SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 627/12

Not Reportable

In the matter between:

SIBONGUMUSA HENRY ZONDO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zondo v S* (627/12) [2012] ZASCA 51 (28 March 2013)

Coram: Maya, Shongwe, Leach JJA et Swain, Mbha AJJA

Heard: **14 March 2013**

Delivered: **28 March 2013**

Summary: **Criminal procedure - sentence – imprisonment – cumulative effect of a sentence of a total of 39 years imprisonment in respect of two separate convictions for robbery committed with aggravating circumstances - sentence held to induce a sense of shock and reduced accordingly.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Southwood et Patel JJ sitting as court of appeal):

(a) The appeal against sentence is upheld to the extent indicated below.

(b) Paras 2 and 3 of the high court's order are set aside and are substituted with the following:

'2. The appeal is upheld in respect of the sentence of 10 years' imprisonment imposed in respect of the convictions of attempted murder. Such sentence is set aside and substituted with a sentence of seven years' imprisonment.

3. The sentence of seven years' imprisonment imposed for robbery with aggravating circumstances (count 1), and the sentence of 7 years' imprisonment in respect of the nine convictions for attempted murder (counts 4-12), are ordered to run concurrently.'

JUDGMENT

MBHA AJA (MAYA, SHONGWE, LEACH JJA ET SWAIN AJA CONCURRING)

[1] Arising out of a cash in transit heist and related events more fully described below, the appellant was convicted in the Secunda Regional Magistrate Court (the trial court) on a count of robbery with aggravating circumstances (count 1), a count of robbery involving the theft by force of a motor vehicle (count 2), ten counts of attempted murder (counts 3-12), one count of attempted robbery of another motor vehicle (count 13) and four counts of unlawful possession of firearms consisting of rifles, handguns and ammunition. On 10 May 2002 he was sentenced to seven years' imprisonment for robbery with aggravating circumstances (count 1), three years' imprisonment for robbery and attempted robbery (counts 2 and 13 having been taken together for purposes of sentence), ten years'

imprisonment for the ten counts of attempted murder and five years imprisonment for the four counts of unlawful possession of firearms and ammunition. It was ordered that the sentences imposed for the ten counts of attempted murder and unlawful possession of firearms and ammunition should be served concurrently. Effectively, he was to serve 20 years' imprisonment.

[2] The appellant's subsequent appeal to the North Gauteng High Court, Pretoria (Southwood and Patel JJ), against both the conviction and sentence, was partially successful. That court upheld the appeal against the convictions in respect of robbery (count 2), one of the counts of attempted murder (count 3), the count of attempted robbery (count 13) and counts of unlawful possession of firearms and ammunitions (counts 14-17). The sentence of seven years imprisonment imposed in respect of count 1 was left unaltered. However, the sentence of ten years' imprisonment in respect of the remaining convictions for attempted murder (counts 4-12) was set aside and substituted with a sentence of seven years' imprisonment. In terms of s 282 of the Criminal Procedure Act 51 of 1977 (the Act), the altered sentence was antedated to 10 May 2002. Effectively, the appellant was to serve 14 years' imprisonment from that date.

[3] This appeal, with leave of the court below, is against the sentence only. The cumulative effect of the sentence of 14 years imprisonment imposed by the high court, taken together with the sentence of 25 years' imprisonment which was imposed on the appellant on 25 February 2000 in respect of an earlier conviction and which he was already serving when he was tried by the trial court, resulted in him being obliged to serve a total sentence of 39 years imprisonment. This the appellant argued, is shockingly inappropriate.

[4] Before considering the issues for determination in this appeal, it is necessary to briefly set out the factual background of the matter. The evidence led before the trial court disclosed that on 2 December 1997, at the Secunda Business Centre, the appellant, then a police officer in the employ of the South African Police Service holding the rank of constable, together with about 14 other men who were all armed with assault rifles and handguns, robbed security officers of Khulani Springbok Patrols of two boxes containing an undisclosed amount of money and a .38 special revolver. This robbery, which formed the basis of count 1 in the charge sheet, occurred as the security officers

were leaving the premises of United Bank after collecting the boxes. The perpetrators fled in two LDV vehicles. Numerous members of the police and traffic officers chased the robbers, who then started firing back in order to avoid arrest. Consequently, at least one police officer and member of the public sustained gunshot wounds. It is these shooting incidents which gave rise to the counts of attempted murder. The gang also robbed one Burman Wessels Pretorius of his Nissan Maxima and also attempted to rob Solomon Nkosi of his employer's Toyota Conquest vehicle: the basis of counts 2 and 13 respectively. The State led the evidence of 27 witnesses, including that of one Richard Khuzwayo, one of the perpetrators who later became the State's main witness. As stated above, the appellant was subsequently convicted on all 17 charges brought against him.

[5] After conviction and when the appellant was leading evidence in mitigation, he brought it to the attention of the trial court that he was already serving a sentence of 25 years' imprisonment for a robbery with aggravating circumstances committed on 15 November 1998.

[6] In imposing a sentence of 20 years imprisonment, the trial court appropriately considered the triad as espoused in *S v Zinn.*[1] Having found, rightly, that the Criminal Law Amendment Act 105 of 1997 was not applicable, (the Act only came into operation on 1 May 1998) the trial court concluded that the aggravating circumstances far outweighed the mitigating factors, in particular because the appellant was a police officer who was in a position of trust to the public; that the robbery was planned well in advance and executed with military precision; firearms were used; and the robbers, instead of handing themselves over when confronted by the police, chose to shoot back at their pursuers thus endangering the lives not only of the police but of members of the public as well.

