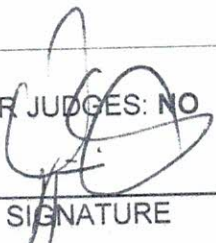




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

APPEAL NO: 406/2017

• REPORTABLE: NO • OF INTEREST TO OTHER JUDGES: NO • REVISED 28 June 2019 DATE	 SIGNATURE
---	---

In the appeal of:

ARMANDO TEMBE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

VUMA AJ

INTRODUCTION

[1] This is an appeal against sentence only.

BACKGROUND

[2] On 12 September 2013 the appellant was arraigned in the Magistrate's Court, Atteridgeville, on four (4) counts of housebreaking with intent to rob and robbery with aggravating circumstances. He was convicted in respect of all four counts and sentenced as follows:

"On count 1, 15 years' imprisonment as contemplated in Section 51(2) Act 105 of 1997 (sic).

Count 2, 15 years' imprisonment as contemplated in Section 51(2) of Act 105 of 1997.

Count 3, 15 years' imprisonment as contemplated in Section 51(2) of Act 105 of 1997.

Count 4, 15 years' imprisonment as contemplated in Section 51(2) of Act 105 of 1997.

And then in terms of Section 280(2) Act 50 of 1997, the Criminal Procedure Act, the court orders that the sentences on counts 1 and 2 are to run concurrently with sentences on count 3 and 4 respectively. So, that would give an effective sentence of 30 years' imprisonment.

In terms of Section 103(1) of Act 60 of 2000. The accused is declared unfit to possess a firearm."

[3] On 12 June 2017 appellant applied before the trial court for leave to appeal against both his conviction and sentence wherein only leave to appeal against sentence was granted. The appellant proceeded to draw up a Petition for leave to appeal against his conviction, papers which he signed on 29 June 2017. However, from the Record, what became of the appellant's "Petition" is unknown, save to state that on 26 July 2017 the appellant filed his Notice of Appeal against sentence only.

THE SUMMARY OF THE FACTS LEADING TO THE APPELLANTS' CONVICTION

[4] The appellant, together with two other unknown assailants, had broken into a house at a lodge in Lanseria and wielding a firearm and a screwdriver, robbed four female complainants of their belongings, which belongings consisted mainly of clothing, jewellery, cellphones and an I-pad. With the assistance of the GPS-location of the I-pad, the police were able to trace the appellant who was arrested walking along the road with two bags belonging to some of the complainants. When searched by the police officer, women clothing and the I-pad belonging to some of the complainants were seized from the appellant. The other suspect who was with the appellant flee the scene of the appellant's arrest upon noticing the police. The I-pad was identified by one of the other complainants to be the property of Mrs Raauw, who confirmed that indeed it was her property.

GROUND OF APPEAL BY APPEAL

[5] The court *a quo* erred in the following respects:

5.1. Instead of balancing the mitigating and aggravating circumstances, it overemphasized the seriousness of the offence, the interests of the society, the prevalence of the offence and the impact that the crime had on the victims.

5.2. It failed to take into account the following with regard to the appellant's mitigating factors:

5.2.1 He was a first offender;

5.2.2 He was still young at the time of the sentencing (and although disputed by the respondent), he was 17 years old at the time of the commission of the offence;

5.2.3 He had spent a substantial period of time in prison before trial;

5.2.4 The robbery(ies) constituted one incidence although affecting four complainants; and

5.2.5 Some of the items were recovered.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[6] Based on paragraph 5 above, Counsel for the appellant submitted that the appeal court sets aside the trial court's shockingly inappropriate effective sentence of 30 years' imprisonment with one that would factor in the mitigating factors. It was further submitted that duplication of charges thus resulted in the unjustifiable trial court's piecemeal approach. An effective sentence of 10 years would be appropriate in the circumstances in *casu*.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[7] The following was submitted as the appellant's personal circumstances:

- 7.1 That he was 21 years old when sentenced;
- 7.2 He was single and without any children;
- 7.3 He completed grade 6 in Mozambique; and
- 7.4. He does not have any previous convictions.

[8] In aggravation of sentence it was submitted that the appellant acted together with two co-assailants in committing the offences complainants who at the time were on vacation. The appellant had broken into the complainants' chalet at night and robbed them of their belongings, wielding a knife and a firearm. He did not show any remorse for his actions. It was further submitted that there were no substantial and compelling circumstances that called for the trial court to deviate from the prescribed minimum sentence and that the appeal be dismissed.

[9] With regard to the duplication of charges, Counsel submitted that for purposes of putting charges against an accused person, despite the said charges flowing from the facts, the respondent will always split same in respect of each respective complainant. However, in the event of a guilty verdict being returned by a trial court against an accused in respect of each of the said charges/ counts, the rippling effect of the duplication of the said charges would be balanced out when the trial court by ordering that each of the said sentences should run concurrently. She then submitted that in

casu, the trial court could have adopted the above approach and sentence the appellant to an effectively 15 years' imprisonment in respect of all counts cumulatively. She conceded that the 30 years' effective imprisonment was harsh.

CASE LAW

[10] The enquiry regarding the imposition of sentence on appeal is not whether the sentence is right or wrong but whether the court acted reasonably or properly in the exercise of its discretion (see *S v Obisi* 2005 (2) SACR 350 (W) para 8). The question whether the trial court exercised its discretion reasonably depends on whether, considering all the circumstances of the case, the trial court could have reasonably imposed the sentence which it did (see *S v Obisi* para 8).

[11] In addition to the above, a court of appeal will interfere with a sentence of a trial court in a matter where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection (see *S v Salzwedel and Another* 1999 (2) SACR 685 (SCA) para 10). Since *S v Rabie* 1975 (4) SA 855 (A) at 865B-C it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate (see *S v Rabie* at 857D-F).

[12] In *S v Salzwedel* at 591G the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[13] According to the triad formulated by the Appellate Division in *S v Zinn* 1969 (2) SA 537 (A), the personal circumstances of the criminal, the seriousness of the offence and the interests of the community are the relevant factors determinative of an appropriate sentence.

[14] In *S v Malgas* 2001 (1) SACR 469 (SCA) the court remarked as follows on 'substantial and compelling circumstances' on page 470:

'The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.'

ANALYSIS AND FINDINGS

[15] From the above, it is common cause that the charges the appellant has been convicted of are very serious and that the society frowns upon them. It is further

common cause that the court *a quo* sentenced the appellant in terms of the Minimum sentence regime which prescribes a sentence of a minimum of 15 years' imprisonment unless substantial and compelling circumstances are found to exist.

[16] With regard to the duplication of charges submissions, I am of the view that despite the appellant being convicted in respect of all the four counts, the trial court should have ordered that all the said sentences should run concurrently so as to avoid the double jeopardy consequence.

[17] Furthermore, with regard to the question whether the trial court balanced the triad as per authority of *Zinn* above, I find that the trial court did not factor failed in this regard by overemphasizing the interests of the community and the seriousness of the offence at the expense of the appellant's personal circumstances. With regard to the time already spent by the appellant in detention at the time of sentencing, I am of the view that the three (3) spent therein by the appellant would not have made any material difference even if the trial court had taken it into account.

[18] The crux of the matter is: did the trial court misdirect itself in finding that there were no substantial and compelling circumstances for it to deviate from the prescribed minimum sentence. I am of the view that taking into account the facts of this matter, the appellant being a first offender and his age, such factors should have constituted a special and compelling circumstances that should have caused the trial court to deviate from imposing the prescribed minimum sentence. Despite disagreement regarding his actual age, I am of the view that it cannot be gainsaid the appellant was very youthful at the time.

[19] Based on the above, I find that the trial court misdirected itself with regard to

the following:

1. Not ordering that the sentences in respect of the four counts should run concurrently; and
2. Not finding that the appellant's personal circumstances, particularly his youthfulness and being a first offender constituted special and compelling circumstances which thus called for a deviation from the prescribed minimum sentence.

[20] In the premises, this court finds that the trial court's sentence is both shockingly inappropriate and that the trial court misdirected itself as stated above.

CONCLUSION

[21] In the result, I conclude that the appellant succeeds in his appeal against sentence.

[22] The following order is made:

Order.

1. The appeal is upheld.
2. The sentence imposed by the Regional Court, Atteridgeville is set aside and replaced by the following:
 - (a) The accused is sentenced to 10 (ten) years imprisonment on each count.
 - (b) The sentences on each count are to run concurrently with effect from 12 September 2013.
 - (c) In terms of Section 103(1) of Act 60 of 2000 the accused is declared unfit

to possess a firearm.



L VUMA
Acting Judge of the High Court

I agree



N MNGQIBISA-THUSI
Judge of the High Court

Heard on: 18 June 2019

Judgment delivered on 28 June 2019

Appearances:

For appellant: Adv M Koos- Monyakane

Instructed by:

For Respondent: Adv A Roos

Instructed by: Office of the DPP