

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 570/2024

In the matter between:

SIFISO NYEMBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nyembe v The State* (570/2024) [2026] ZASCA 156 (18 November 2026)

Coram: ZONDI DP and PETSE, MBHA, DLODLO and MPHAHLELE AJJA

Heard: 10 June 2026

Delivered: 18 November 2026

Summary: Criminal law and procedure – sentence – whether the court a quo failed to adequately consider the cumulative effect of the sentences imposed in unrelated cases – whether the court a quo erred in computing the effective sentence – whether the court a quo erred in suspending portion of the sentence without conditions.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Tsoka J and Malungana AJ sitting as court of appeal):

1 The appeal is upheld in part to the extent indicated in para 4 of this order.

2 The appellant is sentenced as follows:

Count 1: 15 years' imprisonment.

Count 2: 8 years' imprisonment.

Count 3: 12 months' imprisonment.

Count 4 (kidnapping): 8 years' imprisonment.

3 The sentences imposed on counts 2 and 3 shall run concurrently with the sentence on count 1.

4 The sentence imposed on count 4 is wholly suspended for a period of 5 years on condition that the appellant is not convicted of kidnapping committed during the period of suspension.

5 The appellant shall serve an effective period of 15 years' imprisonment.

JUDGMENT

Dlodlo AJA (Zondi DP and Petse, Mbha and Mphahlele AJJA concurring):

[1] The appellant, Mr Sifiso Nyembe, together with fellow accused, Messrs Justice Maringa and Thatho Sakwana, were charged in the Johannesburg Regional Court (the regional court) on four counts, namely: count 1 was robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law

Amendment Act 105 of 1997 (the Act). Count 2 was unlawful possession of firearms in contravention of s 3 read with ss 1, 103, 117, 119, 120(1)(*a*), and s 121 read with Schedule 4 of the Firearms Control Act 60 of 2000, further read with s 250 of the Criminal Procedure Act 51 of 1977 (the CPA), as well as s 51(2) of the Act. Count 3 was unlawful possession of ammunition in contravention of s 90 read with ss 1, 103, 117, 119, 120(1)(*a*) and s 121 read with Schedule 4 of the Firearms Control Act and further read with s 250 of the CPA. Count 4 was kidnapping.

[2] Briefly, the following is what preceded the arrest of the appellant and his co-perpetrators. As already mentioned, the appellant and his companions were charged with 4 counts. It was alleged that on 2 February 2012 and in Pantha Street, Kensington they confronted the complainant and robbed her of her BMW 3 Series motor vehicle, a cellphone and a gold necklace at gunpoint. They drove away from the crime scene to Soweto whilst the complainant was still inside the vehicle. In pleading guilty to the charges the appellant and his cohorts admitted that a firearm was used in the commission of the robbery. They were confronted by the police on the Chris Hani Baragwanath road. They abandoned the vehicle and ran away to evade arrest. However, their attempted escape was short-lived as they were apprehended. They were convicted as charged, on their respective pleas of guilty.

[3] As already mentioned, in their ensuing trial the appellant and his cohorts were, following their conviction, sentenced as follows:
Count 1 (robbery): 15 years' imprisonment.
Count 2 (unlawful possession of firearms): 8 years' imprisonment.
Count 3 (unlawful possession of ammunition): 12 months' imprisonment.
Count 4 (kidnapping): 8 years' imprisonment.

The regional court ordered that the whole of the sentences imposed on counts 2 and 3 run concurrently with the sentence imposed on count 1. In addition, 4 years of the sentence imposed on count 4 was ordered to run concurrently with the sentence imposed on count 1. The regional court ordered that the appellant serve an effective 23 years' imprisonment. The regional court further declined to take into account the sentence of 14 years' imprisonment imposed on the appellant in an unrelated criminal trial.

[4] Dissatisfied with the cumulative sentence, the appellant sought leave to appeal which was refused by the regional court. However, leave to appeal was subsequently granted by the Gauteng Division of the High Court, Johannesburg (the court below) on petition to it.

[5] On 16 May 2019, the court below heard the appeal and upheld it in part. It proceeded to set aside the sentences imposed by the regional court and substituted them with the following:
15 years' imprisonment on count 1;
8 years' imprisonment on count 2;
8 years' imprisonment on count 3; and
8 years' imprisonment on count 4, of which four years were suspended without any conditions being stipulated as required by law. The sentences on counts 2 and 3 were ordered to run concurrently with the sentence on count 1, whilst the remaining four years of the sentence on count 4 were ordered to run concurrently with the sentence on count 1. An effective sentence of 15 years' imprisonment resulted. However, the court below went on to order that the appellant undergo imprisonment for an effective period of 19 years' imprisonment. Aggrieved by this twist, the appellant

subsequently applied for and was granted special leave to appeal to this Court on 8 May 2024.

