THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1178/2016

In the matter between:

KARABO RANTLAI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rantlai v The State* (1178/2016) [2017] ZASCA 106 (13 September 2017)

Coram: Bosielo, Seriti and Saldulker JJA and Plasket and Tsoka AJJA

Heard: 17 August 2017

Delivered: 13 September 2017

Summary: Appeal against sentence – appellant convicted on three counts of robbery read with s 51(2)(*a*) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007 and one count of unlawful possession of a firearm and one of unlawful possession of ammunition – all three counts of robbery were taken together for purposes of sentence – the appellant was sentenced to a composite sentence of 20 years' imprisonment – the conviction in respect of one count of robbery set aside on appeal – the original sentence not altered – whether the composite sentence imposed on appellant was appropriate.

ORDER

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

1 The appeal against sentence in respect of counts 2 and 3 is upheld.

2 The sentence imposed by the trial court in respect of counts 1, 2 and 3 is set aside and replaced by the following:

'(a) In respect of count 2, the appellant is sentenced to 15 years' imprisonment.

(b) In respect of count 3, the appellant is sentenced to 15 years' imprisonment.'

3 In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of count 2 is ordered to run concurrently with the sentence imposed in respect of count 3.

4 The sentences of imprisonment of 15 years in respect of the unlawful possession of a semi-automatic firearm, of which 11 years is wholly suspended for a period of 5 years on condition that the accused is not convicted of possession of an unlicensed firearm in contravention of the Firearms Control Act, and which offence is committed during the period of suspension where direct imprisonment is imposed without the option of a fine, together with imprisonment for 1 year imposed in respect of the unlawful possession of ammunition remain unaltered. Effectively the appellant will undergo imprisonment for 5 years.

5 Taking into consideration, the sentences in respect of counts 4 and 5, the accused will therefore undergo imprisonment for an effective period of 20 years.

6 In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of paragraph 2 above, is antedated to 3 May 2012.

JUDGMENT

Bosielo JA (Seriti and Saldulker JJA and Plasket and Tsoka AJJA concurring):

[1] The appellant was convicted in the Regional Court, Orlando on three counts of robbery with aggravating circumstances read with s 51(2)(*a*) of the Criminal Law Amendment Act 105 of 1997 (the Act) as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, one count of unlawful possession of a semi-automatic firearm (count 4) and one count of unlawful possession of ammunition (count 5). He was sentenced to 20 years' imprisonment on all three counts of robbery with aggravating circumstances. The trial court took all three counts together for purposes of sentence. In respect of count 4, the appellant was sentenced to 15 years' imprisonment with 11 years wholly suspended for 5 years on suitable conditions. This meant that he was sentenced to an effective term of 4 years' imprisonment. In respect of count 5, he was sentenced to 1 year imprisonment. His effective sentence was thus 25 years' imprisonment.

[2] The appellant failed in his application for leave to appeal before the regional magistrate against both his conviction and sentence. Upon leave to appeal having being refused, he filed a petition with the Gauteng Local Division, Johannesburg for leave to appeal. The court a quo granted him leave to appeal against his conviction only.

[3] The appellant's appeal before the court a quo succeeded partly in that the conviction on count 1 was set aside. However, the court below left the sentence of an effective 25 years' imprisonment unaltered. Aggrieved by this, he then petitioned this Court for special leave to appeal against the order of the court a quo which essentially confirmed the sentence imposed by the regional magistrate. This Court granted the appellant special leave to appeal against the sentence to this Court. Hence the appeal before us.

[4] Because this appeal turns on a narrow legal issue, it is not necessary to deal with the evidence tendered. The appellant's counsel attacked the sentence on two grounds. The first ground was that the regional magistrate failed to investigate and consider if there were substantial and compelling circumstances present, as required by s 51(3) of the Criminal Law Amendment Act 105 of 1997, which could justify a departure from the minimum sentence prescribed by s 51(2)(*a*) of the Act. In support of his submissions, he relied on the following facts, namely the appellant's youthfulness; that there were no injuries caused to the complainants during the robberies; that only two cellular phones were taken, and that the appellant had spent almost a year in prison awaiting his trial. He submitted that these facts, considered cumulatively, are weighty and substantial enough to justify a departure from the minimum sentence of 15 years' imprisonment.

