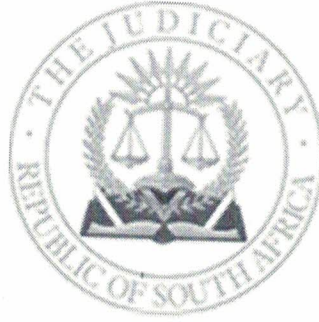




IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: [N]
(3)	REVISED: [N]
(4)	Signature:  Date: <u>07/06/23</u>

CASE NO.: A119/2022

In the matter between:

SMITH, ELTON JONATHAN

Appellant

and

THE STATE

Respondent

NEUTRAL CITATION: *Smith Elton Jonathan vs The State* (Case Number: A119/2022)
[2023] ZAGPHCJ 616 07 June 2023.

Delivery: This judgement is delivered through electronic transmission via the email to the legal representatives of the parties and is thus deemed to have been delivered on 07 June 2023.

MABESELEJ ET KUMALO J

JUDGMENT

KUMALO J

INTRODUCTION

- [1] The Appellant was charged at the Regional court sitting at Protea North, SOWETO with a count of kidnapping, robbery, assault, pointing a firearm, an antique firearm or airgun and robbery with aggravating circumstances.
- [2] Appellant was charged with two other persons and he was accused No.2 in the trial court.
- [3] The appellant was convicted on counts 1, 3, 5 and acquitted on counts 2, 4 and sentenced to an effective seven years' term of imprisonment.
- [4] The appellant noted an appeal on sentence only.
- [5] It is to be noted at the outset that the charge of robbery with aggravating circumstances carry a minimum sentence of 15 years imprisonment for a first offender. The appellant was sentenced to a term of imprisonment of seven years for this offence. The other sentences for the other crimes that he was convicted of were ordered to run concurrently with the sentence on robbery.
- [6] It is trite that a court of appeal, when dealing with the question of sentence, is guided by the principles as enunciated in ***S v Rabie***¹ namely;
- "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*

¹ 1975 (4) SA 855 at 857D-F

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

[7] The above principles have been reiterated by the Supreme Court of Appeal in ***S v Nkosi and Another***² when Maya JA (as she then was) stated the following:

"it should be reiterated that sentencing is pre-eminently a matter for the discretion of the trial court and that this court does not have an overriding discretion to interfere unless the sentences imposed by the court below are vitiated by an irregularity or misdirection or are disturbingly inappropriate."

[8] Likewise, this court's power to interfere with a sentence imposed is limited. It can only interfere where the sentence is disproportionate, harsh or is of the view that the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.

[9] Counsel for the Appellant had raised several issues in his heads of argument alleging that the court *a quo* misdirected itself on and that it failed to apply correctly the principles applicable to the sentencing of a primary care giver. I, however, do not intend to deal with those arguments for the simple reason that at the commencement of the appeal hearing he (correctly in my view) conceded that his was a hopeless case on appeal.

[10] Robbery with aggravating circumstances carries a minimum sentence of 15 years for a first offender unless the court can find substantial and compelling circumstances to deviate from the prescribed sentence.

[11] Despite the paucity of such substantial and compelling circumstances, the learned magistrate deviated from the prescribed minimum sentence and sentenced the appellant to a period of 7 years effective imprisonment for a crime of robbery with aggravating circumstances.

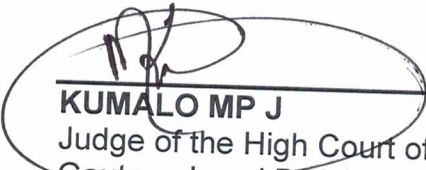
² 2011 (2) SACR 482 (SCA)

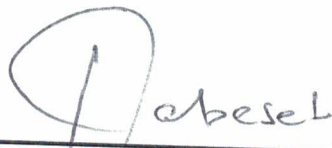
[12] It is my view that the Learned magistrate was very lenient in the circumstances and this Court ought to have called on the parties to address it on the issue of whether it ought to increase the sentence or not. Appellant ought to consider himself fortunate that this was not done.

[13] In the circumstances, the following order is made:

1. The Appellant's appeal against sentence is dismissed.

I agree


KUMALO MP J
Judge of the High Court of South Africa
Gauteng Local Division, JHB


MABESELE MM J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Appearances:

Counsel for the Appellant: Adv I.B Mthembu

From the Legal- Aid South Africa

Counsel for the Respondent: Adv. M.W Mbaqa

From the office of The Director of the Public Prosecution South Gauteng.

Hearing Date: 29 May 2023

Delivered: 07 June 2023