[6] The appellant submitted that both the regional court and the court below misdirected themselves in relation to the imposition of sentence by failing to properly consider the cumulative effect of the sentences imposed in this matter, coupled with the 14-year sentence of imprisonment for murder imposed by the high court in unrelated proceedings on 17 April 2012.

[7] In particular, the appellant argued that the failure both by the regional court and the court below to order all the sentences to run concurrently, or to properly consider their cumulative impact when viewed together with the prior murder sentence of 14 years' imprisonment, constitutes a material misdirection. For this proposition, the appellant relied on several authorities, including *S v Belelie*;[1] *S v Mate*;[2] *S v Brophy*;[3] and *S v Muller*,[4] which are to the effect that sentences imposed in respect of offences committed as part of the same criminal transaction, or arising from the same incident, should ordinarily be ordered to run concurrently.

[8] Counsel for the appellant emphasised that the kidnapping (count 4) was committed in the course of the robbery (count 1) and therefore submitted that the entire sentence on count 4 ought to have been ordered to run concurrently with the sentence imposed on count 1. Consequently, the appellant contended that the court below failed to adequately address the cumulative effect of the sentences when reducing the effective term from 23 to 19 years' imprisonment. Therefore, its failure

[1] *S v Belelie* 1997 (2) SACR 79 (W) at 81J-82A.
[2] *S v Mate* 2000 (1) SACR 552 (T) at 556H-J.
[3] *S v Brophy and Another* ZAGPHC 83; 2007 (2) SACR 56 (W) paras 16-18.
[4] *S v Muller and Another* [2011] ZASCA 151; 2012 (2) SACR 545 (SCA) paras 9-10.

resulted in an effective sentence of 33 years' imprisonment (when taken together with the murder sentence) which is strikingly severe and should rather be reserved for particularly heinous cases.[5]

[9] The appellant further argued that the court below erred in formulating the sentence on count 4. This was so because in suspending four years of the eight-year sentence without specifying any conditions of suspension, which is impermissible in terms of s 297(1) of the CPA, the court below committed a serious misdirection.[6] The appellant further submitted that the manner in which the suspension and concurrency orders were formulated led to an incorrect computation of the overall effective sentence.

[10] On the other hand, the respondent submitted that, although certain inconsequential errors appear in the judgment of the court below (including the omission of the appellant's surname and the absence of the signatures of both presiding judges), these are not material and do not invalidate the judgment. The respondent contended, in this regard, that the transcript clearly shows that the puisne judge concurred in the judgment and that the identity of the appellant is apparent from the case number and the facts.

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[5] Ibid para 10.

[6] Section 297(1) provides that where a court convicts a person of an offence in respect of which no minimum sentence is prescribed by law, the court may, in its discretion, pass sentence but order the operation of the whole or part of the sentence to be suspended for a period not exceeding five years on any condition referred to in paragraph (*a*)(i), such as good conduct. To bolster his argument, the appellant, also relied on *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) para 28, where this Court held that:
'It is an established principle that conditions for the suspension of a sentence must be crafted in such a clear manner that it is easy for the accused to know what they entail and to be so practical that an accused will be able to comply with them without being exposed to undue hardship.'

[11] Insofar as the sentences imposed in respect of counts 1 and 2 are concerned, the two offences fall within the purview of s 51(2) of the Act. Accordingly, the prescribed minimum sentence provided for in the Act is 15 years' imprisonment unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In regard to the concurrency of the various sentences imposed by the trial court, the respondent correctly relied on *S v Mokela*[7] for the proposition that concurrency is appropriate only where the offences are inextricably linked in terms of locality, time, protagonists, and common intent. Thus, both the court below and the trial court did not misdirect themselves in exercising their sentencing discretion when they did not order the sentences imposed to run concurrently with the 14-year murder sentence previously imposed on the appellant by the court in an unrelated criminal trial. The offences for which the appellant and his cohorts were charged in the regional court were committed while he was on bail in respect of the murder charge then pending before the high court. The fact that the appellant was out on bail facing a serious charge of murder and yet not deterred from committing further offences reveals his total disrespect for the law. Instead, he continued to commit further serious offences. Moreover, that the appellant continued with his criminal escapades regardless, sufficiently demonstrates his propensity to commit crime, which conduct ordinarily dictates that the sentences imposed should be left to run consecutively in order to bring it home to him that crime does not pay.[8]

[12] Nevertheless, respondent's counsel correctly conceded that the court below misdirected itself in respect of count 4 when it suspended four years of the sentence imposed without specifying conditions attaching to the suspension. It is trite that it

[7] *S v Mokela* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) para 11.
[8] *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 9.

is not competent to suspend a sentence either in toto or partially without attaching appropriate conditions to the suspension.

