REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A176/12

11/10/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

11 OCTOBER 2012 .....
Date Signature

In the matter between:

TEBOGO RAMPAI **Appellant**

And

THE STATE **Respondent**

JUDGMENT

TEFFO, J:

INTRODUCTION:

[1] This is an appeal against sentence only. The appellant was originally charged in the Court a quo with six other accused for murder, robbery with aggravating circumstances, unlawful possession of firearms, unlawful possession of ammunition,

murder and robbery with aggravating circumstances. Three of the appellant's co - accused could not be found. The state therefore withdrew charges against them.

[2] The trial proceeded against the appellant and three remaining co - accused. The co - accused were then acquitted at the end of the State's case. The appellant was also acquitted on counts 5 and 6 (i.e. murder and robbery with aggravating circumstances).

[3] After hearing the evidence Claassen J also acquitted the appellant on counts 3 and 4 (namely, unlawful possession of a firearm and unlawful possession of ammunition) and convicted him of murder (count 1) and robbery with aggravating circumstances (count 2).

[4] The charges of murder (count 1) and robbery with aggravating circumstances (count 2) were read with the provisions of Act 105 of 1997 (the Minimum Sentence Act)

[5] The appellant was then sentenced as follows:

> on count 1, the murder charge, he was sentenced to life imprisonment, on count 2, robbery with aggravating circumstances, he was sentenced to 20 years imprisonment.

[6] Leave to appeal against conviction was refused.

[7] The grounds upon which this appeal is based are that the sentences imposed are excessive given that the appellant was only 20 years old when he committed these offences.

[8] The facts in this matter were briefly as follows:

> During the night of the 5 and 6 December 2003 Enoch Kometsi (Kometsi) held a party at his home. Around 4 am on 6 December 2003 the appellant and his friends arrived at the party. A scuffle ensued outside in the street between the appellant and the deceased (Humphrey Musi Kulane). The deceased ran into the house where Kometsi, Percy and Walter were sitting. He shouted at Kometsi that somebody was trying to kill him. The appellant and one of his friends, namely, Bodlosa, entered the house. Both of them were armed with

firearms. They took the firearms out and started hitting the deceased with them on his head. The appellant ordered all the people in the house outside, pointing them with his firearm. Kometsi and all the people who were in the house left the house. Richard, one of the appellant's friends was herding the party goers into a group at the corner of the house. He was also armed with a firearm. As they left the house to go outside, a shot was fired inside the house. The appellant and Bodlosa came out of the house and they together with Richard took the music system that was outside and walked away with it. When Kometsi and his friends entered the house they found that the deceased was lying on the floor with one bullet wound on his chest. A vehicle was summoned to take the deceased to the hospital but he died on the way.

[9] The issue for determination is whether the Court a quo misdirected itself by finding that there were no substantial and compelling circumstances justifying it to impose lesser sentences to sentences of life and 20 years imprisonment for the murder and robbery with aggravating circumstances.

[10] It is trite that 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,*
>
> *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"* **(S v Rabie 1975(4) 855A at 857 D-F)**

[11] In **S v Mhlakaza 1997 (1) SACR 515 (SCA**) at 519 a-e the Supreme Court of Appeal made the following remarks:

> *"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive."*

See also **S v Johaar 2010(1) SARC 23 (SCA)** at 31 C par (21)

[12] In **S v Swart 2004(2) SACR 370 (SCA)** the Court expressed itself as follows:

"In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a smaller role. Moreover, as pointed out ***in S v Malgas 2001(1) SARC 469 (SCR)*** *where the court finds that it is not bound to impose a prescribed sentence " the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislator provided".*

[13] At 381f-I in **S v Msimanga and Another 2005(1) SACR 377 OPD** the Court remarked as follows:

"The reason for the existence of the criminal justice system is to serve the interest of the public and sentencing, as an integral part of that system, has the same raison d'être. Violent conduct in any form can no longer be tolerated, and Courts, by imposing heavier sentences, convey the message, on the one hand, to the prospective criminals that such conduct is unacceptable and on the other hand, to the public that the Courts take seriously the restoration and maintenance of the living conditions. Deterrence is over-arching and general purpose of punishment. Since no civilised community should have to tolerate barbaric conduct, in cases of crime in particular the deterrence and retribution aims of punishment are to be preferred over those of prevention and rehabilitation which in such cases play a subordinate role."

