

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA.**

CASE NO: A90/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
[...]	
22-04-2024	MALATSI-TEFOUM

In the matter between:

PARKIES, TSHEPO

APPELLANT

And

THE STATE

RESPONDENT

APPEAL JUDGMENT

CORAM: MALATSI-TEFFO AJ (PHAHLANE J. concurring)

INTRODUCTION

[1] The Appellant was the second of two appellants, a 27-year-old male at the time of sentencing, charged with three counts in the Oberholzer Regional Court. He was convicted of all three counts, namely;

- 1.1 Count 1: Attempted murder.
- 1.2 Count 2: Robbery with aggravating circumstances.
- 1.3. Count 3: Unlawful possession of a dangerous weapon contravening section 3 of ACT 15 of 2013.

[2] On 25th November 2020, he was sentenced to 8 years imprisonment for count 1, 15 years imprisonment for count 2, and was cautioned and discharged in count 3. No compelling and substantial factors justified a lesser sentence than the cumulative 23 years imprisonment.

[3] The sentences were not ordered to run concurrently, so the effective sentence is 23 years imprisonment. The appellant contends that an effective term of 23 years imprisonment is too harsh and strikingly inappropriate that the trial court erred in not imposing a lesser sentence on the count inappropriate and that the trial court erred in not imposing a lesser sentence on the count of robbery. The appellant is of the view that the court should have ordered the two sentences to either run concurrently or impose a suspended sentence, alternatively, community service.

[4] The appellant initially sought leave to appeal against the sentence, which the trial court refused. However, on a petition before our brothers Nyathi J and Millar J on 6

February 2023, the order was granted. Therefore, the appeal before us concerns the sentence only.

FACTUAL BACKGROUND AND RELEVANT GROUNDS OF APPEAL

[5] The charges stem from an attack on Keletso Magwaza (“the victim”) and his girlfriend on 2 September 2018 when they were on their way home from the party at phase 2 in the early morning hours. The Appellant was part of a group of 3 people who accosted the pair, chased away the girlfriend, and then robbed the victim of his watch and R500 cash before stabbing him 12 times with a knife.

[6] The Appellant made an admission in terms of 220 that he was part of the group that attacked the victim. He further indicated that the victim was in the company of a female, and he went into a yard and came back with a knife, with which he attacked the group and stabbed one, Zukiso. He indicated that he did stab the victim.

[7] The evidence on record is that the Appellant and his co-accused acted as a gang to rob the victim. They were all armed with knives, and the appellant admitted that he inflicted many stab wounds on the victim, although he could not remember the exact number in that light. The victim was just walking with his girlfriend, and there was no proven sign of provocation.

[8] The mitigating factors, submitted on behalf of the appellant, were as follows;

- First-time offender
- A young adult male aged 25 years at the time of the event
- He was employed, and the father of a 2-year-old was staying with him and his family.
- He was under the influence of alcohol when the offences occurred; therefore, peer pressure could have played a role during the commission of the crime

[9] The aggravating circumstances submitted by the Respondent's counsel were as follows;

- the Appellant and his co-perpetrators were all armed with knives and had succeeded in robbing the Appellant before proceeding with the further stabbing of the victim.
- The appellant admitted having stabbed him 12 times and left him to die
- The appellant and his co-accused acted as a gang, and they were all armed.

[10] The respondent contended that the trial court's approach to a sentence cannot be faulted and that there is no basis for interference, taking into account that, essentially, the trial court was well aware that the cumulative effect of the sentences should be considered; hence the court had indicated that they would have to reduce the sentence to provide for the total effect

[11] Therefore, the issues to be considered are whether the trial court misdirected itself in imposing the cumulative imprisonment of 23 years against the Appellant or whether there are substantial and compelling circumstances that warrant a deviation from the imposition of the prescribed sentence on the count of robbery.

THE PRINCIPLES APPLICABLE TO APPEAL

[12] It is trite law that the imposition of sentence falls within the court's discretion. The courts are burdened with the task of imposing the sentences, and the appeal court will only interfere if the reasoning of the sentencing court was vitiated by misdirection, or the sentence imposed induces a sense of shock or can be said to be startlingly inappropriate. Nonetheless, a mere misdirection is insufficient to entitle the appeal court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not

exercise its sentencing discretion or exercised it improperly or unreasonably. As a court of appeal, this court must also determine whether the sentence imposed on the appellant was justified. (See **S v Salzwedel**¹, **Bogaards v S**², **S v Mokela**³, **S v Malgas**⁴, **Director of Public Prosecutions v Mngoma**⁵)

[13] In the present case, the Appellant referred to the case of **S v Mbatha**⁶, which deals with deviations from the minimum sentence. In **S v Vilakazi**⁷, Nugent AJ interpreted the *determinative test as set out in the Malgas* case as justifying the view that any sentence considered disproportionate to the offense committed would justify the imposition of a lesser sentence. This is irrespective of whether exceptional circumstances exist or not. To me, these cases are irrelevant as they relate to the appellants' request on the concurrency or other less severe method of sentencing in respect of the attempted murder sentence.

