



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

Case No: A 308/2012
19/02/2015

In the matter of:

Lucky Mdhuli

Appellant

Versus

State

JUDGMENT

Maumela J.

1. This case came opposed before this court as an appeal.
There was no clarity at the beginning, but it later became common cause between the parties that the appeal can only be against sentence. The conviction stands to be confirmed.
2. Before the Regional Court for the district of Gauteng, sitting in Oberholzer, the appellant, Lucky Mdluli, who was 29 years of age at the time he was arraigned, was charged with two counts as follows:
 - 2.1. On count I:
Housebreaking with intent to Rob and Robbery with Aggravating Circumstances read section 262 (1), and

264 of the Criminal Procedure Act 1977: (Act No 51 of 1977): "Criminal Procedure Act".

2.2. On count II:

Robbery with aggravating circumstances, as intended in section 1 of the "Criminal Procedure Act").

3. On Count I, it was alleged that the appellant is guilty of Housebreaking with Intent to Steal and Theft, read with the provisions of section 262 (1), and section 264 of the "Criminal Procedure Act". The allegations were that upon or about the 22nd of May 2011, and at or near 418 Khutsong in the district of Oberholzer in the Regional Division of Gauteng, the accused did unlawfully and intentionally, and with the intent to rob, break open and enter the shack of **Veness** Junior, and did then and there wrongfully and intentionally assault, and with force take the items listed; the property, or in the lawful possession of Venus Junior.
4. The following is a list of the items in issue:
 - 4.1. 1 x 54 Centimetre Panasonic TV worth R 600-00.
 - 4.2. 1 x Black Samsung S233 cell phone worth R 800-00.
 - 4.3. 1 x Telefunken DVD Player worth R 600-00.
 - 4.4. 1 x Pair Timberlain boots worth (R 450-00.
 - 4.5. 1 x Black bag worth R 150-00.
 - 4.6. Cosmetics worth R 130-00.
 - 4.7. 3 x packets of 20 Courtly, Craven A, and Peter Stuyvesant, worth R 75-00, and
 - 4.8. 40 sachets of Raja spice worth R 1 200-00.
5. On count II, it was alleged that the appellant is guilty of Robbery with Aggravating Circumstances, read with the provisions of section 51 (2), 52A, and 52B, of the Criminal Law Amendment Act 1997: Act No 105 of 1997: "Criminal

Law Amendment Act". The allegations were that upon or about the 22nd Day of May 2011, and at Khutsong in the Regional Division of Gauteng, District of Oberholzer, the accused did wrongfully and unlawfully assault Veness Junior and take with force 1x LG Cell phone v/a, her property, or property in her lawful possession, the aggravating circumstances being that a firearm was used.

6. Before the court *a quo*, the Appellant pleaded not guilty. Given the opportunity to explain his plea, he exercised his right to silence. Venas Junior was the first witness to be called by the state. Under oath, she told court on the 22nd of May 2011, at about 21h30 in the evening, she was at home alone. As she was cooking supper, four people arrived and kicked the door open. She said that Lucky Mdluli, the appellant, was one of the people. She said that the appellant pointed a firearm at her and demanded money. The other people in his company searched around in the shack, while one stood outside to see if the on goings were being detected by the public.
7. The intruders found her phone, which was on the charger. They took it with them, together with her TV, a DVD player, and a big bag of money in which there was about R1200-00, in Mozambican currency. They also took cigarettes and a small speaker. She said that she compiled and signed a list of the items taken from her house, which list she gave to the police, and was admitted as "Exhibit A".
8. While the invaders were still at her place, somebody arrived to buy cigarettes. The intruders kept quite when this person knocked, but they then exited. The said person asked her what was going on, but she did not respond because she

had mistaken him for one of the invaders. She had been ordered to look down and not to look the intruders in the faces. Upon realizing her mistake, she explained to that person what had just happened.

9. She borrowed a phone from that person and phoned the police who never arrived. On the following morning she went to report the incident at the police station. She told court that she knows the Appellant, Lucky Mdluli, well. She said that she was not seeing the appellant for the first time because he had robbed her before. When the first robbery happened, she did not know the Appellant. One other day, somebody came to inform her that there is a television set on sale. Someone else tipped her about the fact that the people who are selling the TV are crooks or “tsotsis”.
10. The witness stated further that upon advice, she went to inspect goods that were on sale at some household. The TV she found was not hers. However, she found on sale, boots that had been robbed from her home. Upon further advice, she reported this to the ‘street committee’. The person who was selling tried without success to dissuade her from reporting. This person told her that he had bought the boots from Lucky Mdluli, (the appellant). However, this person soon moved away from the area and when the police came looking for him, she could not trace him anymore.
11. Still in the company of the police, she visited the Appellant’s home where she identified her TV and the DVD, together with most of the other items taken from her place. The items she had identified as hers were loaded into the vehicle and taken to the police station. She said that whilst she knew the Appellant well, she did not know the other people in his

Appellant well, she did not know the other people in his company who came to her house. She said that the firearm that the Appellant had in his possession on the day he and the others came to her house was a hand gun. She stated that on the day of the incident, the Appellant pointed at her with the firearm. On the night the Appellant and the others came to her home, the lights were on. One of the intruders had a knife in his possession.

12. The second state witness to be called was constable Mapitsi, he told court under oath that he is the member of the South African Police, stationed at Khutsong under the CID section. He has 7 years of experience in the police force. He is the Investigating Officer in this case. He said on the 26th of May 2011, he was busy with the investigation of this case. He was then approached by the complainant, who told him that she knows the whereabouts of Lucky Mdluli, (the Appellant). He, together with the complainant, went to Shawela section as directed by the complainant.
13. It was in the night and they found the appellant, (Lucky Mdluli), and some other people sited around a fire near the door. As he entered the people tried to run away. He already knew the appellant because of other previous encounters he had with the Appellant. As the people fled, he managed to arrest the appellant and informed him that he is being arrested for a case of House Robbery. He read to the appellant his rights and took him to the police station and detained him there for the night.
14. He also told court the complainant took him to Lucky's home. He told the people that he is looking for items stolen from another house. Lucky's mother and sister directed him

to a shack where Lucky was supposed to be living. A search at that shack unearthed her TV and her DVD. He took the said items with him to the police station where he registered them into the Exhibit Register. After the close of the state case, the Appellant testified in his own defence.

15. He was convicted on Count 1. He was sentenced to undergo 12 (twelve) years of imprisonment. This court is to decide on the appropriateness or otherwise of the sentence meted out to the appellant by the court *a quo*. In *S v Zinn*¹, the court stated that in imposing sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community". The offence of which the appellant stands convicted is serious. A firearm was used in its commission.
16. In *S v Samuels*², the court stated as follows: "*What seemed to weigh with both courts was the prevalence of violent crimes executed with unlicensed firearms. That consideration was deserving of and warranted appropriate recognition in the determination of an appropriate sentence*". However, in the Samuels case, the firearm in issue had no cartridge of ammunition. The trial court was chided for not taking that aspect into consideration. *In casu*, it was never established whether the firearm had a cartridge or not, and if so, it was never established whether the cartridge was loaded with ammunition or not.
17. A concern was raised to the effect that at the beginning of proceedings, the court *a quo* did not explain to the appellant, the implications of section 52 (2) of the "Criminal Law

¹. 1969 (2) SA 537 (A).

². 2011 (1) SACR 9 (SCA).

Amendment Act” being read with the Robbery charge, much as the implications of. In sentencing the appellant for purpose of count III, the court *a quo* applied the provisions of section 51 of the Criminal Law Amended Act 1997. (Act number 105 of 1977) in that way the court viewed itself to be enjoined to impose a minimum sentence prescribed unless exceptional and compelling circumstances were to found to be attended to the person of the appellant who justify the non-imposition of the minimum sentence prescribed is 15 years of imprisonment.

18. The appellant was 25 years of age at the time he was sentenced. He was single, but he had a three year old child who stays with the mother, who is unemployed. He had previous convictions. On the 14th of June 2004, at Khutsong, he was convicted of Robbery and he was sentenced to undergo 2 (two) years of imprisonment, which sentence was wholly suspended for 5 (five) years on condition that the accused is not convicted of an offence of robbery, attempted robbery, theft, or any offence of which assault is an element, which offence shall have been committed during the period of suspension and for which the accused is sentenced to imprisonment without an option of a fine. On the 12th of January 2010, he was convicted of contravening section 4 (a), of the Unlawful Possession of Unwrought Precious Metals. He was sentenced to pay a fine of R 6 000-00. He was placed under correctional supervision until the 11th of July 2011.
19. Our case law has determined that sentences imposed on accused persons have to be tinged with a measure of

mercy. In *S v Rabie*³, Holmes JA stated: *"Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime and being fair to society"*.

20. In avoiding the imposition of the minimum sentence prescribed, in the face of a crime of the seriousness reflected *in casu*, the sentencing court has infused an element of mercy in the sentence passed. This court also has to be weary of readily tempering with a sentence passed by the court *a quo* because the appellant appeared before it, giving it the opportunity to view the appellant closely. In *S v Barnard*⁴, the court cautioned that: *"A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially or properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably"*.
21. I find that the appellant has not demonstrated to this court that the sentence meted out to him was shockingly inappropriate. He has not demonstrated that in imposing sentence against him, the trial court misdirected itself judicially; let alone that it misdirected itself seriously. As

³ . 1975 (4) SA 855 (A), at page 861.

⁴ . 2004 (1) SACR 191 (SCA).

such, the appeal against sentence stands to be dismissed and the following order is made:


ORDER.

1. Conviction is confirmed.
2. The appeal against sentence is dismissed.



T. A. Maumela.
Judge of the High Court of South Africa.

I agree.


JJ. STRIJDOM AJ
Acting Judge of the High Court of South Africa.