CASE NO. sa 3/93 IN THE SUPREME COURT OF NAMIBIA

In the criminal appeal of:

PAULUS NDIKWETEPO	FIRST APPELLANT
MATBEUS TJAPA	SECOND APPELLANT
VANASIUS AMEHO	THIRD APPELLANT

and

THE STATE	RESPONDENT

CORAM: MAHOMED, C.J., et DUMBUTSHENA, A.J.A. et CHOMBA, A. J.A.

Heard on: 1993/10/04
Delivered on: 1993/10/15

JUDGMENT

CHOMBA, A.J.A.: The three appellants, together with three others with whom we are not concerned in this appeal, were on the 24th April 1992 charged before the High Court with fifteen counts. Just as this judgment will not concern itself - save in passing only - with those three others, so also will it be confined only to those counts on which the appellants v/ere convicted and later sentenced. The appeal is against sentence.

The first count charged robbery with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act No. 51 of.1977. The second appellant was convicted of this and sentenced to eighteen (18) years

imprisonment. On the third count, also charging robbery with aggravating circumstances, the first and second appellants were sentenced to fifteen and sixteen years/- '' imprisonment respectively. As regards the sixth count equally charging robbery with aggravating circumstances, the first and third appellants were convicted and each received a sentence of twelve years imprisonment.

On the eighth count, charging robbery with aggravating circumstances, the second appellant alone was convicted and a prison sentence of fifteen years was imposed. The first and third appellants were further sentenced on the tenth and eleventh counts, both alleging robbery with aggravating circumstances. They consequently received sixteen years imprisonment each. Further still the first appellant alone was found guilty on the twelfth count which charged attempted murder and he was sentenced to fourteen years imprisonment, seven years of which were ordered to run concurrently with the sentence on the tenth and eleventh counts.

The first and third appellants were additionally convicted on the thirteenth count charging theft of the one sheep and a sentence of six months imprisonment was imposed on each of them. Lastly the first appellant was convicted on the fourteenth and fifteenth counts charging respectively possession of ammunition without a licence and escape from lawful custody. In regard to these last two offences, sentences of six (6) months and twelve (12) months imprisonment respectively were imposed.

Save for the seven (7) years imprisonment ordered to be served by the first appellant concurrently with his sentence on the tenth and eleventh counts/ the rest of the sentences were ordered to run consecutively. In the result the effective sentences the three appellants received were fifty-two (52) years imprisonment in respect of the first appellant, forty-nine (49) years imprisonment in respect of the second appellant and twenty-eight and half (28,5) years in respect of the third appellant.

After making unsuccessful applications in the court a quo for leave to appeal against both conviction and sentence, the three appellants petitioned this court. After a careful consideration of the totality of the evidence and all relevant circumstances this court rejected the petitions as they related to convictions, but granted leave to appeal against sentence.

It is against the foregoing back-drop that on Monday, 4th October, 1993, the appeals of all the three appellants were heard.

In substance the Learned counsel for the appellants submitted that some of the individual sentences imposed were excessive, and further that the aggregate sentences were totally inappropriate and so severe that they induced a sense of shock. They therefore urged this Court to interfere with the sentences.

Both counsel for the appellants cited authorities which

outline principles to be followed by a sentencing Court in considering appropriate sentences. These principles were -

a) the personal circumstances of the prisoner as well as facts which appear from the evidence and which tend to mitigate the severity of the sentence.

b) the seriousness of the offence proved against the accused and the manner in which it was executed, and

c) the expectations of society.

The appellants' counsel impugned the sentences on the basis that the court a quo did not pay due regard to principle (a) above. As to principle (b) they argued that the sentences imposed in relation to the offences of robbery with aggravating circumstances indicated that the court a quo -exaggerated the seriousness of those offences. To this end Mr Kasuto submitted that the eighteen years imprisonment imposed on the second appellant on the first count tended to place the offence charged in the same category of seriousness as murder. Mr Grobler argued that the sentence of fifteen years imprisonment imposed on the first appellant in regard to the third count - relating to the robbery from Mr and Mrs Schneider - Waterberg - showed lack of appreciation on the part of the court a quo that that appellant played only a minor role in the commission of that offence. In the circumstances, it was argued, the first appellant merited a lesser sentence.

