IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

CASE NO: CA&R 318/2011
Date Heard: 6 June 2012
Date Delivered: 25 June 2012

In the matter between:

BONGANI ZENZILE Appellant

and

THE STATE Respondent

JUDGMENT

GOOSEN, J:

[1] The appellant was convicted of four counts of robbery with aggravating circumstances, one count of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. He was sentenced to 15 years' imprisonment in terms of section 51(2) of Act 105 of 1997 in respect of each of the robbery charges; 10 years' imprisonment in respect of the attempted murder charge; 10 years in respect of the unlawful possession of a firearm and 3 years in respect of the unlawful possession of ammunition. The charges arose from two separate armed robberies. The magistrate ordered that the sentences in respect of two robbery counts and the unlawful possession of a firearm and ammunition should run concurrently, thus imposing an effective sentence of 15 years' imprisonment for those offences. It was also ordered that the sentences in respect of the other two robbery counts should run concurrently. The cumulative effective sentence imposed was one of 40 years' imprisonment.

[2] The appeal proceeds against sentence only, leave to appeal having been granted on petition. The essence of the appeal is that the cumulative effect of the sentences induces a sense of shock and that this court is therefore at large to interfere with the sentences imposed. It is also submitted that the magistrate erred in not finding that the appellant's youthfulness together with the fact that he is a first offender cumulatively constitute substantial and compelling circumstances which warrant a departure from the sentences prescribed by section 51 of Act 105 of 1997.

[3] In the alternative hereto it was submitted that even if substantial and compelling circumstances are not found to exist, the two incidents of armed robbery giving rise to the charges were committed within weeks of one another and were sufficiently closely related to warrant an order that a portion of the sentences imposed be served concurrently in order to ameliorate the cumulative effect of the sentences.

[4] The State concedes that the effective sentence of 40 years' imprisonment does indeed induce a sense of shock and accordingly supports the appeal. Mr *Els*, on behalf of the State, submitted that the effect of the sentence ought to have been ameliorated by ordering that the sentence in respect of the attempted murder charge should be served concurrently with the sentences imposed in respect of the robbery charges thereby reducing the effective sentence to one of 30 years' imprisonment.

[5] The imposition of sentence is a matter within the discretion of the trial court and a court of appeal will only interfere with the exercise of such discretion where the trial court has misdirected itself or has not exercised its discretion judicially or reasonably.

[6] In *S v Dyanti* 2011 (1) SACR 540 (ECG) Petse ADJP (as he then was) summarised the approach of an appeal court to an appeal on sentence (at par. 6) as follows:

> "It has been held in a plethora of judicial pronouncements that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will only be entitled to interfere with the sentence imposed by the trial court if one or more of the recognised grounds justifying interference on appeal has been shown to exist. See, in this regard, *S v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A). Once it is shown that one, some, or all of the following factors exist, the appellate court will be justified in interfering, namely if the sentence appealed against is, for example:
> • disturbingly inappropriate;
> • so totally out of proportion to the magnitude of the offence;
> • sufficiently disparate;
> • vitiated by misdirections showing that the trial court exercised its discretion unreasonably;
> • is otherwise such that no reasonable court would have imposed it."

[7] The circumstances in which an appeal court will interfere with a trial court's discretion in relation to sentence were re-iterated in *S v Sadler* 2000 (1) SACR 331 (SCA) ([2000] 2 All SA 121) where the court (at 334*d* – 335*g*) said:

> "The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* 1994 (1) SACR 112 (A) at 119*j* – 120*c*:
>
> 'It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 857D – F:
>
> '1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal —
> *(a)* should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court''; and

> *(b)* should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.
>
> 2. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.''
>
> The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised."

[8] As noted in *Sadler* the formulation of the test is considerably easier than giving practical effect thereto. The appeal court must be satisfied that its choice of penalty is the appropriate penalty and that that of the trial court is not (*Sadler* par. 10).

