THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 420/12

NOT REPORTABLE

In the matter between:

VELILE JOHNSON GUCA **FIRST APPELLANT**

TERENCE YISAKE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: ***Velile Guca v The State*** **(420/12) [2012] ZASCA 201**
(30 November 2012)

Coram: **Mthiyane DP, Leach and Tshiqi JJA**

Heard: **9 November 2012**

Delivered: **30 November 2012**

Summary: Criminal Law – effective sentence shockingly inappropriate.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Patel J and Kruger AJ sitting as court of appeal):

1 The appeal is upheld.

2 Paragraph two of the order of the high court is set aside and replaced with the following:

'The appeal against sentence is upheld. The sentences imposed on both appellants are set aside and replaced with the following:

(a) Count one: 15 years.

(b) Count two: 15 years.

(c) Counts three and four are taken together for the purposes of sentence and the appellants are sentenced to three years.

(d) Count five: 13 years.

(e) Count six: 13 years.

(f) Count seven: 10 years.

(g) Counts eight and nine are taken together for the purposes of sentence and the appellants are sentenced to three years.

(h) The various sentences are to run concurrently as follows:

(i) The sentences on counts 3, 4 and 5 are to run concurrently with that imposed on count 1.

(ii) The sentences on counts 6, 7, 8 and 9 are to run concurrently with that imposed on count 2.

(iii) The effective sentence to be served is therefore 30 years imprisonment.

(i) The above sentences are antedated under s 282 of the Criminal Procedure Act 51 of 1977 to 7 September 2001 when sentence was imposed in the Regional Court'.

JUDGMENT

TSHIQI JA (MTHIYANE DP AND LEACH JA CONCURRING):

[1] This is an appeal against sentence only. Both appellants were charged, together with a third accused, in the Regional Court, Benoni on four counts of robbery with aggravating circumstances, one count of attempted murder, two counts of contravening s 2 read with sections 39(2) and 40 of the Arms and Ammunition Act 75 of 1969 (unlawful possession of an unlicensed firearm) and two counts of contravening s 36 read with s 39(2) of the same Act (unlawful possession of ammunition). Both appellants were convicted on all counts whilst their co-accused was convicted on four counts and acquitted on the remaining five counts.

[2] The appellants were each sentenced to an effective period of 55 years' imprisonment whilst their co-accused was sentenced to an effective period of 25 years' imprisonment. They lodged appeals to the North Gauteng High Court, Pretoria (per Patel J and Kruger AJ), against both their convictions and sentences. Their appeals against the convictions were dismissed but the appeals against the sentences were upheld. The high court in substituting the sentences imposed by the trial court committed an error in the computation of the sentences. The effect of the error is that the sentences imposed by that court became unclear.

[3] The first appellant lodged a further application for leave to appeal to this court in the high court. When the matter came before Shongwe DJP and Makhafola J, they raised the error committed by the court a quo and as a result leave was granted on 14 November 2008 in respect of the first appellant 'only to the limited extent that there

was an error in the computation of the effective sentence imposed' by the high court. On 18 September 2012 leave against sentence was also granted to the second appellant.

[4] Three issues arise before this court in respect of both appellants. First, the error in the computation of the sentences. Second, the failure by the magistrate to apprise the appellants that the Criminal Law Amendment Act 105 of 1997 was applicable in respect of some of the counts and the consequences flowing from that omission. Third, the effective sentences imposed on the appellants.

[5] Counsel for the State initially sought to argue that the error in the computation of the sentences was no longer relevant as it had already been rectified through a document termed 'Variation of order in terms of Rule 42(1)*(b)*, dated 31 August 2008, by Kruger AJ, one of the judges who had heard the appeal. He was, however, constrained to concede that it was not so because the judge concerned was, on that date already *functus officcio*, Patel J had since passed away and the reliance on uniform rule 42(1)*(b)*[1] was misplaced. What Kruger AJ did is a nullity and has no effect on the sentence. It is in the circumstances open to this court to determine the sentences afresh. Before doing so I need to deal with the failure by the magistrate to warn the appellants that the minimum sentencing legislation was applicable. The high court did not deal with that issue at all.

[6] The State conceded before this court that no reliance should have been placed on the Criminal Law Amendment Act by the magistrate. The charge sheet did not refer to it and the appellants had not been warned by the court that they were facing minimum sentences upon conviction. In the light of the State's concession, I intend to proceed on the basis that the magistrate's reliance on the Criminal Law Amendment Act amounted to a misdirection. (See further *S v Legoa* 2003 (1) SACR 13 (SCA); *S v Makatu* 2006 (2) SACR 582 (SCA) at paras 6 - 7*; Mapule v S* [2012] ZASCA 80).

[7] The magistrate in her judgment took into account all the trite considerations before she imposed sentence and also gave a comprehensive analyses of such considerations.

[1] Uniform rule 42(1)*(b)* deals with 'an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission' and not with variation orders.

The individual sentences she imposed were appropriate but their accumulative effect is too harsh and shockingly inappropriate. The magistrate overemphasised the retributive aspects of punishment and failed to strike an appropriate balance. That misdirection and the error in the computation of sentence by the high court, provide justification for this court to interfere. This can be done by the appropriate alteration of para two of the order of the high court, which dealt with the sentence.

[8] I make the following order:

1 The appeal is upheld.

2 Paragraph two of the order of the high court is set aside and replaced with the following:

'The appeal against sentence is upheld. The sentences imposed on both appellants are set aside and replaced with the following:

(a) Count one: 15 years.

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(i) The sentences on counts 3, 4 and 5 are to run concurrently with that imposed on count 1.

(ii) The sentences on counts 6, 7, 8 and 9 are to run concurrently with that imposed on count 2.

(iii) The effective sentence to be served is therefore 30 years imprisonment.

(i) The above sentences are antedated under s282 of the Criminal Procedure Act 51 of 1977 to 7 September 2001 when sentence was imposed in the Regional Court.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For First Appellant:	JM Mojuto
	Instructed by:
	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
For Second Appellant:	LA van Wyk
	Instructed by:
	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
For Respondents:	M Mashuga
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein