

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

- (1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes_

Date: 26/01/2022



Signature.....



CASE NO: A194/2019

In the matter between:

MOKOLO GEORGE

Applicant

and

THE STATE

Respondent

J U D G M E N T

LEKOKOTLA AJ:

- 1 The appellant and his two co-accused Christopher Sehlale and Terrence Goniwe were each charged with robbery with aggravating circumstances in

that on 12 March 2016 near Ninth Road and Second Avenue in Alexander/Bramley they unlawfully and intentionally assaulted Nokulunga Khumalo and Sinenhlanhla Nkonde and forcefully took two cellphones from them, which was their property. The aggravating circumstances prevailed in that a firearm was used during the commission of the offence.

- 2 The police officers who were parked across the road from where the incident took place received a tip off from a nearby driver who informed them that there were two men who had robbed two women and that these two men were running in the police officers' direction from the scene of the incident.
- 3 The appellant and his co-accused came towards the direction of where the police officers were parked walking very fast, then the police officers apprehended them. The two cell phones were recovered from the accused by the police and handed to the complainants. The toy gun that was used by the appellant during the robbery was confiscated from the appellant and his co-accused by the police.
- 4 All three (3) accused appeared before the honourable magistrate Boshoff at the Wynberg Magistrates Court.
- 5 The appellant and his two co-accused pleaded not guilty to the charge of robbery with aggravating circumstances. All three accused chose not to make a plea explanation in terms of section 105 of the Criminal Procedure Act.

- 6 At the conclusion of the trial, on 31 May 2016, the appellant and his co-accused Christopher Sehlale were convicted of assault with aggravating circumstances under the Criminal Procedure Amendment Act, 105 of 1997. They were each sentenced to 15 years imprisonment in terms of section 51(2) of the Criminal Procedure Amendment Act, 105 of 1997. The court *a quo* made no order in terms of section 103(1) of the Firearms Control Act, 60 of 2000.
- 7 Accused 3 (Terrence Goniwe) was acquitted of the charge as the evidence given by the complainants demonstrated no involvement or association of the third accused in the commission of the offence.
- 8 On 31 October 2019 the appellant brought an application for leave to appeal against sentence imposed by the learned magistrate Boshoff at the trial court. This application was granted by the learned magistrate on the same day, without specifying any reason for granting the leave to appeal against sentence.
- 9 The matter is now before court on leave to appeal granted against sentence by the court *a quo* on 31 May 2016.

Appeal against Sentence

- 10 In **S v Rabie**¹ the then Appellate Division held as follows in relation to sentence:

"1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to evade such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised"

"2. The test under (b) is vitiated by irregularity or misdirection or is disturbingly inappropriate".²

- 11 It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court. Consequently, a court of appeal can only interfere with the sentence of the trial court where it is satisfied that the trial court's sentencing discretion was not judicially properly exercised. That is, where there was a misdirection on the part of the trial court in the imposition of the sentence³ or when the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.⁴

¹ 1975 (4) SA 855 (A) at 857E

² This test set out in Rabie was confirmed by the Supreme Court of Appeal in **S v Romer** [2011] JOL 27157 (SCA)

³ **S v Blank** 1995 (2) SACR 62 (A); **S v Kgosimore** 1999 (2) SACR 238 (SCA); **S v Obisi** 2005 (2) SACR 350 (SCA) and **S v Moswathupa** 2012 (1) SACR 259 (SCA)

⁴ This test set out in Rabie was confirmed by the Supreme Court of Appeal in **S v Romer** [2011] JOL 27157 (SCA)

