IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No.: CA154/2017

Date Heard: 10 October 2017

Date Delivered: 11 October 2017

In the matter between:

SIVIWE MENE Appellant

and

THE STATE Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant was convicted on 13 May 2016 on one count of robbery with aggravating circumstances (count 1), one count of the unlawful possession of an AK-47 automatic firearm (count 2), one count of unlawful possession of ammunition (count 3) and four counts of attempted murder.

[2] He was sentenced to 20 years' imprisonment on count 1 and 15 years' imprisonment in respect of count 2 of which 12 years was ordered to run concurrently with the sentence imposed on count 1. In respect of count 3 he was sentenced to 5 years' imprisonment and it was ordered that this sentence should run concurrently with the sentence in respect of count 1. The judge *a quo* considered the four counts of attempted murder to arise from a single incident and accordingly took them together for purposes of sentence. In respect of the four counts of attempted murder the appellant was sentenced to 5 years' imprisonment of which 3 years were ordered

to run concurrently with the sentence on count 1. He was accordingly sentenced to an effective term of imprisonment of 25 years. He appeals against the sentence imposed with leave granted by the Supreme Court of Appeal, on petition.

Background

[3] The appellant was charged together with one co-accused. It is common cause that they, together with two other perpetrators (the robbers) robbed one Yaw of the amount of R170 000,00. The robbery occurred along the national road between Queenstown and Whittlesea.

[4] Yaw was travelling in a motor vehicle in the direction of Queenstown when the robbers forced his car to a standstill with the aid of hand guns and an AK-47 automatic firearm. The robbery occurred in broad daylight whilst two other vehicles driven by innocent members of the public were in close proximity to the scene of the robbery. The police, who had been previously advised of the expected robbery, arrived on the scene whilst the robbery was in progress and a shootout ensued. Both the vehicles of the innocent members of the public were struck in the shootout. The robbers fled the scene in their motor vehicle with the police in pursuit. The appellant and his co-accused were subsequently arrested.

[5] Of the amount of R170 000,00 in cash which was stolen from Mr Yaw during the course of the robbery only R40 000,00 was subsequently recovered.

[6] Both counts 1 and 2 are subject to recommended minimum sentences of 15 years' imprisonment in terms of section 51 of the Criminal Law Amendment Act, 105

of 1997. The appellant acknowledges that the court *a quo* correctly held that there were no substantial and compelling circumstances which justified a lesser sentence than that recommended. In respect of count 1, however, the judge *a quo* considered a sentence of 20 years' imprisonment to be appropriate.

[7] In the appellant's application for leave to appeal it was contended on his behalf only that the effective sentence of 25 years' imprisonment imposed was disturbingly inappropriate and that the court should have ordered that all sentences on the remaining counts run concurrently with the sentence imposed on count 1, particularly because the sentence of 20 years' imprisonment imposed on that count was significantly in excess of the applicable discretionary minimum sentence of 15 years' imprisonment, which, it was argued, already took into account the relevant aggravating circumstances. For these reasons it was submitted that there was a reasonable possibility that another court may find that an effective sentence of 20 years' imprisonment was appropriate in the circumstances and that such reduction justifies an interference on appeal with the sentence imposed.

[8] The appellant's co-accused was convicted only on count 1 and the four counts of attempted murder. The same sentence was imposed upon him in respect of these counts and he was accordingly sentenced to an effective period of 22 years' imprisonment.

[9] Both the appellant and his co-accused applied for leave to appeal against the sentences imposed upon them. Both applications were dismissed. Both the appellant and his co-accused petitioned the Supreme Court of Appeal for leave to

appeal. Their petitions were placed before two different sets of judges. The appellant was granted leave to appeal. The petition of his co-accused served before Willis JA and Nichols AJA. They dismissed his application for leave to appeal on the grounds that there are no reasonable prospects of success.

[10] Generally, when two co-accused are charged in the same proceedings and the evidence exhibits a parity in blameworthiness for their conduct logic dictates, and justice demands, that absent a cognizable distinction in their personal circumstances or their respective roles in the offence, there ought to be parity in the punishment imposed. In the present matter the appellant is 41 years of age and a first offender. His co-accused was 32 years of age and first offender. The appellant has three minor children and his co-accused had two minor dependent children. They were both arrested on the day of the offence and spent approximately 14 months in prison awaiting trial. There is, in my view, no distinction to be drawn in their personal circumstances. Both played an active role in the commission of the offence, save that the appellant carried a fully automatic firearm, which his co-accused did not.

[11] The robbery with aggravating circumstances and the attempted murder counts constitute very serious offences which were committed in a brazen manner on a public road with the robbers discharging, *inter alia*, a fully automatic firearm in proximity of innocent members of the public. The imposition of the sentence of 20 years' imprisonment in respect of count 1 was therefore fully justified. The appellant does not contend otherwise. The sentence imposed in respect of the four counts of attempted murder is not attacked either. The Supreme Court of Appeal considered, in the case of the appellant's co-accused, that the portion that was ordered to run

concurrently with the sentence imposed in respect of count 1 was justified and that there was no reasonable prospect of success on appeal for the co-accused.

