IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISON

CASE NO: A262/2018

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO
(3) REVISED. ✓

25/8/2020
DATE SIGNATURE

In the matter between:

SANDILE MTHETHWA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

SARDIWALLA J

INTRODUCTION:[1]

[1] *This judgment deals with the appeal against the judgment in the court a quo. It therefore proceeds on the premise that the reader is familiar with that judgment, the full details of the individual charges against the accused as per the indictment and the categorisation of the charges adopted by the learned Magistrate. In the interest of brevity evidence led before the court a quo will not be repeated*

[1] This is an appeal against sentence only. On 6 December 2017 the appellant appeared in the Regional Court Gauteng, held at Benoni on one charge of robbery with aggravating circumstances. The appellant pleaded not guilty and was sentenced to an effective period of 15 years of imprisonment. In addition, he was declared unfit to possess a firearm.

[2] The appellant petitioned the Judge President of the High Court on 7 March 2018 and was granted leave to appeal against his sentence only. The appellant was legally represented in all proceedings against him.

ISSUES ON APPEAL

[3] The issue is whether the sentence imposed by the magistrate was disturbingly disproportionate. The appellant in its heads of argument stated that the trial court erred in sentencing the appellant without allowing sufficient evidence in mitigation to be placed on record. The appellant therefore contends that the court assumed the armchair approach in the sentencing proceedings by failing to consider a probation officers report or calling witnesses to testify in mitigation. The court therefore erred in finding that there were no substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence. Further that this prejudices the appellant's rights to appeal and that the matter should be remitted to the *court a quo* for reconsideration of the sentence.

LAW AND ANALYSIS

[4] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In ***Mokela v The State*** **2012 (1) SACR 431 (SCA) para [9], Bosielo JA** stated the following:

> *'This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have*

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required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.

been distilled and set out in many judgments of this Court. See S v Salzwedel 1999 (2) SACR 586 (SCA) at 591F-G; S v Pieters 1987 (3) SA 717 (A) at 727F-H; S v Malgas 2001 (1) SACR 469 (SCA) para [12]; Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) para [11]; and S v Le Roux & others 2010 (2) SACR 11 (SCA) at 26b-d. '

[5] It was held in **S *v Salzwedel* 1999 (2) SACR 586 (SCA)** that:

"An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."

[6] The appellant argued that despite his previous convictions for theft and assault committed in 2008 and 2011 that this was his first conviction for robbery. Counsel therefore submitted that he did not possess the propensity to commit violent crimes. Counsel submitted that the court failed to consider the personal circumstances of the accused prior to sentencing him but did not state what personal circumstances of the accused were present that would have deterred the court from prescribing the minimum sentence, if any.

[7] I have read the judgments of the court a quo and I agree with the learned magistrate that there is no evidence or reasoning before this Court to determine that any substantial and compelling circumstances existed for consideration. I also agree with the learned magistrate that since the coming into effect of the Criminal Procedure Act 105 of 1997 "the problem has not subsided. It has become more and more acute". Although Counsel for the appellant alleges that where there is a prescribed minimum sentence that a court should not proceed with sentencing unless the personal circumstances of the accused are placed before the court, I must respectfully disagree. Counsel for the appellant in the court a quo Advocate Graf made submissions in mitigation of the appellants personal circumstances and did not request that the court consider a probation officers report nor did he call any witnesses to testify in mitigation. [8] A court is not called upon to be a referee

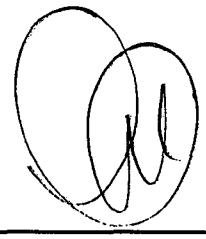
between the parties but has a judicial duty to apply the law to the facts of the matter before him. There is sufficient evidence against the appellant on sentencing that must be attached to give due weight to the gravity of the crimes for which the appellant has been convicted to determine whether the sentences were 'disturbingly inappropriate'. I am unable to find that even in light of a probation officers report or witness testimonies that the appellants personal circumstances would outweigh the interests of justice. The appellant in my view is what can only be referred to as a habitual criminal with two previous convictions against him and now a third. I find that for the purposes of an appeal against sentence this is relevant as did the court a quo when prescribing the minimum sentence.

[9] Having considered both arguments before this court I agree with the view held in ***Mokela v The State*** that sentencing is pre-imminently the discretion of the sentencing court and I am of the view that the proceedings were in accordance with justice.

ORDER

[10] It is ordered that:

1. **The appeal against sentence is dismissed.**



SARDIWALLA J
JUDGE OF THE HIGH COURT

I AGREE

MUNZHELELE A J
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	**:**	**3 September 2019**
Date of judgment	**:**	**12 August 2020**
Appellant's Counsel	**:**	**Adv.: J K Kgokane**
Appellant's Attorneys	**:**	**Legal Aid South Africa**
Respondent's Counsel	**:**	**Adv.: L Williams**
Respondent's Attorneys	**:**	**NDPP**