THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 333/2017

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA **APPELLANT**

and

JUDA JOSEPH PLEKENPOL **RESPONDENT**

Neutral citation: *DPP v Plekenpol* (333/17) [2017] ZASCA 151 (21 November 2017)

Coram: Shongwe AP, Willis, Swain and Mathopo JJA and Schippers AJA

Heard: 3 November 2017

Delivered: 21 November 2017

Summary: Criminal law and procedure : cross-appeal by the State : prescribed minimum sentence for robbery involving the taking of a motor vehicle not considered by the trial court or this court in the hearing of the convicted person's appeal : s 51 (2) of the Criminal Law Amendment act 105 of 1997 : cross-appeal succeeds : prescribed minimum sentence of 15 years' imprisonment imposed, 10 of which ordered to run concurrently with the 18 years imposed on the count of murder : effective sentence 23 years' imprisonment.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Maumela J sitting as the court of first instance):

1 The appeal is upheld.

2 The sentence of four years' imprisonment imposed by the court below in respect of count 2 and the order antedating that sentence to 28 July 2014 are both set aside and substituted with the following:

'On count 2, the accused is sentenced to undergo 15 years' imprisonment of which 10 years are to run concurrently with the sentence imposed on count 1 antedated to 4 June 2015.'

3 The respondent is therefore sentenced to an effective 23 years' imprisonment.

JUDGMENT

Willis JA (Shongwe AP, Swain and Mathopo JJA and Schippers AJA concurring):

[1] This appeal, or more precisely, this cross-appeal, concerns the applicability of the minimum sentence provisions to a robbery involving the taking of a motor vehicle. The respondent was indicted in the Gauteng Division of the High Court, Pretoria (Maumela J) on a count of murder (count 1) as well as a count of robbery with aggravating circumstances , as defined in s 1 of the Criminal Procedure Act 51 of 1977 (count 2). He pleaded guilty to the count of murder but, in respect of count 2, he pleaded guilty to the competent verdict of robbery (*simpliciter*). The pleas on both counts were accepted by the State and he was found guilty accordingly. Of particular relevance is the fact that the robbery involved the taking of a motor vehicle.

[2] In terms of Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLA), read with s 51(2) thereof, the respondent was therefore potentially liable to a minimum sentence of 15 years' imprisonment arising from the robbery for the very reason that it included the taking of a motor vehicle. The trial court found, incorrectly, that the crimes of which the respondent had been convicted 'do not attract minimum sentences in terms of the Criminal Law Amendment Act in the sense that he was convicted of offences that do not entail the implementation of minimum sentencing legislation.' It sentenced the respondent to four years' imprisonment on count 2 but ordered that the sentence run concurrently with count 1 in respect of which he had also been convicted. The sentence imposed on count 1 was 24 years' imprisonment. This was therefore the effective sentence. Both the State and the respondent were given leave to appeal to this court against sentence only. The appeal by the State was referred to by the trial court and the parties themselves as the cross-appeal. In 2016 this court heard the respondent's appeal and reduced the sentence on count 1 to 18 years' imprisonment but left undisturbed the concurrent running of the four year sentence on count 2. The effective sentence was then 18 years' imprisonment. At that previous hearing, this court overlooked the cross-appeal granted to the State in respect of sentence on count 2. It is this cross-appeal which is now before us.

[3] The appellant, the Director of Public Prosecutions (DPP), argued before us that this court was required by law to interfere with the misdirection committed by the court a quo, in not having imposed the prescribed minimum sentence of 15 years' imprisonment in respect of count 2, involving the taking of a motor vehicle. In addition, the DPP contended that although the crimes of murder and robbery were closely linked in time and place, they were committed with two different, separate intentions and, accordingly, an order for the concurrency of the sentence for robbery with that for the murder amounted to a misdirection.

[4] The DPP contended further that, in any event, the sentence of four years' imprisonment was 'so shockingly and inappropriately lenient that no reasonable court could have imposed it'. In summary, the DPP reasoned that this court should interfere by imposing a sentence of 15 years on count 2 because of an absence of substantial and compelling circumstances, which may justify a lesser sentence. The

DPP also submitted that the sentence on count 2 should not, in its entirety, run concurrently with the sentence imposed on count 1. The DPP's reasons will be dealt with later.

