THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 135/11

In the matter between:

DANIEL WILLIAM MOKELA **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Mokela v The State***
(135/11) [2011] ZASCA 166 (29 September 2011)

Coram: Mthiyane, Maya and Bosielo JJA

Heard: **05 September 2011**

Delivered: **29 September 2011**

Summary: **Appeal – Sentence – Appellant convicted of robbery with aggravating circumstances and attempted murder – appellant sentenced to imprisonment for 25 years in respect of count 1 and 5 years in respect of count 2 – whether the appeal court erred in interfering with the magistrate's order that the sentences imposed in respect of the two counts should run concurrently.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Hussein J and Luther AJ sitting as court of appeal):

1. The appeal succeeds to the extent that the sentences are varied by the order that the sentence of 5 years in respect of the count of attempted murder shall run concurrently with the sentence of 15 years in respect of the count of robbery with aggravating circumstances. The effective sentence to be served by the appellant is a period of imprisonment of 15 years.

JUDGMENT

BOSIELO JA (Mthiyane and Maya JJA concurring)

[1] The appellant was convicted on his pleas of guilty, of robbery with aggravating circumstances (count 1) and attempted murder (count 2) in the Regional Court, Pretoria North. He was sentenced to a term of imprisonment of 25 years in respect of count 1 in terms of s 51(2)(a)(ii) of the Criminal Law Amendment Act 105 of 1997 (as amended) (the Act) and to imprisonment of 5 years in respect of count 2. The regional magistrate ordered that the sentence imposed in respect of count 2 should run concurrently with the sentence imposed in respect of count 1.

[2] The appellant appealed against both his conviction and sentence to the South Gauteng High Court, Johannesburg. The appeal against the conviction and sentence in

respect of count 2 failed. However the appeal against the sentence of 25 years in respect of count 1 succeeded to the extent that the sentence was set aside and replaced with a sentence of 15 years' imprisonment. The order that the sentences in respect of both counts should run concurrently was set aside by the court below. The effective sentence for the appellant is a term of imprisonment of 20 years. The appellant is appealing to this Court against his sentence with leave of the court below.

[3] As the appeal is against the sentence only those facts which are germane to the determination of an appropriate sentence for the appellant deserve to be briefly recounted. According to his plea-explanation the appellant, accompanied by his friend, went to one Ms Beetge's house to commit theft where they confronted her. In order to subdue her, the appellant throttled her and caused her to fall to the ground and throttled her whilst sprawled on the ground. She was then stabbed in her stomach with a knife by the appellant's friend.

[4] On appeal to the court below the appeal succeeded partly in that the appeal against conviction in respect of both counts was dismissed. However concerning the sentence, the court below found that the regional magistrate misdirected himself on sentencing by treating count 1 as falling within the ambit of s 51(2)(a)(ii) of the Act by virtue of the fact that the appellant had a previous conviction of robbery, and thereby treating him as a second offender. I agree.

[5] The relevant part of s 51(2)(a) of the Act provides:

'51(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

(a) Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20

years.'

[6] It is a clear requirement of s 51(2)(a)(ii) that for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the State had to prove that he is a second offender of robbery with aggravating circumstances. This is the jurisdictional requirement necessary to trigger s 51(2)(a)(ii). All that the State proved in this case is that the appellant had previous convictions amongst others for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)(a)(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.

[7] In its judgment the court below correctly pointed out that there is a distinction between robbery and robbery with aggravating circumstances. As a result, the court below found, correctly, that the regional magistrate ought not to have treated the appellant as a second offender and imposed a sentence of 25 years' imprisonment but should have treated him as a first offender in terms of s 51(2)(a)(i) of the Act, thus qualifying for a sentence of imprisonment of not less than 15 years. For that reason, the court below set aside the sentence of imprisonment for 25 years and imposed a sentence of 15 years' imprisonment in terms of s 51(2)(a)(i) of the Act.

[8] However, having done this, the court below proceeded to set aside the order of the regional magistrate that the sentences imposed in respect of the two counts should run concurrently. Regrettably the court did not furnish reasons for this order. What is even more disturbing is that it does not appear from the judgment whether either the appellant's counsel or counsel for the State were afforded an opportunity to address the court on this crucial aspect.

[9] It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para 11; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d.

[10] In ordering the sentences imposed on the two counts to run concurrently, the regional magistrate relied on s 280(2) of the Criminal Procedure Act 51 of 1997 (the Criminal Procedure Act). The section provides a sentencing court with a discretion when sentencing an accused to several sentences to make an order that such sentences run concurrently. There are a number of reasons which a sentencing court can legitimately take into account in this regard. One such ground is the cumulative effect of such sentences. It follows that a court of appeal can only interfere with the exercise of such a discretion by the sentencing court where it is satisfied that the sentencing court misdirected itself, or did not exercise its discretion properly or judicially. Absent such proof, the appeal court has no right to interfere with the exercise of a discretion by a sentencing court.

[11] I have already stated that the court below did not give reasons why it interfered with the order made by the regional magistrate in exercising his or her discretion for the sentences to run together. In the absence of such reasons we are unable to conclude that the regional magistrate did not exercise the discretion properly or judicially. In fact the order by the court below has the hallmarks of an arbitrary decision. It follows that the

court below erred in setting aside the order by the regional magistrate for the sentence imposed in respect of count 2 to run concurrently with that imposed in respect of count 1. This is so because the evidence shows that the two offences are inextricably linked in terms of the locality, time, protagonists and importantly the fact that they were committed with one common intent. (See, for example, *S v Brophy & another* 2007 (2) SACR 56 para 14).

[12] I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it un-judicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefore. In *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) para 15 the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision stated that:

'…Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process…'. See also *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28.

[13] Regarding the duty of judicial officers to give reasons for their decisions it is instructive to have regard to what the RT Hon Sir Harry Gibbs GCMG, AC, KBE, the

former Chief Justice of the high court of Australia stated in the Australian Law Journal 1993 (67A) 494 where he said at 494:

'…The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view…'.

See also *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) paras 28-30.

[14] It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the

critical question of whether such conditions ought to be varied or not. See *Commentary On The Criminal Procedure Act* at 28-6D.

[15] I interpose to state that I have no problem with the sentence of 5 years' imprisonment imposed in respect of count 2. The facts of this case justify such a sentence. The complainant, a 46 years old woman was attacked by the appellant and his friend in her own home. The sanctity and privacy of her private home was invaded. The appellant initiated the attack on her. This incident was pre-planned. The complainant was threatened with a knife pressed against her throat. Later she was stabbed with a knife in her stomach by the appellant's friend. The appellant was present and witnessed this and did not intervene. He proffered no explanation why the complainant who had already been successfully subdued was stabbed. The stabbing was unnecessary and gratuitous. Jewellery valued at approximately R4 000 was stolen and never recovered. I agree with the court below that there is no basis to interfere with the sentence of 5 years in respect of count 2.

[16] In the result, the following order is made:

1. The appeal succeeds to the extent that the sentences are varied by the order that the sentence of 5 years in respect of the count of attempted murder shall run concurrently with the sentence of 15 years in respect of the count of robbery with aggravating circumstances. The effective sentence to be served by the appellant is a period of imprisonment of 15 years.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	Mr JH van Rooyen (Attorney) Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	A Coetzee SC Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein