THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 073/14

In the matter between Not Reportable

MADALA GOODWILL SHUBANE **FIRST APPELLANT**

GEORGE MONDLANA **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Shubane v The State* (073/14) [2014] ZASCA 148 (26 September 2014)

Coram: Shongwe, Majiedt and Mbha JJA

Heard: **10 SEPTEMBER 2014**

Delivered: **26 SEPTEMBER 2014**

Summary: Sentence – Robbery with aggravating circumstances – Premeditated, well planned robbery – Firearm and knives used – Violence inflicted upon, inter alia, elderly woman – Gun held against head of seven year old child – 17 years' imprisonment appropriate – no requirement in our law that a sentencing officer should forewarn an accused person of a contemplation to impose a sentence in excess of the statutorily prescribed minimum sentence.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Preller et Pretorius JJ, sitting as court of appeal):

The appeal against sentence is dismissed.

JUDGMENT

Majiedt JA (Shongwe and Mbha JJA concurring):

[1] The appellants, Mr Madala Goodwill Shubane and Mr George Mondlana, appeal against the sentence of 17 years' imprisonment imposed upon them in the Benoni Regional Court for robbery with aggravating circumstances, confirmed on appeal to the North Gauteng High Court, Pretoria (Pretorius J, Preller J concurring). The first appellant appeals with the leave of the high court and the second appellant with the leave of this court.[1]

[2] The appellants and a confederate, the erstwhile accused number one, accosted Mr Mohammed Jogee in his garage at home during the early morning of 2 June 2004 as Mr Jogee was about to take his child to school. One of the robbers was armed with a firearm and the other two with knives. Mr Jogee was assaulted, tied up with a computer cable and pushed into his motor vehicle. Two of his assailants entered the house and he was later also taken there by the third attacker. Inside the house Mr Jogee's wife and his elderly mother were also assaulted by the robbers. One of the robbers pointed

[1] The high court initially refused the second appellant's application for leave to appeal, but purported to 'recall' that order when subsequently granting the first appellant leave to appeal. The high court was *functus officio* when it purported to 'recall' its first order and granted the second appellant leave to appeal to this court, having earlier granted such leave to the first appellant. The second appellant's subsequent petition for leave to appeal was granted by this court.

the firearm at the Jogees' seven year old son, demanding money. The boy directed the robbers to his coin collection, but they were not interested in it. The Jogee family's ordeal ended when their neighbours who had heard the commotion intervened, causing the robbers to flee, taking with them a mobile phone, a wallet containing R200 in cash and bank cards, a ring and car keys. The wallet and the ring were never recovered.

[3] The Regional Magistrate took into account the aggravating and mitigating circumstances before imposing sentence. In respect of the latter he had regard to the appellants' personal circumstances which were as follows:

(a) The first appellant was 28 years old, unemployed and single with no dependants. He earned approximately R1 000 per month doing part-time jobs and lived with his unemployed brother;

(b) The second appellant was 31 years old, single and had three minor children. He ran a small business as a hawker from which he earned R2 000 per month.

[4] Neither of the two appellants had any previous convictions and they had spent ten months (the first appellant) and just under 12 months (the second appellant) in custody before their trial was finalised. The Regional Magistrate pertinently took these factors into account in his deliberations on a suitable sentence.

[5] The following aggravating circumstances were taken into consideration by the Regional Magistrate for sentencing purposes:

(a) The fact that the wallet (and its contents) and the ring were never recovered;

(b) The invasion of the Jogees' home, which is supposed to be their safe haven, by the armed robbers;

(c) The assaults on the victims, particularly on Mr Jogee's elderly mother;

(d) The shocking act of holding a firearm against a seven year old child's head.

[6] In addition to these aggravating factors enumerated by the Regional Magistrate, one also discerns from the record that the appellants have not shown any remorse at all. A further aggravating factor is the fact that on the evidence on record the robbery had clearly been carefully planned and was thus premeditated.

[7] It was contended on behalf of the appellants that the Regional Magistrate had misdirected himself by not forewarning the appellants that he contemplated imposing a sentence in excess of the minimum sentence of 15 years statutorily prescribed for this type of offence.[2] The appellants' legal representatives should have been given an opportunity to make submissions on why a sentence in excess of the prescribed minimum sentence should not be imposed, so it was contended. These contentions are misplaced. There is no duty in our law upon a sentencing officer to forewarn an accused person of such a contemplation or to grant an opportunity for submissions to be made in this regard. In *Mthembu*[3] this court endorsed the view of the high court in that matter (the Full Court consisting of Jappie, Swain and Gorven JJ)[4] that no such forewarning is required.[5] And this court also upheld that Full Court's finding that *Mbatha*,[6] in which the contrary was earlier held, was wrongly decided.[7]

[8] We are bound by this court's judgment in *Mthembu* which was, with respect, correctly decided. Having earlier alluded to the divergent judgments of the Full Courts in *Mbatha* and *Mthembu*, Ponnan JA and Petse AJA held as follows:[8]

'It may well be a salutary practice for a court, if it holds a view adverse to a particular litigant, to put that to the litigant or such litigant's representative during argument. But we cannot imagine that where a view is just in its embryonic stage, a failure to do so,