[5] In order to decide the questions posed at the beginning of the judgment and following thereupon, the appropriate order in the circumstances, it is necessary to set out both the factual matrix and the procedural history of the matter.

[6] The respondent had the benefit of legal representation at his trial. As mentioned previously, he had been indicted in the court a quo on one count of murder and one count of robbery with aggravating circumstances. The respondent pleaded guilty on 28 July 2014 but, in respect of the count of robbery with aggravating circumstances, he expressly pleaded guilty to robbery *simpliciter* (ie robbery without aggravating circumstances being present). This plea was accepted by the State. The trial judge thereupon delivered his verdict as follows:

'In your plea explanation, you admitted all the elements in the crimes, with regard to which you tendered the plea of guilty. The State has accepted your plea of guilty, in the manner expressed in your plea statement. As a result, you are found guilty on the two counts as follows.

On count 1, you are found guilty of murder, read with the provisions of Section 51 subsection (2) of the Criminal Law Amendment Act 105 of 1997. On count 2, you are found guilty of ordinary robbery, however, read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997.'

In other words, the respondent, at the time of his conviction could have had no doubt that he risked receiving the prescribed minimum sentence of 15 years in respect of count 2. This also appears from the record, where his legal representative set out his plea explanation.

[7] In that plea explanation the respondent said that he had come to know his victim, the deceased, through a mutual friend, known as Eddie. Eddie and the deceased had lived together. On 9 April 2013 Eddie and another person known as Dave had gone to a gay bar called Rasputin together. There, during the night, the respondent had met the deceased. Later, they retired to the house in Garsfontein where Eddie and the deceased lived. At that house the respondent also met a

person known as 'Charles'. There they also drank wine and conversed before falling asleep. Eddie and the respondent developed a sexual relationship.

[8] As a result of his short stay at the home of the deceased, a relationship of sorts developed between them. They smoked cigarettes, drank alcohol and used a drug known as 'CAT' together. During the evening of 13 April 2013, at a time when both the deceased and the respondent had been under the influence of alcohol and drugs, the deceased said to him: '*Ek moet praat, dan kan ons die hele aand hier op die bank spyker*'. The respondent explained to the court that, 'roughly translated', this meant that 'they can have sex the whole evening on the couch'. The respondent said he tried to ignore this remark but later the deceased pressed his intentions further by grabbing the respondent's arm and suggesting they should go to the deceased's bedroom together. The respondent claimed to have been 'shocked and humiliated' by these sexual overtures.

[9] Pulling himself away from the deceased, the respondent fell over the couch on to a bucket containing some cane sticks, one of which he described as a knopkierie. The respondent sustained a laceration as a result. He became angry and when the deceased came towards him again, the respondent described what happened as follows:

'In the emotional state that I was in, I again struck him with the knopkierie. I thought he still wanted me to go to his bedroom. Due to the fact that I lost my temper, I cannot recall how many times I struck the deceased. I do, however, know it was multiple times and all over his upper body and head.'

[10] The respondent then realised that the deceased had been seriously injured. Claiming still to be in a state of anger when the deceased had attempted to stand up, the respondent kicked him to force him down again. The respondent said that he then panicked and, acting impulsively, he decided to steal some of the deceased's property. He said that this would allow him to feed his drug addiction. The respondent loaded these items on to a pick-up truck or bakkie belonging to the deceased. The respondent also forced the deceased to disclose his personal identification number (PIN) for his bank card.

[11] The items taken from the deceased by the respondent were the following:(a) a *Mahindra* light delivery vehicle; (b) two cellular phones; (c) several items of clothing; (d) a large number of musical CDs; (e) a guitar; (f) several items of sound and television equipment; (g) laptop computers and other computer equipment; (h) a microwave oven; (i) golf clubs and other golfing equipment; (j) several banking and other electronic transaction cards; and (k) an unknown amount of cash in small change. The respondent pawned some of these items, while others were found in his hotel room, where he was arrested on 17 April 2013.