Counsel further submitted that where the offences formed a

series of one course of criminal conduct, there was need to order that the sentences thereon should run concurrently. To this end our attention was drawn to the fact that in the present case the offences were committed between 29th December 1990 and 24th March 1991, a period of just under three months. That the offences of which the appellants were convicted formed one criminal conduct was high-lighted by the mode of commission of all the robberies,
whereby the appellants and their cohorts invaded farmsteads owned, and at the material times occupied, by a man and his wife, who were, in the majority of cases, elderly people> and also that at the time of the intrusions the assailants were armed with offensive weapons, ranging from fire-arms to
pangas and sticks. They used these to over-come resistance from their victims. It was also a common feature of all the
robberies that the assailants demanded money and firearms, inter alia.

In their quest to show that the sentences imposed on the appellants were excessive and, therefore, wrong, counsel submitted that on the authorities available the heaviest cumulative sentence imposed did not exceed 30 years imprisonment. Moreover it was also urged that the court a quo should have given due weight to the principle that punishment is intended, among other things, to reform a prisoner. In this connection it was pointed out that in the case of the first appellant, as he was aged 33 years at the time of the sentences imposed on him amounting altogether

to 52 years, he would be eighty-five years old at the time of release, assuming that the whole sentence had to be served.

That sentence was therefore as good as denying him the opportunity to reform. This argument can be extended to the second appellant who, aged 36 years at the time of sentence, would also be 85 years old at the time of release if the full sentence were to be served.

Mr Grobler further submitted that the first appellant having been sentenced for attempted murder, the shooting of Mr De Lange ought not to have been taken into account as an aggravating circumstance in sentencing the appellant on the robbery charged in counts 10 and 11. He further implored us to find that in shooting Mr De Lange the first appellant acted in self-defence because Mr De Lange had hit him first with a walking stick on the nose/ causing him to bleed. He buttressed this argument by reminding us that in the earlier robberies of a similar nature and in which the first appellant featured the victims were not shot at although firearms were used to intimidate them.

Lastly Mr Grobler submitted that the sentence imposed on his client violated article 8(2)(b) of the Constitution of Namibia, which forbade the subjection of anybody to "torture, cruel, inhuman or degrading treatment or punishment."

In urging the court to interfere with the sentences imposed on his clients Mr Kasuto submitted that the court below had committed a number of misdirections in assessing the sentences. He argued, for instance, that the 18-year sentence imposed on the second appellant on count 1 had no

reformative effect but was calculated to break him.

As against the submissions summarised above, suffice it to mention that Mr Small supported all the sentences. He underscored the rule of practice - which through invariable application by appellate courts has acquired the mantle of a rule of law - that punishment is pre-eminently a matter for the discretion of the trial court. In his submission that discretion had not been improperly, injudiciously or unreasonably exercised by the court a quo so as to warrant interference by this Court with the sentences.

It is, indeed, a settled rule of practice that punishment falls within the discretion of the court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate court ought not to interfere with the sentence imposed. This principle emerges from a chain of authorities, but for our purposes it suffices to refer only to two of them.

In S v Rabie 1975(4) S.A. 855 (A) at page 857 there occurs the following passage: -

> "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."

It is explained in the same judgment that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.

Another case in point is S v Ivanisevic and Another 1967 (4) S.A. 572 (A) in which HOLMES, J.A. stated at page 575 that "... it has more than once been pointed out that the power of a Court of Appeal to ameliorate sentences is a limited one: See Ex Parte Neethling and Another 1951 (4) S.A. 331 at page 335 H; R v Lindsay and Another 1957 (2) S.A. 235 (N); S v de Jaqer and Another 1965 (2) S.A. 616 (A) at page 629. This is because the trial court has a judicial discretion and the appeal is not to the discretion of the Court of Appeal: on the contrary, in the latter court the enquiry is whether it can be said that the trial court exercised its discretion improperly."

Another test applied by appellate courts entertaining appeals against sentence which is said to be on the oppressive side is whether such sentence is so manifestly excessive that it induces a sense of shock in the mind of the court (See R v Lindsay 1957 (2) S.A. 235.) If it does the inference can be drawn that the discretion had not been properly exercised.

