THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 1179/16

In the matter between:

ANTHONY ZIMILA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zimila v S* (1179/16) [2017] ZASCA 55 (18 May 2017)

Coram: Shongwe ADP, Mbha and Van der Merwe JJA and Molemela and Coppin AJJA

Heard: 2 May 2017

Delivered: 18 May 2017

Summary: Criminal Law and Procedure : Sentence : cumulative effect thereof where appellant convicted of similar multiple offences : circumstances in which an appellate court will interfere : interference warranted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Claassen J and Legodi J concurring) sitting as court of appeal.

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'(a) On count 1 the appellant is sentenced to 15 years' imprisonment.

(b) On count 4 the appellant is sentenced to 15 years' imprisonment.

(c) On count 5 the appellant is sentenced to 3 years' imprisonment.

(d) On count 6 the appellant is sentenced to 7 years' imprisonment.

(e) On count 13 the appellant is sentenced to 20 years' imprisonment.

(f) On count 15 the appellant is sentenced to 15 years' imprisonment.

(g) The sentences in respect of counts 4, 5 and 6 are ordered to run concurrently with the sentence imposed in respect of count 1.

(h) The sentence imposed in respect of count 15 is ordered to run concurrently with the sentence imposed on count 13.

(i) Effectively, the appellant is sentenced to 35 years' imprisonment.

(j) The sentences are antedated to 25 March 2004.'

JUDGMENT

Shongwe ADP (Mbha, Van der Merwe JJA and Molemela and Coppin AJJA concurring)

[1] This appeal is with special leave of this court and is limited to the cumulative effect of the sentences imposed. The appellant having been convicted of multiple robberies with aggravating circumstances, including attempted murder and the unlawful possession of a firearm in terms of s 2 read

with s 1, 39(1), 39(2) and 40 of the Arms and Ammunitions Act 75 of 1969, was sentenced to a total of 77 years' imprisonment by the Regional Court, Benoni, Gauteng. On appeal against the convictions and sentences to the Gauteng Division of the High Court, Pretoria (Claassen J and Legodi J concurring), the appeal was partly successful in that it was upheld in respect of certain charges and the effective sentence was reduced to 53 years' imprisonment. This court was asked to consider, as stated above, whether the cumulative effect of the sentences was too severe.

[2] The multiple offences, twenty one counts in all, were committed on various occasions, with the appellant acting as part of a group and using the same *modus operandi*. The victims were way-laid at their respective homes by the robbers. They were accosted, tied up, their houses ransacked, jewellery and other valuables, including a number of motor vehicles, forcibly removed. This spate of robberies, which were, no doubt, premeditated and well executed, took place between the period April 1999 and March 2002. The appellant was apprehended on 19 March 2002.

[3] The appellant conceded that he was convicted of serious offences and that a long term of imprisonment is unavoidable. He conceded further that the sentences, when considered individually, are unassailable. However, it was submitted on his behalf that the court a quo did not sufficiently reduce the cumulative term of imprisonment. It was argued that therein laid the misdirection which justifies this court to interfere with the sentences by ordering that parts of the sentences run concurrently.

[4] On the other hand, on behalf of the respondent, Ms Vorster, cautioned that this court should not send an incorrect message to the lower courts, which would diminish the seriousness of the offences. She mentioned that the value of

the goods that were forcibly removed was very high. In one incident in respect of the robberies at the Du Toit's family home, (count 1), goods worth more than R1 million, which included three expensive motor vehicles, were removed. She argued further that the sentences imposed were appropriate, considering that no substantial and compelling circumstances were found to exist. The appellant conceded this point. She urged this court to confirm the sentences imposed and submitted that the cumulative effect of the sentences was not shockingly inappropriate and therefore no misdirection occurred in the court a quo.

[5] There is a myriad of case law dealing with sentencing in general and the cumulative effect thereof in particular. In *S v Rabie* 1975 (4) SA 855 (A) at 857 D-F Holmes JA observed that:

'1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2 The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

The above quoted statement reflects the starting point and the test to be applied when dealing with an appeal against sentence generally. Upon finding that the sentence is vitiated by a misdirection or is disturbingly inappropriate, the appeal court must interfere and consider sentence afresh.

