IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISIOIN, PIETERMARITZBURG

CASE NO: AR 742/17

In the matter between:

LINDOKUHLE ZAMANI DUMA	First Appellant
NJABULO CYPRIAN NXUMALO	Second Appellant

and

THE STATE	Respondent

Order

Having heard counsel and after reading the papers, the following order is made:

(a) The appeal succeeds in so far as it related to the cumulative effect of sentence;

(b) The decision of the court a quo is altered to read:

'(i) In respect of count 2, the robbery charge, the accused are sentenced to 20 years imprisonment.

(ii) On count 3 that of attempted murder, the accused are sentenced to 15 years.

(iii) Counts 4, 5 and 7 have been taken together for purposes of sentence and the accused are sentenced to a cumulative sentence of 10 years Counts 2 and 3 are ordered to run concurrently with the effective sentence being 30 years.'

(c) The sentence is antedated to 6 January 2017.

JUDGMENT

MASIPA J (JAPPIE JP AND NKOSI J concurring):

Introduction

[1] On 6 January 2017, the court a quo convicted the appellants of one count of robbery with aggravating circumstances, count 2; and 4 counts of attempted murder counts 3, 4, 5 and 7. They were on the same day sentenced to 20 years for the robbery charge, 15 years in respect of the attempted murder charge in count 3 and counts 4, 5 and 7 were taken together for purposes of sentence and they were cumulatively sentenced to 10 years. Count 2 was ordered to run concurrently with the 10 years in counts 4, 5 and 7 with the effective term of imprisonment being 35 years. The appellants were granted leave to appeal only in respect of sentence.

[2] What gave rise to the appellants' conviction and sentence emanates from a robbery which was effected at a pension pay point at the Ncinci Community Hall in Mpumalanga in the Province of KwaZulu-Natal. The accused armed themselves with firearms for purposes of carrying out the robbery and acquired a stolen vehicle. On 14 June 2013, while the pension pay out officials were paying out the pension to the recipients who are elderly, the appellants accosted the pension pay out officials and the security officers at gun point disarming the security officers from Fidelity Security of their firearms. The complainant in count 3 Mr D S Nzuza was shot and seriously wounded during this interaction, hence the attempted murder charge on this count.

[3] The appellants boarded their vehicles and fled the scene. The South African Police Service was alerted of the robbery and its members converged to the scene and in pursuance of the appellants. The appellants shot at the police and a shootout ensued. This then related to the attempted murder charges in counts 4, 5 and 7.

Judicial notice can be taken of the fact that pension pay points are ordinarily amassed with pensioners and those intending to conduct business with them.

[4] Sentencing is a discretion of the trial court, see *S v PB* 2013 (2) SACR 533 (SCA) at par 19. It is trite that an appeal court will not interfere with the decision of the court a quo unless it finds that on a conspectus of the evidence before the court a quo its decision was clearly wrong or that in arriving at such decision, the court a quo acted irregularly and misdirected itself in a material respect. See In *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30.

[5] What was raised in the appellant's heads of argument related to the appropriateness of sentence based on the purported failure by the court a quo to inform the appellants of its intention to impose a sentence in excess of the prescribed minimum sentence? The second point which was raised by Mr Pillay for the appellants was the cumulative effect of sentence. He argued in this regard that all the sentences ought to have been made to run concurrently.

[6] Mr Pillay conceded that the argument relating to the failure to inform the appellants of an intention to impose a sentence in excess to the prescribed minimum was unmerited. The concession was correctly made in view of the court in *S v Mthembu* 2012 (1) SACR 517 (SCA) holding that the approach that the failure to inform the defence that a sentence exceeding the minimum prescribed sentences provided for in S51 of the Criminal Law Amendment Act was contemplated by the sentencing court constitutes a defect in the proceedings cannot be endorsed and that the failure by the sentencing court to appraise the defence of this does not result in a failure of justice vitiating the sentence. The circumstances of this case do justify the sentences imposed by the court a quo. The conduct of the appellants was reprehensible and they clearly disregarded the value of human life especially that of the elderly who deserve to be care for.

[7] In *S v Maake* 2011 (1) SACR 263 (SCA) at para 20 the court set out the importance of a judicial officer providing reasons for arriving at a particular sentence and stated the following:

> *"When* a *matter is taken on appeal,* a *court of appeal has* a *similar interest in knowing why* a *judicial officer who heard the matter made the order that he did. Broader considerations come into*

play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice".

[8] The judgment of the court a quo falls short of this since there are no reasons provided by the court a quo as to why it arrived at the sentence which it did. What we are left with is to speculative. Of course as was conceded by Mr Pillay for the appellant, the gruesome nature of the offences of which the appellants were convicted cannot be denied and warranted the sentences imposed.

[9] It is our view that the court *a quo* arrived at an appropriate sentence in respect of each of the three counts. Since there are no reasons provided by the court a quo, it is unclear as to how it arrived at its decision that the sentence in count 2 should run concurrently with that imposed in respect of counts 4, 5 and 7. The issue which this court should consider therefore relates to the effective sentence of 35 years.

[10] In my view, the court failed to take into account the inextricable link between counts 2 and 3 the fact that the offences of which the accused were convicted are closely connected. The sentences in counts 2 and 3 ought to have been made to run concurrently with each other. The subsequent counts being count 4, 5 and 7 were somewhat remote from the main scene to be made to run concurrently with counts 2 and 3.

[11] Having heard counsel and after reading the papers, the following order is made:

(a) The appeal succeeds in so far as it related to the cumulative effect of sentence;

(b) The decision of the court a quo is altered to read:

‘(i) In respect of count 2, the robbery charge, the accused are sentenced to 20 years imprisonment.

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(c) The sentence is antedated to 6 January 2017.

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MASIPA, J

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JAPPIE, JP

I AGREE

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NKOSI, J

I AGREE

APPEARANCES:

For the Applicant:	Mr T P Pillay
Instructed by:	Justice Centre, Durban.
For the Respondent:	Ms C Kander
Instructed by:	Director of Public Prosecutions, Pietermaritzburg.

Matter heard on:	28 January 2019.
Judgment delivered:	1 February 2019.