THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 709/2022

In the matter between:

VUSI MABENA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mabena v The State* (Case no 709/22) [2024] ZASCA 89 (7 June 2024)

Coram: MEYER, WEINER and KGOELE JJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 7 June 2024.

Summary: Criminal Law – Sentencing – Convictions of robbery with aggravating circumstances and attempted murder – whether sentence for each conviction should have been ordered to run concurrently.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Chesiwe AJ, with Carelse J concurring, sitting as court of appeal):

1. The late filing of the record is condoned and the appeal is reinstated.
2. The appeal against sentence succeeds.
3. Paragraph 1 of the order of the high court is set aside and replaced with the following:

   '1.1 The appeal of the first appellant against conviction is dismissed.

   1.2 The appeal of the first appellant against sentence succeeds.

   1.3 The order of the Regional Court for the Regional Division of Gauteng, Johannesburg on 31 July 2014, in relation to the sentence imposed upon accused no 1 is set aside and replaced with the following:

   (a) Accused no 1 is sentenced to 15 years' imprisonment pursuant to his conviction of robbery with aggravating circumstances (count no 1);

   (b) Accused no 1 is sentenced to 5 years' imprisonment pursuant to his conviction of attempted murder (count no 3);

   (c) The sentence of 5 years' imprisonment is to run concurrently with the sentence of 15 years' imprisonment.'

JUDGMENT

Meyer JA (Weiner and Kgoele JJA concurring):

[1] In the morning on 5 March 2010, at the Blairgowrie Shopping Centre, two armed robbers entered the Nashua Mobile shop and, wielding their firearms, robbed the owner of a Sony Ericson cellphone, a laptop computer, airtime vouchers, cash, a gold chain and a wallet that he had in his possession. When they fled the shop, they were chased by two ADT security guards at whom each robber fired one gunshot. The ADT security guards overwhelmed them and recovered all the items they had stolen except the cellphone. They held the robbers until police officers arrived who arrested them.

The two robbers were identified as the appellant, Mr Vusi Mabena, and his co-accused, Mr Mpumelelo Ncube.

[2] On 30 July 2014, the appellant and his co-accused were convicted by the Regional Court, Johannesburg, *per* Regional Magistrate Mr Louw (the trial court), of robbery with aggravating circumstances and attempted murder. A minimum sentence of 15 years' imprisonment in the case of a first offender and 20 years' imprisonment in the case of a second offender for the crime of robbery with aggravating circumstances should, in terms of s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997,[1] be imposed by the court, unless the court finds that substantial and compelling circumstances exist.[2]

[3] The next day the trial court sentenced the appellant to 15 years' imprisonment and his co-accused to 25 years' imprisonment pursuant to their convictions of robbery with aggravating circumstances, and each to five years' imprisonment pursuant to their convictions of attempted murder. The trial court ordered the sentence of 5 years' imprisonment to run concurrently with the sentence of 25 years' imprisonment only in respect of the appellant's co-accused. The trial court granted the appellant and his co-accused leave to appeal their convictions and sentences to the full bench of the Gauteng Division of the High Court, Johannesburg (the high court).

[4] On 30 June 2017, the high court (Chesiwe AJ with Carelse J concurring) dismissed the appeals of the appellant and his co-accused against their convictions and sentences. The high court appears to have misinterpreted the sentence imposed by the trial court. It correctly held the trial court sentenced the appellant to 15 years'

---

[1] Section 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 provides:
'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
(a) Part II of Schedule 2, in the case of-
(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

[2] Section 51(3)*(a)* of the Criminal Law Amendment Act 105 of 1997 provides:
'(3)*(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections. it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

imprisonment pursuant to his conviction of robbery with aggravating circumstances, and to five years' imprisonment pursuant to his conviction of attempted murder. It incorrectly found that the trial court had ordered the appellant's sentence of five years' imprisonment to run concurrently with his sentence of 15 years' imprisonment and that '[t]he effective sentence in respect of the first appellant [the appellant in this Court] was 15 years' imprisonment'.

[5] The high court held that the trial court duly considered the triad factors[3] in sentencing the appellant: the appellant's person, the crimes committed by him, and the interests of society. Due consideration was also given to the mitigating and aggravating factors present. The high court held that that there was no reason to interfere with the sentences imposed upon the appellant: the trial court exercised its sentencing discretion judicially and there was not a disparity between the sentences imposed and the ones that ought to have been imposed.[4] The present appeal against sentence is with leave of this Court.

[6] It is clear that the trial court did not order the sentences to run concurrently and the high court erred in making the finding that the trial court had so ordered. Clarity accordingly becomes necessary. Two weighty factors that compel the conclusion that the trial court should have ordered the sentence of five years' imprisonment for attempted murder and the sentence of 15 years' imprisonment for robbery with aggravating circumstances to run concurrently, are these: First, the attempted murder was committed immediately after the robbery while the appellant and his co-accused were trying to flee from the scene of the robbery. The two crimes committed by the appellant are thus closely related in terms of time and locality. Second, the appellant spent four years and four months in prison pending the finalisation of the criminal trial. The trial court failed to give proper consideration to the cumulative effect of the two sentences, which failure amounts to a misdirection.[5]

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

---

[3] In *S v Zinn* 1969 (2) SA 537 (A) at 540G, it was held that in imposing a sentence which is considered suitable in the circumstances, the court must take into consideration the triad, consisting of the crime, the offender and the interests of society.
[4] *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (1) SACR 469 (SCA) para 12.
[5] *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) paras 9 and 11.

1. The late filing of the record is condoned and the appeal is reinstated.
2. The appeal against sentence succeeds.
3. Paragraph 1 of the order of the high court is set aside and replaced with the following:

   '1.1 The appeal of the first appellant against conviction is dismissed.

   1.2 The appeal of the first appellant against sentence succeeds.

   1.3 The order of the Regional Court for the Regional Division of Gauteng, Johannesburg on 31 July 2014, in relation to the sentence imposed upon accused no 1 is set aside and replaced with the following:

   (a) Accused no 1 is sentenced to 15 years' imprisonment pursuant to his conviction of robbery with aggravating circumstances (count no 1);

   (b) Accused no 1 is sentenced to 5 years' imprisonment pursuant to his conviction of attempted murder (count no 3);

   (c) The sentence of 5 years' imprisonment is to run concurrently with the sentence of 15 years' imprisonment.'

_____

P MEYER
JUDGE OF APPEAL

Heads prepared by:

For appellant:	M P Milubi
Instructed by:	Legal Aid South Africa, Johannesburg Local Office. Legal Aid South Africa, Bloemfontein Local Office.