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

**JUDGMENT**

Case No: 442/12

In the matter between: Not Reportable

**JOHANNES PETRUS BASSON** **First Appellant**

**PIETER JOHANNES HENDRIK DU PLESSIS** **Second Appellant**

and

**THE STATE** **Respondent**

**Neutral citation:** *Johannes Petrus Basson v The State* (442/12) [2012] ZASCA 204 (30 November 2012)

**Coram:** MPATI P, SHONGWE JA and MBHA AJA

**Heard:** 7 November 2012

**Delivered:** 30 November 2012

**Summary:** **Criminal Procedure – sentence – multiple convictions – sentences ordered to run concurrently – portion of effective cumulative period of imprisonment ordered to run concurrently with previous sentence.**

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**ORDER**

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**On appeal from**: North Gauteng High Court, Pretoria (Preller J and Van Rooyen AJ, sitting as court of appeal):

(a) The appeal succeeds to the extent indicated in the following sub-paragraph;

(b) Paragraph 2 of the order of the court below is altered to read:

'Otherwise the appeal against sentence is dismissed, save that it is ordered that:

(i) in respect of the first appellant, the sentences imposed in counts 1, 2, 3, 5 and 6 shall run concurrently with the sentence in count 4, save that one (1) year of each of the sentences in counts 1, 2, 3, 5 and 6 shall be served after the completion of the sentence in count 4; and

(ii) in respect of the second appellant, the sentences in counts 1, 2, 5 and 6 shall run concurrently with the sentence in count 4, save that one (1) year of each of the sentences in counts 1, 2, 5 and 6 shall be served after the completion of the sentence in count 4.'

(c) It is further ordered that, in respect of the first appellant, 15 years of the cumulative sentence of 25 years' imprisonment shall be served concurrently with the sentence imposed on him by the Brits Regional Court on 29 May 2003, and, in respect of the second appellant, 12 years of the cumulative sentence of 24 years' imprisonment shall be served concurrently with the sentence imposed on him by the Brits Regional Court on 18 February 2003.

(d) To the extent necessary, all sentences altered by this court and the court a quo are backdated to the date of imposition of sentence.

(e) The effect of the order of this court, read with the order of the court a quo is therefore that the first appellant shall serve an effective term of imprisonment of 25 years and the second appellant an effective term of imprisonment of 24 years.

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**JUDGMENT**

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**MPATI P (SHONGWE J and MBHA AJA CONCURRING):**

[1] On 8 August 2003 the two appellants were convicted by the Pretoria Regional Court (the trial court) of four counts of robbery with aggravating circumstances (counts 1, 2, 4 and 5 respectively) and one of theft of a motor vehicle (count 6). In addition, the first appellant was convicted of one count of attempted murder (count 3). They were sentenced on 19 August 2005. In respect of each of counts 1, 2 and 5 each appellant was sentenced to 15 years' imprisonment. They were each sentenced to 20 years' imprisonment in respect of count 4 and five years' imprisonment in respect of count 6. The first appellant was sentenced to 10 years' imprisonment in respect of count 3.The sentences on count 2 were ordered to run concurrently with the sentences on count 1, while the sentences on count 5 were ordered to run concurrently with those in count 4. This meant that the first appellant would serve a total of 50 years' imprisonment and the second appellant a total of 40 years' imprisonment.

[2] The appellants' appeal to the Transvaal Provincial Division of the High Court (now North Gauteng High Court) against their sentences yielded good results for them. On 13 June 2005 that court (per Preller J, with Van Rooyen AJ concurring), exercising its inherent powers of review, altered the attempted murder conviction (count 3) to one of assault with intent to do grievous bodily harm, set aside the sentence imposed by the trial court and imposed a sentence of three (3) years' imprisonment. It then made the following order:

'[T]he sentences imposed on counts 2, 3, 4, 5 and 6 shall be served concurrently with the sentence imposed on count 1, save for in each case a sentence of 1 year which has to be served after the completion of the sentence on count 1. The nett effect thereof would be that the first appellant is sentenced to 20 years' imprisonment and the second appellant to 19 years' imprisonment.'

The court further ante-dated the sentences to 'the date on which the present sentences were imposed by the court a *quo* . . .' .

