IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A159/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
8/8/2014
DATE SIGNATURE

8/8/2014

In the matter between:

ABRAHAM CLAYTON WILLEMSE Appellant

And

THE STATE Respondent

JUDGEMENT

STRAUSS, AJ:

1. The appellant was convicted on one count of robbery with aggravating circumstances, read with the provisions of the Criminal Law Amendment Act, 105 of 1997, on 23 August 2007, by the Regional Court sitting at Middelburg, and was sentenced to 20 years' imprisonment. It was further ordered that three years of his sentence should run concurrently with a 15 year term of imprisonment, that the appellant was already serving for a previous conviction on robbery.

2. Leave to appeal the sentence only, was granted by the court a quo.

AD SENTENCE

3. It is so that sentence is generally a matter to be decided upon by the trial court and the said court has a wide discretion in this regard as set out in **S v Rabie 1975 (4) SA 855 (A)**. In **S v Petkar 1988 (3) SA 751 (A)** the following was stated:

> "*The court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated irregularly, misdirected or is one which no reasonable court could have come to, in other words one where there is a striking disparity between the sentence and that which this court considers appropriate.*"

4. In **S v Mutungwa & Another 1992 SACR 1 (A)** the following was stated::

> "*An appeal court cannot simply interfere with a sentence imposed. One or more of the accepted grounds must justify interference with the sentence on appeal must exist.*"

5. In imposing sentence, the court a quo considered the triad as espoused in the decision of **R v Zinn 1969 (2) SA 537 (A)** having regards to the personal circumstances of the accused, the offence of which he has been convicted and the interest of the society.

6. The personal circumstances of the appellant were that he was 34 years old when he was sentenced to an effective 17 years' imprisonment, on 23 August 2007. He has three children of between 14 and 3 years old, and he was the breadwinner.

7. No doubt the offence was very serious in that the appellant robbed the complainant, one Christo Van Wyk, who was 21 years of age on 22 October 2002, of his vehicle. He was brandishing a firearm, got into the vehicle of the complainant, pointed him with the firearm and told him to drive to the industrial area. The complainant drove to the industrial area where the appellant ordered him to get out of the vehicle and remove his shirt. He also hit him once with the firearm on the head. At that stage the appellant told the complainant to run into the mealie field and he drove off with the complainant's vehicle. The vehicle and the goods in it were never recovered. Fortunately for the complainant he did not sustain any serious physical injuries, but no doubt sustained some emotional trauma, in fearing for his life. An identification parade was held later at which he identified the appellant. The total value of the vehicle plus value of the goods inside the vehicle, totalled an amount of R45,000.00.

8. *"The interests of the society direct a court that it should not be diverted from its duty to act as an independent arbiter by making choices on the basis that they would find favour with the public."* This was stated in **S v Mahlakaza & Another 1997 (1) SACR 51 (SCA).**

9. The appellant represented himself in the trial court initially, and the minimum sentence which applied to this offence was explained to the appellant in great detail by the court a quo. In sentencing the court a quo considered the fact that the appellant had a previous conviction also for armed robbery and was serving a 15 year prison sentence, for this previous conviction.

10. With sentence the appellant had acquired the services of legal aid, and the court a quo was addressed on the minimum sentence for the offence. The court a quo, was requested to have regard to the fact that the sentence will run concurrently with the current sentence being served by the appellant. The court a quo thus in sentencing the appellant considered this and made an order that three years of the current sentence run concurrently with the previous sentence. Thereby resulting in a sentence of 32 years imprisonment effectively.

11. Thus the appellant was convicted of robbery with aggravating circumstances in terms of Part 2 of Schedule 2 read with Section 51(2)(a)(ii) of the Criminal Law Amendment Act, 105 of 1997. The prescribed minimum sentence applicable was one of 20 years' imprisonment, as the appellant had a previous conviction for robbery with aggravating circumstances. The appellant was duly alerted to the possible application of the Act by the prosecutor and the magistrate at the commencement of the proceedings.

12. The approach to be followed when deciding whether or not to impose a minimum sentence in terms of Act 105 of 1997 was described by the Supreme Court of Appeal in **S v Vilikazi 2009 (1) SACR 551 (SCA)** as stated at paragraph 15 on page 561 that:

> *"It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case before it imposes a prescribed sentence to assess upon a consideration of all the circumstances of the particular case*

whether the prescribed sentence is indeed proportionate to the particular offence".

And further at paragraph 20 on page 563:

"*Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case though bearing in mind what the legislature has ordained and the other strictures referred to in Malgas. It was also pointed out in Malgas that a prescribed sentence need not be shockingly unjust before it is departed from for one does not calibrate injustice in a court of law. It is enough for the sentence to be departed from that it would be unjust to impose it.*"

13. It was also stated in **S v Matyiti 2011 (1) SACR 40 (SCA)** at paragraph 23 that:

"*Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is no longer business as usual and yet one notices all too frequently the willingness on the part of sentencing cause to deviate from the minimum sentence prescribed by the legislature for the flimsiest of reasons. Reasons, as here do, they do not survive scrutiny.*

As Malgas makes plain, courts have a duty despite any personal doubts about the efficiency of the policy or personal aversion to it to implement those sentences. Our courts derive their power from the Constitution and like other arms of State owe their fealty to it. Our Constitution order can hardly survive if the court's fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resorting to vague ill-defined concepts such as relative youthfulness or other equally vague and ill-founding hypothesis that appear to fit the particular sentencing officer's personal notions of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer is foundational to the rule of law which lies at the heart of our Constitutional order."

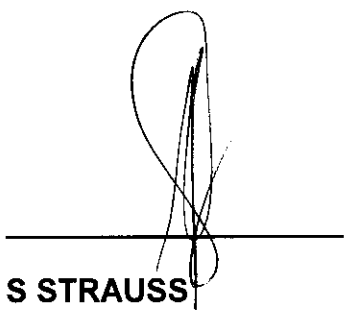
14. It is apparent that the appellant is raising the cumulative effect of the sentence imposed, with the sentence that he is already serving in another matter. The main argument in this regard relies heavily on the matter of Zondo v The State. I agree with the submissions on behalf the State that the reliance on this matter is flawed due to the fact that in the Zondo matter, Act 105 of 1997 had no application as the offences were committed before the Act was in operation, and the effective sentence

that the accused had to serve in Zondo was also 32 years imprisonment, after the Supreme Court of Appeal intervened.

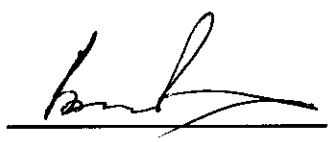
15. In the Zondo matter the accused, was a first offender. In the matter in causa, the appellant is not a first offender, and I agree with the views of the State, that the a court a quo did not impose a sentence that induces a sense of shock, or is tainted by any misdirection. It can also not be said that the sentence was designed to exceed the natural lifespan of the appellant.

I therefore make the following order:

The appeal is dismissed and the sentence of the court a quo is confirmed.



S STRAUSS
ACTING JUDGE OF THE HIGH COURT



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JUDGE OF THE HIGH COURT:

I agree and it is so ordered