[12] Unlike the appellant's co-accused the appellant was further convicted of possession of a fully automatic firearm and ammunition. This offence, of its own, constitutes a very serious offence and carries with it a prescribed recommended minimum sentence of 15 years' imprisonment. He was accordingly convicted of a greater transgression than his co-accused. The imposition of the recommended minimum sentence in respect of count 2 is not challenged. It is argued, however, that the court *a quo* ought to have ordered that the entire sentence run concurrently with the sentence imposed on count 1. I am unable to agree. An additional period of 3 years, over and above the period of imprisonment imposed upon his co-accused, in my view, reflects his greater culpability. For these reasons I do not consider that the appeal, on the ground raised in the application for leave to appeal can succeed.

[13] Mr **van der Spuy**, who appeared on behalf of the appellant argues, however, that the court *a quo* erred in not having taken into consideration that the appellant had been incarcerated for a period of approximately 14 months prior to trial. In these circumstances, where the offences are linked by time, place and intent, it is submitted that the court *a quo* had misdirected itself in failing to order that all the sentences should run entirely concurrently.

[14] The proper approach for this court to adopt to an argument of this kind was set out by Van Winsen AJA in **S v Fazzie and Others** 1964 (4) SA 673 (AD) at 684A-B where he said:

> "Does this failure (of the Court *a quo* to have regard to two factors) constitute a misdirection? It is trite law that the determination of a sentence in a criminal matter 'is pre-eminently a matter for the decision of the trial Court'. In the exercise of this function the trial Judge has a wide discretion in deciding which factors – I here refer to matters of fact and not of law – he should in his opinion allow to influence him in determining the measure of the punishment. See *R v S* 1958 (3) SA 102 (AD) at 106."

[15] In **S v Pillay** 1977 (4) SA 531 (A) at 535A-C Trollip JA stated:

> 'I pause here to say that, merely because a relevant factor has not been mentioned in the judgment on sentence, it does not necessarily mean that it has been overlooked, for "no judgment can ever be perfect and all-embracing" (*R v Dhlumayo and Others,* 1948 (2) SA 677 (AD) at pp 702, 706). Moreover, the value to attach to each factor taken into account is also for the trial Court to assess. Hence, the learned Judge in *Fazzie's* case said at p. 684B:
>
> "This Court will not readily differ from the Court *a quo* in its assessment either of the factors to be had regard to or to the value to be attached to them."
>
> (See also *S v Berliner* 1967 (2) SA 193 (AD) at p. 200D).'

[16] It was argued before the judge *a quo* at sentencing stage that all the sentences should run concurrently. Whilst she did not in her judgment deal specifically with the argument she exercised her discretion and imposed a sentence which she considered to be appropriate. In refusing the application for leave to appeal the judge *a quo* held that :

> "To have all sentences run concurrently will not do justice to the victims as the sentence would become shockingly lenient."

[17] In these circumstances it must be accepted that she did indeed give consideration to the argument and exercised her discretion in that regard.

[18] I turn to consider the alleged misdirection arising from the period of the appellant's incarceration prior to trial. In **Fazzie**, Van Winsen AJA stated with reference to misdirections at 684B-C:

> "Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what he did, then such action by the trial Court will be regarded as a misdirection on its part entitling the Court to consider the sentence afresh."

[19] The period of the incarceration of the appellant prior to trial is not dealt with in the judgment. It does not, however, follow that the judge *a quo* did not take the period of their incarceration pending trial into consideration. The alleged misdirection was not raised in the notice of application for leave to appeal nor during argument. In these circumstances the judge *a quo* did not address this issue in her judgment on the application for leave to appeal. Had the alleged misdirection been raised the judge *a quo* would have been in a position to deal with the aspect and to clarify whether she has indeed given consideration thereto or not. We simply do not know whether this aspect was considered, and if so, how it influenced the judge *a quo*.

[20] Whereas the belated allegation of a misdirection was never raised with the court *a quo* I do not think that it can be said that it clearly appears that the trial court did not have regard to this fact, nor that it ought to have assessed the value of this factor differently. The Supreme Court of Appeal, in dismissing the application of the appellant's co-accused would also have had regard to this factor. I think that it must be accepted as a point of departure, that the sentences imposed, including the order

relating to the concurrent running of sentences in respect of counts 1 and the four counts of attempted murder must be accepted. I have already held that I do not think that the additional three years' imprisonment imposed upon the appellant to reflect his greater blameworthiness is inappropriate.

[21] This brings me to a consideration of what should be considered to be a misdirection justifying an interference with the sentence imposed by the court *a quo*. Again, in **Pillay's** case *supra* at 535E-G Trollip JA stated:

> '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 enquiry 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 entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'

[22] Even if I accept that the trial court failed to have regard to the duration of the incarceration of the appellant pending trial I do not think that this factor vitiates the court's decision on sentence (compare **Director of Public Prosecutions Pretoria v Gcwala and Others** 2014 (2) SACR 337 (SCA) at 343a-e.)

[23] In the circumstances of the present case I do not consider that the sentence imposed can be said to be disturbingly inappropriate, more particularly when

weighed against the sentence imposed upon the appellant's co-accused, nor am I satisfied that the court *a quo* necessarily committed any misdirection. To the extent that a misdirection may have been committed it is not one which vitiates the court's decision on sentence

[24] In the result, the appeal is dismissed.

J W EKSTEEN
JUDGE OF THE HIGH COURT

BLOEM J

I agree.

G H BLOEM
JUDGE OF THE HIGH COURT

MSIZI AJ

I agree.

N MSIZI
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Mr van der Spuy instructed by Legal Aid Justice Centre, Grahamstown
For the State:	Adv Robinson instructed by National Director of Public Prosecutions, Grahamstown