IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A160/2018

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

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SIGNATURE

11 February 2021
.....
DATE

In the Appeal of:

MDUDUZI PHIKWA **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 10 February 2021.

JUDGMENT

LESO, AJ

INTRODUCTION

[1] Appellant appeals against a sentence of 15 years' direct imprisonment for the offence of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with sections 51(2), 53 and Schedule 2 of the Criminal Law Amendment Act 105 of 1977. The Regional Court Magistrate, Mkhatshane presided over the matter under case number SH19/16 at the Gauteng Division, held at Sebokeng and he found the appellant guilty of the above offence on 25 July 2017. On 28 July 2017 sentence was imposed where appellant was sentenced to effective fifteen (15) years term imprisonment and declared unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000.

[2] The State alleged that on 8 January 2016, at or near Gold Star wholesalers, at Sebokeng, in the district of Gauteng, the appellant and other assailants unlawfully and intentionally assaulted Johan Ogilvie Lewis and other people. It was further alleged that the appellant forcefully took the victim's property, to wit, a Blackberry cellphone, 9mm Luger Pistol and the amount of R40 000 without his consent. A firearm was used in the commission of the above offence. The appellant pleaded not guilty and he was legally represented throughout the trial.

GROUNDS FOR APPEAL

[3] The grounds for appeal as briefly set out in the appellant's heads and as repeated by his counsel during oral submissions are the following:

3.1 Failure by the trial court to take into account all the factors that are relevant for purposes of the determination of sentence. As a result, the

court imposed a sentence that is "shocking and disproportionate to the offence and the facts of the case.

3.2 That the court failed to apply the determining test as laid down in *S v Malgas*[1] and thereby erred in finding that no substantial and compelling circumstances are attendant to the person of the appellant on the basis of which the court can be justified in deviating from the imposition of the prescribed minimum sentence.

3.3 That the court failed to take into account the prospects of rehabilitation and the period that the appellant spent in custody awaiting finalization of the trial.;

3.4 Complainant did not suffer serious injuries;

3.5 That the appellant was 37 at the time of sentence, he was married and had minor children;

3.6 Appellant only completed grade 11; and was incarcerated due to parole violation for 21 months as a results of this crime.

[4] The appellant submitted that the cases of *S V Zinn*[2], *S v Mthethwa and Others*[3] *and S v Nkosi*[4], set the guideline on how the court should impose a balanced sentence by considering personal circumstances of the accused, the circumstances of the commission of the crime, the interest of society, the nature of the offence and the offender. It is argued that the court *a quo* failed to apply the principles on sentencing as employed in the above cases. On the argument of prospects of rehabilitation, the appellant referred to *S v Khumalo and Other*[5],

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[1] 2001(1) SACR 469 (SCA)
[2] *1969 (2) SA 537 (A)*
[3] *2015(1) SACR 302 (GP)*
[4] *2012(1) SACR 87 (GNP*
[5] *1984 (3) SA 327 (A),*

S v Dodo[6], *S v Du Toit*[7], on the effect of long duration of imprisonment. The appellant argues that the sentence imposed by the court *a quo* leaves little or no hope that he will be rehabilitated. On the object of sentencing, the appellant cited the following cases; *S v Maseola*[8], *S v Mhlakaza and another*[9] *and S v Monyane and Others*[10].

GROUNDS FOR OPPOSING APPEAL

STATE'S CASE

[5] The state opposed the appeal and argued as following;

5.1 That the trial court did, indeed apply its mind extensively and enumerated the considerations, precedent and reasons for the sentence imposed.

5.2 Further, the sentence strikes the required balance between the elements of a sentence, clearly showing that the court's treatment of the enumerated factors was not mere lip-service.

5.3 The seriousness of the offence, the interests of society and the circumstances of the accused were all duly and explicitly considered and none were given more *gravitas* than others.

5.4 A person who does not accept responsibility cannot be rehabilitated. At the very least, his rehabilitation process would need to be longer to bring him to insight, where an offender already displaying insight may require less time to rehabilitate. The accused has never accepted responsibility,

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[6] *2001 (1) SACR 594 (CC),*
[7] *1979 (3) SA 846 (A) p 857 at F*
[8] *2010(2) SACR 311 (SCA) at 314 C*
[9] *1997(1) SACR 515 (SCA) at 523 g-j*
[10] *2008(1) SACR 543 (SCA)*

and in fact applied for leave to appeal the conviction as well as the sentence. Whereas the accused is well within his constitutional rights to apply for leave to appeal; it is safe to assume that the mind of the appellant is not remorseful and is therefore, less likely to rehabilitate. Leave was only granted where the sentence is concerned.

5.5 The statements made about the personal circumstances of the accused are bare statements with no indication of how such facts should influence the decision of the court. Besides, the court *a quo* imposed the minimum sentence as it was required to do.

