



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

Case no: 541/11  
Not Reportable

In the matter between:

**SANELE ZONDO**

**Appellant**

and

**THE STATE**

**Respondent**

**Neutral citation:** *Sanele Zondo v The State* (541/11) [2012] ZASCA 27  
(28 March 2012)

**Coram:** NAVSA, TSHIQI AND WALLIS JJA AND PETSE AND NDITA AJJA

**Heard:** 16 February 2012

**Delivered:** 28 March 2012

**Summary: Sentence – Trial court failing to balance mitigating factors against aggravating factors – Effective sentence reduced to 12 years’ imprisonment.**

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## **ORDER**

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**On appeal from:** The KwaZulu-Natal High Court, Pietermaritzburg (Pillay and Ntshangase JJ sitting as court of appeal):

- a. The appellant’s appeal succeeds to the extent set out below.
- b. The sentence imposed by the court below is set aside and substituted with the following:
  - ‘(i) The sentence on count 1 is set aside and substituted with a sentence of 12 years’ imprisonment.
  - (ii) The sentence on count two is confirmed.
  - (iii) It is ordered that the sentences on counts one and two should run concurrently.
  - (iv) The appellant is therefore sentenced to an effective term of 12 years’ imprisonment.’

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## **JUDGMENT**

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TSHIQI JA (NAVSA, and WALLIS JJA and PETSE and NDITA AJJA concurring)

[1] This is an appeal against sentence only. The appellant was convicted in the regional court, Durban, on 5 December 2003 on one count of robbery with aggravating

circumstances<sup>1</sup> and one count of attempted robbery.<sup>2</sup> He was sentenced to the prescribed minimum period of 15 years' imprisonment on count one, the court having found no substantial or compelling reasons to deviate from that sentence, and to a further period of ten years' imprisonment on count two. The court ordered that five years of the sentence on count two should run concurrently with the sentence on count one. He was thus sentenced to an effective term of 20 years' imprisonment.

[2] On appeal the KwaZulu-Natal High Court, Pietermaritzburg found no reason to interfere with the sentence imposed by the regional court magistrate and consequently dismissed the appeal. He now appeals to this court, with the leave of the high court, against sentence only, and only on the limited basis that this court may order that the whole of the sentence on count two should run concurrently with the sentence on count one.

[3] The convictions and sentences arise from a robbery that was committed by a group of men on 7 September 2003, around 10h00. The appellant together with his co-assailants, who were not arrested, accosted and robbed two Philippine nationals, a male and a female colleague who were walking along Commercial Road, Durban to attend a conference at the International Convention Centre (the ICC). The appellant carried a knife. He robbed the woman of her handbag and fled whilst one of his co-assailants attempted, but did not succeed, to rob the male of his backpack. A member of the public who witnessed the incident alerted two police officers, Sergeant Phungula and Inspector Smith, who were apparently patrolling in the street not far from the scene and accompanied them in their official vehicle to assist in identifying the assailants.

[4] The appellant and one of his co-assailants were spotted whilst waiting to cross a street, within about three minutes after receiving the tip-off. Inspector Smith who was driving the police vehicle stopped the vehicle and the two assailants ran away in different directions. Sergeant Phungula alighted from the vehicle and gave chase. Sergeant Phungula testified that when he saw the appellant he noticed that the latter was in possession of something, which looked like a dark-coloured bag, concealed in his trousers and he decided to focus his attention on him. Inspector Smith followed in

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<sup>1</sup> Section 51(2) of the *Criminal Law Amendment Act* 105 of 1997 (Part II of Schedule 2) was held to be applicable.

<sup>2</sup> The conviction on count two was based on the doctrine of common purpose.

the police vehicle. The appellant entered a side street and on realising that Inspector Smith was behind him, changed direction and ran back towards the direction from which Inspector Phungula was approaching. At that stage, approximately two metres from him, Inspector Phungula observed that the appellant was carrying a black and red handbag. He saw him trying to throw it over a wall but it fell on the pavement next to the wall. Inspector Phungula then arrested the appellant. The bag was later retrieved by the two police officers and was later identified by the female complainant as her bag, which had earlier been snatched from her. He was also positively identified by the complainant as her attacker. Her passport and other personal belongings were found inside the bag.

[5] It is trite that it is the trial court which has the discretion to impose an appropriate sentence. A court on appeal should only interfere if the sentence is vitiated by a material misdirection.<sup>3</sup>

[6] The trial court rightly considered the uncontroverted evidence of the complainant that she was traumatised by the attack, the prevalence of the crime and also its impact on the South African tourism industry. These, however, were not the only considerations that should have been taken into account. There are mitigating factors. The court in the exercise of its discretion should as much as possible 'strive to achieve a judicious balance between all relevant factors "in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others"'.<sup>4</sup> In so doing the court should consider both mitigating and aggravating circumstances.

[7] The robbery for which the appellant was convicted consisted of handbag snatching with a threat of violence with a knife. No injuries were sustained by the complainant. The bag was recovered within a short space of time and none of its contents were missing. Consequently no permanent loss was suffered by the complainant.

[8] There was no evidence that the male colleague was subjected to any physical harm. It seems that he successfully resisted any attempts to disposses him of his

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<sup>3</sup> See *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

<sup>4</sup> *Moswathupa v The State* (168/11) [2011] ZASCA 172 para 4; *S v Banda* 1991 (2) SA 352 (BG) at 354E-G.

backpack. The whole incident was perpetrated in an amateurish manner and was, according to the evidence, perpetrated hastily and in a rush to flee away. An effective period of imprisonment of 20 years is a very severe punishment which should ordinarily be reserved for particularly heinous offences.<sup>5</sup>

[9] The robbery and the attempted robbery were both part of a continuous incident. The appellant was convicted on the attempted robbery on the basis of common purpose. It was, in my view, prudent for the court to seek an appropriate sentence for all of them taken together.<sup>6</sup>

[10] For the above reasons, a case has been made for this court to interfere with the sentence imposed. Although leave was granted only pertaining to the cumulative effect of the sentence, counsel submitted that we should interfere in relation to the sentence imposed in respect of count one, even though no leave had been granted in relation thereto. In effect counsel applied for leave to extend the grounds of appeal against sentence, which I am inclined to grant. In my view there is a basis to interfere.

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

- a. The appellant's appeal against sentence succeeds to the extent set out below.
- b. The order of the court below is set aside and substituted with the following:
  - (i) The sentence on count 1 is set aside and substituted with a sentence of 12 years' imprisonment.
  - (ii) The sentence on count two is confirmed.
  - (iii) It is ordered that the sentences on counts one and two should run concurrently.
  - (iv) The appellant is therefore sentenced to an effective term of 12 years' imprisonment.'

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<sup>5</sup> *Muller v The State* [2011] ZASCA 151; *Moswathupa v The State* (168/11) [2011] ZASCA 172.

<sup>6</sup> *S v Johaar* 2010 (1) SACR 23 (SCA) para 14.

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Z L L Tshiqi  
Judge of Appeal

APPEARANCES

APPELLANT:

Adv. A.D. Collingwood  
Instructed by Legal Aid  
Durban

RESPONDENT:

Adv. Ngcobo  
Instructed by the Director of Public Prosecutions,  
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