[14] The contention that the trial court erred in not imposing a shorter term of imprisonment is misplaced. The offence of robbery, which the fourth appellant was convicted and sentenced for, falls under the purview of Act 105 of 1997, which carries a prescribed sentence of fifteen (15) years imprisonment and cannot be deviated from lightly and for flimsy reasons, as enunciated by the Supreme Court of Appeal in the case of **Malgas**. The court reaffirmed the principle in **S v Matyityi**⁸ when it held that a court imposing a sentence in terms of Act 105 of 1997 is not free to inscribe whatever sentence it deems appropriate, but the sentence prescribed for the specific crime in the legislation.

¹ 1999 (2) SACR 586 (SCA) at 591F-G.

² 2013 (1) SACR 1 CC.

³ 2012 (1) SACR 431 (SCA) at para 9.

⁴ 2001 (1) SACR 469 (SCA) at para 12

⁵ [404/08] 2009 ZASCA 170

⁶ 2009 (2) SACR 623 (KZP)

⁷ 2009 (1) SACR 554 (SCA)

⁸ 2011 (1) SACR 40 (SCA).

[15] In **S v Msimanga and another**,⁹ The Supreme Court of Appeal held that violence in any form is no longer tolerated. Our Courts, by imposing heavier sentences, must send out a message to the prospective criminals that their conduct is not to be endured and to the public that courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.

[16] It is clear from the record of the trial proceedings that the appellant was warned of the provisions of the Minimum Sentence Act. The trial court considered the appellant's circumstances in considering the appropriate sentence to impose. It was also mindful of the "triad" factors pertaining to sentences as enunciated in **S v Zinn**¹⁰, namely, "the crime, the offender, and the interest of society. With that in mind, it is important to heed the purpose for which legislature was enacted when it prescribed sentences for specific offences which fall under the purview of section 51(2) for which the appellant was convicted and sentenced, in respect of the court of robbery

Concurrency of sentence

[17] Section 280 of the Criminal Procedure Act, 51 of 1977 ("CPA") provides the sentencing court with the discretion, when sentencing an accused to several sentences, to order that such sentences run concurrently to have a cumulative effect of such sentences. In deciding whether to exercise its discretion, the court will then also consider the overall objects of the sentence it imposes and will seek to achieve a balance between the competing interests at the stage of sentencing. It follows that a court of appeal can only interfere with the exercise of such discretion by the sentencing court where it is satisfied that the sentencing court did not exercise its discretion properly or judicially and where the sentence imposed is not justified. The section provides as follows:

⁹ 2005(1)SACR 377(A)

¹⁰ 1969 (2) SA 537 (A)

“(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

[18] According to this section, when sentencing an offender with more than one punishment is involved, a court must ensure that the cumulative effect of the sentences does not result in excessive punishment. This the court can do by ordering that the sentences or a portion/s thereof run concurrently.

[19] The test in determining whether or not the sentences ought to be ordered to run concurrently is - whether or not the sentences are appropriate, whether there is an inextricable link between the offences in the sense that they form part of the same transaction ¹¹ “with one common intent” (my emphasis).

[20] Consequently, the question of whether the trial court misdirected itself in not directing that the sentences should run concurrently gives rise to the same issue that every court of appeal sitting on appeal against the sentence has to decide, namely, whether the sentence imposed is appropriate.

¹¹ See *S v Nthabalala* [2014] ZASCA 28 (unreported, SCA case no 829/13, 28 March 2014); *S v Nemutandani* [2014] ZASCA 128 (unreported, SCA case no944/13, 22 September 2014).

[21] The principle was considered in *Mopp v State*¹² where the court stated that: “failure by a trial court to order the sentences imposed to be served concurrently in terms of section 280 of Criminal Procedure Act, does not constitute a misdirection where the court exercised its sentencing discretion reasonably, and that in such a case, there was no basis for the appeal court to interfere with the sentence, and accordingly, the appeal was dismissed.

[22] It is trite law that in determining a fair and appropriate sentence, a court must, in the exercise of its sentencing discretion, strike a balance and have due regard to the foundational principles of the sentence, which are referred to as the “triad” factors pertaining to punishment, namely:– the nature and seriousness of the crimes committed by the accused; the personal circumstances of the accused; and the interests of society as pronounced in *S v Zinn*. This court also recognized that the circumstances under which the crimes were committed, and the victims of crimes are also relevant factors concerning the last triad, where the interest and protection of society’s needs should have a deterrent effect on the would-be criminals.

[23] The record shows that the trial court was also mindful of concurrent sentencing and opted not to make such an order, having considered all the circumstances before it. Put differently, the court exercised its discretion not to order the sentences to run concurrently after considering all the circumstances.

[24] Undoubtedly, there were more aggravating factors (as referred to in this judgment) than mitigating factors on the facts of the current matter. The trial court, having considered all of these, found that 15 years’ imprisonment was an appropriate sentence for the offence of robbery and 8 years of attempted murder. I cannot fault its finding in this regard, nor can I find that it did not exercise its discretion properly.

¹² [2015] ZAECGHC 136 (25 November 2015).