[14] Claassen J in imposing sentence took the following into account:

14.1 That both offences were committed with the use of a firearm;

14.2 The appellant was operating as a gang leader when these crimes were committed;

14.3 The appellant and his two friends all armed with firearms, gate crashed a party at a private dwelling, entered the house of Komati and killed one of Kometsi's guests;

14.4 The crime was committed in an arrogant and audacious manner;

14.5 The appellant has not been remorseful for committing such crimes;

14.6 The appellant was 20 years old when he committed these offences;

14.7 He was a relatively young man but it appeared that he had embarked upon a career of crime in that earlier in 2003 he also committed another murder and three robberies with aggravating circumstances. He was therefore sentenced for these crimes during December 2007 to 20 years imprisonment;

14.8 The crimes committed on 6 December 2003 were also gang related;

14.9 He has been in custody for the past two years partly for the matter against which this appeal is brought and partly for the previous crimes he committed;

and held that there are no compelling and substantial circumstances to justify a departure from the minimum sentences laid down by the Minimum Sentences Act.

[15] Counsel for the defence contended that although at face value there are no substantial and compelling circumstances, the Court a quo did not allow enough evidence relating to the appellant's personal circumstances to be placed before it prior to sentencing the appellant. **In S v Samuel 2011 (1) SACR 9 SCA** where the appellant appealed against a sentence imposed by the Regional Court of two years imprisonment for a conviction on a charge of unlawful possession of a firearm and against a reduced sentence of the High Court of 18 months imprisonment and suspension of 6 months imprisonment, the Supreme Court of Appeal held that there had been insufficient facts before the Magistrate to enable her to exercise proper sentencing discretion. The Court further held that it was not known how the appellant came into possession of the firearm, how long he had kept it or why. Equally little was known about the appellant, his educational background, the type of work he did, or whether he was the kind of a young man who should go to jail. The Court also

held that despite the appellant having been represented at the trial, there had been a duty on the Magistrate to call for such evidence as was necessary to enable her to exercise her sentencing discretion properly. The Court held the view that this might well have been the kind of a case where a pre-sentence report was necessary to allow all the available sentencing options to be explored.

[16] In **S v Banda 1991 (2) SACR 325 (B) Friedman J** remarked as follows when passing sentence:

> *"The Court fulfils an important function in applying the law in the community. It has the duty to maintain law and order. The Court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no space in life it does not include. The Court must also by its decisions, and imposition of sentence, promote respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender. The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquillity in the land needs to be taken into account."*

[17] Although it is conceded that the defence counsel's argument has merit, the fact is that in the present matter the appellant had already been convicted of murder and three robberies with aggravating circumstances at the time he was sentenced by the Court a quo which were committed in the same year that he had committed the offences in question. It is my view that even if more information was called for by the trial Court with regard to the appellant's personal circumstances, it would not have made any difference. The Court a quo can therefore not be faulted on this aspect.

[18] Based on the reasons set out above, I am of the view that the sentences imposed were appropriate under the circumstances and the Court a quo correctly held that no substantial and compelling circumstances existed to justify lesser sentences than those imposed.

[19] I therefore cannot find any reason to interfere with the sentences that have been imposed by the Court a quo.

[20] In the result the following order is made:

20.1 The appeal is dismissed.

M J TEFFO

JUDGE OF THE HIGH COURT

I agree

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

I agree

W HUGHES

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT:	**S MOENG**
INSTRUCTED BY	**PRETORIA JUSTICE CENTRE**
COUNSEL FOR THE RESPONDENT:	**P N NGCOBO**
INSTRUCTED BY	**THE DIRECTOR OF PUBLIC PROSECUTIONS**
DATE OF HEARING	**8 OCTOBER 2012**
DATE OF JUDGMENT	**11 OCTOBER 2012**