Can it be said when these tests are applied to the

individual sentences passed in the present case, that the court a quo fell into error? In other words can it be said that the trial court exercised its discretion other than judicially, properly or reasonably?

A positive answer to this question would justify interference with any one or more of the sentences.

A perusal of the record of appeal shows that the trial judge was very much alive to the principles of sentencing as reproduced above. As regards personal circumstances the trial judge noted (see at page 1877 et seq.) the ages of the appellants, their family circumstances, standard of education attained and their antecedents. In this connection the judge took cognisance of the fact that whereas the first and third appellants were first offenders, the second appellant, on the other hand, had previous convictions as follows:

1981 -
1981 -
1983 -
1983 —m

3 months imprisonment for housebreaking.
9 months imprisonment for housebreaking with intent to steal.
13 months imprisonment for housebreaking with intent to steal.
15 months imprisonment of which 10 months were ordered to run concurrently with the previous sentence for housebreaking with intent to steal.

1985 - released on parole.
1986 - Two years imprisonment for housebreaking

with intent to steal and theft. Additionally 3 years 'imprisonment for housebreaking with intent to steal and theft and another three years

imprisonment for a similar offence.

In the result the trial judge, quite rightly imposed a heavier sentence on the second appellant, for example, on count three on which the first and third appellants were found guilty - he imposed 15 years imprisonment on the first appellant whereas the second appellant got 16 years imprisonment.

In regard to the seriousness of the crimes committed the trial judge addressed his mind to individual offences, noting that in the case of offences in which Mr and Mrs Schneider-VJaterberg and the latter's mother, Mrs Merckens, all elderly persons, were concerned, they were pounced on by five men as they watched TV on the evening of 3rd February 1991. He recorded that one of the assailants was wielding a pistol which he later pointed at Mr Schneider-Waterberg, while the other four, including the first appellant, carried sticks and pangas. The victims were assaulted in the process of which Mrs Merckens sustained a fractured right elbow. The intruders demanded money and firearms. Apart from being assaulted the victims had their hands tied with electric wire, their residence was then ransacked and a number of items stolen.

From the judge's notes it is made evident that this kind of violence, in which firearms, pangas and/or sticks were used, was replicated in varying degrees in relation to the other offences of robbery with aggravating circumstances. He showed in addition that in the case of the invasion of the farm house of Mr and Mrs De Lange there was an actual

shooting with a firearm resulting in Mr De Lange being seriously wounded in the left cheek. He was lucky that he lived to tell the story of his ordeal. The charge of attempted murder resulted from that shooting. Needless to mention also that as in the case of the Schneider-Waterbergs, various household and other effects were stolen.

It was against the foregoing back-drop that the appellants received sentences ranging from 12 years to 18 years imprisonment on the individual charges of robbery with aggravating circumstances, and 14 years imprisonment for attempted murder in the case of the first appellant.

In our view a misdirection would be said to occur if, for example, the court a quo were to fail to apply any or all the principles of punishment, or if in applying them the court was guilty of over-emphasizing any one of them at the expense of others.

Illustrative of such a misdirection is the judgment of Rumpff, J.A., in S v Zinn 1969 (2) S.A. 537 (A) where at page 540 D - F the learned judge stated -

> "The reference in the second passage from the judgment quoted above to the appellant no longer being a young man, who 'spits blood from his bronchial tubes' is the only reference in the judgment on sentence to the appellant's age and malady, and, having regard to the context in which the reference is made, one is driven to the conclusion that the learned Judge-President considered the crimes committed to be of such

> magnitude that, if any weight were to be given to the personal circumstances of the appellant, business and industry in the whole of Cape Town would come to a disastrous end, I think that this conclusion of the Judge-President is not merely the strongly-worded but justified condemnation of the indignant censor, but rather a hyperbole, exaggerating beyond permissible limits the nature and effect of the crime, and minimising the personality of the offender and the effect that punishment might have on the offender. The over-emphasis of the effect of the appellant's crimes, and the underestimation of the person of the appellant, constitutes, in my view, a misdirection and in the result the sentence should be set aside."

Upon a careful examination of the entirety of the judgment of the court a quo, as it relates to sentencing, I can discern no similar or parallel misdirection to that in the Zinn case, supra. Furthermore, as was acknowledged by both sides on 4th October 1993 when we were hearing the submissions in this case, examples were replete of cases in which sentences of comparable severity were imposed. And as MacDonald, J.A., states in S v Ndhlovu and Another 1971 (1) S.A. 27 (R) at page 31 C

> "In deciding whether a sentence is excessive, this court must be guided by the sentences sanctioned or imposed by this court in similar cases, due allowance being made, of course, for factual differences."

I would endorse this dictum and merely add that the similar sentences are those of this court "or courts of comparable jurisdiction."

In the light of the foregoing I am satisfied that the court a quo exercised its discretion properly and judicially in imposing the individual sentences. Further I cannot say that these individual sentences, viewed against the background of the manner in which the offences relating to them were executed, are so manifestly excessive that they induce a sense of shock in my mind.

However my conclusion in the preceding paragraph does not dispose of all the issues in this appeal. Counsel for the appellants, as already shown in the preceding paragraphs of this judgment, have raised the issue of the cumulative effect of these sentences. They have described the cumulative effect of these sentences as being so excessive as to evoke a sense of shock. Further they argued that the magnitude of the sentences, especially the 52 years and 49 years imprisonment imposed on the first and second appellants had no reformative effect but were calculated to break them. Arguing further that the offences which attracted those sentences, after all, constituted one course of criminal conduct, spanning the period from 29th December, 1990 to 24th March 1991, counsel concluded that the court a quo, by imposing consecutive sentences instead of concurrent ones, fell into error.

These submissions were well received by this Court.

In Zambia a rule of practice has evolved over the years that when a series of offences are part of a course of conduct they should be regarded as one for the purpose of sentence

and should be visited with concurrent sentences: See Kalunaa v The People (1975) Z.R. 72; Chomba v The People (1975) Z.R. 245; Mbewe v The People (1977) Z.R. 41, to cite only a few. This rule of practice seems to be buttressed by the Criminal Law Review of October 1973 para. 593 (U.K) . At that paragraph there occurs the following passage: -

> "As a general rule consecutive sentences should not be added together to produce an aggregate sentence which is totally out of proportion to the gravity of the individual offences, or the most serious of them. A court is entitled to reduce what would be the logical total sentence if a strictly mechanical approach were followed, if this is necessary to produce a reasonable result."

This passage has been interpreted by the Zambian courts to mean that if, for example, a person was convicted of fifteen offences an appropriate sentence for each of which, regarded individually, would have been one year's imprisonment, it would be wrong to sentence him to a total of fifteen years imprisonment, unless the total course of behaviour warranted such a sentence.

In S v Whitehead 1970 (4) S.A. 424 (A) the appellant, a young man aged about eighteen years, had brutally slain his stepmother. Moments after he had managed to conceal the deceased's body in the bathroom his father arrived home. The latter, according to the appellant's evidence, asked what was wrong. The appellant then attacked and stabbed him in the back. In the " result he was charged with two offences, namely murder and assault with intent to commit

murder and was convicted on both counts. The trial court having found mitigating circumstances in his favour, the appellant was sentenced to 15 years imprisonment for murder and 7 years imprisonment for assault with intent to commit murder.

On the appeal against sentence it was contended on the appellant's behalf that the latter offence should have been regarded by the court a quo as forming part of the earlier crime of murder. Ogilvie Thompson, J.A., rejected that contention in the following words at page 4 38D - E.

> "Nor am I able to accede to the defence submission that the assault upon Whitehead (the appellant's father) should have been regarded as forming part of the earlier crime to a degree requiring both crimes to be treated as one for the purpose of sentence, or at least, that the whole of any sentence passed in respect of the second crime should have been directed to run currently with the sentence on the murder charge. The interval which elapsed between the two crimes, the premeditation which attended the second crime and, indeed, all the circumstances of the crime, are features which, in my opinion, effectively dispose of the submission last-mentioned."

On the contrary in the High Court Division of the Eastern Cape in the case of S v Pase 1986 (2) S.A. 303, a reverse conclusion was obliquely arrived at. In that case the trial magistrate had convicted a youth of an offence involving conduct which was presumed to link him to an unlawful organisation, namely the Pan African Congress (PAC). At the time of conviction the youth was serving a sentence in

connection with an offence of public violence. That sentence had been imposed shortly after the offence of associating with the PAC was committed. The trial magistrate rejected a submission on behalf of the youth that part of the sentence imposed in the case of which he was seized should be ordered to run concurrently with the sentence the youth was already serving. The magistrate held that the two offences were totally different from each other in nature.