[5] The second attack was against the globular sentence of 20 years' imprisonment imposed on the appellant in respect of three counts of robbery which were considered together for purposes of sentence. The attack was premised on the basis that, notwithstanding the fact that the conviction in count 1 (robbery with aggravating circumstances) was set aside by the court below, the court below did not take that into account when considering an appropriate

the sentence. In fact it left the sentence imposed by the regional magistrate intact. In simple terms the argument is that the appellant is still serving a globular sentence of 20 years' imprisonment as if the conviction on count 1 still stands.

[6] On the contrary, the respondent's counsel submitted, regarding the first ground, that the facts and personal circumstances put forward by the appellant did not qualify as substantial and compelling circumstances justifying a departure from the minimum sentence prescribed by the Act. However, he conceded that the composite sentence of 20 years' imprisonment appeared, in the circumstances of this case, to be undesirable, inappropriate and impractical as it was impossible to ascertain how to apportion the sentence in respect of each count of robbery. To resolve this conundrum, he submitted that it would be practical and just if the globular sentence imposed by the trial court in respect of counts 1, 2 and 3 could be set aside and substituted with a sentence of 15 years' imprisonment in respect of counts 2 and 3. He conceded further that in order to ameliorate the severity of the sentence, the sentences imposed should be ordered to run concurrently.

[7] Once again, this appeal raises the contentious issue of the desirability and practicality of imposing a globular sentence where an accused who pleaded not guilty to multiple counts is partly successful in his appeal against one or other convictions as it happened in this case. The real question facing us as a court of appeal is, how do we undo the globular sentence of 20 years' imprisonment to enable the appellant to get the benefit of an acquittal on count 1, for, should we do nothing about it, it would mean that his success on appeal is nothing but a pyrrhic victory.

[8] Having listened to both counsel, I am not persuaded that the facts put before us by the appellant's counsel qualify as substantial and compelling as interpreted by our courts, in particular in the seminal judgment of *S v Malgas* 2001 (1) SACR 469 (SCA) at paras 20-22. It suffices to state that they are ordinary circumstances which do not qualify as cogent or sufficiently weighty to justify a departure from a sentence peremptorily prescribed by the legislature for the kind of offences for which the appellant was convicted. To put it differently, in the circumstances it appears to me that the prescribed sentences in respect of counts 2 and 3 are not disproportionate to the crimes, the criminal and the legitimate needs of society. I therefore find that there is no merit in the appellant's counsel's submission.

[9] It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See *S v Young* 1977 (1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences particularly where an accused was convicted after having pleaded not guilty but subsequently having the conviction on some counts set aside on appeal. See *Director of Public Prosecutions, Transvaal v Phillips* [2011] ZASCA 192; 2013 (1) SACR 107 (SCA) para 27 where Petse AJA stated:

'The practice of imposing globular sentences for multiple counts is generally an undesirable one.'

See also *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 10.

[10] As it is clear from *Young*, *Kruger* and *Phillips* that there is no absolute bar against imposing globular sentences, there seems to be some unanimity in

our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances. See *S v Nkosi* 1965 (2) SA 414 (C) at 416C. This is because there will be circumstances where for instance it can be used to ameliorate the effect of sentences which individually may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused pleaded guilty on multiple offences which are closely connected in terms of time and common facts and in respect whereof the individual sentences may, cumulatively amount to a sentence that induces a sense of shock. There may of course be other cases where such a sentence might be appropriate.

[11] The serious difficulties which are likely to be caused by imposing such a sentence were highlighted as far back as *Nkosi* (supra) where the court stated at 415-416:

'In the vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each offence and then by scaling down the sentences if the cumulative effect renders the total unreasonable. An exception would seem to arise in cases where it is decided to impose a reformatory sentence or a sentence of whipping, and there may be other such cases. But as pointed out by Van Den Heever J. (as he then was), in *R v Frankfort Motors (Pty) Ltd.*, 1946 OPD. 255 at pp. 267-8, the imposition of a globular sentence often causes difficulties on appeal or on review and this seems to be the reason underlying the practice in England.'

