



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)**

CASE NO: A374/13

(1) (2) (3)	REPORTABLE: NO OF INTEREST TO OTHER JUDGES: NO REVISED.
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20 February 2014

S JULY

In the matter between:-

NKOSI VUKILE DLAMINI

Appellant

And

THE STATE

Respondent

JUDGMENT

JULY AJ

1. This is an appeal brought by the appellant through a petition that was granted by this court. This court granted leave to appeal in respect of the sentence. For purposes of this judgment, this court will concern itself with only those facts that are relevant to sentencing.

2. The appellant was charged for robbery with aggravating circumstances. The complainants version of events was that the appellant, with his two friends, robbed her of her cell phone and she was hit with a brick and stabbed in the process. According to the complainant, it was the appellant who hit her with a brick while the friend stabbed her.
3. Although a contrary version was put to the witnesses who testified on behalf of the state, the appellant refused to testify. Only during the determination of a sentence did the appellant testify. He testified that he has two children.

SENTENCE

4. It is trite law that sentencing is the discretion of the trial court. This court may not interfere with such discretion on the basis that it is wrong. Only in the case of demonstrable material misdirection that this court may be justified to interfere. Absent the material misdirection this court has limited powers to interfere with the sentence imposed by the trial court. Also in cases where sentence imposed by the trial court induces a sense of shock will this court be justified to interfere with the sentence.
5. In imposing a sentence the trial court is enjoined to take personal circumstances of the accused.
6. In this matter the trial court took into account that he had two children as well as his personal circumstances.
7. In paragraph 20, on page 81 of the judgment, the court state :

"I have... having considered all the factors the only mitigating factors in this are the age of the accused and the fact that he is a first offender..."

8. The nature of the offence committed by the appellant for which he was found guilty attracts a minimum sentence of 15 years. The sentence cannot be deviated from, unless there are substantial and compelling reasons for such deviation.
9. The trial court, rightly so, considered age to be a substantial and compelling factor, justifying deviation and sentenced the appellant to 12 years imprisonment. It, however, found the fact that the appellant had children not to be compelling because he was not in any way responsible for them. The appellant is appealing to this court for the further reduction of the minimum sentence.
10. The powers of this court to interfere with the sentencing of the trial court are limited. This court may only interfere with the sentence imposed by the trial court when there has been demonstrable and material misdirection by such a trial court in imposing such a sentence, or that court's discretion has not been exercised properly or judicially. In the absence of such proof, the appeal court has no right to interfere with the exercise of such discretion.
11. The court in *S v Kekane*¹ stated that:

"It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock. It has been submitted on behalf of the appellant that the sentence is out of proportion to the gravity of the offence and that, in the circumstances of this case, a non-custodial sentence was appropriate. It is true that the appellant has an unblemished record and that he was a useful member of society in

¹ 2013 (1) SACR 101(SCA).

gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced."

12. In *S v Barnard*², the court held 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."

13. If there is no clear misdirection that is not the end of the enquiry, the appeal court will have to look at the reasonableness of the sentence.

14. In *S v Truyens*³, the court referred to *S v Whitehead*⁴ with approval that where there is no misdirection by the trial court, the remaining question is:

"Whether there exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed – or, to pose the enquiry in the phraseology employed in other cases, whether the sentences

² 2004(1) SACR 191 (SCA).

³ 2012 (1) SACR 79 (SCA).

⁴ 1970 (4) SA 424 (A).

appealed against appear to this Court to be so startlingly or disturbingly inappropriate- as to warrant interference with the exercise of the learned Judge's discretion regarding sentence."

15. I do not think the circumstances of this case warrant the interference with the sentence imposed by the trial court.

16. Accordingly the following order is made:

1. The appeal by the appellant is dismissed.

JULY AJ

JUDGE OF THE HIGH COURT

I agree

FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPELLANT : E. TLAKE

FOR RESPONDENT : V.H MONGWANE

DATE OF HEARING : 20 FEBRUARY 2014

DATE OF JUDGMENT : 20 FEBRUARY 2014