THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 593/2020

In the matter between:

ISAAC MLUNGISI MHLAMBI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Isaac M Mhlambi v The State* (593/20) [2021] ZASCA 49 (21 April 2021)

Coram: Zondi, Schippers and Mbatha JJA and Carelse and Mabindla-Boqwana AJJA

Heard: 17 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to Saflii. The date and time of hand-down is deemed to be 10h00 on 21 April 2021.

Summary: Criminal law and procedure – sentence – two counts of robbery with aggravating circumstances – possession of firearm – special leave to appeal granted – cumulative effect of sentence properly considered – sentence appropriate – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi and Louw JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Schippers JA (Zondi and Mbatha JJA and Carelse and Mabindla-Boqwana AJJA concurring):

[1] The appellant was convicted in the regional court, Oberholzer, on two counts of robbery with aggravating circumstances, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. He was sentenced to 15 years' imprisonment on each of the two counts of robbery (counts 1 and 2); five years' imprisonment on the charge of unlawful possession of a firearm (count 4); and five years' imprisonment on the charge of unlawful possession of ammunition (count 5). The regional court ordered the sentences on counts 2, 4 and 5 to run concurrently. Thus, the appellant was sentenced effectively to 30 years' imprisonment.

[2] The appellant and his co-accused, Mr Tshepo Reginald Matshego, successfully petitioned the Gauteng Division of the High Court, Pretoria (the high court) for leave to appeal against their conviction and sentence. The State conceded that it had not proved that they had unlawfully possessed ammunition (count 5) and consequently that they should not have been convicted of that offence. Save for setting aside the conviction of unlawful possession of

ammunition,[1] the high court dismissed the appeal against conviction. The appellant's appeal against sentence was partially successful. The sentence of 15 years' imprisonment on count 1 was set aside and replaced with a sentence of 10 years' imprisonment. The appellant's effective term of imprisonment was thus reduced to 25 years. Mr Matshego's appeal against sentence was dismissed.

[3] The appellant then petitioned this Court for special leave to appeal against his conviction and sentence. He was granted leave to appeal against sentence only. The parties have agreed that this Court may dispose of the appeal without hearing oral argument, in terms of s 19(1)*(a)* of the Superior Courts Act 10 of 2013.[2]

[4] The basic facts can be shortly stated. It is clear from the evidence that the robberies were perpetrated by more than three persons, although only the appellant and two of his co-accused had been charged with committing the crimes. On count 1 (robbery with aggravating circumstances) the appellant was convicted of hijacking a Hino 26-ton truck (a horse and trailer) and its cargo, in broad daylight on 19 June 2007 in Carltonville. The truck was fairly new and valued in excess of R1 million, and its cargo of foodstuff, at about R300 000.

[5] The modus operandi of the appellant and his co-perpetrators was this. Two of the robbers travelling in a bakkie pulled up alongside the truck and falsely signalled to the driver that the truck was open. The truck stopped. When the driver

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[1] Nothing turns on the fact that the Gauteng Division of the High Court, Pretoria set aside this conviction in the body of the judgment and that it is not referred to in the court's order. It is a settled principle that when interpreting a court's judgment or order, the court's intention must be ascertained primarily from the language of the judgment or order according to the usual, well-known rules of interpretation. The judgment or order and the courts reasons for giving it must be read as a whole in order to ascertain its intention (*Firestone South Africa (Pty) Ltd v Genticuro* AG 1977 (4) SA 298 (A) at 304D-F; *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) para 10.

[2] Section 19*(a)* provides: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

(a) dispose of an appeal without the hearing of oral argument'.

got to the back of the trailer, the appellant and two of his co-perpetrators, who were all armed, emerged from a white Toyota Tazz motor vehicle (the Tazz), parked at the back of the truck.

[6] The robbers pointed their firearms at the driver of the truck and ordered him to get into the Tazz. Two workers who were in the truck got out and went to the trailer to see what was happening. They too were ordered into the Tazz at gunpoint. Meanwhile, the robbers in the bakkie returned to the truck and ordered Mr Samuel Zwandile Madai, a worker who had remained in the truck, to get into the bakkie, which he did. He was also ordered not to look at their faces. The robbers then stole the truck. Mr Madai was taken to some bushes nearby where the robbers communicated by cell phone. He overheard them saying that he was an old man and would not give them any problem. The robbers kept Mr Madai there and ordered him not to get up until they left that place. Some 30 minutes later, after the robbers had left Mr Madai sought help from a farmer who took him to a nearby police station.

[7] The truck driver and his passengers were driven away in the Tazz in the direction of Ventersdorp and taken down a farm road in Klerkskraal. There they were ordered to get out of the car, crawl under a bush and held hostage for some five hours by one of the appellant's co-accused who was armed. Another robber returned with the Tazz to fetch the one who had been guarding them. The truck driver and his passenger then walked to the N14 and took a taxi to Ventersdorp where they reported the robbery.

[8] On 10 July 2007 at about 20h00 and in Ventersdorp, the appellant and his co-accused hijacked a second truck, a Mercedes-Benz horse and trailer carrying a cargo of cement valued at R800 000 (count 2). The truck driver had stopped to check whether its headlights were working. As he got back into the truck three

robbers were at the driver's door. One of them pulled him out of the truck and overpowered him. The driver did not give evidence; he had left the employ of the truck's owner. The appellant's palm print was found on the driver's door of the truck. The passenger, Mr Kaizer Stock, tried to flee. One of the robbers pointed a firearm at him, and ordered him to get back into the truck and lie on the bed. Another robber then drove the truck for a considerable distance on the N14 Freeway in Krugersdorp.

[9] At Klerkskraal the robbers ordered Mr Stock to get out of the truck, which he did. The appellant's co-accused, Mr Matshego, who arrived in a red Toyota Corolla (the Corolla) which had been following the truck, pointed a firearm at Mr Stock, ordered him to get down and not to look at his face. Another robber tied Mr Stock's hands and feet and left him on the side of the road. The robbers stole the Mercedes truck. The appellant and Mr Matshego left in the Corolla. Subsequently Mr Stock managed to free himself and found his way to Klerkskraal Police Station. There he was informed that the police were already searching for the truck, which had been fitted with a satellite tracking device.

[10] The Mercedes truck was tracked to Carltonville where it had stopped. The robbers fled. Employees of the tracking company who had searched for the truck received a radio report that the Corolla was involved in the robbery. It had passed them on the road. When they saw that the police were already at the truck they turned around, pursued the Corolla and pulled it off the road, some five kilometres from where the truck had been found. The appellant and Mr Matshego were apprehended. When the police arrived, they were arrested. A 9 mm pistol was found in the cubbyhole of the Corolla. This firearm was licensed to Mr Nkosana William Ndlovu, the appellant's brother-in-law. The evidence showed that the appellant had called Mr Ndlovu numerous times on his cell phone before, during and after both robberies. Mr Ndlovu was also charged on both counts of robbery

with aggravating circumstances, but passed away whilst the proceedings were pending in the regional court.

[11] It was the modus operandi of the appellant and his co-perpetrators on count 2, which led to their arrest on count 1. They had taken the driver of the Hino truck and his passengers to the same area in Klerkskraal, where they were held hostage. During the first robbery, Mr Ndlovu was a passenger in the Tazz. Both he and the appellant were identified by two different witnesses as having been involved in the robbery of the Hino truck. When the investigating officer testified in July 2009 – two years after the robbery had been committed – the Hino truck had not been found. There is no evidence that its cargo was recovered.

[12] The appellant's defence put to the State witnesses was that he was not involved in any of the hijackings. At the close of the State case, the appellant and his co-accused chose not to testify, did not present evidence by any other witnesses in their defence and closed their case.