[25] Having considered all the aspects relating to the sentence, the trial court found no substantial and compelling circumstances that would persuade the court to deviate from imposing a term of 15 years imprisonment on the count of robbery as ordained by the legislature. Furthermore, the court found that 8 years imprisonment for attempted murder was an appropriate sentence under the circumstances. I cannot fault its finding in this regard, nor can I find that it did not exercise its discretion properly.

Suspension of Sentence and Community Service

[26] The argument raised by the appellant's counsel about the conditions in prisons that this factor should also be considered, in my view, is a non-starter, and there is no basis for raising such an argument. The aspects of a suspended sentence, overcrowding in prisons, and community service do not find application in this case because section 51(2) of Act 105 of 1997, concerning the count of robbery, specifically prescribes a custodial sentence in case of a conviction. In my view, if this notion were to be allowed, it would not serve the interest of justice and would defeat the purpose of punishment. Be that as it may, the general principles governing the imposition of a sentence in terms of the Act, as articulated by the Supreme Court of Appeal in *S v Malgas*, cannot be ignored. This relates to the fact that a court that is required to impose a sentence in terms of the Minimum Sentences Act is not free to inscribe whatever sentence it deems appropriate, but the sentence prescribed for the specified crime in the legislation". This principle was reaffirmed by the Supreme Court of Appeal in ***S v Matyityi***.

[27] With the mitigating factors presented, I found no persuasive factors to support the appellants that the suspended sentence coupled with a shorter term of imprisonment in

this case would be appropriate. Therefore, the trial court did not err when it found that no circumstances justified the lesser punishment.

[28] The trial court's discretion to consider all the factors presented to it was precise. There is thus no reason for interference by the appeal court. *The Zin principle* was considered by the trial court when it used its discretion, as it will become apparent hereunder.

[29] The court took into account the personal circumstances of the appellant. The Supreme Court of Appeal in ***S v Ro and Another***¹³ warned that: “to elevate the personal circumstances of the accused above that of society in general and the victims, in particular, would not serve the well-established aims of sentencing, including deterrence and retribution.” On the other hand, the court in ***S v Lister***¹⁴ held that: “*To focus on the well-being of the accused at the expense of all other aims of sentencing such as the interest of society is to distort the process and to produce in all likelihood a warped sentence.*”

[30] The offenses of which the appellant was convicted are of a serious nature. The appellant and the other accused must have harbored direct intent to kill when they stabbed the victim 12 times. The victim was hospitalized for quite some time. The appellant alleged that he was under the influence of alcohol and that peer pressure could have played a role. In ***S v Vilakazi***¹⁵ the Supreme Court of Appeal stated that “once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what that period should be, and those seem to be the flimsy grounds that ***Malgas*** said should be avoided”.

¹³ 2010 (2) SACR 248 (SCA)

¹⁴ 1993 SACR 228 (A)

¹⁵ 2012 (6) SA 353 (SCA) at para 58.

[31] I concur with the court a quo that the level of crime has become so uncontrollable within society and the country at large. Long-term incarceration, in this case, is the appropriate measure to protect the community, and this will send out a message to the prospective criminals that their conduct is not to be endured and to the public that courts are seriously concerned with restoring and maintaining safe living conditions.

[32] Regarding the appellant's state of sobriety, there is no evidence before the court to suggest that the accused's blameworthiness was affected or diminished at the time of the commission of the offence. Neither can it be suggested otherwise. The author SS Terblanche in **A Guide to Sentencing in South Africa**¹⁶ opines that if the effects of the case (and the additional information as might be provided) show that the accused's capacity was impaired, it should be mitigating since the offender's blameworthiness might then be regarded as diminished. He sets out that:

"7.3.9 Liquor and drugs: -

The intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. This is because "[liquor] can arouse sense and inhibit sensibilities," which may diminish the offender's responsibility. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender, and only then can his blameworthiness be regarded as diminished".

Therefore, I concur with the court's a quo that alcohol consumption cannot be blamed for the commission of this crime.

¹⁶ 3rd Edition, 2016 at 7.3.9 page 226; See also: Mpongoshe v S (CA24/2019) [2020] ZAECGHC 8

[33] Having given proper and due consideration to all the circumstances and considering the arguments and submissions made by both parties, this court cannot fault the trial court's decision, nor can it be said that the trial court misdirected itself regarding the sentence. I cannot find that 23 years' imprisonment is a shockingly excessive or inappropriate sentence. Accordingly, we agree with the trial court's findings, and we believe that the trial court did not misdirect itself.

[34] Consequently, the following order is made:

1. The appeal against the sentence is hereby dismissed.

**MALATSI-TEFFO LM
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA.**

I concur

[...]

**PHAHLANE PD
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION
PRETORIA**

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 23 April 2024

Date of hearing: The matter was heard via video conferencing or otherwise. The matter may be determined accordingly. The matter was set down for a court date on 09 November 2023

Date of Judgment: 23 April 2024

APPEARANCES:

Counsel for the Appellant: S. Simpson

Instructed by: The Legal Aid SA

Counsel for the Respondent: A. Coetzee

Instructed by: The Director of Public Prosecutions