In reversing the Magistrate's decision Kannemeyer, J., stated at page 306 I - 307 A - C as follows:

> "While it is a requirement when various counts are taken as one for the purpose of sentence, that there should be a close connection or similarity between the offences involved, I know of no such requirement when a sentence or a portion thereof is ordered to run concurrently with a sentence already being served. There is no such provision in section 280 of Act 57 of 1977 which authorises the concurrent running of sentences .... I do not consider that the magistrate was necessarily correct in holding that the offences are of totally different natures. The appellant is serving a sentence of 3 years imprisonment ... in respect of public violence .... Sitting as judges of this Division, we are aware that, in all probability, the charge of public violence involving an 18 year old . . . Black School boy contained a strong political element as does the crime of which the Magistrate had to punish the appellant. Indeed had the appellant been charged with the present offence and public violence simultaneously, an order that part of the sentences should run concurrently

would have been

17 entirely

appropriate."

Section 280 of the Criminal Procedure Act no. 51 of 1977 states

"COMMULATIVE OR CONCURRENT SENTENCES

1) When a person is at any trial convicted of two or more offences, or when a person under sentence or undergoing sentence is convicted of another offence, the Court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments shall run concurrently."

This section has consistently been applied to order concurrent sentences where the cumulative effect of several sentences may otherwise be too severe (See S v Young 1977 (1) SA 602 (A); R v Abdullah 1956 (2) SA 295 (A) at 299/300; S v Mtshak 1967 (2) SA 509 (N) at 510 A.)

From the foregoing examination of the law as contained in the preceding paragraph and the exposition thereof in the cases of Whitehead and Pase, supra, it is evident that in appropriate circumstances, the Court will order that the whole or part of two or more sentences may be served concurrently.

In the final analysis I accept the submission that this court should, for reasons apparent in the preceding

paragraphs, interfere with the cumulative sentences passed by the trial court. To this end although I have earlier held that the individual punishments were not inappropriate, there is need to interfere with them in order to impose condign cumulative sentences. In the next paragraphs, therefore, I shall indicate which of the sentences have to be altered. In the event, this court is at large as to the sentences to impose in place of those to be altered.

Applying the principles outlined in the preceding paragraphs, I now proceed to consider the appropriate sentences to be imposed on the appellants.

Taking into account, the personal circumstances of each of the appellants, their previous records, the nature of their offences and their ages, I have come to the conclusion that the substantial parts of the sentences imposed on each of the appellants should be ordered to run concurrently, so that the effective sentence of imprisonment on the first appellant is 22 years, that on the second appellant 20 years, and that on the third appellant 16 $^{1/2}$ years.

It is ordered that -

(1) The sentences imposed on the first appellant are confirmed but,

(a) the sentence imposed in respect of counts 3 and 6 and 10 years of the sentence imposed in respect of count 12 shall run concurrently with the sentence of 16 years imprisonment imposed in respect of counts 10 and

11; and

b) the sentence imposed in respect of counts 13, 14 and 15 shall run consecutively.

c) with the result that the effective sentence of the first appellant shall be 22 years.

(2) The sentences imposed on the second appellant are confirmed but

a) the sentence imposed in respect of count 3 and 13 years of the sentence imposed in respect of count 8 shall run concurrently with the sentence of 18 years imposed in respect of count 1.

b) with the result that the effective sentence of the second appellant shall be 20 years.

(3) The sentences imposed on the third appellant are confirmed but

a) the sentence imposed in respect of count 6 shall run concurrently with the sentence of 16 years imprisonment imposed in respect of counts 11 and 12.

b) the sentence imposed in respect of count 13 shall run consecutively.

c) with the result that the effective sentence of the third appellant shall be 16 1/2 years imprisonment.

F.M. CHOMBA, ACTING JUDGE OF APPEAL

I agree

I. MAHOMED, CHIEF JUSTICE

I agree

E. DUMBUTSHENA, ACTING JUDGE OF APPEAL