

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION)

2/12/2010

Case No: A609/2010

Heard on 25/11/2010

Delivered on 02/12/2010

In the matter between

Sibusiso Mthembu

1st Appellant

Sibusiso Ngwenya

2nd Appellant

Abel Sibusiso Nkosi

3rd Appellant

And

The State

Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO ☒ YES ☐ NO

(3) REVISED.

2/12/2010 DATE

B. Pakati SIGNATURE

CORAM VV THLAPI et B PAKATI AJ

JUDGMENT

PAKATI AJ

1. The appellants, Sibusiso Mthembu, Sibusiso Ngwenya and Abel Sibusiso Nkosi, were charged in the Regional court, Nigel, with two counts of robbery with aggravating circumstances, one count of possession of an unlicensed firearm and illegal possession of one live round of

ammunition. They pleaded not guilty to all the charges. They were found guilty of robbery with aggravating circumstances on count 1. On count two they were found not guilty and discharged. They were all convicted of the illegal possession of a firearm. The 2nd appellant was convicted of illegal possession of one live round of ammunition in count 4. The 1st and 3rd appellants were found not guilty and discharged in respect of count 4. Counts 1 and 3 were taken together for purposes of sentence in respect of appellants 1 and 3. In respect of the 1st appellant the trial court took counts 1, 3 and 4 together for purposes of sentence. They were each sentenced to fifteen (15) years imprisonment and were declared unfit to possess a firearm.

2. The magistrate refused leave to appeal against their convictions and sentences but, court granted leave to appeal it only against sentence only.
3. In sentencing the appellants the magistrate took into account the nature of the offence, the appellant's personal circumstances and the interests of society. He also took into account the purpose of punishment namely, prevention, deterrent, retribution and rehabilitation. He considered the fact that the appellants were first offenders

but that does not mean that they cannot be given a custodial sentence.

4. A brief synopsis of the case against the appellants is that on 14 October 2006 around 20h00 at Bluegum, Duduza, the complainant, Nomvula Rosleen Similane, was alighting from a taxi proceeding home in the company of her friend, Rosina Ramasela Lekgodi, when they were robbed by the three appellants. She only managed to identify appellants 1 and two. When they crossed the street they demanded her handbag and her phone. She handed over her phone to 1st appellant and the bag to the 2nd appellant. At that stage the 2nd appellant pointed a firearm at her. From the bag the 2nd appellant took a sum of R260 (two hundred and sixty rand) and threw her cards on the ground. According to Rosina the three appellants appeared and followed them. The 2nd appellant took out a firearm and demanded the cell phone from her and also demanded Nomvula's handbag which was handed over to him. When she screamed the 1st appellant hit her from behind and told her to not to look at him.
5. The 1st appellant ordered the 2nd appellant to shoot them because they were known to them but they fortunately left

them unharmed. When the incident took place visibility was good. The high-mast light was on.

6. The next day Rosina, Nomvula and Tebo Goligodi, the brother to Rosina, proceeded to where the appellants stay. Goligodi demanded the return of cell phones and the money from the appellants. The appellants told them that they should return later as the phones were not with them. When they returned later they found the 2nd appellant who handed the phones over to them. Nomvula's phone did not have a sim card but Rosina's was still in order.
7. Rosina knew the first appellant. She also knew where he stayed which is not far from her home. She regarded him as a brother. She did not know the other appellants before the incident.
8. The Magistrate stressed that robbery with aggravating circumstances is a serious offence and for that reason the legislature has prescribed minimum sentences. He indicated that the court has a duty to protect the members of the community against gangs who waylay law-abiding citizens when they alight from taxis and rob them of their property. He was satisfied that there were no substantial

and compelling circumstances in their personal circumstances.

9. In **S v KIBIDO 1998 (2) SACR 213 (SCA)** at 216G-J

Olivier JA held:

“Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see S v Fazzie and Others 1964 (4) SA 673 (A) at 684A – B; S v Pillay 1977 (4) SA 531 (A) at 535A – B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (S v Fazzie and Others (supra) at 684B – C; S v Pillay (supra) at 535E).

Furthermore, a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that

the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in S v Pillay (supra) at 535E – G)."

10. Mr Van Vuuren for appellant 1 placed on record his personal circumstances as follows:
 - 10.1 That he was 35 years old, unmarried and had two minor children aged five (5) and eighteen (18) respectively;
 - 10.1.1 That before his arrest he was a contract worker and earned R1500-00 (one thousand five hundred rand) per month;
 - 10.2 That he is a first offender.

11. Mr Van der Merwe for 2nd appellant indicated that the appellant is 25 years old, unmarried and has no children. He was unemployed at the time of his arrest. He also pointed out that he is a first offender. He requested the court to find that there existed substantial and compelling circumstances.

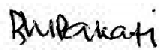
12. Mr du Plessis for the 3rd appellant stated that the appellant was 28 years old, unmarried and had three children aged eight (8), six (6) and five (5) respectively. The children live with their mother. The appellant was working at the time of

his arrest and was earning R270-00 (two hundred and seventy rand) per week. He also asked the court to find that there were substantial and compelling circumstances present. All the appellants spent about two years in custody awaiting trial. In **S v BROPHY AND ANOTHER 2007 (2) SACR 56 (W)** at 58 -59 para 15 Schwartzman J held:

“More importantly, and what the Court a quo overlooked entirely, was the period of time spent by both accused awaiting trial and sentence. Counsel for the accused and the State agreed that this was a factor that should have been taken into account by the trial Court. That this factor was overlooked entitles this Court to interfere with the sentence and impose what it considers to be a proper sentence.”

13. In the present case it is clear that the trial court overlooked the period spent in custody by the appellants awaiting trial. This is a factor that should have been taken into account. It should also be noted that the evidence shows that the two cell phones were recovered even though one of them did not have its sim card anymore. Another factor that had to be taken account by the trial Court was that the value of the money taken from Nomvula was not particularly huge (R260-00).

14. The trial court misdirected itself in not finding that there existed substantial and compelling circumstances constituted by an aggregate of all the factors considered cumulatively.
15. In the circumstances I propose to make the following order:
1. The appeal against sentence is upheld.
 2. Counts 1 and 3 are taken together for purposes of sentence in respect of appellants 1 and 3.
 3. Counts 1,3 and 4 are taken together for purposes of sentence in respect of 2nd appellant.
 4. the sentence of fifteen(15) years is set aside and is replaced with a sentence of eight(8) years imprisonment each antedated to 25/08/08.



B M PAKATI

ACTING JUDGE

NORTH GAUTENG DIVISION



V V TLAADI

JUDGE OF THE HIGH COURT

NORTH GAUTENG DIVISION

On behalf of the Appellant : Adv P.M Mositsa
Instructed by : Legal Aid Centre
On behalf of the state : Adv L Simpson
Instructed by : Director of Public Prosecutions