[13] In *S v Salzwedel and Others*, (*Salzwedel*) this Court held that:

'An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparage, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.'[9]

Accordingly, where the trial court fails to exercise its discretion reasonably, resulting in the imposition of a sentence which is disturbingly inappropriate or shockingly harsh or lenient, an appeal court is entitled to interfere and correct the sentence. A sentencing court is required to exercise its discretion reasonably and always within the bounds of the law, and when it fails to do so, the appeal court would be entitled to interfere and correct the sentence. Regard being had to the order of the court below to the effect that four years of the sentence on count 4 should run concurrently with the sentences imposed on count 1, the correct effective sentence should therefore have been 15 years' imprisonment, and not 19 years' imprisonment as decreed by the court below.

[14] Section 280(1) and (2) of the CPA deals with cumulative or concurrent sentences. The section reads as follows:

'280 Cumulative or concurrent sentences

(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.

[9] *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) para 10.

(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.'

For present purposes, one needs only focus on s 280(2) of the CPA. Because the appellant was convicted and sentenced to imprisonment for multiple offences, the sentences were, as a general rule, required to run consecutively unless the court directed that they run concurrently. The sentencing court has a discretion to order differently. In exercising its penal discretion, the court will have regard to the fact that the law requires that the cumulative effect of multiple sentences must not be disproportionately severe, while at the same time ensuring that the seriousness of each offence is properly reflected in the total sentence.[10]

[15] It is necessary to emphasise that robbery with aggravating circumstances, kidnapping, unlawful possession of firearms and ammunition were committed by the appellant while he was on bail on a charge of murder of which he was convicted and subsequently sentenced to 14 years' imprisonment. Clearly, the offences with which the appellant was charged in the regional court constitute a separate and unrelated criminal enterprise. In short, the two sets of offences were not inextricably linked in terms of locality and time. Indeed, interference is only warranted where there has been a misdirection of a serious nature by the sentencing court.

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[10] *S v Maraisana and Another* 1992 (2) SACR 507 (A) at 511, where the Court held that:
'What is generally pursued is, inter alia, that the sentencing authority in its search for a fair total:
(1) must take into account the cumulative effect of the sentences on the different charges;
(2) must prevent a convicted person from being punished twice for the same acts (even if they are taken into account twice for purposes of conviction);
(3) should not create the impression that a serious offence is not a matter of seriousness in the Courts. (English translation). Also see *S v Morten* 1991 (1) SACR 483 (A) at 486E.'

[16] In *S v Skenjana*,[11] this Court held that the fact that an effective sentence may appear severe does not necessarily mean that the trial court exercised its discretion unreasonably or to such an extent that it warrants interference on appeal. In *S v Hewitt*, this Court said the following:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interfering is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'[12]

[17] Both the regional court and the court below correctly treated the murder conviction under case number SS93/2011 and the offences in the present matter as separate and distinct criminal enterprises. The trial court thus did not err in not ordering any concurrency between the sentences imposed in this matter and the murder sentence imposed in the high court trial. The Commentary on the Criminal Procedure Act[13] (Du Toit) states that:

'Obviously, when the offender is already serving a sentence when he is sentenced for another crime, there will often be no connection whatever between the different crimes.

To conclude: whereas a connection between the different crimes provides a strong indication that the sentences should be ordered to be served concurrently, the absence of a connection does not

[11] *S v Skenjana* 1985 (3) SA 51 (A) at 51. Also see *Salzwedel* para 10.
[12] *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8. Also see *S v Lungisa* [2020] ZASCA 99; 2021 (1) SACR 1 (SCA) para 8. *S v Livanje* [2019] ZASCA 126; 2020 (2) SACR 451 (SCA) para 25.
[13] E. du Toit et al, *Commentary on the Criminal Procedure Act RS 68,* 2022 ch28-p20J-1.

absolve the sentencing court from carefully considering the total sentence and ensuring that it remains within the bounds of what is appropriate and reasonable, given all the circumstances.'

[18] However, in *S v Kruger* (*Kruger*) this Court stated that the mere fact that offences were committed at different times and places does not justify a failure to have regard to the cumulative effect of the overall sentences.[14] Subsequent decisions following *Kruger* have been consistent in considering the cumulative effect of sentences where offences are closely connected. In *S v Soni*, for instance, this Court dealt with the cumulative effect of the sentences as follows:

'Furthermore, in our view, given the circumstances under which the offences on counts 2, 4 and 6 occurred, they are all closely linked to count 1. All these offences form part of the scheme which the appellant embarked upon, carefully planned, and which ultimately culminated in the commission of the offence on count 1. In the light of the cumulative effect of the sentences imposed, the sentences on counts 2, 4 and 6 are to run concurrently with the sentence on count 1.'[15]

[19] In *Zulu v S*, this Court held that:

