



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A226/2016

In the Appeal between:

TSEDISO DANIËL MAKOLE

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J *et* PIKE, AJ

HEARD ON: 31 JULY 2017

JUDGMENT BY: PIKE, AJ

DELIVERED ON: 31 AUGUST 2017

- [1] The appellant was charged in the regional court at Odendaalsrus on 1 count of robbery with aggravating circumstances.

- [2] He pleaded not guilty but was subsequently found guilty, as charged, on 5 February 2014, and was sentenced to 15 years imprisonment, being the prescribed minimum sentence in terms of the provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (“the Act”).
- [3] An application for leave to appeal against the sentence was granted by Mr Bosch, the presiding officer, as the magistrate Mr Human, who heard the case, has since retired.
- [4] The court a quo convicted the appellant on the following facts: Mr Rabale, the complainant, testified that on the evening of 23 November 2012 he was on his way home from work when he met the appellant, whom he knew from before the incident, and who asked for R2, which he refused.
- [5] The complainant went to Ramahau Tavern, bought two beers, drank one and put one in his bag. On his way home two young men ran from behind passed him, turned around and approached him. Three men grabbed him from behind and whilst threatening him with a knife, took his wallet, cellular phone and bag.
- [6] As the complainant turned around, he identified the appellant as one of the accomplices and informed him that he will tell of the robbery. As a result of this the appellant instructed his accomplices

to stab the complainant to prevent him from identifying them as the accomplices. The accused sustained four wounds which were as a result of him being stabbed in the upper right arm twice, leaving both entry and exit wounds.

- [7] The complainant testified that he knew three of the men and their parents.
- [8] The appellant denied the totality of the events and testified that he spent the whole day at Julo's Tavern, playing pool and left at 21:00.
- [9] The appellant confirmed that he knew the complainant and that his father worked with the complainant.
- [10] The court a quo approached the evidence of the complainant with the required caution and found that the appellant's version is to be rejected as false, in my view correctly so.
- [11] In imposing sentence the trial court had regard to the provisions of the Act regarding minimum sentences to be imposed in the absence of substantial and compelling circumstances. The trial court considered the personal circumstances of the appellant in that he is 32 years old, he is unemployed, unmarried and does not have children. He resided with his parents, has matric and was busy looking for work. The accused is a first offender.

- [12] The trial court then considered the aggravating factors. The court decided that aggravating factors are the fact that five young men were involved, which constituted to gang violence, and the fact that the appellant gave the instruction that the complainant should be stabbed.
- [13] As a result the trial court found that no substantial and compelling circumstances exist which justify a departure from the imposition of the prescribed minimum sentence.
- [14] Mr Dreyer, who appeared on behalf of the appellant, submitted that the sentence imposed by the magistrate is in the circumstance shockingly harsh and inappropriate. It was also the contention of mr Dreyer that the magistrate erred in underemphasizing the personal circumstances of the appellant, whilst overemphasized the interest of the community. Therefor his contention was that the magistrate erred in finding that there were no substantial and compelling circumstances in order for the court to deviate from the requisite minimum sentence.
- [15] Counsel for the State, mr Botha, submitted that there are no merits in the appeal, in that the court did take the personal circumstances of the appellant into account in determining whether substantial and compelling circumstances exist. Mr Botha emphasized the fact that the appellant instructed his accomplices to stab the

complainant, who is an old man. It was also the contention of mr Botha that the appellant does not have any remorse.

[16] The substantial and compelling circumstances relate to offences that fall within the provisions of the Act. A court applying the provisions of section 51 must consider the existence or not of substantial and compelling circumstances before passing sentence. If these circumstances exist the court must record them. If the court finds that none exist it must be clear from the record that the court did in fact consider them and dealt with the issue before coming to a conclusion.

[17] Before I consider whether substantial and compelling circumstances exist in this particular matter it is necessary to mention that the principle that applies with respect to an appeal against sentence is well-established. It is trite that sentencing is a matter pre-eminently within the discretion of the trial court. The trial court considers what a fair and appropriate sentence should be.

A court of appeal will interfere with the exercise of such discretion only on limited grounds.

[18] The test in deciding whether substantial and compelling circumstances exist was stated in **S v Malgas** 2001 (1) SACR 469 SCA at para 12:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because

it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, and appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

- [19] If the sentencing court on consideration of the circumstances is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

- [20] In ***S v Matyityi* 2011 1 SACR 40 SCA** the SCA clarifies that ***Malgas*** clearly establishes that the sentencing court must independently apply its mind to the question of whether the prescribed sentence is proportionate to the crime. If not, substantial and compelling circumstances as contemplated in section 51(3)(a) exist, and the court may not impose the prescribed sentence.

- [21] When imposing sentence a court must ordinarily have regard to the fact that the imposition of sentence is principally a matter of judicial discretion save where the legislature has decreed otherwise. This then requires that the sentencing court should have regard to, inter

alia, the peculiar facts of each case, the crime and the personal circumstances of the offender. “What has to be considered is the triad consisting of the crime, the offender and the interests of society.” (See **S v Zinn** 1969 (2) SA 537 (A) at 540G-H).

[22] In my view the court a quo erred in viewing the mitigation factors in isolation where the combined impact is considerable. The circumstances need not be exceptional, but should ultimately, cumulatively constitute weighty reasons for justifying a departure from the imposition of the prescribed minimum sentence.

[23] In the present matter I find that the following mitigating factors exist:

1. The appellant is a first offender.
2. The appellant had no dangerous weapons on him.
3. The appellant’s personal circumstances are also favourable:

He is unmarried, 32 years old, has no dependents and has matric. The appellant performed “piece” jobs by installing roof tiles on houses.

4. The possibility for rehabilitation cannot be excluded
5. The circumstances in this matter is not of the worst degree which might be found during robbery with aggravating circumstances.

[24] The abovementioned circumstances, cumulatively regarded, satisfy me that a sentence of 15 years imprisonment is unjust. The circumstances, therefor, qualify as substantial and compelling circumstances within the meaning of section 51(3)(a) of the Act.

[25] The court a quo therefore erred in finding that there are not substantial and compelling circumstances which justify a departure from the prescribed minimum sentence.

[26] We are consequently entitled and compelled to interfere with the sentence imposed.

[27] In the result the following order is made:

1. The appeal against the sentence is upheld.
2. The sentence imposed by the court a quo is set aside and substituted with a sentence of 10 years imprisonment, antedated to 5 February 2014.

EA PIKE, AJ

I concur:

C VAN ZYL, J

On behalf of appellant: Adv NJG Dreyer
 Instructed by: Jacobs Attorneys
 Bloemfontein

On behalf of respondent: Adv JP du P Botha

Instructed by:

Office of the Director: Public Prosecutions
Bloemfontein