[13] The grounds of appeal, in summary, are these. Despite its finding that the trial court was under the wrong impression that the minimum sentences in s 51 of the Criminal Law Amendment Act 105 of 1997 were applicable to counts 1 and 2, the high court erred in failing to find that the sentences on those counts were vitiated by material misdirection. It should have remitted the matter to the trial court to impose sentence afresh. The high court erred in overemphasising the seriousness of the offence and the interests of society, and failed to balance these factors properly against the appellant's personal circumstances. It also erred in overemphasising the deterrent and retributive aspects of punishment at the expense of rehabilitation and prevention. The court failed to take into account the cumulative effect of the sentences imposed.

[14] It is trite that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Rabie*,[3] Holmes JA stated the principle thus:

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court";

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'[4]

[15] Applied to the present case, in my view it cannot be said that in reducing the appellant's sentence to an effective term of imprisonment of 25 years, the high court failed to exercise its discretion judicially and properly. The high court, citing *Nndateni*,[5] had regard to the fact that the trial court had committed a procedural irregularity by invoking the provisions of the Criminal Law Amendment Act 105 of 1997, without warning the appellant that minimum sentences were applicable in respect of counts 1 and 2. The court noted that it was not in dispute between the State and the defence that although the minimum sentences legislation was incorrectly applied, the trial court's jurisdiction entitled it to impose a sentence of 15 years' imprisonment in respect of counts 1 and 2. It is a settled principle that even where a sentence is not shockingly inappropriate, an appellate court is entitled to interfere or at least consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing

[3] *S v Rabie* 1975 (4) SA 855 (A) at 857.
[4] *Rabie* fn 3 affirmed by the Constitutional Court in *S **v** Shaik and Others* 2008 (5) SA 354 (CC) para 66.
[5] *Nndateni v S* [2014] ZASCA 122

discretion.[6] As appears from paragraph 24 below, the high court considered that the sentence imposed on the appellant was shockingly inappropriate.

[16] The high court did not overemphasise the gravity of the offences and the interests of society. The robberies were carefully planned, brazenly executed by a number of robbers and highly organised. The hijacked trucks and their cargo were of high value, and the appellant and his co-accused would not have committed armed robbery of this sort, unless there was an organised illicit market to dispose of the vehicles and cargo. The cargo in the first robbery consisted of numerous pallets of mealie-meal, samp mealies, cooking oil and rice valued at R300 000; and in the second robbery, 17 pallets of cement worth some R800 000 – goods that can exchange hands very quickly.

[17] The appellant and his co-perpetrators subdued their victims by threatening them with firearms. Contrary to the appellant's submission, the fact that no one was killed or injured was not due to the conduct of the robbers, but because of the fear they instilled in their victims. A further aggravating factor was that the driver of the Hino truck and his passengers were kidnapped and held hostage for five hours at gunpoint. This was so that they could not alert the police to the robbery and to ensure that the appellant and his co-accused could make a complete getaway with the truck and its cargo. In this they succeeded. There is no admissible evidence that the Hino truck was found and it is clear that its cargo was never recovered.

[18] Barely three weeks after the first armed robbery, the appellant and his co-accused committed the second robbery. Mr Stock said that he was terrified when the firearm was pointed at him and he was ordered to lie face down in the truck;

[6] *S v Jimenez* [2003] ZASCA 2; [2003] 1 All SA 535 (SCA) para 7.

and that the robber who drove the truck later said that he would not kill him. He was also threatened with a firearm whilst being bound hand and foot, and left on the side of the road. He testified that he has nightmares about the incident. But for the tracking device and swift reaction by employees of the tracking company and the police to recover the truck and apprehend the appellant, he and his co-accused would have got away with the truck and its cargo. Further, the trial court rightly took into account the prevalence of armed hijacking of trucks within its area of jurisdiction, and their adverse impact on business and the economy. The theft of cargo has a ripple effect on the supply chain going beyond the stolen goods. This includes increased insurance premiums for freight companies, loss of sales and additional stock replacement and transport costs. All these costs are ultimately paid by consumers as the costs of goods increase to offset these losses.