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[2] Section 51(2)(*a*)(i) of the Criminal Law Amendment Act 105 of 1997 (the Act) read with Part II of Schedule 2 thereof.
[3] *S v Mthembu* 2012 (1) SACR 517 (SCA).
[4] *S v Mthembu* 2011 (1) SACR 272 (KZP).
[5] *S v Mthembu* fn 3 above para 18.
[6] *S v Mbatha* 2009 (2) SACR 623 (KZP) – a decision of the Full Court (Wallis J, van der Reyden and Niles-Duner JJ concurring).
[7] *S v Mthembu* fn 3 above para 18.
[8] *S v Mthembu* fn 3 above para 18.

without more, would constitute a defect in the proceedings. In particular Wallis J's approach, that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes, without more, a defect in the proceedings, cannot be endorsed. In our view such failure in and of itself will not result in a failure of justice which vitiates the sentence. After all, any sentence imposed, like any other conclusion, should be properly motivated (*S v Maake* 2011 (1) SACR 263 (SCA). And we should not lose from sight that our appellate courts have, in terms of long standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate. As both *Legoa* and *Ndlovu* make plain, a "vigilant examination of the relevant circumstances" is required. Here, the indictment was explicit. It stated: "MURDER read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997". Thus, right from the outset, the accused was informed in unambiguous terms that the state intended to rely on the minimum sentencing provisions. No specific irregularity was alluded to in argument. A careful perusal of the record reveals that there was none.'

Counsel for the appellants sought to place reliance for his contentions on this court's judgment in *Maake*.[9] But, as this court demonstrated in *Mthembu,* the *Mbatha* judgment was cited in *Maake* in a completely different context.[10] The reliance on *Maake* is therefore misconceived. In any event, when an accused person is at the commencement of a trial apprised of the sentencing provisions in sections 51 and 52 of the Act, read with Schedule 2, that by necessary implication includes the provisions relating to a Regional Magistrate's power to impose a sentence not exceeding five years more than the prescribed minimum sentence of imprisonment.

[9] The second arrow to the appellants' bow was the contention that the Regional Magistrate had failed to furnish reasons for imposing a sentence in excess of the minimum prescribed by law. If correct, that would justify a conclusion that the sentence was arrived at arbitrarily and may very well result in interference on appeal.[11] But this submission is devoid of merit. The record reflects that the Regional Magistrate set out in his judgment on sentence in

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[9] *S v Maake* 2011 (1) SACR 263 (SCA).
[10] *S V Mthembu* fn 3 above para 19.
[11] *S v Maake* above para 28; *S v Mathebula & another* 2012 (1) SACR 374 (SCA) paras 11 and 12.

some detail the aggravating factors referred to above which impelled him not to deviate from the prescribed minimum sentence. He then made reference to the subsection in the Act which vested in him the power to impose a sentence in excess of the prescribed minimum. He regarded these aggravating factors, particularly the violent assault on an elderly lady and the pointing of a firearm at a seven year old boy's head, as so heinous that it warranted a sentence in excess of the 15 years' imprisonment prescribed by law. This ground of appeal must therefore also fail.

[10] The last aspect for consideration is whether the sentence of 17 years' imprisonment warrants interference on appeal. Counsel for the appellants argued without much vigour that there are substantial and compelling circumstances to deviate from the prescribed minimum sentence. These were contended to be the fact that the appellants had spent more than a year in custody awaiting trial, that they were first offenders and that the State had failed to adduce any evidence regarding the injuries sustained by the victims. Short shrift can be made of the first two aspects. As stated, the Regional Magistrate pertinently took into consideration the time the appellants had spent in custody before sentencing. And the contention is also factually incorrect – as indicated above the first appellant had spent ten months and the second appellant just under a year in custody at the time when they were sentenced. As far as the second aspect is concerned, the Act specifically provides for harsher sentences to be imposed on second and third offenders.[12] A first offender is therefore already given the benefit of a lesser sentence by the Act itself. The fact that the appellants have no previous convictions is most certainly a positive mitigating factor in their favour, but it can hardly be a compelling or substantial circumstance on its own.

[11] The last factor contended for is somewhat startling. While it is true that no evidence was led regarding the victims' physical injuries, the emotional trauma which they must have suffered is unquestionable. This is particularly so in the case of Mr Jogee's mother and his seven year old son. One can

[12] Section 51(2)(*a*)(ii) and (iii) of the Act, read with Part II of Schedule 2.

hardly imagine more reprehensible conduct than the assault of an elderly lady and the pointing of a firearm against the head of a young child in the course of an armed robbery inside a private home. I am satisfied on the facts of this case that the Regional Magistrate was correct in finding that no substantial and compelling circumstances exist and that a sentence in excess of the prescribed minimum is warranted. The gravity of the offence and the circumstances under which it has been committed justify the sentence imposed. And the high court was correct in dismissing the appeal. The appeal is thus devoid of merit.

[12] I issue the following order:

The appeal against sentence is dismissed.

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S A MAJIEDT

JUDGE OF APPEAL

APPEARANCES

For Appellants:	J Mojuto
Instructed by:	Legal Aid SA, Pretoria
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	P W Coetzer
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein