JUDGMENT (20 MARCH 2020)

MOSSOP AJ The appellant stood trial on two separate occasions in the Verulam Regional Court.

On 24 January 2008 he stood trial with a co-accused on a charge of robbery with aggravating circumstances. The offence was alleged to have occurred on 7 April 2007 and the appellant pleaded not guilty. After hearing the evidence, the learned regional magistrate convicted the appellant and sentenced him to fifteen years' imprisonment. I shall refer to this as '*the first trial*'.

On 7 December 2009 the appellant again stood trial, this time on two counts of robbery with aggravating circumstances, a count of unlawful possession of a firearm and a further count of the unlawful possession of ammunition. These offences were alleged to have occurred on or about 12 December 2006. On this occasion the appellant pleaded guilty to all charges and was duly convicted on all the charges. I shall refer to this as '*the second trial*'. The learned regional magistrate presiding, who was not the regional magistrate who convicted and sentenced the appellant in the first trial, sentenced the appellant on the two counts of robbery to fifteen years' imprisonment on each count but ordered that those sentences would run concurrently with each other. In respect of the conviction for the unlawful possession of a firearm and ammunition, both counts were taken as one for the purposes of sentence and the appellant received a sentence of fifteen years' imprisonment. The latter sentence was not ordered to run concurrently with the sentences imposed in respect of the two counts of

robbery. The net effect was that the appellant was sentenced to an effective thirty years' imprisonment.

After his conviction in the first and second trials, the appellant in each instance brought an application for leave to appeal and in both instances those applications were refused. In both instances he therefore petitioned the High Court. In this regard his efforts bore some fruit as the High Court granted the appellant leave to appeal but only in respect of the sentences imposed in both the first and second trials and directed that those appeals should be heard together.

The position as it now stands, regard being had to the two sets of sentences imposed upon him, is that the appellant is condemned to be imprisoned for a period of forty-five years.

I have considered the evidence, such as it was, advanced on behalf of the appellant on the question of mitigation of sentence. Besides the youthfulness of the appellant, the fact that no one was physically injured in the commission of the crimes for which he was convicted, that before his first conviction he was a first offender and that he pleaded guilty at the second trial, there are no compelling and substantial circumstances which would justify the imposition of a sentence less than the minimum sentence prescribed for the offences of which he was convicted. However, that is not the end of the matter.

After the appellant was convicted at the second trial, the State addressed the court and informed the learned regional magistrate presiding that the appellant was a sentenced prisoner. The State, however, was not in

possession of an updated version of the record of the appellant's previous convictions. The version that the State possessed indicated that the appellant had no previous convictions. Everyone involved in the second trial was aware that this was not the case as the appellant was serving a sentence.

The meaning of a previous conviction was considered by HOLMES JA in *R v Zonele and Others* 1959 (3) SA 319 (A) at page 330C-D –

> "A previous conviction may be described as one which occurred before the offence under trial."

A conviction is not a previous conviction unless the offender is brought to court and convicted and sentenced for the offence before the current offence was committed (see *S v Smullion* 1977 (3) SA 1001 at 1004D).

In my view, the learned regional magistrates presiding at the trials of the appellant were justified in imposing the prescribed minimum sentences for the offences for which the appellant was convicted. However, whilst it may be so that chronologically the offence for which the appellant was convicted at the first trial occurred after the offences for which he was convicted at the second trial and that strictly speaking such was not a previous conviction, I am of the view that the learned regional magistrate presiding at the second trial ought to have investigated the nature and extent of the sentence that the appellant was serving at the time that she proceeded to sentence him. She did not do so.

In his thoughtfully considered heads of argument Mr Shah, who appears for the State, acknowledged that the learned regional magistrate presiding at the second trial did not appear to consider the cumulative effect of the sentences she proposed imposing upon the appellant when considered against the sentence that he was already serving. It was a sensible submission made by Mr Shah and demonstrates his objectivity in performing his functions.

The learned regional magistrate undoubtedly considered the cumulative effect of the sentences she intended imposing in the matter before her but she did not further consider the cumulative effect of those sentences on the sentence that the appellant was already serving or whether any portion of those sentences she intended to impose should be ordered to run concurrently with the sentence the appellant was already serving.

Section 280(2) of the Criminal Procedure Act 51 of 1977 provides that a punishment consisting of imprisonment shall commence one after the other unless the court directs that such sentences of imprisonment shall run concurrently. The rationale for ordering sentences to run concurrently is to obviate the severity and harshness of the sentences if their cumulative effect is not taken into consideration.

