

REPUBLIC OF SOUTH AFRICA



**IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)**

CASE NO:A398/2013

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

16 MAY 2014

Signature: _____

In the matter between

RADEBE, ENOCH MANDLA

APPELLANT

And

THE STATE

RESPONDENT

J U D G M E N T

CORAM: RE MONAMA J et MOSIKATSANA AJ:

[1] The appellant was charged in the Protea Regional Magistrate's court with two counts:

Count 1: Robbery with aggravating circumstances read with the provisions of Act 51 of 1977 and s 51(2) of Act 105 of 1997;

Count 2: Attempted murder.

[2] On 17 November, 2010 he pleaded not guilty to both counts. On 02 December, 2010 he was convicted on count 1 and acquitted on count 2 to obviate a splitting of charges and a concomitant duplication of conviction. He was sentenced to eighteen years imprisonment. Leave to appeal conviction and sentence was denied on 30 March, 2011. Leave to appeal sentence only was granted on petition on 23 August, 2013.

[3] The incident from which the charges arose occurred on 28 August, 2010 at approximately 23h30. The first complainant arrived home. He found his wife, the second complainant home, waiting for him. The first complainant entered the house, he closed the door but he did not lock it. He sat down. Immediately thereafter, three men entered the house without knocking. The appellant was amongst them. He had a gun. The other assailant was holding an iron rod. The first person to enter the house was the assailant with the iron rod, followed by the appellant and the third assailant.

[4] The appellant accosted the first complainant. He swore at him and demanded cell-phones and money from him. The Appellant and the other two assailants ordered the first and second complainants to face down and not to look at them. Each time the appellant demanded money from the first complainant, he whipped him with the firearm on the head. In total he whipped him on the head three times with the firearm. The first complainant was bleeding from the injuries he sustained from being hit with a firearm on the head. The appellant and his accomplices eventually robbed the first and second complainants of their two cell-phones.

[5] The appellant and his two accomplices continued to demand money from the complainants. The second complainant informed them that they had no money except for the R5.50 that was placed on the sofa. The assailant who was carrying an iron rod called the second complainant a bitch and asked her what she expected him to do with R5.50. The appellant threatened to shoot the first complainant. At the same time the assailant with an iron rod went into the bedroom. At this point, the second complainant stood up. She pleaded with them not to shoot her husband. She told them that they didn't have money but that they could take the TV, DSTV decoder and the DVD player because that was all they had.

[6] Instantaneously, the second complainant grabbed the appellant. They struggled for the firearm. She pushed the appellant to the kitchen next to the stove. During the struggle, the firearm that was already cocked went off, shooting the second complainant on her right breast. The second complainant and the appellant continued to fight for control of the firearm. She pushed the appellant outside the house and started screaming for help. The assailant with an iron rod who was in the bedroom at the time came to the appellant's assistance. He hit the second complainant on the left side of both her head and her hip. She continued to scream asking the neighbours for help. Appellant and the assailant with an iron rod fled the scene.

[7] Both complainants were taken to hospital. The first complainant was released after receiving stitches to the head due to the injuries he sustained from being pistol-whipped. The second complainant went through surgery. She was hospitalised for seven days. Three of those days she spent in the intensive care unit. None of the items stolen during the robbery were recovered.

[8] Both complainants identified the appellant by means of a scar on the left side of his upper lip. Both complainants were also able to pick out the appellant in an identification parade line-up. The line-up consisted of seven persons. The regional magistrate commented that ideally the line -up should have consisted of ten persons, but he found a parade of seven persons to be sufficient for the purpose.

[9] The Appellant's defence was a total denial of all the allegations against him. He argued that he was incorrectly identified. He stated that the investigating officer had taken pictures of him on his cell-phone and shown them to the complainants to enable them to identify him as the perpetrator at the parade. He stated that after the arrest he was taken to the home of the complainants to be shown to the complainants but they were not home. At the time the complainants were still in hospital.

[10] The regional magistrate found that the complainants' evidence was reliable and that the scar on the appellant's lip by which he was identified, made it easy for the complainants to identify him.

[11] On the issue of sentence, counsel for the appellant argued that a sentence of eighteen years for aggravated robbery resulting in the victims being injured is shockingly inappropriate as it is not proportionate to the offence committed, the interests of society or those of the appellant (*S v Vilakazi* 2009 (1) SACR 552 (SCA) 574-575 par58-60). She argued that the regional magistrate misdirected himself in reasoning that the use of a firearm in a robbery is far more aggravating than if a knife is used.

[12] Appellant's counsel further argued that even though the charge of attempted murder was dropped as it amounted to a splitting of charges it appeared that the eighteen year sentence was intended to punish the appellant for shooting the second complainant. Appellant's counsel submitted that the statutory minimum sentence of fifteen years would have been appropriate in the circumstance, as it would have the desired effect of making the appellant appreciate the blameworthiness of his actions while tampered with mercy (*S v Rabie* 1975(4) SA 855 (A)).

[13] The respondent has reminded this court that sentence is a matter for the sentencing court (*S v Kgosimore* 1992 (2) SACR 238 (SCA)) and that the court of appeal is not to interfere with the sentence imposed merely because it would have imposed a different sentence or even a lighter sentence. The appeal court it is argued can only interfere with the sentence if it is convinced that the regional magistrate did not exercise his discretion judiciously (*S v Skenjana* 1985 (3) SA 51 (A)).

[14] In the heads of argument, respondent argued that the appellant was legally represented throughout the trial and that his counsel addressed the sentencing court on mitigation. Respondent further submits in its heads, that the regional magistrate carefully weighed all the factors including the aggravating factors in imposing a sentence of eighteen years.

[15] The regional magistrate in passing sentence took into account as mitigating factors, that the appellant has a child to maintain, that he has no prior convictions and that he spent some time in jail awaiting trial. These factors were balanced against the fact that the crime was premeditated and that the second complainant was wounded with a firearm and almost killed in the robbery. The regional magistrate having found no compelling and

substantial reasons to impose a lesser sentence than the prescribed minimum of fifteen years also found sufficient facts to exceed the minimum.

[16] The difficulty that this court encounters is that the regional magistrate did not sufficiently articulate the considerations which justified a sentence in excess of the prescribed minimum of fifteen years. In our view, the regional magistrate did not exercise his discretion judiciously in imposing a sentence of eighteen years which is in excess of the prescribed minimum of fifteen years.

[17] In oral argument on 11 March, 2014 despite earlier written submissions by the respondent, arguing for the 18year sentence not to be disturbed, both counsel conceded that a sentence of eighteen years is shockingly inappropriate even when taking into account the fact that the second complainant sustained gun wounds in the robbery.

[18] This court accepts the oral arguments of both counsel on the severity of the sentence. It is the finding of this court that the regional magistrate was misdirected in imposing a heavier sentence than the statutorily prescribed minimum of fifteen years without giving adequate reasons to justify a heavier sentence.

IN THE RESULT

[19] The sentence of the court *a quo* is set aside and is replaced with the following:

19.1 15yrs imprisonment antedated to the date of sentence 02 December, 2012.

TL MOSIKATSANA
ACTING JUDGE OF THE HIGH COURT

I agree.

RE MONAMA
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANTS

MS M BOTHA

COUNSEL FOR RESPONDENT

ADV E DUPLOOY

DATE OF HEARING

11 MARCH 2014

DATE OF JUDGMENT

16 MAY 2014