IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR207/2015

In the matter between:

MPUMELELO IRVIN SHANGASE — APPELLANT

and

THE STATE — RESPONDENT

Coram : Gorven et Seegobin JJ
Heard : 11 February 2016
Delivered : 19 February 2016

ORDER

On appeal from the Regional Court, Pietermaritzburg (Mr Ngobese, sitting as a court of first instance):

(a) The appeal against sentence succeeds to the extent set out below:

(i) The sentence imposed on counts 5, 6 and 9 are set aside and replaced with the following:

On counts 5, 6 and 9, the accused is sentenced to five years imprisonment on each count.

(ii) The aggregate sentence of 15 years imposed on counts 5, 6 & 9 will run concurrently with the aggregate sentence of twenty years imposed on counts 1, 2, 7 and 8. The effective sentence is one of 20 years imprisonment.

(iii) All of the sentences will run from 13 September 2012.

JUDGMENT

SEEGOBIN J (Gorven J concurring):

[1] This is an appeal against sentence only. The appellant was arraigned in the Regional Court, Durban, on the following charges: count 1, robbery with aggravating circumstances; count 2, kidnapping; count 3, kidnapping; count 4, robbery with aggravating circumstances; count 5, theft; count 6, theft; count 7, kidnapping; count 8, robbery with aggravating circumstances, and count 9, theft. At the conclusion of all the evidence, he was convicted on counts 1, 2, 5, 6, 7, 8 and 9. Counts 1 and 2 were taken as one for the purpose of sentence and he was sentenced to ten years imprisonment; on counts 5 and 6 he was sentenced to eight years on each count; counts 7 and 8 were taken as one and he was sentenced to 10 years imprisonment and on count 9, he was sentenced to ten years imprisonment. The effective sentence was one of 46 years imprisonment.

[2] The offences in counts 1 and 2 were committed on 4 August 2009 while those in counts 5 and 6 were committed on 30 April 2009 and 3 December 2009

respectively. The offences in counts 7 and 8 were committed on 30 November 2009 and that in count 9 on 3 January 2010.

[3] Mrs *Barnard* who appeared on behalf of the appellant, submitted that the cumulative effect of the sentence of 46 years imprisonment induces a sense of shock. Quite apart from this she also contended that the individual sentences on counts 5 and 6 and that on count 10 were shockingly inappropriate bearing in mind the different amounts that were stolen on these counts. On count 5 for instance the amount stolen was R15 700.00 whereas on count 6, the amount was R1 900.00. Despite this the trial court imposed a sentence of eight years on each of these counts. As far as count 9 is concerned the amount involved was R10 250.00 and the sentence imposed was ten years imprisonment. This was higher than on count 5 in which the amount is greater. Given these disparities, she submitted that a fair sentence on these three counts should be one of five years imprisonment on each count.

[4] Mr *Mcanyana*, for the State, properly and correctly in my view, conceded that the cumulative effect of the sentence imposed by the court *a quo* was unduly severe. He further accepted that the individual sentences on counts 5, 6 and 9 should be reduced to five years on each count.

[5] It is well-established that when dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe[1]. Leach JA in *S v Muller*[2] stated the position as follows:

> "When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as

[1] S v Moswathupa 2012(1) SACR 259 SCA.
[2] 2012(2) SACR 545 (SCA) at 549-550.

Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence. As Nicholas JA observed in *S v Skenjana*:

> 'A sentence of 20 years' imprisonment is undoubtedly very severe . . . . My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.
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> . . .
>
> Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers must not be visited with punishments to the point of being broken. (*Per* Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G.)'"

[6] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or when the sentence imposed by the trial court is shocking and startlingly inappropriate. In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that '(p)unishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy'[3]. In addition to that the court must also consider the main purposes of

[3] S v Rabie 1975(4) SA 855() at 862 G-H.

punishment, which are deterrent, preventive, reformative and retributive. In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others[4].

[7] It is clear that the aggregate sentence in the present matter cannot be justified and must be ameliorated. The starting point, however, would be to reduce the sentences on counts 5, 6 and 9 to five years on each count as there appears to be no reasonable explanation for the disparity between the sentences imposed on these counts. Having done this exercise I believe that the aggregate sentence should be one not exceeding 20 years. This can be achieved by ordering the sentences to run concurrently as will be reflected in the order which follows hereunder.

[8] An ancillary issue raised by Mrs Barnard was that the trial court had failed to take into account the period of two years and seven months which the appellant spent in custody awaiting trial. I disagree. This was taken into account by the trial court when considering an appropriate sentence to be imposed.

ORDER

[9] The order I make is the following:

(a) The appeal against sentence succeeds to the extent set out below:

(i) The sentence imposed on counts 5, 6 and 9 are set aside and replaced with the following:

On counts 5, 6 and 9, the accused is sentenced to five years imprisonment on each count.

[4] S v Moswathupa, *supra*, para [4].

(ii) The aggregate sentence of 15 years imposed on counts 5, 6 & 9 will run concurrently with the aggregate sentence of twenty years imposed on counts 1, 2, 7 and 8. The effective sentence is one of 20 years imprisonment.

(iii) All of the sentences will run from 13 September 2012.

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_____ I agree

GORVEN J

Date of Hearing	:	11 February 2016
Date of Judgment	:	19 February 2016
Counsel for Appellant	:	EX Sindane
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	MV Mcanyana
Instructed by	:	The Director of Public Prosecutions, Pietermaritzburg