[6] I now turn to deal with the facts of this case and the applicable principles. After the regional court sentenced the appellant to an effective 77 years' imprisonment, the full court found that in respect of certain counts there was a

splitting of charges, as well as some calculation errors in respect of the total number of years of imprisonment. The full court found, therefore, that there was a misdirection and decided to interfere and sentence the appellant afresh. It reasoned that the regional court took all the factors on sentence into account but failed to consider the cumulative effect of the sentences. It further reasoned that a period of 45 – 50 years imprisonment, cumulatively, would be appropriate in the circumstances. However, it made an error itself by computing the total number to be 49 years of imprisonment. It later corrected the error and made the effective imprisonment sentence to be 53 years, which it arrived at as follows: It acquitted the appellant on counts 2, 9 and 11 and confirmed the convictions and sentences on counts : 1 (Robbery with aggravating circumstances) and sentenced to 15 years' imprisonment; Count : 4 (Robbery with aggravating circumstances) and sentenced to 15 years' imprisonment; Count : 5 (Possession of unlicensed firearm) and sentenced to 3 years' imprisonment; Count : 6 (Attempted murder) and sentenced to 7 years' imprisonment; Count : 13 (Robbery with aggravating circumstances) and sentenced to 20 years' imprisonment (motivation being that threats and a firearm were directed at children); and Count : 15 (Robbery with aggravating circumstances) and sentenced to 15 years' imprisonment. It ordered some of the sentences to run concurrently, hence, the effective sentence of 53 years' imprisonment.

[7] None of the charges against the appellant individually warranted a sentence of life imprisonment. Nevertheless the eventual effective sentence is tantamount to imposing a sentence which has the effect of removing the appellant permanently from society. He would be released at age 89, as he was 36 years old when he was sentenced. In other words, a sentence of 53 years' imprisonment has the potential of being more onerous than life imprisonment. I say this because, presently, in terms of s 73(6) of the Correctional Services Act 111 of 1998, a person sentenced to life imprisonment may be considered for

release on parole after serving 25 years in prison. (See *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 521 G-I) where Harms JA remarked that:

'Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in *S v Nkosi (1), S v Nkosi (2), S v Mchunu* 1984 (4) SA 94 (T)) courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.'

In *S v Nkosi & others* 2003 (1) SACR 91 (SCA) at 94 – Farlam JA observed that:

'[7] As was stated in *S v Bull and Another; S v Chavulla and Others* 2001 (2) SACR 681 (SCA) at 693*j* - 694*a*, this Court has, since the abolition of the death penalty, "consistently recognised that life imprisonment is the most severe and onerous sentence that can be imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society".

In the *Bull* case it was also pointed out (at 694*b*) that this Court has repeatedly warned against excessively long sentences being imposed to circumvent the premature release of prisoners by the Executive.'

[8] It is trite that sentencing is the most difficult part of a criminal trial, especially where there are multiple charges and the trial court has to consider the cumulative effect of the sentences. This court has on numerous occasions stated that reference to prior decided cases on sentence is a useful aid or tool to assist a court in determining an appropriate sentence. In the final analysis, each case must be decided on its own merits. Needles to mention, no two cases are the same.

[9] An appellate court will therefore interfere with a sentence of the court a quo in instances where there is a striking disparity between what it determined as an appropriate sentence and what the appellate court considers ought to have been an appropriate sentence. (See *Road Accident Fund v Murunga* 2003 (5) SA 164 (SCA) para 23 – a civil matter, but the principle applicable is the same; –

see also *S v Matlala* 2003 (1) SACR 80 (SCA) at para 9 and 10 and the cases cited therein). In the present case this court has a clear and definite view that it would not have imposed a cumulative sentence of this magnitude, as it has the potential of being more onerous than life imprisonment. On that basis, this court is at liberty to interfere and reconsider the cumulative effect of the sentence afresh.

[10] The regional court, as well as the court a quo, considered all the purposes of punishment, the personal circumstances of the appellant, the seriousness of the offences and the interest of society. There is no need to repeat same. The area of interference will be in respect of making certain sentences to run concurrently with count 1 and the sentences in counts 13 and 15 to run concurrently. The logic is that when considering an appropriate sentence, the regional court considered all the necessary factors, therefore, since the offences are similar in nature, it would serve the interests of justice to mitigate the length of the sentence by ordering some of the counts to run concurrently.

[11] I therefore propose what is stated in the order below to be an appropriate effective sentence, taking into account the cumulative effect of the individual sentences.

[12] The following order is made:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

‘(a) On count 1 the appellant is sentenced to 15 years’ imprisonment.

(b) On count 4 the appellant is sentenced to 15 years’ imprisonment.

(c) On count 5 the appellant is sentenced to 3 years’ imprisonment.

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(g) The sentences in respect of counts 4, 5 and 6 are ordered to run concurrently with the sentence imposed in respect of count 1.

(h) The sentence imposed in respect of count 15 is ordered to run concurrently with the sentence imposed on count 13.

(i) Effectively, the appellant is sentenced to 35 years' imprisonment.

(j) The sentences are antedated to 25 March 2004.'

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J B Z Shongwe
Acting Deputy President

Appearances:

For the Appellant:	H L Alberts
	Instructed by:
	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
For the Respondent:	P Vorster
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein