



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no.: A120/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
24 February
DATE 2022 / SIGNATURE

BOKANG SERAKE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

BOKAKO AJ (Kooverjie J concurring)

1. The appellant was convicted in the regional court, Oberholzer, on one count of attempted robbery with aggravating circumstances, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. He was sentenced to 15 years' imprisonment for count of attempted robbery (count 1); 15 years' imprisonment on the charge of unlawful possession of a firearm (count 2); and five years' imprisonment on the charge of unlawful possession of ammunition (count 3).

2. The trial court ordered that the sentence in respect of count 1 and 3 shall run concurrently with the sentence in respect of count 2. The appellant was effectively sentenced to fifteen (15) years imprisonment.
3. The appellant, Mr Bokang Serake, appealed against his sentence, more specifically count 1 – attempted robbery with aggravating circumstances.
4. On 1 September 2017, the complainant and his wife returned home after having withdrawn some money. The wife of the complainant alighted from the vehicle to open the gate. They then heard a gunshot. The appellant was standing next to the complainant's door, pointed a firearm at him, demanded money and thereafter hit the complainant on the bridge of his nose. The son of the complainant emerged from the house after hearing a gunshot and ran towards the appellant. A scuffle ensued between them and eventually the son managed to disarm the appellant. Thereafter the community emerged and assaulted the appellant, he was then arrested by the Police.
5. The appellant's version differs somehow. According to him on the night of the incident he was followed by a group of people. He ended up at the complainant's premises seeking help. At the time the complainant was inside his vehicle drinking with somebody else. The appellant informed them of the situation he found himself in. The passenger then got out of the vehicle and was in possession of a firearm. All the appellant could recall thereafter was that he was hit over the head, lost consciousness and woke up in hospital days later.
6. The grounds of appeal raised in essence was that the trial court misdirected itself by imposing the minimum sentence for the count of attempted robbery in terms of

Section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). The trial court erred in imposing a sentence of 15 years of imprisonment which is the prescribed minimum sentence for the crime of robbery with aggravating circumstances. Furthermore, it was argued that the sentence of 15 years of imprisonment for the attempted robbery with aggravating circumstances was disproportionate and not justified.

7. The further grounds were that the trial court erred in overemphasising the seriousness of the offence and the interests of society and failed to balance these factors properly against the appellant's personal circumstances. It also erred in overemphasising the deterrent and retributive aspects of punishment at the expense of rehabilitation and prevention. The court failed to take into account the cumulative effect of the sentences imposed.
8. The respondent opposed this appeal on the basis that there was no misdirection on the part of the court *a quo*. The court took all relevant factors into consideration when sentencing the appellant and moreover the sentence imposed was fair and appropriate in the circumstances.
9. The respondent further pointed out that the appellant's understanding of the application of the prescribed minimum sentence in terms of Section 51 (2) of the Act was incorrect. In these circumstances the court correctly applied its general jurisdiction of 15 years' maximum imprisonment sentence.
10. The appellant submitted that a distinction must be drawn between an attempted robbery and robbery thereby inferring that the latter attracts a more severe sentence. Robbery with aggravating circumstances consists of the theft of property

by unlawfully and intentionally using violence or threats of violence to take the property of another or to induce submission to its taking¹. It is the taking of property from another by force or threats.

11. An attempt to commit a common law or a statutory offence is also punishable at law². In circumstances where the activities of a person who intends to commit a crime is interrupted, the test is whether there has been, what is referred to as, "the commencement of the consummation" of the crime. The question is essentially whether the accused person unlawfully engaged in conduct that was not merely preparatory, but had reached at least the stage of the commencement of the execution of the intended crime.

12. On the facts of this matter, all the preparations necessary to execute the robbery were completed as correctly found in court *a quo* in that the appellant was in possession of a firearm with ammunition and such was pointed at the complainant when the appellant demanded money. The question is whether by the time he was interrupted, the actions of the appellant went beyond the dividing line between that preparation, and the commencement of the execution of the robbery. The response is in the affirmative. In this instance, the appellant assaulted the complainant and fired a gun shot. If it was not for the abrupt appearance of the complainant's son the appellant would have fully executed robbery.

¹ Snyman, 5th Ed p517.

² See section 256 of the Criminal Procedure Act 51 of 1977 and section 18 (1) of the Riotous Assemblies Act 17 of 1956. See also Snyman Criminal Law 6th ed at page 276.