'In holding that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentences, the magistrate attached no weight to the fact that while Mr Zulu faced and was properly convicted of two counts of robbery, the two counts arose out of a single criminal enterprise. The problem to which this gave rise when they were treated separately for the purposes of sentence is readily apparent. Had Mr Ngungweni's wallet, cellphone, watch and other valuables been stolen, but the robbers had heeded Ms Mtombeni's plea and let her keep her handbag, they could only have been convicted of one count of robbery. That would have attracted a sentence of 15 years imprisonment. Even had the magistrate wished to impose a sentence of 30 years imprisonment she could not have done so. The upper level of her sentencing powers was 20 years.'[16]

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[14] *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 9.
[15] *S v Soni* [2021] ZASCA 57; [2021] 3 All SA 362 (SCA); 2021 (2) SACR 241 (SCA) para 153.
[16] *Zulu v S* (226/2016) [2016] ZASCA 207 (21 December 2016) para 5.

Thus, where offences are closely connected and form part of a single criminal enterprise, ordering the resultant sentences to run concurrently ensures that the total sentence reflects the cumulative wrongdoing without resulting in disproportionate punishment. However, where various offences are committed at different times or places and therefore treating them as distinct criminal enterprises and imposing consecutive sentences pays due regard to the seriousness of each offence.

[20] As far as count 4 is concerned, it is important that s 297(1)(*b*) of the CPA must be borne in mind. This section provides that where a court convicts a person of an offence in respect of which no minimum sentence is prescribed by law, the court may, in its discretion, pass sentence but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on any condition referred to in para (*a*)(i), such as good conduct. In *Director of Public Prosecutions, North Gauteng v Thabethe*, this Court held that:

'It is an established principle that conditions for the suspension of a sentence must be crafted in such a clear manner that it is easy for the accused to know what they entail and to be so practical that an accused will be able to comply with them without being exposed to undue hardship.'[17]

This means that the accused must know what conduct may result in the suspended sentence being put into operation.

[21] Importantly, in *R v Cloete* the need for specifying the conditions of a suspended sentence clearly was explained thus:

'[I]t does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and

[17] *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) para 28.

not divorced from it, or removed from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition.'[18]

[22] This demonstrates that conditions attached to a suspended sentence must be clearly formulated, certain, and practically capable of being complied with by the accused in order to ensure legal certainty and avoid ambiguity or undue hardship in their implementation. It has been stressed repeatedly that conditions applying to a suspended sentence must bear some relationship to the circumstances of the crime which is being punished and be stated with precision so that the convicted person fully understands the ambit and extent of what is prohibited.

[23] In this case the court below committed a misdirection by failing to state the conditions upon which the four years of the sentence on count 4 were suspended. The suspended sentence loses its essential character as a fair and certain penal tool, and this offends against the fundamental requirements of legal certainty and fairness. An accused person cannot be left to speculate about the boundaries of what conduct is proscribed during the period of suspension. This constitutes a material misdirection in the structuring and computation of the sentence. This, on its own, warrants interference by this Court. In *Salzwedel* this Court said the following:

'An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.'[19]

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[18] *R v Cloete* 1950 (4) SA 191 (E) at192. Also see *S v De Bruin* 1967 (3) SA 399 (SWA) at 400; *S v C* 1988 (2) SA 398 (ZII) at 399.

[19] *Salzwedel* para 10.

[24] In essence, a sentencing court is required to exercise its discretion within the bounds of the law, and a failure to do so entitles an appeal court to intervene. But in one respect, both the trial court and the court below, correctly exercised their discretion reasonably in deciding not to order any portion of the sentences in the present matter to run concurrently with the 14-year murder sentence imposed by the high court in unrelated criminal proceedings.

[25] It bears mentioning, albeit in passing, that the only fundamental error that the court below committed was to substitute the sentence of twelve months' imprisonment imposed by the trial court on count 3 with one of 8 years' imprisonment. It was not competent for the court a quo to do so for there was no appeal by the State against such sentence. Therefore, the twelve months' sentence imposed by the trial court must be reinstated whatever misgivings one may have about its leniency.

[26] In the result the following order is made:

1 The appeal is upheld in part to the extent indicated in para 4 of this order.

2 The appellant is sentenced as follows:

Count 1: 15 years' imprisonment.

Count 2: 8 years' imprisonment.

Count 3: 12 months' imprisonment.

Count 4 (kidnapping): 8 years' imprisonment.

3 The sentences imposed on counts 2 and 3 shall run concurrently with the sentence on count 1.

4 The sentence imposed on count 4 is wholly suspended for a period of 5 years on condition that the appellant is not convicted of kidnapping committed during the period of suspension.

5 The appellant shall serve an effective period of 15 years' imprisonment.

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D V DLODLO

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	E Guarneri
Instructed by	Legal-Aid SA, Johannesburg
	Legal-Aid SA, Bloemfontein
For the respondent:	N Kowlas
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.