5.6 That the magistrate allowed the accused to place before him reasons why he should deviate therefrom and the appellant failed to do so, both before the court *a quo.* Now on appeal, the reasoning on sentence on the part of the court *a quo* speaks for itself.

5.7 That the seriousness of the offence, the interests of society and the circumstances of the accused were all duly and explicitly considered and none were given more *gravitas* than others.

5.8 That the appellant quite rightly concedes that in the face of minimum sentencing legislation, his personal circumstances fade into the background although they do not get rendered. But background does not mean invisible. These should still be considered as part of the "composite yardstick" precedent exhorts, and indeed were duly considered.

5.8 The reasons that the accused advanced for purposes of mitigation of the sentence are "flimsy", and their consideration as "substantial and compelling" is outlawed in the case of **S v Malgas** (*supra*).

[6] I will not recite the cases which the state used as reference in its opposition save to state the stated cases are repetition of the appellant's stated case and the state argues that the said referred cases by the appellant do not support the appellants case as the cases bears different facts.

SUMMARY OF EVIDENCE ON SENTENCING

[7] Appellant conceded that in light of the minimum sentence legislation, he is liable for 15 years of imprisonment. It was argued that the personal circumstances of the appellant as listed in paragraph 3 should be considered substantial and compelling based on which the court will be justified in deviating from the imposition of the prescribed minimum sentence;

[8] The court *a quo* referred to several cases during sentencing. Firstly the judgment of De Vos(J) in the case of *S V N(155/2013)* wherein the following was said " the imposition of punishment must be accompanied by judicious mercy and humanity following the facts and circumstances of the case. On the process of sentencing, the court referred to *S V Zinn.* On balancing the personal circumstances of the appellant and whether there are substantial and compelling circumstances, the court referred to *S v Vilakazi*[11]and S v Malgas as a guideline for imposing the appropriate sentence. See page 215 to page 219 of the record.

[11] *2009 (1) SA CR 552 (SCA)*

[9] The court *a quo* said that there is authority for the view that criminals should not be sent to prison to come back with daring faces if the sentence is light. In conclusion, the magistrate stated as follows; "I *have looked at all the facts presented before me and could not find anything substantial and compelling to justify departure from minimum sentence. The aggravating circumstances far outweighs the mitigating factors. The accused was not a man of straw. He had a decent income, earning R8 000.00 per month. Surely he could take care of his wife and children without engaging in crime*". See page 218 of the record.

ANALYSIS OF EVIDENCE

[10] For the offence of robbery with aggravating circumstances, the law prescribes a minimum sentence of 15 years. Section 51 (2) of the Act on the other hand provides for the minimum sentencing of categories of offenders who have been convicted of offences referred to in Parts II, III and IV of Schedule 2 by providing that: 'Notwithstanding any other law, but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in- (a) Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15. The law provides that the sentencing court can only deviate from the above prescribed minimum sentence if it finds that there are substantial and compelling reasons on which to deviate. This court can only interfere with the sentence if there are grounds upon which the court should interfere.

[11] The only consideration for this court is whether the court *a quo* failed to consider all factors or whether it misdirected itself by finding that there were no substantial and compelling circumstances on the basis of which to deviate from the imposition of the minimum sentence when it imposed sentence on the appellant.

[12] It is common cause that the offence which the appellant has committed calls for the court to impose the minimum prescribed sentence of 15 years. It is a sentence that the society expects the court to impose and the appellant would have been pre-warned about the possible imposition of this sentence at the beginning of the trial. During the address in mitigation of sentence, the appellant's attorney confirmed that the appellant was aware that in the event of a conviction, he is facing 15 years' imprisonment. Therefore, the sentence imposed cannot invoke a sense of shock as argued by the appellant. The only time this sentence can invoke a sense of shock is when the sentencing court has downplayed or failed to consider the substantial and compelling facts placed before it by the appellant.

[13] From the record, while the court *a quo* had fully outlined the aims of sentencing which are retribution, deterrence, rehabilitation and prevention. The court has also considered the personal circumstances of the appellant as stated in the appellants ground of appeal and as further stated that, in aggravation of sentence, the offence was operated by a gang and members of a gang should be tracked down and be arrested.

