Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **A58/2017**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

[redacted]

10 MAY 2024

---------- ----------

SIGNATURE **DATE**

In the matter between:

SIZWE MAKARONA NDIMANDE First Appellant

JOHAN BHEKOKWAKHE MNCUBE Second Appellant

VUKANI SIBIYA Third Appellant

And

THE STATE

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 10 May 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The first, second and third appellants [appellants] appeared in the Regional Court, Nigel, [trial court] were tried on various counts each, which included robbery with aggravating circumstances, possession of an unlicenced semi-automatic firearm and attempted murder. They were found guilty and convicted on a number of these charges. Each appellant was sentenced to an effective 30 (thirty) years' imprisonment.

[2] This appeal lies as against sentence only with leave upon petition.

[3] The nub of this appeal has been confined to two grounds according to the appellants' counsel. The first ground is the consideration of the discretion exercised by the trial court when it applied the cumulative or concurrent sentences provided for in section 280 of the Criminal Procedure Act 51 of 1997 [the Act] [section 280 enquiry] and the second ground, whether the trial court should have considered the appellants' pre-conviction incarceration and reflected it in passing the sentence.

[4] No appeal lies against the trial court's failure to find substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997. This court them considers the two grounds from this premise.

[5] To appreciate the arguments presented on appeal, requires a brief understanding of the background facts giving rise to the crimes.

BACKGROUND FACTS

[6] In Nigel on the 21 July 2010 just after 06h00 in the morning, the 6 to 9 café [café] and, a BP garage, which is situated next to the café, was robbed by the appellants. The facts demonstrate that the robbery was planned, first and second appellant robbed the cashier and a patron in the café whilst the third appellant robbed the cashier at the BP garage. At the time, the appellants wielded semi-automatic firearms and displayed physical aggression. Unbeknown to the

appellants, and during the committal of robberies, two police officers, Warrant Officers Olwagen [Olwagen] and Von Wielligh [Von Wielligh], were at the BP garage. Olwagen stopped at the BP garage intending to fill his motor vehicle with diesel. Olwagen then noticed the appellants with firearms running from the scene and jumping onto the back of a white bakkie. They sped off with cash, cigarettes and cell phones. Olwagen together with Von Wielligh, gave chase, Olwagen was driving. Shots were fired at the policeman from the back of the bakkie and a shootout ensued. Olwagen returned fire, fatally wounding the driver of the bakkie.

[7] Due to the driver's injuries the bakkie came to a standstill on the side of the road, the appellants ran away.

[8] The appellants were taken into custody on 27 July 2010 and remained in custody after a lengthy bail appeal, awaiting trial for a period of 3 (three) years and 4 (four) months prior to being sentenced on the 18 November 2013.

[9] Against this backdrop the two grounds.

CUMULATIVE / CONCURRENT SENTENCES, SECTION 280 ENQUIRY

[10] It is common cause that the trial court did apply section 280 of the Act but counsel for the appellants argues that the trial court did not exercise its discretion judicially in that, notwithstanding applying section 280 of the Act, the combined effect of the sentences was still too severe.[1] He argued that the totality principle should have been applied. In other words, the court in exercising its discretion must look at the totality of the criminal behaviour and ask if it is appropriate to sentence such accused for all the offenses. The protection mechanism of human dignity the core principle of section 280 of the Act giving rise to the totality principle.

[11] Counsel contended that the trial court should have regarded the total criminal behaviour of the appellants as emanating out of the same incident namely the initial robbery itself which simply just escalated.

---

[1] S v Chauke 2016(2) SACR 309 (FB)

[12] Counsel for the respondent, although appreciating the effect and application of the totality principle argued that the robbery did not emanate from a single event. The robbery with unlicensed firearms, what transpired at the scene and fleeing from it can be regarded as emanating from the same incident but that, the decision and need to use the weapons and to fire the first shot directed at the police officers without provocation, thereafter triggering the shootout, must be considered as an incident on its own not simply emanating from the robbery when apply the totality principle. Counsel for the appellants did not proffer a reply to this contention.