[9] As indicated the charges arise from two separate armed robberies in which the appellant was involved. In the first of these, in August 2009, the appellant together with a number of accomplices went to the house of a Mr Jonas where they forced him to give to them a police uniform which belonged to a tenant. He was then forced to accompany the men to a house. This was the house of a Mr and Mrs Cakwebe, in Ramaphosa, the scene of the first armed robbery. The men entered the house and robbed the couple of cellphones. The couple were threatened with a firearm during the course of the robbery.

[10] The second incident occurred a few weeks later, in September 2009, when the appellant, again in the company of a group of accomplices entered the house of a Mr Futshane and his wife, in Ikhamvelile, and robbed the couple of DVD players, cellphones, jewellery and cash. Mr Futshane was shot during the course of the robbery.

[11] Although it was submitted by the appellant's attorney that the trial court had erred in not finding that substantial and compelling circumstances exist which warrant the imposition of a sentence other than those prescribed by section 51, the submission was not pressed. In my view the magistrate's findings in this regard cannot be faulted. I am accordingly satisfied that the magistrate did not misdirect himself in regard to the determination of the existence of substantial and compelling circumstances.

[12] It follows from this that the individual sentences imposed by the magistrate in respect of each of the offences for which the appellant was convicted are not vitiated by any misdirection or error, nor can it be said that the individual sentences are strikingly disparate.

[13] The same cannot however be said when regard is had to the cumulative effect of the sentences. Whilst it is undoubtedly so that the appellant has been convicted of numerous very serious offences, one cannot lose sight of the fact that these offences relate to two instances of armed robbery committed within a short time span. They are therefore closely related in time. In each instance too the multiple charges arise from the same set of

occurrences. This the magistrate did recognise by ordering that the sentences on the respective robbery counts should run concurrently.

[14] In my view the magistrate did not give due consideration to the cumulative effect of the sentences imposed. The result is a sentence which, when one has regard to the circumstances of the matter as a whole, including the personal circumstances of the appellant, his relative youth and his lack of previous convictions, is strikingly disproportionate. It appears that the magistrate had in mind the need to impose a sentence for each of the two separate incidents and to ensure that such sentences are served separately. It appears too that the magistrate considered it appropriate to impose a separate effective sentence for the attempted murder charge. The failure to provide for some measure of concurrence of sentence for the separate incidents has given rise to a sentence which is not appropriate.

[15] It follows that this court is at large to substitute its sentence for that of the trial court. In formulating an appropriate sentence it is appropriate that a portion of the effective sentence imposed in respect of the one armed robbery be served together with that imposed in respect of the second armed robbery.

[16] I would accordingly make the following order:

a) The appeal against sentence is upheld.

b) The sentences imposed by the magistrate are set aside and substituted with the following:

"Charge 1: 15 years' imprisonment in terms of section 51(2) of Act 105 of 1997;
Charge 2: 15 years' imprisonment in terms of section 51(2) of Act 105 of 1997;
Charge 3: 10 years' imprisonment;
Charge 4: 15 years' imprisonment in terms of section 51(2) of Act 105 of 1997;
Charge 5: 15 years' imprisonment in terms of section 51(2) of Act 105 of 1997;
Charge 6: 10 years' imprisonment;
Charge 7: 3 years' imprisonment.
IT IS ORDERED that the sentences imposed on charges 1,2, 6 and 7 be served concurrently, to the effect that the accused serve 15 years' imprisonment;
IT IS ORDERED that the sentences imposed on charges 4 and 5 be served concurrently, to the effect that the accused serve 15 years' imprisonment;
IT IS FURTHER ORDERED THAT three (3) years of the sentence imposed on charge 3 and seven (7) years of the effective sentence on charges 4 and 5 be served concurrently with the sentences imposed on charges 1, 2, 6 and 7, to the effect that the accused serve a total cumulative sentence on all charges of 30 years' imprisonment.
In terms of section 103 (1) of Act 60 of 2000 no order is made, the accused is deemed not to be competent to possess a firearm."

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G GOOSEN
JUDGE OF THE HIGH COURT

CHETTY J:

I agree. Such an order will issue.

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D CHETTY
JUDGE OF THE HIGH COURT

APPEARANCES:	For Appellant:	Ms. H. McCallum Justice Centre Grahamstown
	For Respondent:	Mr. D. Els Director of Public Prosecutions Grahamstown