The same misgivings were expressed by Trollip JA in *S v Young* at 610 as follows:

'Appellant's counsel contended that counts 1 to 4 should be taken together for the purpose of imposing one sentence thereon, and that counts 5 to 7 should be dealt with similarly. That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act, 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed

is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg., *S v Nkosi*, 1965 (2) SA 414 (C), where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review, especially if the convictions on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable. However, in the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; and in the ultimate result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant.'

[12] As alluded to already, the main argument in this appeal is that because of the globular sentence of 20 years' imprisonment in respect of all three counts of robbery, the appellant was wrongly denied the benefit which should have redounded to him when count 1 was set aside. It was submitted that the court below erred in not considering the sentence in respect of counts 2 and 3 afresh after it set aside the conviction in respect of count 1.

[13] It is true that if the appellant was sentenced individually on each count to imprisonment for 15 years as prescribed by the Act, the sentence of imprisonment in respect of count 1 on which he was acquitted on appeal, would have had to fall away. Once the conviction on one count of robbery with aggravating circumstances was set aside, the court below was obliged to reconsider the sentence and determine afresh an appropriate sentence for the remaining two counts. That did not happen. As a result, the appellant is now serving the same sentence as if the conviction on one count of robbery was never set aside.

[14] The globular sentence of 20 years' imprisonment for all three counts is clearly impractical and unworkable in this case. It is difficult to try to apportion the sentence to individual counts. What the trial court should have done was to sentence the appellant separately for each count and to invoke s 280(2) of the Criminal Procedure Act 51 of 1997 (the CPA) to make an order that the sentences run concurrently, if it wanted to ameliorate the severity of the three sentences. See *S v Nkosi* at 415H.

[15] I find it apposite to reiterate the warning expressed in *Young*, *Kruger*, *Nkosi* and recently *Phillips* that, although there is no bar to imposing a globular sentence, it is imperative for judicial officers to consider the desirability of such a sentence carefully before imposing it, bearing in mind the kind of problems it may cause. This case is a classical example of the kind of serious if not intractable problems which will occur on appeal where some counts are set aside and there is a need to alter the globular sentence imposed. We are now faced in this appeal with the difficult task of having to unscramble a scrambled egg. Although useful at times, such a sentence must be imposed in exceptional circumstances only.

[16] It is clear to me that the result of what happened in this case amounts to an injustice. An accused cannot be made to serve a sentence for a conviction that has been set aside. It follows that such a sentence cannot stand as its legal basis fell away when the conviction for which it was imposed was set aside. It follows that the court below erred in failing to reconsider the sentence. On this basis, the court is at liberty to reconsider the cumulative effect of the sentence imposed on the appellant afresh.

[17] Both counsel were agreed that the most practical solution to this rather intractable problem, given the time lapse and possible prejudice to the appellant is to set aside the globular sentence and to sentence the appellant afresh in respect of counts 2 and 3 and to make an order that the sentences run concurrently. I agree.

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

1 The appeal against sentence in respect of counts 2 and 3 is upheld.

2 The sentence imposed by the trial court in respect of counts 1, 2 and 3 is set aside and replaced by the following:

'(a) In respect of count 2, the appellant is sentenced to 15 years' imprisonment.

(b) In respect of count 3, the appellant is sentenced to 15 years' imprisonment.'

3 In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of count 2 is ordered to run concurrently with the sentence imposed in respect of count 3.

4 The sentences of imprisonment of 15 years in respect of the unlawful possession of a semi-automatic firearm, of which 11 years is wholly suspended for a period of 5 years on condition that the accused is not convicted of possession of an unlicensed firearm in contravention of the Firearms Control Act, and which offence is committed during the period of suspension where direct imprisonment is imposed without the option of a fine, together with imprisonment for 1 year imposed in respect of the unlawful possession of ammunition remain unaltered. Effectively the appellant will undergo imprisonment for 5 years.

5 Taking into consideration, the sentences in respect of counts 4 and 5, the accused will therefore undergo imprisonment for an effective period of 20 years.

6 In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of paragraph 2 above, is antedated to 3 May 2012.

_____

L O Bosielo
Judge of Appeal

Appearances

For the Appellant:	WA Karam
	Instructed by:
	Justice Centre, Johannesburg
	Justice Centre, Bloemfontein
For the Respondent:	VT Mushwana
	Instructed by:
	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein