

✓ delivered on
09/11/17



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED	
DATE <u>7/11/2017</u>	SIGNATURE <u>[Signature]</u>

CASE NO: A227/20²⁰¹⁶~~06~~

SELBY SIBUSISO MTHINUNYE

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN NIEKERK, AJ

- [1] On 8 February 2016 Appellant was granted leave to appeal on petition against a sentence imposed on the 29th of June 2015 by the Regional Court, Benoni, having been found guilty on two counts of robbery with aggravating circumstances.
- [2] Appellant was sentenced to 15 years of imprisonment on each of the two counts of robbery with aggravating circumstances, and the Trial Court ordered that the sentences run concurrently.

- [4] The conviction on the two counts of robbery and the sentences referred to *supra* follows an incident which took place on 30 January 2015 when the Appellant and another perpetrator robbed three persons at gunpoint. All three the victims testified during the trial and corroborated each other's evidence in material respects. All three witnesses confirmed that it was the other perpetrator who pointed a firearm at them, and each victim testified about goods robbed from them which *inter alia* included that each victim was robbed of a cell phone, and apart from the cell phones a certain amount of cash was taken from each victim, as well as identity documents, and in respect of one of the victims, a driver's licence.
- [5] After finding the Appellant guilty on the two charges of robbery with aggravating circumstances, the minimum sentence of 15 years of imprisonment for a first offender for robbery with aggravating circumstances was imposed as a sentence in terms of the provisions of Section 51(2) of the Criminal Law Amendment Act, Act no. 105 of 1997.
- [6] It was argued on behalf of the Appellant that the Trial Court misdirected itself in not finding substantial and compelling circumstances, by not considering the following factors:
- [6.1] The firearm was used only to obtain submission from the complainants;
 - [6.2] None of the complainants were harmed in any way;
 - [6.3] The low value of the stolen items;
 - [6.4] Appellant was not in possession of the firearm;
 - [6.5] The prospects of rehabilitation.
 - [6.6] Not requesting the legal representative of the Appellant to address the Trial Court in respect of substantial and compelling circumstances;

- [6.7] The proportionality of the sentence.
- [7] On appeal it was argued that a duty remained on the presiding Magistrate to at least enquire from the legal representative of the Appellant whether there is any address in respect of the presence of substantial and compelling circumstances, in order to determine whether a sentence less than the prescribed minimum could be imposed in terms of the provisions of Section 51(3) of the Act 105 of 1997, with reference to the authority of ***State v Mokgara 2015 (1) SA CR 634 (GP)***. Comparing the authorities of ***State v Fortune 2014 (2) SA CR 178 (WCC)*** and ***State v Ndlovu 2007 (1) SCAR 535 (SCA)*** it was further argued on behalf of the Appellant that the sentence of 15 years of imprisonment is disproportionate given the circumstances of the case before the Court.
- [8] It is trite law that sentencing falls within the discretion of the Trial Court, and that a Court of Appeal's right to interfere with a sentence is limited to instances where the Court materially misdirected itself or commits a serious irregularity in evaluating all the relevant factors with regard to sentence:

Vide: State v Rabie 1975 (4) SA 855 (A) at 857 D – E

- [9] Where a statutory prescribed minimum sentence applies, as *in casu*, the Court can only deviate from the prescribed sentence and impose a lesser sentence if there are "*substantial and compelling circumstances*" present which warrants a deviation from the statutory prescribed minimum sentence. To this extent, the discretion of the Trial Court is therefore restricted statutorily, and the issue *in casu* is therefore whether or not the presiding Magistrate who imposed the sentence on the Appellant could have found "*substantial and compelling circumstances*" to impose a reduced

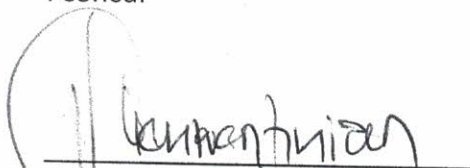
sentence than prescribed in terms of Section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997.

- [10] It is clear from the judgement of the presiding Magistrate that all relevant factors were considered. Reference is made in the sentence part of the judgment of the trial court to all the considerations referred to on behalf of the Appellant in the Appellant's Heads of Argument as set out *supra*. It is further clear from the record that the presiding Magistrate also considered extenuating circumstances, as well as the prevalence of the offence and the effect that it has on society. From the judgement of the presiding Magistrate, it is therefore clear that the presiding Magistrate considered the relevant factors, whether it be mitigating factors or extenuating circumstances.
- [11] In the circumstances, it cannot be found that the Trial Court misdirected itself. The imposition of the sentence was done in terms of a statutory provision which restricted the discretion of the Trial Court. There are therefore no grounds to interfere with the sentence imposed by the Trial Court as a result of which the appeal is dismissed.



P A VAN NIEKERK
ACTING JUDGE GAUTENG DIVISION PRETORIA

I concur



N JANSE VAN NIEUWENHUIZEN
JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPELLANT: Ms MASETE

INSTRUCTED BY: LEGAL AID SA

FOR RESPONDENT: ADV. LUYT

INSTRUCTED BY: THE STATE ATTORNEY

DATE OF HEARING: 2 NOVEMBER 2017

DATE OF JUDGMENT: NOVEMBER 2017