13. From the record it is noted that the court *a quo*, found that the appellant had not provided any substantial argument for not imposing the prescribed minimum sentence. It held that no substantial and compelling circumstances were shown to exist, and that imprisonment for 15 years would not be disproportionate to the offence of attempted robbery with aggravating circumstances. It further emphasised such court had a discretion to determine the nature and extent of the punishment to be imposed within its framework³.
14. Robbery is the theft of property through the use of either violence, or the threat of violence. In the present matter the appellant did take a step towards satisfying certain jurisdictional elements of the crime of robbery. This court is of the view that at the time of interruption, the conduct of the appellant amounted to anything more than preparation. In the result, the appellant's conviction on the charge of attempted robbery is justified.
15. The minimum sentencing legislation has had a far reaching effect on sentences imposed in respect of the offences listed in the Act. On many occasions injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, namely taking into account all the circumstances of not only the offence itself, but also the circumstances of the parties involved.

³ The punishment jurisdiction of district and regional courts is determined by section 92 of the Magistrates' Courts Act 32 of 1944,

16. In *S v Malgas*⁴ the Supreme Court of Appeal considered the minimum sentencing legislation and examined whether these provisions eliminated the court's discretion in imposing sentences. The court acknowledged that the minimum sentencing legislation is to be read in the light of the values enshrined in the Constitution and in a manner which respects those values. Moreover the courts have a discretion to judge whether or not the circumstances of any particular case justifies a departure. However the courts have to decide whether the circumstances of a particular case justify a departure from the prescribed sentence. All factors traditionally taken into account in sentencing continue to play a role.

17. We are mindful that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Rabie*,⁵ Holmes JA stated the principle thus:

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 erode 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 whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate⁶.*

18. This court is satisfied that the trial court did not overemphasise the gravity of the offences and the interests of society. The robbery was planned and orchestrated.

⁴ 2001 (1) SACR 469 SCA

⁵ *S v Rabie* 1975 (4) SA 855 (A) at 857.

⁶ *Rabie* fn 3 affirmed by the Constitutional Court in *S v Shaik and Others* 2008 (5) SA 354 (CC) para 66.

The appellant threatened the complainant with a firearm and injured the complainant. Contrary to the appellant's version, the fact that nothing was taken from the complainant cannot be a consideration. The assault on the complainant and his family constitutes an aggravating factor.

19. Consequently the appellant's submission that the sentence imposed '*is an extremely severe punishment that should be reserved for particular heinous offences*', has no merit. Each matter must be considered on its own merit. This court can only interfere if there was a misdirection on the part of the court *a quo*.

20. We note that the court *a quo* had considered all the relevant factors when imposing the sentence. The appellant's personal circumstances were taken into account. The following personal circumstances of the appellant were placed before the trial court by his legal representative: The appellant was 39 years old, single, has 5 children aged 14, 10, 8 and 4 years as well as a baby aged 9 months, passed grade 11 at school, at the time he was employed for a period of 4 months at Merafong Solid Company and earned an income of R13 000 per month. We have also noted that he had previous convictions.

21. The present case is one where the societal needs for an effective deterrence outweighs the personal circumstances of the appellant. The appellant has shown no remorse and consequently is not a good candidate for rehabilitation.⁷

22. In this matter the court *a quo* found correctly that the offence of attempted robbery with aggravating circumstances was a serious offence and that it has become

⁷ S v Matyityi [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 12.

prevalent in our communities. The court *a quo* did not find any substantial and compelling circumstances to deviate from the 15-year sentence.

23. In our view, the approach of the court *a quo* on the sentence cannot be faulted. The facts of the present matter justified the sentence imposed for attempted robbery with aggravating circumstances. The circumstances in which the complainants were accosted in their personal space was considered to be very serious by the court *a quo*.

24. Upon taking all the facts into account, the interests of society, the personal circumstances of the appellant, the seriousness of the offences and the sentences imposed by the trial court, we conclude that the individual sentences imposed by the court *a quo* should not be set aside but the sentences continue to serve concurrently as ordered.

25. In the result, the appeal is dismissed.



H KOOVERJIE
Judge of the High Court
Gauteng Division, Pretoria



T P BOKAKO
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

Counsel for the appellants: Mr LA van Wyk

Instructed by: The Legal-Aid Board

Counsel for the respondent: Adv S Lalane

Instructed by: Director of Public Prosecutions

Date heard: 9 February 2022

Date of Judgment: February 2022



2017	21	R 145 200
2020	23	R 492 000
2019	20	R 384 000
2021	28	R 420 000
2011	14	R 300 000
2012	13	R 382 000
2012	24	R 312 000
2014	11	R 473 330
2013	11	R 300 000
2013	14	R 460 000

08-10