[7] In my view, the trial court erred, however, in omitting to consider the appellant's request that whatever sentence was going to be imposed had to be ordered to run concurrently with the sentence of 25 years' imprisonment that he was already serving at the time. The high court erroneously perpetuated this. It appears from its judgment in granting leave to appeal that the fact that the appellant was serving 25 years' imprisonment was not drawn to its attention during argument and that in imposing the

[1] *S v Zinn* 1969 (2) SA 537 (A).

sentences that it did it took no account of the fact that its sentence would lead to a cumulative effective sentence of 39 years' imprisonment.

[8] The appellant was 37 years old when he was sentenced by the trial court, on 10 May 2007. This means that he will be 76 years old by the time he completes serving his sentence. This appears to have completely escaped the attention of the trial court when it imposed a sentence of 20 years' imprisonment on him. The court a quo also ignored this factor when it reduced that sentence to 14 years' imprisonment, but allowed it to run consecutively with the sentence of 25 years' imprisonment imposed for the robbery committed in November 1998. Counsel for the respondent conceded, rightly, that 39 years' imprisonment is a long period of incarceration and does, considering all the circumstances of the case, induce a sense of shock.

[9] This court has repeatedly warned against excessively long sentences being imposed by trial courts. In *S v Mhlakaza*[2] the court had to consider whether sentences of imprisonment, which are cumulatively far in excess of 25 years, are proper. Harms JA, dealing with the element of deterrence, noted that although it remained, according to judicial precedent, an important consideration when imposing sentence, its effectiveness in deterring others from committing (similar) offences was unclear. He further stated that '(a)s far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is *always* proportionate to its length' before going on to state that a lengthy term of imprisonment would serve none of the purposes of punishment and would simply serve to appease public opinion. He pointed out, accordingly, that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption.[3] See also: *S v Skenjana* 1985 (3) SA 51 (A) at 55 C-D; *S v Siluale* 1999 (2) SACR 102 (SCA) at 106g-107a; *S v Bull*; *S v Chavulla* 2001 (2) SACR 681 (SCA) para 22 and *S v Matlala* 2003 (1) SACR 80 (SCA) para 7-3.

[10] The trial court and the court a quo misdirected themselves in the manner demonstrated above, thus warranting this court to interfere with the sentence. I must, however, stress that this must not in any way be construed to underplay or minimize the

[2] 1997 (1) SACR 515 SCA at 519 g.
[3] At 524 a.

gravity and seriousness of the offences the appellant committed. These were adequately highlighted by the trial court and I see no need to repeat what has already been said in this regard. I need also mention that the other robbery in respect of which the appellant was sentenced to 25 years imprisonment was committed in November 1998 whilst he was out on bail after his arrest in connection with this case, on 3 February 1998.

[11] I am also wary of being seen to be creating an unacceptable precedent that an accused person could go on a criminal spree committing separate instances of serious crimes, but effectively being punished for only one of them. For this reason, I am of the view that ordering the two sentences to run concurrently in their entirety would not only send out a wrong message. It would in effect defeat the purpose of adequately punishing the appellant for his conduct. At the same time, the approach I intend adopting in correcting the misdirection by both the trial and the court a quo will go a long way to assuage the cumulative effect of a 39 years period of imprisonment imposed on the appellant.

[12] As I have mentioned above, the court a quo left unaltered the sentence of seven years for robbery with aggravating circumstances and imposed a further seven years' imprisonment for all the counts of attempted murders taken together. I am of the view that those sentences are, in the circumstances of the case, justified. Nevertheless, I will order that they run concurrently. The appellant will effectively serve seven years' imprisonment, but this sentence shall run after the sentence of 25 years' imprisonment imposed in February 2000.

[13] Two further aspects need to be addressed. First, in para 2 of its order the high court erred by referring to 10 counts of attempted murder for which a sentence of seven years' imprisonment was imposed. In the light of the appellant's successful appeal in regard to his conviction on count 3, there are in fact only nine counts of attempted murder in respect of which he has been convicted. This error can be corrected in our order below.

[14] Secondly, and more importantly, in para 3 of its order the high court, acting under s 282 of the Criminal Procedure Act, antedated the sentences it imposed to 10 May 2002 being the date sentence had been imposed by the trial court. Given that the appellant

was already serving his sentence of 25 years' imprisonment at that time, a fact which had escaped the high court, its direction in that regard is both meaningless and inappropriate and should be set aside.

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

(a) The appeal against sentence is upheld to the extent indicated below.

(b) Paras 2 and 3 of the high court's order are set aside and are substituted with the following:

'2. The appeal is upheld in respect of the sentence of 10 years' imprisonment imposed in respect of the convictions of attempted murder. Such sentence is set aside and substituted with a sentence of seven years' imprisonment.

3. The sentence of seven years' imprisonment imposed for robbery with aggravating circumstances (count 1), and the sentence of 7 years' imprisonment in respect of the nine convictions for attempted murder (counts 4-12), are ordered to run concurrently.'

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ACTING JUDGE OF APPEAL

APEARANCES:

FOR APPELLANT:	IN PERSON
FOR RESPONDENT:	J. J. KOTZE Instructed by: The National Director of Public Prosecutions, Pretoria The National Director of Public Prosecutions, Bloemfontein