[19] What is more, the appellant overlooks his conviction and sentence in respect of the unlawful possession of a firearm – a 9mm Parabellum semi-automatic pistol. The unlicensed possession of semi-automatic firearms is extremely serious and violent crime involving the use of such weapons has not diminished. The legislature had in mind that generally unlicensed weapons of that kind are possessed for use in serious crimes such as robbery with aggravating circumstances and hijacking, hence the prescribed minimum sentence of 15 years' imprisonment in the absence of substantial and compelling circumstances.[7] The appellant had easy access to the firearm which was licensed to Mr Ndlovu. The appellant assisted the licensed firearm owner to use it to commit crimes: it was used in both armed robberies.

[20] In the circumstances, the submission on behalf of the appellant that the sentence imposed 'is an extremely severe punishment that should be reserved for

[7] *S v Swartz* 2016 (2) SACR 268 (WCC) para 41, affirmed in *S v Motloung* [2016] ZASCA 96; 2016 (2) SACR 243 (SCA) para 23.

particular heinous offences', has no merit. The cases relied upon by the appellant are distinguishable on their facts and do not support the submission advanced.[8]

[21] The appellant's personal circumstances were properly taken into account. For practical purposes, he was a first offender. He owned property that pointed to stability. He was 33 years old when the crimes were committed, had passed matric, has two children aged 9 and 13, and earned R800 per week making and installing burglar bars and security gates.

[22] The present case is one in which the personal circumstances of the appellant are overshadowed by the seriousness of the crimes and the interests of society.[9] The appellant showed no remorse and consequently is not a good candidate for rehabilitation.[10]

[23] The submission that the high court should have remitted the matter to the trial court to consider sentence afresh because it was wrongly under the impression that minimum sentences were applicable, has no foundation. Again, the authorities relied upon by the appellant do not support this submission.[11] The high court approached the matter on the basis that counts 1 and 2 should be treated separately in determining an appropriate sentence. This approach is beyond criticism. In *S v Young*,[12] the importance of treating offences separately to determine an appropriate sentence, was stated as follows:

'[I]n the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; and in the ultimate

[8] *Muller v S* [2011] ZASCA 151; *Zondo v S* [2012] ZASCA 27; *Moswathupa v S* [2011] ZASCA 172.
[9] *S v Segole and Another* 1999 (2) SACR 115 (W) at 124-125; *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58.
[10] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 12.
[11] *Nndateni v S* [2014] ZASCA 122; *Moswathupa* fn 5 para 6.
[12] *S v Young* 1977 (1) SA 602 (A) at 610G-H.

result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant.'

[24] The cumulative effect of the sentences imposed on the appellant in respect of counts 1, 2 and 4 were properly controlled and its undue harshness suitably mitigated in the high court's order. It held that whilst individual sentences ought not to be disturbed when there was no misdirection by the sentencing court, the effective sentence of 30 years' imprisonment was excessive, and induced a sense of shock. It referred to the judgments of this Court in which it has warned against the imposition by trial courts of excessively long sentences; and held that such sentences 'ought to be realistic and should not be open to the interpretation that they have been designed for public consumption'.[13]

[25] The high court accordingly set aside the sentence of 15 years' imprisonment imposed on the appellant in respect of count 1 and substituted it with a sentence of 10 years' imprisonment. In doing so, the court reasoned that since both the appellant and Mr Matshego had been convicted on count 2, if the sentences on counts 1 and 2 had to run concurrently in their entirety, the purpose of adequately punishing the appellant for his conduct, would be defeated. This finding and the reasons for it cannot be faulted.

[26] In the result, the appeal is dismissed.

A SCHIPPERS
JUDGE OF APPEAL

[13] *Zondo v S* [2012] ZASCA 51; *S v* S v *Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 524.

APPEARANCES

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