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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non reportable

Case no: 1247/2018

In the matter between:

THOKOZANI KWAZI CHONCO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Chonco v The State* (1247/2018/) [2019] ZASCA 75 (30 May 2019)

Coram: Navsa ADP and Saldulker JA and Eksteen AJA

Heard 16 May 2019

Delivered: 30 May 2019

Summary: Criminal Law – appeal against sentence above prescribed minimum sentence – whether justified – failure to provide reasons – sentence considered afresh.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Makhanya and Keightley JJ sitting as court of appeal):

1 The appeal against sentence is upheld.

2 The order of the high court is set aside and substituted as follows:

'The appeal is upheld to the extent reflected in the substituted order:'

'The magistrate's order in relation to sentence is set aside and substituted as follows:

(a) The accused is sentenced to 15 years' imprisonment.

(b) The sentence is antedated to 30 August 2011.'

JUDGMENT

Saldulker JA (Navsa ADP and Eksteen AJA concurring):

[1] The appellant, Mr Thokozani Chonco, was convicted in the Alexandra Regional Court on one count of robbery with aggravating circumstances and sentenced to 18 years' imprisonment. An application for leave to appeal against both his conviction and sentence was refused. On petition to the Gauteng Local Division (the high court) leave to appeal was granted against sentence only. The appellant's appeal against the sentence to the high court (Makhanya and Keightley JJ) was however unsuccessful. The appeal before us, against sentence only, is with the leave of this court.

[2] The issue on appeal is whether the sentence of 18 years' imprisonment imposed by the regional court magistrate (Mr Boshoff) in respect of the robbery count was appropriate.

[3] I turn to consider the facts. On the morning of 27 January 2007, the complainant, a soft drink wholesaler was robbed at his business at gunpoint by

the appellant and another perpetrator. They took a cellular phone, cigarettes and R10 000 cash from him. None of those items was recovered. The complainant was unable to identify his assailants. However the appellant was linked to the crime by means of his palm print, found on the drawer in the office where the wholesaler kept the money. The appellant did not dispute that the palm print was his. His version was that he had entered the area as a result of an invitation from the complainant because of a dispute concerning the state of the money tendered and the change given to him. That version was rightly rejected. As stated earlier, he was duly convicted and sentenced by the regional court magistrate.

[4] At the time of sentencing, the appellant was 30 years old with three minor children. He and the children resided with his mother, a pensioner. The children's mother was deceased. The appellant was the sole breadwinner. He is a first offender in respect of this type of offence. The appellant was incarcerated for a period of five months awaiting finalisation of his trial.

[5] In sentencing the appellant to 18 years' imprisonment the magistrate took into account that the offence was serious and prevalent in the court's jurisdiction, and drastic measures were called for to curb serious crimes. The following comments by him are relevant:

'The court is of the opinion that quite clearly no exceptional or compelling circumstances are present to justify the imposition of a lesser sentence . . .The court is of the opinion that the following is a well-balanced sentence. You are sentenced to 18 years' imprisonment in terms of section 51(1) of the [Criminal Law Amendment Act 105 of 1997] . . .'.

[6] On appeal, the high court concluded that the sentence imposed by the magistrate was appropriate and justifiable in that the court was at liberty to impose a sentence in excess of the minimum sentence of 15 years' imprisonment in terms of the Act.

[7] Section 51 of the Act sets out the discretionary minimum sentence for certain serious offences. Robbery with aggravating circumstances falls within

Part II of Schedule 2, and within the purview of s 51(2)*(a)*(i) of the Act. The relevant part of this section provides:

'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or 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 of not less than 20 years; and

(b). . . .'

[8] A proviso to s 51(2) of the Act reads as follows:

'Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.'

[9] The magistrate cannot be faulted for finding that there were no substantial and compelling circumstances[1] justifying a sentence of less than 15 years imprisonment. He sentenced the appellant to a period beyond the prescribed minimum sentence, ostensibly in terms of the proviso to s 51(2). The problem is that he provided no basis for doing so.

[10] It remains a salutary principle of our law that judicial officers should give reasons for every decision they make, particularly if it has adverse consequences for the accused. This principle, as stated by Navsa JA in *S v Maake* [2010] ZASCA 51; 2011 (1) SACR 263 (SCA) paras 19-28, is deserving of consideration:

'It is not only a salutary practice but obligatory for judicial officers to provide reasons to substantiate conclusions. The magistrate did not do so in respect of the maximum sentence imposed by him. In an article in *The South African Law Journal* entitled "Writing a Judgment", former Chief Justice M M Corbett pointed out that this general rule applies to both civil and criminal cases. In civil cases it is not a statutory rule but one of practice . . .' (See the decisions referred to in *S v Maake*)

[1] In regard to what constitutes substantial and compelling circumstances: See para 9 of *S v Malgas* 2001 (2) SA 1222 (SCA).

[11] In *S v Msimango* [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) para 24, this court in dealing with the imposition of a sentence beyond the prescribed minimum sentence in terms of the proviso said the following:

'In terms of s 51(2) of the CLAA, the appellant should have been sentenced to a period of not fewer than 15 years' imprisonment in the absence of substantial and compelling circumstances. It is true that the regional magistrate had the power to add a further five years to the minimum sentence of 15 years' imprisonment. However, the increase is not to be done whimsically but on sound legal principle which can withstand scrutiny. This requires any presiding officer who intends to invoke this power to give reasons therefore. Regrettably, the regional magistrate gave no reasons for increasing this sentence with an additional five years. On the evidence as it stands, the increase is not justified.'

[12] It must be understood that the minimum sentencing regime was a legislative measure to deal with increased criminality. As stated above, the magistrate rightly concluded that there were no substantial and compelling factors. The magistrate failed to identify and record any facts or circumstances which justified a sentence of imprisonment in excess of the prescribed minimum sentence of 15 years' imprisonment. The magistrate's failure entitles us to interfere with the question of sentencing afresh. There is no basis on the record to conclude that the robbery in question was such as to attract a sentence greater than the prescribed minimum. One should also not lose sight of the fact that the appellant has spent five months in custody awaiting finalisation of his trial. The prescribed minimum sentence of 15 years' imprisonment was therefore the appropriate sentence. Counsel on behalf of the state was rightly constrained to agree that this was so.

[13] In light of the conclusions reached, the following order is made:

1. The appeal against sentence is upheld.
2. The order of the high court is set aside and substituted as follows:

'The appeal is upheld to the extent reflected in the substituted order:'

'The magistrate's order in relation to sentence is set aside and substituted as follows:

(a) The accused is sentenced to 15 years' imprisonment.

(b) The sentence is antedated to 30 August 2011.'

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H K Saldulker
Judge of Appeal

Appearances:

For Appellant:	W A Karam Instructed by: Legal Aid SA Johannesburg Office Johannesburg
For Respondent:	N P Serepo Instructed by: Director of Public Prosecutions Johannesburg