[3] The reference to the first and second appellants being sentenced to 20 years' and 19 years' imprisonment respectively is of course erroneous. In respect of count 4 they were each sentenced by the trial court to 20 years' imprisonment and thus a correct order should have been that the sentences on counts 1, 2, 3, 5 and 6 (in respect of the first appellant) and counts 1, 2, 5 and 6 (in respect of the second appellant) shall run concurrently with the sentences on count 4. Be that as it may, the correct position was that the first and second appellants were to serve 25 and 24 years' imprisonment respectively.

[4] On 9 March 2010 the appellants appeared, unrepresented, before Preller J seeking clarity as to whether sentences imposed on them by the Regional Court, Brits, in respect of separate convictions of robbery were also to run concurrently with the sentences substituted on appeal on 13 June 2005. The offences had been committed on 18 January 2002 in respect of the first appellant and 21 January 2002 in respect of the second appellant. The two appellants were charged separately. The first appellant was sentenced on 29 May 2003 to 15 years' imprisonment, while the second appellant was sentenced on 18 February 2003 to 12 years' imprisonment. (It appears that it was after the appellants' arrest or convictions that investigations linked them to the offences for which they were convicted and sentenced on 8 August 2003.) Preller J treated the appellants' 'enquiry' as an application for leave to appeal against the sentences imposed on them by the Brits Regional Court and granted them such leave. He was of the view that the cumulative effect of the sentences, ie those imposed by the Brits Regional Court and those substituted by him and Van Rooyen AJ on appeal, would be too severe.

[5] However, Preller J subsequently realised that he had had no authority to make the order he did on 9 March 2010 granting leave to appeal against the sentences imposed by the Brits Regional Court.[1] The matter came before him and Goodey AJ on 27 July 2011 when leave was sought, on behalf of the appellants, to appeal against the sentences substituted by the court a quo on appeal to it. The contention was that the appellants would argue that the sentences imposed by the court a quo should be ordered to run

[1] See *S v Zulu* 2003 (2) SACR 22 (SCA).

concurrently with the sentences imposed upon them by the Brits Regional Court. In the course of his judgment on the application for leave to appeal Preller J remarked that neither the court a quo (when it dealt with the appeal), nor the trial court (when it imposed sentence) was aware that the appellants were already serving other sentences. Since he had already expressed the view that the cumulative effect of the sentences substituted by the court a quo and those imposed by the Brits Regional Court was too severe, Preller J, with Goodey AJ concurring, granted the leave sought by the appellants.

[6] It seems to me that the observation made by the court a quo that the trial court was unaware of the fact that the appellants were already serving other sentences was wrong. The trial court said the following about the first appellant in its judgment on sentence:

'The prosecutor has proved previous convictions against you, and of note is one of robbery, which was committed in 2002, that is last year of which you are serving a term of imprisonment.'

And in respect of the second appellant it said:

'The prosecutor proved a previous conviction against you, and the commission thereof was on 21 January 2002 and therefore I will take note of this conviction. But for the purposes of section 51(2) of the Criminal Law Amendment Act I will treat you as a first offender.'

The trial court would have taken note of the fact that the second appellant was serving a sentence of 12 years' imprisonment that had been imposed on him in 2002.

[7] Before the appellants were invited to plead to the charges they were facing, the trial court warned them about the provisions of s 51 of Act 105 of 1997[2] (the minimum sentence legislation) which provide for a minimum sentence of 15 years' imprisonment for robbery with aggravating circumstances, unless there are substantial and compelling circumstances present that would entitle the court to deviate from the prescribed minimum sentence. It concluded, when imposing sentence, that 'there are no compelling circumstances warranting lesser sentences'.

[2] Criminal Law Amendment Act 105 of 1997.

[8] Before us counsel for the appellants submitted that the cumulative effect of the Brits sentences and the sentences substituted by the court a quo and taking account of the fact that all the crimes were part of a series, has resulted in a shockingly disproportionate sentence. Counsel accordingly contended that the cumulative effect of the sentences 'ought to be curbed' by way of an order directing that portion of the effective term of imprisonment in respect of each of the appellants run concurrently with the Brits sentences. Counsel for the State was not averse to such an order being made, but argued that in view of the seriousness of the crimes committed by the appellants the effective terms of imprisonment to be served by the first and second appellants should not be less than 30 years and 29 years respectively.

[9] What is clear from the judgment of the court below is that it intended the appellants to serve an effective term of imprisonment of 20 years and 19 years respectively. It expressed itself thus:

'If one has regard to the fact that the heaviest sentence that a court can impose is imprisonment for life, which is effectively imprisonment for 25 years, it is clear that sentences of 50 years and 40 years are inappropriate. In my view the needs of the case will be met if the first appellant is sentenced to 20 years' imprisonment and the second appellant to 19 years.'

Counsel for the appellants urged us to strive to achieve this goal by setting aside the sentence of 20 years' imprisonment imposed in respect of count 4 and to substitute it with one of 15 years' imprisonment. But a reading of the judgment of the court a quo reveals that the court had no intention of interfering with the sentence imposed by the trial court in respect of count 4. This is clear from the following passage in its judgment:

'There is a distinction between this case [count 4] and the others in that not only the truck was robbed but also a safe containing R28 000 in cash which was removed with a forklift from the wall to which it was affixed.

Sentence is in the first place a matter which is in the discretion of the trial court. I cannot say in the circumstances that that sentence is startlingly inappropriate, or that the magistrate misdirected himself in any respect in coming to the decision that 20 years' imprisonment was a proper sentence.'

I can find no fault with the view expressed by the court a quo and counsel did not suggest that it misdirected itself in any way. Perhaps, the court a quo's 'error' was in ordering one

year ‘in respect of each sentence’ not to run concurrently with the sentence on count one.

[10] The only ground upon which the court a quo granted leave against the sentences it substituted was ‘oor die vraag of die vonnis [in die Brits sake] samelopend uitgedien moet word met die vonnisse wat hulle tans uitdien’. The court indicated in its judgment that it thought that that should be the case, but it was careful to acknowledge that its view would not be binding on this court. Counsel for the appellants submitted that the effect of the failure on the part of the court a quo to consider the cumulative effect of all the sentences (including the Brits sentences) imposed on the appellants is that they must serve terms of imprisonment of 40 and 36 years respectively. At the time of sentencing by the trial court the first and second appellant were 37 and 43 years of age respectively, which means that absent remissions or parole they will be 77 and 79 years old respectively at the end of their imprisonment. That, counsel contended, would be very harsh on them indeed.

[11] The appellants were convicted of very serious offences to which they sensibly pleaded guilty. In count 1 the two appellants, pretending to be traffic officers, stopped a Cantor truck driven by a certain Mr Amon Mpebeko on 11 January 2001 on the N1 between Pretoria and Potgietersrus. They then forced the driver, using a firearm, into the back of their own vehicle, after which two co-perpetrators, Messrs William Kekana and Moses Tshabalala, drove off in the truck to a certain farm or plot with Mr Mpebeko’s co-driver. In count 2 the two appellants were involved in a well orchestrated robbery of a Toyota truck ‘at or near Brits and Rosslyn Roads’. The second appellant had dropped off the first appellant and a Mr Colin Meets (Meets) at a certain spot and then went to position himself such that he could pick a vehicle that they could rob. From his chosen spot he telephoned his two companions and told them which truck to stop. The first appellant and Meets, acting as traffic officers, stopped the Toyota truck referred to above and forcefully dispossessed the driver, Mr Markus Moribe, of it. The driver was kicked with booted feet, tied up and placed in the back of the truck, which was then driven off to the farm or plot referred to above. A firearm was used during the robbery which occurred on 19 June 2001.

[12] As has been mentioned earlier, only the first appellant was involved in count 3. During the course of the robbery in count 2 he stabbed Mr Moribe once with a knife in the

stomach after the latter had attempted to untie himself. He was thereafter thrown out of the moving truck. In count 4 the two appellants, together with Meets, robbed Mr Sybrand Marais, a guard at a cold storage concern in Daspoort, of a Nissan truck and a safe containing R28 000, which were under his lawful control. A forklift was used to break a wall in order to remove the safe. In the process Mr Marais was assaulted with fists and kicked with booted feet and his arm cut with a bolt cutter. The crime was committed on 1 July 2001. In count 5 the same modus operandi was used by the appellants and Meets as in count 2 to stop a Mercedes Benz truck along Pelindaba Road, Renosterspruit, on 28 August 2001, which was then forcefully removed from the lawful possession of Mr Gladman Buys. A firearm was used in the commission of the offence and Mr Buys was tied to a tree in the bush near the road. In count 6 the two appellants, in the company of Meets, stole a Man truck from the premises of PHD Gearbox Centre on 15 October 2001. They jumped over the fence, broke the ignition of the truck and, after the first appellant had broken the lock to the gate so as to open it, they drove the truck to the farm or plot referred to earlier.

[13] It appears that on the day of sentencing the first appellant was divorced but had two children aged 11 and 8 years. He had a standard eight education and had been retrenched from stable employment just before he embarked on the criminal activities for which he had been arraigned. His wife was unemployed and he was unable to provide for his children. It was suggested, before the trial court in mitigation of sentence, that he 'decided on the life of crime' after he had been unsuccessful in securing another job. The second appellant was married with three children, aged 13, 16 and 17 years respectively. They were all at school. He had also been retrenched and turned to crime when he was unable to find gainful employment.

[14] I agree with counsel for the State that being unemployed is no justification for anyone to turn to crime. The robbery counts were accompanied by, it would seem, unnecessary violence, where one person was stabbed in the stomach and thrown out of the moving truck of which he was robbed; one was cut with a bolt cutter and others were mercilessly assaulted. It is so that the court a quo may have intended the appellants to

serve cumulative sentences of 20 and 19 years' imprisonment respectively, but the effect of its order was that they were to serve terms of imprisonment of 25 and 24 years. Considering all the factors I have referred to above, including the appellants' personal circumstances, it would not be fair to society, in my view, whose interests must be taken into account, to reduce the effective terms of imprisonment that come out of the order of the court below. I agree, though, that if the sentences in the Brits matter are added to the later sentences the cumulative effect would result in too severe a punishment for the appellants. I have no doubt that had they been charged with all the offences (including the Brits charges) together they would not have been ordered to serve a cumulative term of imprisonment of more than 25 years. To achieve that goal an order must be made that part of the sentences imposed by the trial court and the court a quo run concurrently with the Brits sentences.

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

(a) The appeal succeeds to the extent indicated in the following sub-paragraph;

(b) Paragraph 2 of the order of the court below is altered to read:

'Otherwise the appeal against sentence is dismissed, save that it is ordered that:

(iii) in respect of the first appellant, the sentences imposed in counts 1, 2, 3, 5 and 6 shall run concurrently with the sentence in count 4, save that one (1) year of each of the sentences in counts 1, 2, 3, 5 and 6 shall be served after the completion of the sentence in count 4; and

(iv) in respect of the second appellant, the sentences in counts 1, 2, 5 and 6 shall run concurrently with the sentence in count 4, save that one (1) year of each of the sentences in counts 1, 2, 5 and 6 shall be served after the completion of the sentence in count 4.'

(c) It is further ordered that, in respect of the first appellant, 15 years of the cumulative sentence of 25 years' imprisonment shall be served concurrently with the sentence imposed on him by the Brits Regional Court on 29 May 2003, and, in respect of the second appellant, 12 years of the cumulative sentence of 24 years' imprisonment shall be served concurrently with the sentence imposed on him by the Brits Regional Court on 18 February 2003.

(d) To the extent necessary, all sentences altered by this court and the court a quo are backdated to the date of imposition of sentence.

(e) The effect of the order of this court, read with the order of the court a quo is therefore that the first appellant shall serve an effective term of imprisonment of 25 years and the second appellant an effective term of imprisonment of 24 years.

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President

APPEARANCES

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| For the Appellants: | L A van Wyk |
| | Instructed by: |

Pretoria Justice Centre
Bloemfontein Justice Centre

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| For the Respondent | J P van der Westhuysen<br>Instructed by:<br>Director of Public Prosecutions, Pretoria<br>Director of Public Prosecutions,<br>Bloemfontein |