[12] The respondent confessed, in writing, to his crimes the next day and co-operated fully with the police, claiming to have suffered from depression and suicidal tendencies as a result of what he had done. He said that he, during the period between his attack on the deceased and the arrest of himself, had 'used a substantial amount of drugs and consumed a lot of alcohol'. The respondent also made a number of formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA), including the fact that the deceased had died as a result of the injuries inflicted upon him by the respondent.

[13] After the respondent had been duly convicted, the State led the evidence of Dr Janette Verster, the forensic pathologist who had undertaken the postmortem examination of the deceased. It would appear that the respondent must also have tied up the deceased around the wrists and either have throttled or attempted to throttle the deceased before he left. Otherwise, the pathologist's findings were consistent with the admissions made by the respondent in his plea explanation.

[14] The State proved a number of previous convictions against the respondent, accumulated since 2007: theft, receiving stolen property, drunken driving, assault and kidnapping. On appeal, his sentences for assault and kidnapping were taken together for purposes of sentencing and reduced to four years' imprisonment to which the provisions of s 276(1)(i) of the CPA applied. In other words, subject to certain conditions, the commissioner had the discretion to release the respondent on parole earlier. In respect of the other previous convictions the respondent had received suspended prison sentences or fines.

[15] The respondent testified in mitigation of sentence. He said he was 32 years of age at the time, that his highest level of education was 'Standard six', that he was married with a ten year old daughter but appeared to have become estranged from both his wife and daughter. The respondent's own childhood was a deprived one. He did not know his father and was largely brought up by his grandmother. The respondent said that he was 'deeply sorry' for what he had done to the deceased and especially regretted the pain this must have caused the deceased's daughter. He consulted a clinical psychologist, Dr Henk Swanepoel for the purpose of assessing sentence. The respondent confirmed as correct that which Dr Swanepoel had recorded in his report as having been told to him by the respondent himself.

[16] As a child, the respondent had been sexually abused and raped while he was in custody at a so-called 'safe house'. The respondent considers himself to be heterosexual but worked as a male prostitute to other men in order to supplement his income as a security guard and to further feed his drug addiction. Dr Swanepoel considered that the respondent may suffer from Borderline Personality Disorder (BPD). Dr Swanepoel reported that the respondent appeared to be sincerely remorseful but was 'emotionally low in functioning or very immature which can influence his insight' and was 'emotionally poorly equipped to effectively deal with demands from the environment'.

[17] With the leave of counsel for the respondent and the court, after the respondent had testified, the State briefly led the evidence of the brother of the deceased. That evidence did not add much to the overall picture. The brother's evidence was that, obviously, the murder of the deceased, a 45 year old man, had been deeply traumatic for his entire family.

[18] On 4 June 2015, the trial judge sentenced the respondent to 24 years' imprisonment on count 1 and four years' imprisonment on count 2. The court ordered the sentence on count 2 to run concurrently with count 1. As outlined above, the respondent's effective sentence was therefore 24 years' imprisonment. The court also ordered the sentence to take effect from the date upon which he had been convicted, viz 28 July 2014. As mentioned previously, the trial court, failed to consider the minimum sentence provisions relating to the taking of a motor vehicle

during the course of the robbery and, quite obviously, in so doing, failed to make a finding as to whether there were substantial and compelling circumstances present which justified a sentence less than the prescribed minimum.

[19] Both the State and the respondent thereupon applied for leave to appeal, the respondent first and then the State. The court a quo granted both parties leave to appeal to this court against sentence only. The question of whether both parties could argue the appeal was clarified after a question by the State. It was made clear that the State would have a right to cross-appeal in respect of sentence. The appeal was heard by this court on 11 November 2016.[1] On 24 November 2016 this court handed down its judgment in the matter, the order of which reads as follows:

'1 The appeal is upheld.