In *S v Muller* 2012 (2) SACR 545 at 550, paragraph 11, the court stated –

> "There is nothing to show that a lengthy period of imprisonment will not bring home the error of their ways. It would be unjust to impose a sentence, the

> effect of which is more likely to destroy than to reform them. However, the cumulative effect of the sentences imposed on the appellants smacks of the use of a sledgehammer: it seems designed more to crush than to rehabilitate them."

It is perhaps unfair to suggest that the learned regional magistrate presiding at the second trial made use of a sledgehammer with which she attempted to crush the appellant. The truth of the matter is that she did not even think about the sentence that the appellant was already serving and made no effort to obtain any information concerning it. Had she done so there is every probability that we would not be seized with this matter as we are. Valuable court resources, time and money could thereby have been saved. Magistrates are accordingly enjoined to seek out all information that could be relevant when it comes to the question of sentence.

I am of the view that this Court is accordingly at liberty to intervene and that the following sentences are not disproportionate.

I accordingly propose making the following order –

1. THE APPEAL AGAINST SENTENCE IN APPEAL AR 545/2018 IS REFUSED AND THE SENTENCE OF FIFTEEN (15) YEARS' IMPRISONMENT IS CONFIRMED.
2. THE APPEAL AGAINST SENTENCE IN APPEAL AR 546/2018 IS ALLOWED AND THE FOLLOWING SENTENCE IS IMPOSED:

2.1. ON COUNT 1, A SENTENCE OF FIFTEEN (15) YEARS' IMPRISONMENT IS IMPOSED.

2.2. ON COUNT 2, A SENTENCE OF FIFTEEN (15) YEARS' IMPRISONMENT IS IMPOSED.

2.3 IT IS ORDERED THAT IN TERMS OF THE PROVISIONS OF SECTION 280(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 THAT THE SENTENCES IMPOSED ON COUNTS 1 AND 2 WILL RUN CONCURRENTLY WITH EACH OTHER. IN ADDITION, FIVE (5) YEARS OF THOSE SENTENCES WILL RUN CONCURRENTLY WITH THE SENTENCE IMPOSED IN APPEAL AR 545/2018.

2.4. ON COUNTS 3 AND 4, BOTH COUNTS ARE TAKEN AS ONE FOR THE PURPOSES OF SENTENCE AND THE APPELLANT IS SENTENCED TO FIFTEEN (15) YEARS' IMPRISONMENT.

2.5. IT IS ORDERED THAT IN TERMS OF THE PROVISIONS OF SECTION 280(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 THAT TEN (10) YEARS OF THE SENTENCE ON COUNTS 3 AND 4 WILL RUN CONCURRENTLY WITH THE SENTENCE IMPOSED IN RESPECT OF COUNTS 1 AND 2.

2.6. THE ORDER MADE IN TERMS OF SECTION 103(1) OF THE FIREARMS CONTROL ACT 60 OF 2000 IS CONFIRMED.

2.7. IN TERMS OF THE PROVISIONS OF SECTION 282 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 THE SENTENCE IN RESPECT OF APPEAL AR 546/2018 IS ANTEDATED AND IS DEEMED TO HAVE BEEN IMPOSED ON 7 DECEMBER 2009.

2.8. THE EFFECT IS THAT THE APPELLANT WILL NOW SERVE A

TOTAL OF THIRTY (30) YEARS' IMPRISONMENT.

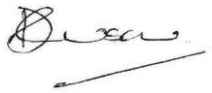
HADEBE J I agree and it is so ordered.

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

NTOKOZO MADUNA
v
THE STATE

CASE NUMBER	:	AR 546/2018
COURT OF ORIGIN	:	DURBAN HIGH COURT
TRANSCRIBER	:	KERRY DICKINSON
DATE COMPLETED	:	17 AUGUST 2020
NUMBER OF CDS	:	1 x CD
NUMBER OF PAGES	:	7



Kerry Dickinson

Tel 033 3425256 • Fax 033 3941190

Final REPORTABLE/ NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NUMBER	:	AR 546/2018
HEARD AT	:	DURBAN
DATE	:	20 MARCH 2020

NTOKOZO MADUNA

versus

THE STATE

BEFORE
THE HONOURABLE JUDGE HADEBE
and
THE HONOURABLE ACTING JUDGE MOSSOP

FOR THE APPELLANT	:	MR M CHILIZA
FOR THE RESPONDENT	:	ADVOCATE K SHAH
INTERPRETER	:	NOT REQUIRED