IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

APPEAL NO:AR26/2022
CASE NUMBER:RC445/13

In the matter between:

LINDOKUHLE RUSKIN MYEZA APPELLANT

and

THE STATE RESPONDENT

ORDER

The Appeal is dismissed.

APPEAL JUDGMENT

CM MLABA AJ with CHILI J concurring)

[1] On the 25th of February 2015, the Pinetown Regional Court convicted the Appellant of two counts of robbery with aggravating circumstances whereafter, on the same day, he was sentenced to 15 years' imprisonment on each count. The court a quo further ordered that five years of the sentenced imposed on count two be served concurrently with the sentence imposed on count one, resulting in the effective

sentence of 25 years. The matter now serves before as an appeal against sentence only, with the leave of the Court *a quo.*

[2] The Appellant was charged with two counts of robbery with aggravating circumstances. In Count one, the State had alleged, that on or about 13 April 2012, in Gillits Westmead, the Appellant threatened the complainant with a firearm and took with force her Motor Vehicle, a Silver V W Golf and a cellular phone, Blackberry 9360. In Count two the State had alleged, that on or about 23 September 2009 the accused threatened the complainants with a firearm and took with force from them 27 boxes of assorted cigarettes valued at R250 000.

[3] The evidence against the Appellant in respect of count one was based on evidence of a fingerprint expert placing the Appellant at the scene of the crime. The Appellant was also identified by the complainant. The evidence against the appellant in respect of count two was based on his arrest in the vicinity of the crime scene. The evidence of finger print expert also placed him at the scene of the crime, in particular, inside the driver's side of the motor vehicle in which the stolen boxes of assorted cigarettes were recovered. In my view, the Appellant was correctly convicted by the Court *a quo* and the conviction should therefore stand.

Sentence

[4] Following on a finding that the Appellant failed to present substantial and compelling circumstances, the Court *a quo* proceeded to sentence the Appellant as follows. On count one the appellant was sentenced to 15 (Fifteen) years' imprisonment, and on count two he was sentenced to undergo 15 (Fifteen) years' imprisonment and it was ordered that 5 (Five) years of this sentence is to run concurrently with the sentence on count one.

[5] Appellant's counsel conceded that both counts on which the court *a quo* found the appellant guilty are of a serious nature and that direct imprisonment of the appellant is the only appropriate sentence. The high water mark of the appellant's appeal against his sentencing by the court *a quo* is that it misdirected itself by imposing an unduly harsh sentence in that it took into account appellant's past conduct despite the fact that the State failed to prove any previous convictions against him and that it

failed to take into account that none of the victims were injured. Appellant's counsel further argued that the court *a quo* ought to have ordered more of the years imposed on count two to be served concurrently with the sentence imposed on count one so as not to amount to an effective term of more than 20 years' imprisonment.

[6] It is trite that sentence pre-eminently lies within the discretion of the trial court. The sentence handed by the court *a quo* can only be altered by this court if this court holds that no reasonable court ought to have imposed such sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a sense of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court has not exercised its discretion properly, or that it is in the interest of justice to alter it.[1]

[7] The offences which the appellant was found guilty of carry a statutory prescribed minimum sentence of 15 years respectively. The appellant does not contend that the court a quo misdirected itself as far as the imposition of the prescribed minimum sentence of 15 years for each offence. What the appellant contends is that the court a quo ought to have taken into account that the State did not prove any previous conviction, and that the victims of his crime were not injured, consequently, the court *a quo* ought to have ordered ten years in respect of count two to run concurrently with 15 years in respect of count one, thereby resulting in an effective sentence of 20 years.

[8] A court's failure to take into account the cumulative effect of sentences could constitute a material misdirection and could lead to a sentence being disproportionately harsh.[2] In *casu*, the court *a quo* did take into account the cumulative effect of the sentences in respect of both counts, by ordering that five years in respect of count two, should run concurrently with the 15 years in respect of count one, thus reducing the appellant's effective sentence from 30 years to 25 years. When the court *a quo* ordered that five years of the sentence in respect of count two should run

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[1] *S v Fhetani* 2007 (2) SACR 590 (SCA) para 5; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) at 254C-F; *S v Anderson* 1964 (3) SA 494 (A) at 495D-E; *Nevilimadi v S* [2014] ZASCA 41 para 17; *S v Asmal* [2015] ZASCA 122 para 8.

[2] *S v Kruger* 2012 (1) SACR 369 (SCA) para 11; *S v Mopp* 2015 JDR 2573 (ECG) para 8; *S v Ngculu* [2015] ZASCA 184 para 19.

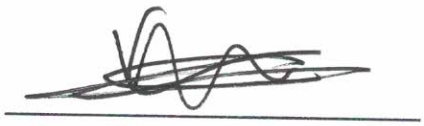
concurrently with the sentence in respect of count one, it made such an order exercising its sentencing discretion as a trial court.

[9] It has been held that a court of appeal should not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence imposed by the trial court with that which the appeal court prefers. To do so will amount to usurping the sentencing discretion of the trial court.[3] Thus, in *casu*, it is not open to this court as an appeal court to interfere with the sentence imposed by the court *a quo* and order that a further five years of the appellant's sentence in respect of count two should run concurrently with the sentence in count one, simply because this court would have made such an order had it been in the shoes of the trial court.

[10] Consequently the following order is made:

Order

The appeal is dismissed.



C M Mlaba AJ

I agree

Chili J

[3] *S v Malgas* 2001 (1) SACR 469 (SCA) at 478D-E quoted in *S v Fielies* [2014] ZASCA 191 para 14; cf *Madyo v S* [2015] ZAECGHC para 4; *S v Weideman* [2014] ZAECPEHC para 4; *S v Roberts* 2015 JDR 2009 (ECG) para 7.

CASE INFORMATION

Date of Hearing : 11 November 2022

Date of Judgment : 5 December 2022

This judgment has been handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 15h00 on 5 December 2022.

APPEARANCES

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