2 The sentence of 24 years' imprisonment imposed by the court below in respect of the murder and the order antedating the operation of the sentences to 28 July 2014 are set aside. The order of the court below is substituted with the following:

"On count 1, the accused is sentenced to undergo 18 years' imprisonment. On count 2, the accused is sentenced to undergo 4 years' imprisonment which is ordered to run concurrently with the sentence imposed on count 1."

3 The effective sentence of 18 years' imprisonment is antedated to 4 June 2015.'

[20] For reasons that are not clear, this court overlooked the State's notice of appeal dated 10 June 2015 which included the cross-appeal on count 2. In its previous judgment this court noted that leave to appeal against sentence had been given to both the State and the respondent. The court observed, however, that it was not clear against which sentence leave had been granted and said that the appellant (now the respondent) had directed his notice of appeal against the sentence imposed in respect of the murder only, that the State had filed no notice of appeal and that therefore there was therefore no 'cross-appeal' by the State. This was not, in fact correct. The court said that the appeal was restricted to the question of the sentence of 24 years on count 1, the count of murder. Accordingly, it did not consider the question of the prescribed minimum sentence of 15 years in respect of count 2. This court did, however, consider the applicability of the minimum sentence for the murder count as provided for in s 51(2)*(a)*(i) of the Act and decided that, in all the

[1] *S v Plekenpol* [2016] ZASCA 171; 2016 JDR 2205 (SCA).

circumstances of the matter, more than the prescribed minimum sentence of 15 years' imprisonment was required.

[21] This court found that the trial court's order antedating the sentences was incompetent and could not be allowed to stand: in terms of the CPA, only an appellate or reviewing court may antedate sentences. In its concluding remarks, this court observed that 'it would be wise to set out in this order the full sentence so as to avoid any misunderstanding that could otherwise occur'.

[22] Even if the plea bargain at the beginning of the trial was made with the intention of avoiding a prescribed minimum sentence on count 2, the record makes it clear that the respondent could have been under no illusions that a plea of guilty to robbery (*simpliciter*) could not avoid the clear provisions of the Act. His counsel even confirmed the applicability of the minimum sentence provisions before the trial court. *S v Malgas*[2] has made it plain that the prescribed minimum sentences are to be respected by the courts.[3] There are no substantial and compelling circumstances justifying a departure from the minimum sentence in respect of count 2.

[23] Nevertheless, to superimpose 15 years' imprisonment on count 2 and to leave that sentence to run entirely consecutively with the sentence of 18 years' imprisonment previously imposed by this court for the murder would entail an effective sentence of 33 years' imprisonment. Counsel for the State eventually conceded that, if left undisturbed, the cumulative effect of the sentence would be excessive. She asked for an effective sentence of 25 years' imprisonment. To order that the sentence on count 2 should run concurrently in its entirety would render the prescribed minimum sentence provisions nugatory. It would also not take into account the gravity of the offences, as a whole, as well as the fact that the State correctly submitted that the murder and the robbery were committed with separately formed intentions. We are of the view that 10 years of the sentence on count 2 should be ordered to run concurrently with the sentence imposed on count 1. The result will effective sentence of 23 years' imprisonment. That will be appropriate in all the circumstances.

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[2] S v *Malgas* 2001 (2) SA 1222 (SCA).
[3] Para 25.

[24] The following order is made:

1 The appeal is upheld.

2 The sentence of four years' imprisonment imposed by the court below in respect of count 2 and the order antedating that sentence to 28 July 2014 are both set aside and substituted with the following:

‘On count 2, the accused is sentenced to undergo 15 years' imprisonment of which 10 years are to run concurrently with the sentence imposed on count 1 antedated to 4 June 2015.'

3 The respondent is therefore sentenced to an effective 23 years' imprisonment.

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N P WILLIS

Judge of Appeal

APPEARANCES:

For Appellant:	P Vorster Instructed by: Director of Public Prosecutions: Pretoria c/o Director of Public Prosecutions: Bloemfontein
For Respondent:	MC Ndalane (with her, JM Mojuto) Instructed by: Legal Aid South Africa, Pretoria c/o Legal Aid South Africa, Bloemfontein