

REPUBLIC OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A532/2013

In the matter between:

MBAMBO, SIBUSISO

Appellant

and

THE STATE

Respondent

JUDGMENT

LAMMINGA AJ:

[1] The Appellant, Mr Sibusiso Mbambo appeared in the Regional Court for the Regional Division of Gauteng held at Randburg on a charge of robbery with aggravating circumstances as contemplated in Section 1 of Act 51 of 1977 read with sections 51 and 52 of Act 105 of 1997. In the charge sheet it was alleged that upon or about the 2nd July 2007 and at 37 S[...] Road, B[...], Randburg, in the Regional Division of Gauteng, he unlawfully and intentionally assaulted Peter Nyaboko, and did then and there and with force take from him the following property which was his property to wit one brown leather jacket valued at R1000-00, four bank cards, cash in the sum of R50-00, motor vehicle keys and a HTC cellular phone, valued at R8000-00 – Aggravating circumstances being that the accused and or an accomplice whether before, during or after the commission thereof handled a firearm, or a dangerous weapon and who inflicted a grievously injury or injuries and/or threatened to inflict a grievous bodily injury or injuries.

[2] The Appellant, who had legal representation throughout the trial, pleaded not guilty to the charge on 11 October 2007, but was convicted and sentenced to 18(eighteen) years imprisonment on 15 October 2007.

[3] On 29 July 2010 an application for condonation and leave to appeal was heard and refused by the Regional Magistrate.

[4] On 6 November 2013 the Appellant's petition to the Judge President for leave to appeal against the conviction was refused but he was granted the requisite leave to appeal against the sentence.

[5] The facts of the case as regards the merits can be summarized as follows:

The Complainant arrived home, at 21h00 on the evening of 2 July 2007, opened the electric gates to his driveway, entered and closed the gates again with a remote control. The premises are fully fenced. He unlocked the security gate and front door and went in to put down his groceries. As he was on his way to close the front door, the Accused entered through the open door, holding a knife in a raised position and gesturing to him to be quiet. The Accused whispered that he should be quiet or will be killed. Three more men entered behind the Accused. Subsequently the Complainant was tied up, gagged and items as listed in the charge sheet, taken from him and/or his house. As the Accused and his accomplices were busy in the house the complainant managed to escape and flag down a police vehicle in the street. The Accused was apprehended in possession of the complainant's jacket and the bank cards, which he tried to discard shortly before he was apprehended.

[6] After the conviction, the State proved a previous conviction of the Accused. He was found guilty of theft committed on 31 May 2004 and sentenced to five years imprisonment of which four years imprisonment was suspended. Unfortunately there is no copy of the SAP 69 included in the record and no indication that the SAP69 was entered into evidence as an exhibit. Therefore we do not know when he was convicted and sentenced on that case. Nor do we know what the conditions of his suspension were. However, dispossessing someone of their property is common to both theft and robbery.

[7] The provisions of the Criminal Law Amendment Act 105 of 1997, specifically Section 51(2) is applicable and states that:-

“(2) 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-

(i) a first offender, to imprisonment for a period not less than 15 years;

...

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years."

And in Part II of Schedule 2:-

"...

Robbery-

(a) when there are aggravating circumstances; or

(b) involving the taking of a motor vehicle."

[8] Although the charge sheet referred to Sections 51 and 52 of Act 105 of 1997, there is no indication in the record that the said provisions were explained to the Accused. In cases such as **S v Chowe** 2010 (1) SACR 141 (GNP) and **S v Ngomane** 2012 (2) SACR 474 (GNP) it was remarked that it is the task and responsibility of the presiding officer to explain the fact that he is exposed to the minimum sentence legislation, since it is inherent to the right to a fair trial. As stated, this point was not raised in this appeal, but the issue was raised during argument and counsel for the Respondent conceded that, since this was not done, the court was restricted to its ordinary sentencing jurisdiction of 15 years. This concession is incorrect in that in this case the Appellant was informed in the charge that it should be read with the provisions of Sections 51 and 52 of Act 105 of 1997. In **S v Nkadimeng** 2008 (1) SACR 538 (T) it was held that where the charge sheet makes a clear reference to the fact that the prosecution will rely on the provisions of Act 105 of 1997, and the Accused has legal representation, then there is no duty on the trial court to explain the implications of that legislation to the Accused.

[9] The Appellant's submission is that the presiding officer misdirected himself in finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence and his finding that a more severe punishment is appropriate.

[10] The circumstances referred to by the Appellant were that:-

10.1. There was no gratuitous violence involved;

10.2. The accused is a first offender in relation to robbery;

10.3. Not much was stolen;

In my view, these do not amount to substantial and compelling circumstances to justify a departure from the minimum sentence.

[11] Another point not raised in this appeal is the fact that the Presiding Officer did not inform the parties that he might consider a sentence of more than the prescribed minimum.

[12] In **S v Mthembu** 2012 (1) SACR 517 (SCA) the Supreme Court of Appeal dealt with the question whether **S v Mbatha** 2009 (2) SACR 623 (KZP) was correctly decided. In **Mbatha**, Wallis J (as he then was) held at paragraph [26] that the proper approach, when a court considers imposing a sentence greater than the prescribed minimum sentence, is that the Accused must be warned by the court, as failing to do so will constitute a defect in the proceedings. After due consideration of the motivation for the finding in the **Mbatha** case, the Supreme Court of Appeal in **Mthembu** (*supra*) held at p 524 paragraph [18] that Wallis J's view 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."

[13] In this regard, the court differed from the finding in **S v Maake** 2011 (1) SACR 263 (SCA), stating that the court therein did not analyse the **Mbatha** (*supra*) decision in arriving at its finding. It follows then that the mere fact that the defence was not informed of the court's contemplation of imposing a higher sentence than what is the prescribed minimum, is not, on its own, sufficient to vitiate the sentence.

[14] In the present case the learned magistrate did set out various aggravating factors which led him to conclude that a more severe punishment other than the prescribed minimum sentence would be appropriate. Thus he states that there was premeditation, an ambush of an individual by a group, prevalence of the offence, a previous conviction on a charge of theft and lack of remorse. In light of the decision in **S v Mthembu** and specifically also that it was decided in **S v Mokela** 2012 (1) SACR 431 (SCA) at p 439 paragraph [10] that a court of appeal will only be justified to interfere in the sentencing court's discretion where it is satisfied that the sentencing court misdirected itself, or did not exercise its

discretion properly or judicially, the sentence must stand.

Accordingly, I propose the following order:-

The appeal against the sentence is dismissed.

LAMMINGA AJ

I agree and it is so ordered:

WEINER J

Counsel for the Appellant: THLAKE

Counsel for the State: MUSHWANA

Date of Hearing: 12 May 2014

Date of Judgment: 15 May 2014