

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Local Division held at Johannesburg)

Case no: A55/2016

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

.....
DATE SIGNATURE

In the matter between:

MOHALE, KAPA

1st APPELLANT

KHUMALO, VINCENT

2nd APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Mlaba AJ:

[1] This is an appeal against sentence only. On 25 March 2014 the appellants were each sentenced to 18 years' imprisonment subsequent to a conviction of Robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("The Act") as referred to in Part II of Schedule 2.

[2] Leave to appeal against both conviction and sentence in terms of section 309B of the Criminal Procedure Act 51 of 1977(CPA) was refused in the court a quo.

[3] Petition to the Gauteng Local Division was successful only in respect of sentence but not on conviction.

[4] The appellants now appeal against the sentence.

[6] The facts upon which a conviction is premised are briefly as follows: on the 19th January 2011 at approximately 18h00, the complainant was in the company of his girlfriend. They were leisurely seated on a bench at the Gillollys Farm in Bedfordview, watching the sunset. Suddenly they were accosted by four unknown men. These men approached them from behind. One of them asked for cigarette. Whilst the complainant was trying to reach out for his cigarette box, two of the unknown men grabbed his girlfriend as one held the complainant. The fourth one stood guard threatening them with the firearm was tucked at his waist. The complainant and his girlfriend were then robbed of their personal belongings, *to wit*, jewellery, cellphones, cap and a wallet. The value of the goods is estimated at R25 000,00.

- [7] The imposition of sentence is a matter falling pre-eminently within the discretion of the sentencing court. As Bosielo JA observed in **S v PB** 2013 (2) SACR 533 (SCA) it is therefore expected of the sentencing court to exercise its discretion judicially and in line with established and valid principles governing sentencing.
- [8] The court of appeal will not interfere with the sentence unless it finds that the sentence is exceedingly harsh/lenient, there was a misdirection on the part of the trial court or the discretion was not exercised judicially:- **S v Fhetani** 2007 (2) SACR 590 (SCA) at [5]; **S v Mothibe** 1977(3) SA 823 (A) at 830D.
- [9] In **S v Malgas** 2001 (1) SACR 469 (SCA) at 478d-e Marais JA observed that a court of appeal will not, “in the absence of a 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 powers of the trial court”.
- [10] In imposing the sentence, the court a quo did not find the existence of substantial and compelling circumstances as envisaged in s51(3) of the Act, justifying the imposition of a lesser sentence than prescribed. It instead increased the sentence from the minimum sentence of 15 years’ to 18 years’ imprisonment.
- [11] It was contended on behalf of the appellants that the sentence is disturbingly inappropriate and too harsh; that the court overemphasized the seriousness of the offence and did attach due weight to the personal circumstances of the appellants. Further, that the court below imposed eighteen years’ imprisonment

but failed to give reasons or to specify the aggravating circumstances that justify the imposition thereof. Counsel relies on the decision of **S v Mathebula and Another** 2012 (1) SACR 374 (SCA) paragraphs 11-12.

[12] The relevant part of section 51 of the Act reads as follows: “Notwithstanding any other law but subject to subsection (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 of not less than 15 years;
- (ii) A second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.

A proviso to s 51(2) of the Act reads:

“Provided that the maximum sentence a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose.”

[13] In **S v Mathebula** above, it was held that “A regional magistrate has the discretion to impose a sentence exceeding the minimum sentence prescribed by the Act with an additional 5 years as provided for in the proviso to s 51(2). Such a discretion must however be exercised judicially and on reasonable grounds. Where a regional magistrate intends to depart from the prescribed minimum

sentence, it is proper and fair that the regional magistrate gives reasons for such a departure.”

[14] The Mathebula case was applied in **Shubane v The State** (073/14) [2014] ZASCA 148 (26 September 2014) in which it was contended on behalf of the appellants that the Regional Court had misdirected itself by imposing the sentence in excess of the minimum sentence prescribed, without furnishing any reasons. The Supreme Court of Appeal as per Majiedt JA was of the view that, if correct, that would justify a conclusion that the sentence was arrived at arbitrarily and may very well result in interference on appeal. The court however found that this was devoid of the truth as the court had given full reasons for increasing the sentence. **See also: S v Maake** 2011 (1) 263 (SCA) at para28

[15] In casu the violence cannot be said to have been as excessive as in the Shubane matter. This I find, without underestimating the trauma that complainant and his girlfriend went through. No reasons were furnished for the increased sentence. It is pertinently clear that the appellants were incarcerated for more than 3 years awaiting trial and sentence. This was not accorded due weight by the court a quo.:-**S v Brophy and Another** 2007 (2) SACR 56 (W), **Radebe v S** (726/12) [2013] ZASCA 31 (27 March 2013 and **S v Dlamini** 2012 (2) SACR 1 (SCA). Each matter should be treated on its own merits.

[16] In my opinion the imposition of sentence in excess of the minimum sentence prescribed was unwarranted and it is inescapable to conclude that it was arbitrary. This Court is therefore at large to interfere.

[17] The trial court further misdirected itself in finding that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence considering the age, and in particular of the 1st applicant) who was 22 years old at the time of the commission of the offence. He has a chance for rehabilitation..

The Appellants had already spent three and half years in custody awaiting trial.

The victims were not subjected to gratuitous violence. Neither the complainant nor his girlfriend suffered any physical injuries. These factors cumulatively constitute factors of substance.

[18] In the result I propose the following order:

18.1 The appeal against sentence is upheld

18.2 The sentence is set aside and substituted with the following:

“ Each of the accused is sentenced to 12 years imprisonment.

IS MLABA
ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.

ML MAILULA
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPELLANT: M MZAMANE

FOR THE RESPONDENT: VH MONGWANE

Heard: 11 August 2016

Delivered: 19 August 2016

Date: 19 August 2016