

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED: ☒
30/8/2010
DATE



2/9/2010

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN GAUTENG DIVISION)

CASE NO: A1121/2009
Appeal Date: 30 August 2010

In the matter between: -

THEMBA NKOMO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: MAVUNDLA J et EBERSOHN AJ

DATE HEARD: 30/9/2010

DATE JUDGMENT HANDED DOWN: 2/9/2010

JUDGMENT ON APPEAL

EBERSOHN AJ.

[1] The appellant is the second of two accused who were charged in the Regional Court held in Springs, as follows:

Count 1: attempted robbery (of a motor vehicle) with aggravating circumstances,

Count 2: attempted murder,

Count 3: possession of an unlicensed firearm, and

Count 4: unlawful possession of ammunition;

[2] The appellant was arrested on 17 July 2004 and remained in custody awaiting trial, up to being sentenced on 28 February 2005.

[3] Leave to appeal was granted with regard to sentence only.

[4] On 28 February 2005 the appellant was found guilty on the attempted robbery count (count 1) and was acquitted on the remaining three counts. The appellant was sentenced on 28 February 2005 to 15 years' imprisonment. The learned magistrate did not find "substantial and compelling circumstances" to exist with respect to count 1 and, being under the mistaken impression that a minimum sentence was prescribed, imposed what the magistrate thought the minimum sentence was, namely 15 years imprisonment as if the appellant had been found guilty of robbery with aggravating circumstances.

[5] The application for leave to appeal against the conviction and the sentence was dismissed by the magistrate. This appeal is brought against the sentence after leave to appeal against the sentence only was granted on petition by this Court.

[6] It seems that the records kept by the Department of Correctional Services is incorrect as it reflects that the appellant was convicted on all four counts, and if so, must be amended to reflect the correct facts. The appellant was accused 2 in the trial before the magistrate and page 86 of the judgment, lines 1 and 2, read as follows:

"Accused 2 is found GUILTY on count 1 and ACQUITTED on counts 2, 3 and

[7] The charge sheet, page "A" of the record, clearly indicates that the appellant, as accused 2, was acquitted on charges 2,3 and 4. The appellant and his co-accused were, furthermore, charged with "attempted" robbery and not "robbery".

[8] The learned magistrate found that there was no distinction to be drawn between attempted robbery- and robbery with aggravating circumstances for purposes of sentencing. The magistrate did not find any grounds to justify a deviation from what she assumed to be the prescribed minimum sentence and sentenced the appellant to 15 years imprisonment as if he was convicted of robbery with aggravating circumstances, it being the prescribed sentence as directed by section 51(2) of Act 105 of 1997.

[9] It was clearly a misdirection, because: (a) there is no prescribed minimum sentence for attempted robbery with aggravating circumstances; (b) the appellant was neither charged with, nor convicted of robbery with aggravating circumstances; (c) the trial court seemingly sentenced the two accused to virtually the same effective sentence despite the fact that the appellant's co-accused was further convicted of attempted murder and the unlawful possession of a firearm and ammunition.

[10] It is clear that this Court accordingly may interfere with the sentence imposed on the appellant.

[11] The traditional mitigating aspects constitute reasons justifying this Court to impose a substantially lesser sentence than the imposed sentence.. See in this regard *S v Ndlovu* 2007 (1) SACR 535 (SCA) par [13] at 538 g-i

[12] Despite the accused being shot at and the appellant's co-accused being wounded, no one, including the complainant, Mr Tocher, was injured or killed. The violence involved was limited to the bare minimum and was directed solely at attaining the goal of robbery, and not at injuring any one. Mr Tocher clearly testified that he was not injured or attacked, but forced to the ground in such a manner that he did not sustain any injury. He also stated that the assailants warned the approaching rescuers to not interfere. It is clear that they were not trigger happy or prone to wanton violence as instant retaliation without prior warning is to be expected in such circumstances. This incident did not erupt in an orgy of violence, despite the appellant's co-accused being armed.

[12] The facts on appeal certainly cannot be deemed as one of the most serious failed robbery attempts considered on appeal. Both the appellant and his armed co-accused refrained from taking a life or causing injuries. It is trite that a fair number of robberies devolve into brutal violence and senseless murders, especially in circumstances where a robbery in progress is, subjectively viewed, resisted, and frustrated, as were the facts in this matter. The vehicle was not damaged and shock aside, the complainant did not suffer damage and harm.

[13] The appellant is a reasonably young, 21 year old single first offender without any dependents, self employed and he earned approximately R800-00 per week. He attained standard 9 at school. He ought to be considered an excellent candidate for rehabilitation, especially in the absence of any evidence to the contrary. The extent and nature of the violence applied at the scene as well as the finding that the appellant did not associate himself with the actions of his gun toting co-accused, support this finding. The term of 15 years will not facilitate rehabilitation; it will

probably break the appellant as it leaves little room for incentives to rehabilitate. The item they attempted to take was not lost, taken or damaged. no one was injured except one of the assailants, and the complainant did not suffer any loss. The appellant was arrested close to the scene and there is no evidence of financial loss or damage to property.

[14] The guidance provided by the principle of proportionality between the nature of the offence and the deserts of the offender was re-affirmed by the Supreme Court of Appeal in *S v Vilakazi* 2009 (1) SACR 522 (SCA) at paras [13]-[19] at 559e-562d. In that matter the appellant's sentence was commuted to fifteen years from life imprisonment.

[15] This Court therefore must set the 15 year sentence aside and replace it with an appropriate sentence, having regard to the cumulative effect of the factors constituting mitigating, suitably balanced against the crime and the interests of society.

[16] The appellant was arrested on 17 July 2004 and remained in custody for the duration of the trial, representing a period of 7,5 months. He started serving his sentence on 28 February 2005. The record does not reflect that the period spent in custody awaiting trial was considered although it was placed on record and seemingly referred to by the trial court. The reasons for sentence do not reflect that this period was considered, nor is it reflected by the sentence imposed. This omission also constitutes a material misdirection, warranting this Court's interference on appeal.

S v Vilikazi and Others 2000 (1) SACR 140 (W)

S v May 2005 (2) SACR 331 (SCA)

S v Brophy and Another 2007 (2) SACR 56 (W)

See: Record P 90 line 20, 21

[17] Mr. van Rooyen, who appeared for the appellant submitted that a suitable sentence would be a period of imprisonment of 8 years and Mr. Mashile, who appeared for the State, very correctly conceded that the sentence imposed was incorrect and submitted a period of imprisonment between 8 and 10 years.

[18] Having studied the record and having considered the arguments of both counsel I am of the opinion that the following order should be made:

1. The conviction of the appellant on the count of attempted robbery is confirmed.
2. The sentence imposed by the magistrate is set aside and is substituted with the following sentence:
"Eight (8) years imprisonment antedated to the 28th February 2005, being the date on which he was originally sentenced. The appellants disqualification to obtain a firearm licence is affirmed."
3. In so far as any official records may exist which reads that the appellant was convicted on counts 2, 3 and 4 , also, by the magistrate are to be corrected forthwith."
4. The Registrar of this Court is requested to inform the Prison Authorities immediately of the outcome of this appeal.



P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS ACCORDINGLY ORDERED.



N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

Counsel for the State

Appellant's counsel

Adv. MASHILE

Mr. J. VAN ROOYEN