IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: A370/2013

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

**20 February 2014** **EJ FRANCIS**

In the matter between:

PATRICK O MOKGOSANE Appellant

and

THE STATE Respondent

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JUDGMENT

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FRANCIS J

1. The appellant appeared in the Johannesburg Regional Court and was charged with robbery with aggravating circumstances (count 1) and possession of an unlicensed firearm (count 2). He was legally represented and was convicted of both counts on 14 February 2007. On 15 February 2007 he was sentenced to 15 years imprisonment for count 1 and 5 years imprisonment for count 2. The sentences were not ordered to run concurrently. He was sentenced to an effective twenty year imprisonment term and was also declared unfit to possess a firearm.

2. The appellant was refused leave to appeal against both conviction and sentence by the trial court but was granted leave to appeal against sentence on petition by this court.

3. The appellant and a co-accused were charged with armed robbery and being in possession of a firearm. This was after they had taken part in an armed robbery at their workplace and had assaulted two employees and took money to the value of R180 398.70. The State's case was that whilst a cashier was busy cashing up, she heard the phone rang and when she picked it up she heard her colleague scream. She also screamed and went to investigate and saw the appellant approaching her. He instructed her to keep quiet and drew down the blind in the office and made her to lie down next to another employee. The second accused who was armed approached them. The appellant left with a black sports bag and went into the cash office, took the money and left with the second accused. The appellant's version was that he was in the bank as a security officer and that one of the cashiers had asked him to help steal a bag and offered him a reward for doing so. He arranged for his cousin to come to the bank who collected the bag and left. The appellant and the accused were duly charged and convicted and sentenced to a twenty year imprisonment sentence.

4. On appeal it was contended that the *court a quo* misdirected itself by not taking into account the cumulative effect of sentence, particularly in view of the fact that the offences were closely linked, by attaching insufficient weight

to the fact that the appellant was a first offender and by over-emphasising the seriousness of the offences and their prevalence in the community at the expense of the appellant's personal circumstances.

5. The trial court dealt with the issue of concurrently as follows:

*"As far as count 2 is concerned the court's jurisdiction is limited to 15 years. I have already imposed 15 years in respect of count 1; 15 years in respect of count 2 for possession of that unlicensed firearm will be excessive in my opinion. But I am going to impose a different separate sentence, I am not going to order that it run concurrently with the offence of count 1, the circumstances does not warrant it."*

6. Sentencing is inherently within the discretion of a trial court. This court's powers to interfere with the trial's court's discretion in imposing sentence are limited unless the trial court's discretion was exercised improperly. The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judicially. If the discretion was exercised improperly, this court will interfere with the sentence imposed. There must be either a material misdirection by the trial court or a gross disparity between the sentence which the appeal court would have imposed had it been the trial court. This Court can interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate. In this regard see *S v Salzwedel and others* 1999 (2) SACR 586 at 588 A – B.

7. The armed robbery charge falls within the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLA). The minimum

prescribed sentence for such an offence is fifteen years imprisonment unless the court found substantial and compelling circumstances. It is trite that when a court considers an appropriate sentence the seriousness of the offence, the interest of the accused, as well as the interest of the society ought to be taken into account. In imposing the sentence that the trial court did, it took into account that the appellant was 22 years old at the time of the conviction. He was unmarried with no children and was employed at Teba Bank as a security officer and was earning R1 650.00 per month. He had no previous convictions and went up to standard 9. He was in custody since April 2006. Since the appellant did not take issue with the sentence imposed on the armed robbery charge, it is not necessary to deal with this but I must add however that the court did not misdirect itself when it found that no substantial and compelling circumstances existed to impose a different sentence to the armed robbery charge.

8. The crucial issue that arises in this matter is whether the court *a quo* should have ordered that the sentence of 5 years imposed on count 2 should run concurrently with the 15 year sentence on count 1. Section 280 of the Criminal Procedure Act 51 of 1977 (the CPA) deals with cumulative or concurrent sentences. Section 280(2) grants the court a discretion to direct that such sentences of imprisonment to run concurrently. The cumulative effect of sentences must always be borne in mind and concurrently served sentences may prevent and accused from undergoing a severe and unjustified long effective term of imprisonment. In this regard see *S v Whitehead* 1970

(4) SA 424 (A) 438F – 440.

9. It is trite that a court must consider the cumulative effect of a sentence and reduce the total of period of imprisonment so that it is proportionate to the total moral blameworthiness of the perpetrator. In *S v Motswathupa* 2012 (1) SACR 259 (SCA) at paragraph 8 at page 263, it was held that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe, when dealing with multiple offences. It is trite that sentencing courts in all the divisions of our courts have been enjoined to have regard to the nature of the offences and where there is a close connection or similarity between the offences involved or where there is a close connection in time and place and in intention with regard to the offences involved, then usually the counts are taken as one for purpose of sentence or the sentences are ordered to run concurrently. See also *State vs Kruger* 2012 (1) SACR 369 SCA and *S vs Mathebula* 2012(1) SACR 374 SCA. In the present case there is such an overlap. Firstly there is a conjoining as to time and place of the offences. The armed robbery and possession of an unlicensed firearm flowed from the same incident.

10. The court *a quo* misdirected itself in not ordering that the sentences should have run concurrently with each other.

11. For the above reasons the following order is made:

11.1 The appeal is upheld.

11.2 The sentence imposed by the trial court is set aside and replaced with the following:

"11.2.1 The accused is sentenced as follows:

(a) 15 years imprisonment on count 1.

(b) 5 years imprisonment on count 2.

(c) The sentence imposed on count 2 is to run concurrently with the sentenced imposed on count 1.

(d) The effective sentence is 15 years imprisonment.

(e) The accused is declared unfit to possess a firearm

(f) The sentence is antedated to 15 February 2007."

FRANCIS J
JUDGE OF THE HIGH COURT

I agree

JULY AJ
JUDGE OF THE HIGH COURT

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| FOR APPELLANT | : | ADV E TLAKE |
| FOR RESPONDENT | : | ADV VT MUSHWANA |
| DATE OF HEARING | : | 18 FEBRUARY 2014 |
| DATE OF JUDGMENT | : | 20 FEBRUARY 2014 |