



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

CASE NO: A03/2015

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

[28 April 2016]

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In the matter between:

MUDAU, IKE

Appellant

and

THE STATE

Respondent

JUDGMENT

MUDAU J:

[1] Arising out of a cash -in -transit heist the appellant, Mr Ike Mudau and another, appeared before the regional court, Protea, charged with robbery

with aggravating circumstances, possession of an unlicensed firearm as well as ammunition. After hearing evidence, the court below acquitted the co-accused in respect of all the counts, but convicted the appellant on the robbery count. This appeal, with leave of the court below, was initially against the sentence only. However, it has since transpired that the appellant served and filed amended Heads of Argument to include an appeal against conviction albeit without leave of the trial court. The appellant contends that this court should use its inherent powers to deal with the appeal on merits as well.

[2] Although the amended papers were not in the court file, the respondent was aware of the developments since November 2015. In argument before us, the appellant contended that he should have been given the benefit of the doubt and was therefore wrongly convicted of robbery. The respondent disagrees. S 309B of the Criminal Procedure Act 51 of 1977 (CPA) provides that any accused “who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, *must apply* to that court for leave to appeal against that conviction, sentence or order” (emphasis added). The language of the Legislature in this regard is peremptory.

[3] S 309C of the CPA makes provision for a petition to the Judge President of the High Court having jurisdiction in the event that leave to appeal is denied. This dispensation is aimed at curbing the unnecessary flow of matters for the consideration of the High Court in instances where there are clearly no merits. In the instant case we were addressed by both parties regarding the merits. If our approach is wrong, we are however of the firm view that there is no

prejudice to the parties in deciding the appeal on the merits as well. Referral to the trial court for leave to appeal the merits under these circumstances would only delay the matter further and is therefore not in the interests of justice.

[4] The relevant facts leading to the appellant's conviction on a charge of robbery with aggravating circumstances briefly stated are as follows: At approximately 11h30 on 23 September 2010 and at Lenasia CBD, a cash-in-transit heist took place. A vehicle belonging to G4 Security was parked outside the Pick n Pay supermarket to deliver small change and also to collect cash. At gunpoint, the security guard with the cash contained in a box (the CPC box) was accosted and robbed of the CPC box. The three men who committed the robbery ran to the parking lot where there was a VW Golf getaway motor vehicle waiting. The appellant was the driver of the Golf. After putting the CPC box inside the Golf, the car would not start.

[5] The robbers tried to push start the car with the appellant behind the wheel but to no avail. The three robbers abandoned the getaway car leaving the appellant behind. The appellant also abandoned the car and ran away. The appellant was a short while later traced to a police station where he tried to open a case of a motor vehicle hijacking. Unfortunately for him he was placed at the scene of the incident by a member of the South African Police Services, warrant officer Manganye, who was off duty at the time, but in the vicinity where the incident occurred.

[6] The appellant's version that the false registration plates on his Golf motor vehicle was affixed by the robbers was rejected by the trial court as the correct registration plates were found inside the motor vehicle. One of the robbers (accused 2) was also arrested but acquitted of the charges. The circumstantial evidence against the appellant on the facts is overwhelming that he was not only the driver of the getaway motor-vehicle, but part of the robbers. The conviction of the appellant on the robbery charge was therefore correct.

[7] I now turn to the question of sentence. It has often been reiterated that sentencing is pre-eminently a matter for the discretion of the trial court and that this court on appeal does not have an overriding discretion to interfere unless the sentences imposed by the court below are vitiated by irregularity or misdirection or are disturbingly inappropriate. Courts on appeal are not to alter a determination arrived at by the exercise of a discretionary power by a trial court merely because it would have exercised that discretion differently (see *S v Sadler*¹ as well as *S v Kgosimore*²).

[8] In *S v Malgas*³ the applicable principle was set out as follows at 478D:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly

¹ *S v Sadler* **2000 (1) SACR 331** (SCA) at 335E-G.

² *S v Kgosimore* **1999 (2) SACR 238** (SCA).

³ *S v Malgas* **2001 (1) SACR 469** (SCA).

be described as 'shocking', 'startlingly inappropriate' ... In the latter situation ... it may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

- [9] S 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2 provides for the sentencing regime applicable to these offences. It requires a minimum sentence of 15 years' imprisonment to be imposed on a first time offender unless a court is satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence than prescribed. The trial court is also at liberty, depending on the circumstances, to impose an additional five years to a first time offender.
- [10] The appellant's personal circumstances are as follows: At the time of the offence, the appellant was 29 years of age, unmarried but a father to two minor children. He had four siblings. He lived with his girlfriend and his younger child. He had passed matric and also had a firefighting certificate. Before his incarceration he worked as a firefighter. His parents were also unemployed. Before his bail was withdrawn, he had spent approximately two months in prison.
- [11] The trial court referred in sentencing to the fact that cash in-transit robberies are prevalent and are the kind of crimes that require detailed planning. I must agree. The court also referred to the aggravating nature of the robbery and found no substantial or compelling circumstances justifying a lesser sentence. In addition, the court also found that the circumstances under which the offence was committed justified an increased sentence beyond the minimum threshold of 15 years to 16 years of imprisonment.

[12] Where serious crimes are involved, it is important too that a stern message be sent out by the Courts to all offenders who participate in this type of crime that they will be seriously dealt with and will face the full might of the law if they are convicted of such offences. In this case the appellant did not at any stage show remorse during the trial nor during argument in mitigation of sentence (See *S v Matyityi*⁴ (SCA) para 14). I do not find under the circumstances that the trial court had in any way misdirected itself or that the sentence imposed is disturbingly inappropriate. It accordingly follows that there is no merit in the appeal against conviction as well as sentence and it must stand to fail.

[13] For the reasons mentioned above the following order is made:

1. The appeal against conviction and sentence is dismissed.

MUDAU J

JUDGE OF THE HIGH COURT

I agree.

SARDIWALLA AJ

ACTING JUDGE OF THE HIGH COURT

⁴ *S v Matyityi* **2011 (1) SACR 40** (SCA) para 14.

Date of Hearing: 28 April 2016

Judgment Delivered: 28 April 2016

APPEARANCES

On Behalf of the Appellant: Adv M.A Khunou

Instructed By: Legal Aid Board South Africa

Johannesburg

On Behalf of the Respondent: Adv M Mashego

Instructed By: Director Public Prosecutions

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