

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

CASE NUMBER: A 381/2014

In the matter between:

30/4/2015

SPHAMANDLA DOUGLAS MASUKU

APPELLANT

and

(1) Reportable: No
(2) Of interest of other Judges: No

THE STATE

RESPONDENT

HEARD ON: 13 April 2015

JUDGMENT: 29 April 2015

STRIJDOM AJ

1. This is an appeal against sentence. The Appellant, a 22 year old male was convicted in the Regional Court Piet Retief on the following charges:

- 1.1. Count 1: Robbery with aggravating circumstances;
- 1.2. Count 2: Robbery with aggravating circumstances;
- 1.3. Count 3: Housebreaking with intend to commit a crime unknown to the State; and
- 1.4. Count 4: Robbery with aggravating circumstances.

2. On 18 May 2012 the Appellant was sentenced to 15 (fifteen) years imprisonment in respect of count 1, 15 (fifteen) years imprisonment in respect of count 2 and 15 (fifteen) years imprisonment in respect of count 3 and 4. Count 3 and 4 was taken together for purpose of sentence.
3. The Court *a quo* ordered that the sentence in counts 3 and 4 should run concurrently with the sentences on count 1 and 2. The effective term of imprisonment was thirty (30) years.
4. Leave to appeal was refused by the Court *a quo*. Subsequently leave to appeal was granted by the High Court.

SENTENCE:

5. The aspects placed in dispute by the Appellant can be enumerated as follows:

5.1. It is submitted that the trial court erred in over-emphasising the seriousness of the offences which the Appellant has committed and the interest of the society whilst the personal circumstances of the Appellant were under-emphasised. The trial court also erred as the sentences is shockingly harsh and induces a sense of shock.

- 5.2. It is further submitted that the trial court has failed to carry out its duty to make sure that sufficient evidence is placed before it so that it can carry its sentencing discretion judicially.
- 5.3. It was contended by counsel for Appellant that the Court *a quo* did not give sufficient effect to the cumulative effect of the sentences.
- 5.4. It was further contended that the Court *a quo* did not consider the time period that the Appellant spent in custody awaiting trial in this matter.
6. The personal circumstances of the Appellant are as follows:
 - 6.1. He was 22 years old.
 - 6.2. He was unemployed.
 - 6.3. He is not married and has no children.
 - 6.4. He went to school up to standard 7.
 - 6.5. Both his parents have passed away.
 - 6.6. He has spent one year and six months in custody awaiting trial.
 - 6.7. Almost all the robbed items were recovered by the complainants.
7. The aggravating factors to be considered are as follows:

- 7.1. The Appellant was convicted of serious offences;
 - 7.2. Violent crimes are rife and prevalent in the country;
 - 7.3. The complainant in count 3 and 4 was attacked at the privacy of his home;
 - 7.4. The Appellant used a dangerous weapon (knife) to threaten and to stab the complainants;
 - 7.5. The Appellant did not show remorse;
 - 7.6. The Appellant has previous convictions for theft, housebreaking and assault;
 - 7.7. He has committed these present offences whilst still serving sentence in the above cases after being released under correctional supervision.
8. The provisions of Section 51 (2) of Act 105 of the Criminal Law Amendment Act 105 of 1997 are applicable.
- 8.1. Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 provides that:

"Notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High

Court shall sentence a person who has been convicted of an offence referred to in –

(a) Part 11 of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years."

9. The Court *a quo* was of the view that the personal circumstances of the Appellant does not constitute substantial and compelling circumstances to deviate from the minimum prescribed sentence. There was no contention by counsel for the Appellant that substantial and compelling circumstances exist, to deviate from the minimum sentence.

10. It was stated in **S v Malgas 2001 (2) SACR 469 (SCA)** at p 481 E-F that:

"the specified sentenced are not to be departed from lightly and for flimsy reason, speculative hypothesis favourable to the offender under sympathy aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

11. In **S v Vilakazi 2009 (1) SACR 522 SCA** the court held as follows:

"That in cases of serious crime the personal circumstances of the offender necessarily receded into the background. Once it was

clear that a substantial jail term was appropriate, questions of whether or not the accused was married, or employed, or how many children he had, were largely immaterial. However, they remained relevant in assessing whether the accused was likely to offend again."

12. It was contended by counsel for the Appellant that the Court *a quo* did not consider the time period that the Appellant spent in custody awaiting trial.
13. The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified. The test is not whether on its own the period of detention constituted a substantial and compelling circumstances but whether the effective sentence proposed was proportionate to the crimes committed.

See: S v Radebe and Another 2013 (2) SACR 165 SCA

14. It was also submitted by counsel for the Appellant that the Court *a quo* did not give sufficient effect to the cumulative effect of the sentences.
15. The Court *a quo* ordered that the sentence in count 3 and 4 should run concurrently with the sentence in count 1 and 2. In my view the Court *a quo* sufficiently considered the cumulative effect of the sentence.
16. It is trite that a Court of Appeal has limited powers to interfere with the sentence imposed by the Trial Court.

In S v Nkosi 2011 (2) SACR at 492 SCA the issue of consideration of an appeal against sentence was again restated as follows:

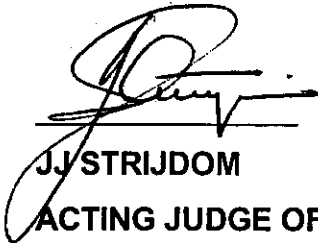
"It should be re-iterated that sentencing is pre-eminently a matter for the discretion of the Trial Court and that this Court does not have an overriding discretion to interfere unless the sentence imposed by the Court below are vitiated by irregularity or misdirection or are disturbingly inappropriate."

17. In my view the Court *a quo* was correct to impose the minimum prescribed sentence as no substantial or compelling circumstance exist to deviate from the minimum sentence. I am also not convinced that insufficient evidence was placed before the Court *a quo* regarding the personal circumstances of the Appellant.
18. Having regard to the cumulative effect of all the factors pertaining to sentence, I am of the view that the sentence imposed by the Court *a quo* is not shockingly heavy or excessive, nor disproportionate to the nature and seriousness of the crime, the criminal and the interests of the society.
19. The Court is not satisfied that the sentence imposed has been vitiated by any material misdirection. In my view the Court *a quo* properly exercised its judicial discretion.

ORDER:

20. The following Order is granted:

20.1. The Appeal against sentence is dismissed.



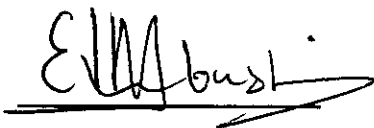
JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

PRETORIA

DATE:

I agree



KUBUSHI J

JUDGE OF THE HIGH COURT

PRETORIA

DATE:

APPEARANCES:

On behalf of the Appellant:

MB Kgagora

Legal Aid

On behalf of Respondent:

Adv L More

Director Public Prosecutions