- 12 The principles set out above serve as guidelines on whether to interfere with the finding of the magistrate on sentence.
- 13 Accordingly, the issue to be decided by this court is whether or not the 15-year sentence imposed by the trial court is shockingly inappropriate or breached by misdirections and indiscretions. If he did, this court will have the right to interfere by setting aside such sentence and substituting therefor with what it considers an appropriate sentence. If not, then the sentence imposed by the trial court will stand.
- 14 When engaging in this endeavour, this court must have regard to the interest of the society, the seriousness of the crime and the personal circumstances of the appellant.⁵ There is evidence from the judgment of the trial court that demonstrates that he was alive to the foregoing when he sentenced the appellant. They include the age of the appellant at the time of the robbery⁶, as they were relatively young; the fact that the offence in question is extremely prevalent in that area (within the jurisdiction of the Wynberg magistrates court); the fact that the appellant and his co-accused chose complainants who are women and who were vulnerable; the fact that a toy gun was used as if it was a real firearm in order to instil fear; the fact that all accused pleaded not guilty; that no serious harm resulted and goods

⁵ S v Zinn 1969 (2) SA 537 (A)

⁶ Judgment of the court a quo, Case Lines 003-44

were recovered as a result of the accused's apprehension by the nearby police.⁷

- 15 Section 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 prescribes a minimum sentence of 15 years direct imprisonment for robbery with aggravating circumstances.
- 16 The evidence that was given by the first and second complainants, respectively, was that the appellant's co-accused Christopher Sehlale instructed the appellant to take out a firearm while Sehlale demanded the two complainants to hand their cellphones over to him. The appellant took out the firearm and took the two complainants' cell phones.
- 17 When it comes to the sentence imposed by the learned magistrate on the appellant, the appellant's contention is that the trial court misdirected itself in imposing a sentence of 15 years direct imprisonment, on the basis that it was too harsh and that consequently it should be reduced to a lesser period.
- 18 The basis for the appellant's contention in support of the reduction of the period of imprisonment imposed by the learned magistrate is that the use of a toy gun should take centre stage since the appellant and his co-accused did not use a real gun in the commission of the offence. According to counsel for the appellant, since a toy gun was used in this case, this merits consideration of the reduced sentence.

⁷ Judgment of the court a quo, Case Lines 003-44-45

- 19 In support of this contention, the appellant's counsel relied on a number of comparative cases where toy guns were used. Among the cases cited by the appellant's counsel include **S v Mthembe**⁸, where the accused who had used a toy gun to rob a complainant of the cell phone, where he did not inflict grievous bodily harm, was sentenced to 15 years direct imprisonment. The sentence was reduced to 10 years' imprisonment on the basis that the use of the toy gun cannot be used to inflict grievous bodily harm, under the Civil Code and not the Criminal Procedure Amendment Act, which is applicable in this case, as what the victim believed was considered irrelevant for purpose of determination of that case.⁹ Furthermore, that the use of a toy firearm per se cannot support a finding of aggravating circumstances pertaining to the main offence.¹⁰
- 20 The Mthembe judgment is distinguishable from the present case because in that case there was a need to demonstrate or satisfy the jurisdictional facts in s.1 (b)(i) and (iii) of the Criminal Code of a threat to inflict grievous bodily harm, which is an aggravating factor, which was found not to exist in light of the use of the toy gun. There is no requirement to establish such jurisdictional fact under section 51(2) of the Criminal Law Amendment Act under which the appellant was charged.

⁸ 2004 JDR 0454 (W)

⁹ Paragraphs 49, 59 and 61

¹⁰ Paragraph 50

- 21 In Mthembe, the court specifically found that the Criminal Law Amendment Act did not apply and rather that the Criminal Code applied and therefore the magistrate's inquiry into the existence of substantial and compelling circumstances was unauthorised and, in fact, incompetent.¹¹ Therefore the magistrate was found to have materially misdirected himself by applying the provisions of the Criminal Law Amendment Act, thereby leaving the appeal court free to interfere with the sentence which was imposed by the magistrate and to impose sentence afresh. For this reason, the appeal court found that the sentence of 15 years imprisonment could not stand. It reduced it to 10 years imprisonment, in light of the inapplicability of the prescribed minimum sentence under section 51 (2) of the Criminal Law Amendment Act No. 105 of 1997. This is not the case in the present case since section 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 applies.
- 22 Counsel for the appellant also relied on **S v Mlangeni**¹² wherein the appellant used a toy gun to rob the complainants. The items that he had robbed the complainants of (boxes of cigarettes which were valued at R230) were recovered. He was the first time offender. The trial court sentenced him to 12 years. The appeal court reduced the 12-year sentence to a 10-year sentence, 3 of which was suspended for 5 years. Therefore, the effective sentence was 7 years.

¹¹ Paragraph 64

¹² (A213/2013) [2013] ZAPG JHC 260 (20 October 2013); 2013 JDR 2495 (GSJ)

- 23 In Mlangeni, the court held that *“the fact that a robbery was committed using a toy gun or not is of no consequence That notwithstanding, however, a court can depart from the minimum imposable sentence on the condition that there exists substantial and compelling reasons for doing so. See in this regard, S v Nkomo 2007 (2) SACR 198 SCA.”*¹³ The court’s further reason for disregarding the argument relating to the use of the toy gun was on the basis that *“the fact that he utilised a toy gun to commit it does not make it less so especially because it accomplished the intended results.”*¹⁴ However, the court proceeded to state that *“it should be borne in mind that his moral blameworthiness cannot be at the same level as a person who uses a true firearm to commit the same crime.”*¹⁵
- 24 Some of the differences between Mlangeni and this case is that in Mlangeni, the complainant pleaded guilty and the personal circumstances of the respective appellants. In this case, the appellant pleaded not guilty. In fact, he maintained his innocence throughout. His testimony was that neither him nor any of his co-accused robbed any of the complainants. In fact, the appellant’s testimony was that the police arrested him and his co-accused for public drinking as they had been at a drinking venue between London Road and Ninth Avenue and not because they robbed the complainants of their cell phones, at gun point, *albeit* a toy gun and despite him and his co-

¹³ Paragraphs 9 and 10 of the judgment

¹⁴ Paragraph 18

¹⁵ Paragraph 18

accused found in possession of the two cell phones that they stole from the complainants. The appellant's co-accused testified that even though they were told when they got apprehended that they were arrested for public drinking, it was only when they reached the police station that they were told that they had in fact been arrested for robbery of the complainants with aggravating circumstances.

25 In the Mlangeni judgment, although the appellant was a first offender, he was employed as a cleaner earning an amount of R1 800.00 per month; he was aged 36 at the time of the commission of the crime; he has one adult child out of wedlock; he showed contrition and accordingly pleaded guilty and that he was HIV positive. Some of the equivalent facts of the appellant, including his health status, employment history and dependants are unknown in this matter but that should not be placed at the footsteps of the learned magistrate as the appellant was represented at all times and it was the duty of the legal representative to have brought these facts to the attention of the learned magistrate.

26 The appellant's counsel paid specific attention to, and at the hearing of the appeal, furnished us with copies of the judgment in **van Schalkwyk v S**¹⁶. This is the 2021 judgment of the Western Cape High Court 's judges le Roux and Cloete. In this case, where the appellant and his co-accused used a toy gun to rob the complainant. The appellant demanded that the complainant

¹⁶ (A145/2020) [2021] ZAWCHC; 2021 JDR 0854 (WCC)

gives the bag that he had on his back to the person behind him, who was pulling at the bag. While the appellant was pointing the gun at the complainant, the police officer, Constable Grant David Abrahams, approaching from his front, behind the appellant, stopped the attempted crime and arrested appellant.

- 27 The appellant thereafter saw the police and attempted to run away. So did his accomplice. However, both culprits were arrested on the scene of the crime without harm or loss to the complainant. The trial court sentenced the appellant, who was not first offender, to 10 years. The high court reduced the sentence to 8 years.
- 28 In van Schalkwyk, the court considered the effect of section 120(6) read with schedule 4 of the Firearms Control Act 60 of 2000, which makes it an offence to point an imitation firearm or an air gun or anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an air gun at any other person, without good reason to do so. It prescribes a maximum sentence of 10 years' imprisonment for any of this conduct. This was despite the fact that the appellant in that case was not charged in terms of the Firearms Control Act 60 of 2000. However, the court still considered the role that it plays in sentencing in that matter. This is because the Criminal Law Amendment Act 105 of 1997 does not prescribe a minimum sentence for the attempt of the crime the appellant was convicted of.

