis and Mbha JJA and Coppin AJA concurring)

[1] On 5 January 2006 in Arcadia, Pretoria, Mr Zulu, the appellant, and a confederate hijacked a motor vehicle belonging to a Mr Ngungweni. At the time of the hijacking, the vehicle was parked in the street. The two robbers, armed with fire-arms, compelled Mr Ngungweni, and a lady who was with him, Ms Mtombeni, to alight. Apart from stealing the motorcar they also threatened Ms Mtombeni and stole her handbag with its contents. What they did not realise was that the vehicle was fitted with a tracker alarm and they were arrested approximately an

hour later in Yeoville, Johannesburg. Both the car and the handbag were recovered.

[2] Mr Zulu and his confederate were charged in the Regional Court, Pretoria with two counts of robbery, namely the robbery of Mr Mgungweni's motor vehicle and the robbery of Ms Mtombeni's handbag. They were also charged with offences arising from their possession of unlicensed firearms and ammunition. On 18 September 2008 they were convicted and on 19 September 2008 they were sentenced. On each count of robbery they were sentenced to 15 years imprisonment in accordance with the provisions of the minimum sentencing legislation, the magistrate having found that there were no substantial and compelling circumstances justifying a lesser sentence. Their sentences on the firearms charges were made to run concurrently with the two sentences for robbery and for present purposes they can be disregarded. The total effective sentence was accordingly 30 years imprisonment.

[3] The magistrate refused Mr Zulu's application for leave to appeal against sentence. A petition to the high court in terms of s 309C of the Criminal Procedure Act 51 of 1977 was dismissed by Ledwaba J and Tuchten AJ. An application for leave to appeal against that dismissal was likewise dismissed. The matter comes before us consequent upon the

grant of special leave to appeal by this court against that refusal. The only question is whether Mr Zulu has reasonable prospects of succeeding in his appeal against sentence if he is permitted to pursue such an appeal.[1] If he has, then his appeal must be upheld, the order dismissing his petition must be set aside and the matter remitted to the Gauteng Division, Pretoria of the high court to hear and determine his appeal against the sentences imposed upon him.

[4] The appeal was set down for hearing on 16 February 2017. A reading of the record and the heads of argument made it clear to all the members of the court allocated to sit in the appeal that the appeal had to succeed. The court has accordingly exercised the power it now has in terms of s 19(a) of the Superior Courts Act 10 of 2013 – one that the Constitutional Court has and has on a number of occasions exercised – to dispose of the appeal without the need to hear oral argument. It is appropriate for us to exercise that power in the interests of the expeditious disposal of the appeal. It will be an appropriate use of judicial resources and will both speed the process of setting down Mr Zulu's appeal for hearing and save costs that would otherwise have been incurred from the public purse.

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[1] *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA).

[5] In holding that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentences, the magistrate attached no weight to the fact that while Mr Zulu faced and was properly convicted of two counts of robbery, the two counts arose out of a single criminal enterprise. The problem to which this gave rise when they were treated separately for the purposes of sentence is readily apparent. Had Mr Ngungweni's wallet, cellphone, watch and other valuables been stolen, but the robbers had heeded Ms Mtombeni's plea and let her keep her handbag, they could only have been convicted of one count of robbery. That would have attracted a sentence of 15 years imprisonment. Even had the magistrate wished to impose a sentence of 30 years imprisonment she could not have done so. The upper level of her sentencing powers was 20 years.

[6] The result was that the chance fact that Ms Mtombeni was present and had her handbag stolen, was the only reason for an increase in sentence from 15 years to 30 years imprisonment. It should have been plain to the magistrate that this was irrational and resulted in a manifestly excessive sentence being imposed for a single criminal enterprise. The theft of the handbag added nothing to the moral culpability of Mr Zulu and did not justify any significant increase in the sentence to be imposed upon him. The problem could have been overcome by treating the two

robbery counts as one for the purposes of sentence or making the two sentences run concurrently.

[7] Apart from this there was also the fact that, although the two men were arrested the same night as the hijacking, the trial dragged on for nearly three years before they were finally sentenced. The magistrate was alive to this but gave it no weight in the sentencing exercise. She should have done so.

[8] For those reasons there were clearly reasonable prospects of success in an appeal against sentence and leave to appeal should have been granted. In the result the following order is made:

1 The appeal is upheld.
2 The order of the high court dismissing the applicant's petition for leave to appeal is set aside and replaced by the following order:
'The applicant is granted leave to appeal against sentence to the Full Court of the Gauteng Division, Pretoria of the High Court.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellants:	P D Pistorius
Instructed by:	Johan van Zyl Attorneys, Pretoria Symington & De Kok, Bloemfontein.
For respondents:	P Vorster
Instructed by:	Director of Public Prosecutions, Johannesburg and Bloemfontein.