[14] The court is implored to go further than considering or "looking" at the personal circumstances of the appellant as the magistrate said in his judgment. From the record, I have no doubt that the magistrate merely recited the personal circumstance of the appellant and simply considered those to be flimsy without analyzing those circumstances individually. What is lacking in this judgment is the fusion of all the presented facts into the consideration of the sentence to be imposed. The court *a quo* did not fully employ the purpose of punishment as outlined in the case of S V Rabie 1975 (4) SA 855(A), page 862 where it was held that punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances. Mthethwa sates that the approach established in *Malgas*, which has since been followed in a long line of cases, sets out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. Among the factors to be considered when determining whether substantial and compelling circumstances are present or not, are the traditional sentencing factors: the triad consisting of the nature of the offence, the personal circumstances of the accused, and the interests of society. The sentence imposed is unfair considering the fact that the appellant is a first offender and he was not the perpetrator and was of a tender age. The court *a quo* has referred to the above cases however it failed to follow the approach established in sentencing the appellant. The sentence was more driven by the aggravating circumstances and the interest of society.

[15] I had to take issue with the court *a quo's* finding that it found no substantial and compelling circumstances to be attendant to the person of the accused which justify departure from the imposition of the prescribed minimum sentence. The

court failed to consider the period which the appellant spend in custody. According to his calculation, the magistrate concluded that the appellant spent one and half years in custody. The above factors should surely directly influence the period of incarceration to be imposed. In the case of *S v Mambo & others*[12] (a case with almost similar facts to the appellant's) "Appellant 2 was a young man of twenty one when he was arrested for the first time on 3 January 1997. He had been in custody for almost one and a half years and was never in trouble with the law before his trial was finalised. In deciding what an appropriate sentence should be in his case, the judge held that these circumstances are in his view so sufficiently substantial and compelling as to justify the imposition of a lesser sentence than the prescribed 15 years' imprisonment. 10 years' imprisonment was considered to be an appropriate sentence.

[16] In this case the appellant tried to apply for bail on 25 January 2016 and after several remands on account of court, his application was formally denied on 7 June 2016 and only on 22 July 2016 was the appellant represented by Legal Aid. On several occasions the matter was transferred from one court to the other and on some occasions the court interpreter was not available. Typically, some delays seem to have been at the instance of the State and others at the instance of the appellant. In the case of *Ngcobo v S (1344/2016) 2018 ZASCA*, primarily the appellant remained in custody because his three bail applications failed. Even if there were delays, this court said in Radebe: 'the test was not whether on its own that period of detention constituted a "substantial and compelling circumstance", but whether the effective sentence proposed was proportionate

[12] 2006(2) SACR 563 (SCA)

to the crime or crimes committed; whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one.'

[17] The magistrate only recited the appellant's personal circumstances and overemphasized the seriousness of the offence. The whole judgment is overshadowed by the offence committed. The facts of this case are similar to the facts in S v Mthethwa and others 2015 (1) SACR 302 (GP), save to say that in Mthethwa the accused used a hammer not a firearm to rob the victims. The appellants were convicted by the regional court, Pretoria, on two counts of housebreaking with intent to rob and robbery with aggravating circumstances. The genesis of the convictions and the sentences is two robberies on 19 November 2009 during which the appellants robbed Mrs Alida Spronk and Mrs Annete Botes, in almost similar circumstances, and within minutes of each other. The appellants entered the house of Mrs Pronk at approximately 10h30 by breaking the entrance gate and the main entrance door. She was alone at the time. She was threatened with a hammer, and her laptop computer was stolen, the value of which she estimated to be R9 000. The appellants had spent close to three years in custody awaiting the finalization of their trial. The trial court found that to constitute substantial and compelling circumstances, hence it deviated from the imposition of the prescribed minimum sentence of 15 years' imprisonment on each count of robbery.

CONCLUSION

[18] The personal circumstances of the appellant, specifically his age and the fact that he is a first offender should be taken into consideration to determine whether the appellant can be rehabilitated.

[19] An unwarranted day in prison should be avoided at all costs because it affects a person's rights to human dignity and freedom. The appellant spent a considerable period in custody awaiting trial for reasons that were not purely of his own doing. This period should be a compelling factor in considering a lesser sentence than the prescribed minimum sentence.

[20] Considering all the relevant factors, I am of the view that the sentence imposed upon the appellant by the court a court *a quo* is overly harsh; much as it is disproportionate to the offence committed. I view that a period of 10 years' imprisonment would satisfy the aims of punishment and it would be fair to the society and the appellant in the sense that rehabilitation shall be enabled.

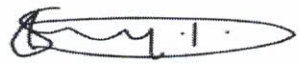
IN THE RESULT, I PROPOSE THAT THE FOLLOWING ORDER BE MADE:

ORDER

1] Appeal against sentence is upheld;

2] The sentence imposed by the regional court is set aside;

3] The imposed sentence of 15 years' direct imprisonment is substituted by of Sentence10 years direct imprisonment



J T LESO

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

MAUMELA T.A.

JUDGE OF THE HIGH COURT

DATE OF THE HEARING: 22 OCTOBER 2019

DATE OF JUDGEMENT: 11 FEBRUARY 2021

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