- 29 Both counsel for the appellant and counsel for the State shared the view that the fact that the Firearms Control Act 60 of 2000 provides a maximum sentence of 10 (ten) years imprisonment for the contravention of section 120(6) should be taken into account as a guideline in the imposition of an appropriate sentence despite the fact that the appellant was not charged under the provisions of section 120(6) of the Firearms Control Act 60 of 2000.¹⁷
- 30 Furthermore, in most of the above cases, including Mlangeni, the appellant was declared unfit to possess a firearm as a result of the guilty finding. In this case, the learned magistrate specifically refrained from making any order in terms of section 103(1) of the Firearms Control Act, 60 of 2000.
- 31 One of the other factors that were highlighted in the Mlangeni judgment was the prevalence of this type of crime in the area in which it was committed. We specifically highlight that in Wynberg/Alexander are this type of crime is very common and is often committed by the perpetrators who are around the age group of the accused when they robbed the complainants. Therefore, in balancing the personal circumstances of the appellant against the interest of the community, the seriousness and the prevalence of the crime, this court has to send a stern warning against the perpetrators of this crime in that area.

¹⁷ Paragraph 14

- 32 van Schalkwyk is distinguishable from the present case in that in van Schalkwyk, the appellant and his accomplice merely attempted to commit the crime as they were caught before completing the crime, hence the applicability of section 120(6) of the Firearms Control Act 60 of 2000 in sentencing.¹⁸ In the present case the appellant and his co-accused managed to rob the complainants and were only caught by the police when they approached the police across the street.
- 33 Therefore, since the crime of robbery with aggravating circumstances was completed in the present case, then section 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 applies and prescribes a minimum sentence of 15 years direct imprisonment for robbery with aggravating circumstances. There is therefore no need to consider the provisions of section 120(6) of the Firearms Control Act 60 of 2000, as was the case in van Schalkwyk judgment, which only prescribes a maximum sentence of 10 (ten) years imprisonment for the contravention of that provision.
- 34 In van Schalkwyk, the court held that the sentence imposed by the trial court was excessive and found it appropriate that guidance be taken, and regard be had to the fact that the maximum sentence prescribed in terms of the Firearms Control Act is ten (10) years and also the fact that the Criminal Law Amendment Act 105 of 1997 does not prescribe a minimum sentence for the attempt of the crime the appellant was convicted of.¹⁹ The court in

¹⁸ Paragraph 14

¹⁹ Paragraph 29

van Schalkwyk concluded that the court *a quo* misdirected itself in that the sentence imposed on the appellant is disturbingly inappropriate, and there was furthermore a material misdirection in taking into account an unproven previous conviction. For these reasons, the court in van Schalkwyk reduced the term of imprisonment of 10 years imposed by the court *a quo* to 8 years' direct imprisonment.

- 35 van Schalkwyk is distinguishable for the reasons set out above. On these bases, there were sufficient grounds for the learned magistrate to impose 15 years direct imprisonment sentences against the appellant and his co-accused.

Alleged Substantial and Compelling Circumstances

- 36 Counsel for the appellant stated that the factors listed on paragraphs 6 to 25 of her heads of argument amounted to substantial and compelling circumstances for the learned magistrate to deviate from the prescribed minimum sentence of 15 years. Some of the factors included the appellant's youth at the time of the offence, as he was only 22 years old at the time; that he was single, lived with his mother at the time of the commission of the offence. She retracted the contention that the accused had spent four years in custody while awaiting trial as that was incorrect.