[13] From the record it appears that the trial court applied section 280 of the Act considering the totality principle as argued but as the respondents' counsel contended, namely applying concurrency of sentences emanating from two different incidents. To illustrate the point: the cumulative effect of the sentences relating to the 3 counts of robbery with aggravating circumstances which each appellant was convicted of, runs concurrently, 15 years for all 3 counts. Whilst the convictions on the 2 counts of possession of unlicenced semi-automatic fire arm which each appellant was convicted of, runs concurrently, 15 years for all 2 counts and the 2 counts of attempted murder in respect of the third appellant runs concurrently with his 2 possession counts.

[14] Counsel for the appellants did not argue that the trial court misdirected itself when applying section 280 of the Act as it did (two separate attacks), this would explain why he did not reply to the respondents argument in this regard, but merely relied on argument that the outcome and consequences emanating from one initial attack, is shockingly inappropriate.

[15] The trial court's judgment is well reasoned and due consideration was given to all the facts in the exercise of its discretion. The fact that no deviation too is relied on by the appellants, tin particular the personal circumstances of the second appellant, this courts is not inclined to disturb the trial courts discretion. This ground must fail.

PERIOD OF PRE-CONVICTION INCARCERATION

[16] The appellants were arrested on 21 July 2010 and sentenced on 18 November 2013. During this period of 3 (three) years and approximately 3 (three) months they were kept in custody pending the outcome of the trial. It is the argument of the appellants that the trial court should have taken the appellants' period of incarceration prior to the commencement of their actual custodial sentence into consideration when imposing the sentence. In this regard the appellants' Counsel referred to and relied on S v Vilakazi[2] in which Nugent JA applied and considered the appellant's incarceration awaiting trial stated that although there may be good reason why bail had been denied, but if such accused is not promptly brought to trial it would be most unjust if such period whilst waiting was not taken into account. The argument was bolstered by reference to S v Brophy and Another[3] stating that the trial court overlooked the period of time spent in prison and such oversight entitling a court of appeal to interfere.

[17] Counsel further contended that because the trial court's order did not state that the term starts to run from the date of sentence, the trial court can interfere with the order.[4]

[18] The respondent's Counsel contended that the trial court indeed considered the period that the appellants were in custody and awaiting trial and specifically dealt with it in its judgment. She referred this Court to S v Radebe and Another in which the Supreme Court of Appeal stated that detention pre-sentencing is a factor when considering substantial and compelling circumstances. This is not the appellants case. The appellant does not seek for a deviation from the sentences imposed in terms of the Criminal Law Amendment Act 105 of 1997 but that not to take it into account is unjust and that because the order specifically deal with the sentence is to commence this court can interfere.

[19] The record reflects that the trial court did not specifically deal with the date upon which the sentence should commence in its order, although the trial court die

---

2 2009 (1) SACR 552 (SCA) [2008] 4 All SA 396 at 574, par 60.

3 **S v Brophy and Another** 2007 (2) SACR 56 (W).

4 **Makhokha v State** (CCT 170/18) [2019] ZACC 19.

mention that it was aware of the time the appellants were incarcerated before sentence was to be passed. The sentence imposed by the trial court of 30 (thirty) years although severe[5], must be proportionate to the crimes committed. No ground is relied on to deviate from the prescribed minimum sentences imposed. To ensure that due consideration is given to achieve a proportionate outcome, this court finds that it can and must not overlook the possibility of any injustice which may if it failed to do so and to consider the appellants' time spent incarceration. Exercising its discretion this Court finds that this ground succeeds on appeal.

Therefore, the following order is made:

1. The appeal against sentence succeeds.
2. The sentences imposed in respect o the First, Second and Third Appellants is set aside and replaced with the following:

"Accused *1 is sentenced to 30 years imprisonment backdated to the 21 July 2010".*
"Accused 2 is sentenced to 30 years imprisonment backdated to the 21 July 2010
"Accused 3 is sentenced to 30 years imprisonment backdated to the 21 July 2010."

[redacted]

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

5 **Muller v S** 2012(2) SACR 545 (SCA) at para 10.

I concur,

N MNCUBE
ACTING JUDGE, HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the First to Third Appellant:	Adv F Van As Email: FrancoisV@legal-aid.co.za
Instructed by attorneys:	Legal Aid South Africa
For the Respondent:	Adv T Louw Email: TLouw@npa.gov.za
Instructed by:	The Director of Public Prosecutions
Date of hearing:	30 April 2024
Date judgment delivered:	10 May 2024