

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 250/2023

In Matter between:

NTOKOZO TOKOLO NTSHANGASE

APPELLANT

And

REX

RESPONDENT

Neutral citation: *Ntokozo Tokolo Ntshangase v Rex (250/23)*
SZHC 166 [2023] (28.06.2023)

CORUM: Makhanya A.J

Date heard: 02.06.23

Date delivered: 28.06.23

Summary: Sentence – imposition of – appellant sentenced to 15 years imprisonment – six counts of robbery – seriousness of offences – interests of society and accused not considered – effect of cumulative sentence of 15 years imprisonment – offences forming part of the same transaction – concurrent and consecutive sentences – Appellant to serve a cumulative sentence of 9 years imprisonment.

JUDGMENT

- [1] The appellant was charged in the Manzini Magistrate court together with six (6) others. They were alleged to have committed a series of robberies. Appellant featured only on counts 10,11,12,13,14 and 15. It was alleged that they acted with a common purpose for committing the robberies. The robberies on counts 10,11 and 12 were committed on the same date, same place, same time but on different complainants. Count 13 was on committed on a different date and different complainant whilst counts 14 and 15 were committed on the same date, place but different complaints.
- [2] On arraignment, the appellant and his co-accused pleaded not guilty to all the charges. The prosecution, led evidence to prove its case. At the conclusion of the trial, the court *aquo* found them guilty.
- [3] Appellant was sentenced as follows:
- Count 10 – Robbery – two (2) years imprisonment no fine.*
- Count 11 – Robbery – two (2) years imprisonment no fine.*
- Count 12 – Robbery – three (3) years imprisonment no fine.*
- Count 13 – Robbery - three (3) years imprisonment no fine.*
- Count 14 – Robbery - two (2) years imprisonment no fine.*
- Count 15 – Robbery - three (3) years imprisonment no fine.*
- [4] Appellant is aggrieved by the cumulative sentence of 15 years imprisonment. He has approached this court, as an appellate court, to interfere with the learned Magistrate's discretion.
- [5] The main ground of appellant's appeal is that the trial court misdirected itself by failing to order counts 10,11 and 12 to run concurrently and also counts 14 and 15.

- [6] He argued that counts 10,11 and 12, as well as counts 14 and 15 formed an integral part of a single transaction. They were committed on the same date, time and place although to different complainants.
- [7] The evidence from the record shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.
- [8] In the case of **Sibusiso Gcina Mchunu v Rex Criminal Appeal case no.04/2014**, para 10, His Lordship M.C.B Maphalala (as he then was) cited the case of **Nkosinaye Samuel Sacolo v Rex Criminal Appeal case no.37/2011** at paragraph 8, where the decision of Justice Moore JA Sitting in the court of appeal of Botswana in the case of **Mosiwa v The State (2006) B.L.R at page 219**.

" As a general principle, consecutive terms should not be imposed for offences arising out of the same transaction or indictment, whether or not they arise out of precisely the same facts...

A court may, however, depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances upon which she or he seeks to justify the imposition of consecutive terms.

Where an offender is convicted of two or more counts of an indictment, the court should normally pass a separate sentence upon each of the individual counts in the indictment. The sentence passed may be ordered to run concurrently with one another consecutively or there may be a mixture of concurrent and consecutive sentences. The court has a duty to indicate clearly the sentence imposed in respect of each count of the indictment upon a finding of guilty has been made.

- [9] The Learned Magistrate when imposing a sentence on the accused did not consider the interests of the accused and that of society. There is nothing on the record which show how he arrived at those sentences which he meted on the accused.
- [10] When a court imposes a sentence, it is proper that it should bear in mind the chief objectives of Criminal punishment, that is, retribution, the prevention of crime, the deterrence of criminals and reformation of the offender. What must also be considered is the triad consisting of the

crime, the offender and the interests of society. See **S v Zinn 1969 (2) at 540 G.**

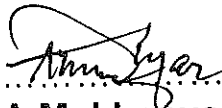
- [11] The appellant in mitigation, he stated that he was not a first offender, but pleaded with the court to disregard the previous conviction as it was irrelevant to the present charges. He submitted that he was remorseful for what he did and that he was wrongly advised by his inmates to plead not guilty. He wished he could change his plea.
- [12] Accused further stated in mitigation that his mother passed away when he was still young and his father was not supportive, that contributed to his involvement in committing criminal offences. He has one child who is in grade 2 and is sickly. The mother of the child is unemployed. He sometimes sells dagga to support his family. He urged the court to be lenient on passing the sentence.
- [13] The record does not show that the prosecutor did or did not lead evidence in aggravation. It is the duty of the prosecution to present evidence to disclose the accused's character, the circumstances under which the offences were committed and the society's interests or attitude to assist the court to pass an appropriate sentence.
- [14] The Learned Magistrate misdirected himself by failing to consider the personal circumstances of the accused that were pleaded by the accused before him in his mitigation.
- [15] Another misdirected by the trial court, is the failure by it to have ordered counts 10,11 and 12 to run concurrently as they were alleged to have been committed on the same date, same place but to different complainants. It has been held where offences were committed in the same transaction, it is unjust and wrong in law to order the sentence of an accused to run consecutively. See **Sifiso Ndwandwe v Rex Criminal Appeal case no. 05/2012, para 20.**
- [16] The court *aqou*, did not have regard to the cumulative effect of the 15 years imprisonment meted on the accused. The appellant was 28 years old on the date of his arrest. He showed to be remorseful and urged the court to exercise leniency when passing the sentence. He pleaded with the court to give him a second chance in life.

- [17] Appellant informed the trial court that he was forced to commit crimes by his poor background. There is a chance for the appellant to prospects of rehabilitation and become a useful member of the society.
- [18] Robbery consists of the theft of property by intentionally using violence or threats of violence induce submission to its taking. See **J.R.L Milton South African Criminal Law and Procedure vol.11 Common Law Crimes 1 ed at 642-643.**
- [19] It is thus a crime involving two unlawful acts taking property and performing violent act upon a person. See also **Burchell J. Principles of Criminal law 3 ed (2005) at 218.**
- [20] Appellant when committing the three offences on counts 10 to 12, they were perpetrated at the same time and place and in a single unbroken sequence. Here, common sense and fairness suggest that he ought to have been punished as if only one offence was committed.
- [21] Mr Phakathi conceded that the court *aquo* should have ordered that counts 10 to 12 to run concurrently.
- [22] In **S v Mokela 2012 (1) SACR 43 (SCA) at para**
"[11], the court expressed the view that sentences are to run concurrently where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent."
- [23] The above principle is applicable in the present case in relation to counts 10 to 12 of the two offences committed by the appellant.
- [24] I, accordingly find it necessary that in order to ameliorate the harshness of the cumulative sentence of 15 years imprisonment imposed by the court *aquo*, I order as follows:

- a. The order of the trial court that the sentences imposed in counts 10 to 12 to run concurrently is set aside and in its stead substituted with the following order,

The two (2) years sentence on each counts 10 to 11 are set aside and are ordered to run concurrent to each other and concurrent to the sentence of 3 years imprisonment on count 12.

- b. The sentence on count 13 is confirmed.
- c. The two (2) years sentence imposed on count 14 is to run concurrent to the sentence of 3 (three) years imposed on count 15, but consecutive to the sentence on count 13.
- d. The appellant is to serve a total sentence of nine (9) years imprisonment.
- e. The sentence is backdated to 11.04.20.



A.Makhanya

Acting Judge of the High Court

Appearances:

For the Appellant – S. Zwane

For the Respondent – S. Phakathi