- 37 Counsel for the appellant also contended that the learned magistrate misdirected himself in imposing a sentence of 15 years direct imprisonment against the appellant as he did so without sufficient information regarding his personal circumstances. The alleged personal circumstances of the appellant that were unknown to the learned magistrate prior to him imposing the sentence included that his health, academic progress, employment status was unknown to the magistrate; (ii) it was also unknown whether or not the appellant had any dependants. The contention was that the magistrate had a duty to enquire from the appellant's legal representatives regarding this information.
- 38 When the appellant's counsel was asked why it was the magistrate who had a duty to enquire about these factors that were unknown to him when the appellant's counsel failed to bring them to his attention since they were so important prior to the imposition of the sentence.
- 39 Counsel for the appellant further contended that the mitigating circumstances, including the alleged lack of pre-meditation prior to the commission of the offence; the fact that a toy gun was used and that the stolen goods were recovered and returned to the complainants, who were not injured during the robbery; the appellant's age (22 years old at the time of the commission of the offence), that he was a first offender and that he was a candidate for rehabilitation as demonstrated through his documents from prison which were attached to the appeal record. These are all the

factors that were said to be substantial and compelling circumstances to impose a lesser sentence than the prescribed minimum sentence.

- 40 In **S v Malgas**²⁰ it was held in relation to substantial and compelling circumstances, that *“it suffices that they are ordinary circumstances which do not qualify as cogent or sufficiently weighty to offences for which the appellant was convicted.”* At paragraph 26 the SCA held as follows:

“The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”

- 41 In **Radebe v S**²¹ the court held as follows:

“If substantial and compelling reasons are present in cases of the rape of an under-aged child then it cannot be found only in the absence of physical injury. If regard is had to the triad of factors (which must also accommodate the impact on the victim) then I would venture that something sufficiently extraordinary would have to be demonstrated by an accused in respect of his reduced moral blameworthiness, other personal circumstances. the circumstances surrounding the rape or. as unlikely as it may seem. possibly even the victim's circumstances in order to displace the opprobrium and moral turpitude which informs the interests of society to punish in the manner reflected in the legislation in cases involving the rape of an under-aged child.

²⁰ 2001 (1) SACR 469 (SCA) p 481, paras 20-22, 25 and 26

²¹ 2019 (2) SACR 381 (GP) p 399, para 53

- 42 Counsel for the appellant was asked during the hearing to point out the specific factors listed above that alleviated the traditional mitigating circumstances to substantial and compelling circumstances, her contention was that all of the aforementioned factors, taken together, amount to substantial and compelling circumstances that justify interference by this court to reduce the sentence imposed by the court *a quo* to a lesser sentence.
- 43 We agree with the respondent's contention that even though the age of the appellant should be considered, however, it should not be over emphasised as it needs to be considered in the context of other factors, including the seriousness of the offence and the interests of the community.²²
- 44 We are not convinced that any of the factors listed by the appellant amount to substantial and compelling circumstances which merit deviating from the prescribed statutory minimum sentence of 15 years which was imposed by the trial court. They are traditional mitigating circumstances, which were considered by the learned magistrate in imposing the prescribed statutory minimum sentence of 15 years.
- 45 Since we can only interfere with the sentence imposed by the court *a quo* if we can demonstrate a misdirection on the part of the learned magistrate, or that the sentence imposed by the trial court is vitiated by or is disturbingly inappropriate, we are unable to do so. In our view the learned magistrate's

²² S v Obisi 2005 (2) SACR 350 (SCA), p 355, para 14

failure to depart from the prescribed minimum sentence on the basis of the factors listed by the appellant's counsel, does not demonstrate misdirection on the part of the learned magistrate or the sentence imposed by him is vitiated by or is disturbingly inappropriate in imposing 15 years' imprisonment, which is a statutorily prescribed minimum sentence for this type of offence. Furthermore, the trial court struck a proper balance between the seriousness of the crime, the interest of the society on the one hand, and the personal circumstances of the appellant on the other. Therefore, the sentence should stand.

46 The appeal is therefore dismissed.



B. LEKOKOTLA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered:



R.E. MONAMA
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG.

PP-

Date of hearing: 2 December 2021

Judgment delivered: 26 January 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 11 January 2022.

APPEARANCES:

For Appellant: Advocate M Mzamane

Instructed by: Legal Aid South Africa

For Respondent: Advocate NJ Xaba

Instructed by: National Prosecution Authority