

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



17/7/15

CASE NUMBER: A734/14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	<u>26.6.2015</u> DATE SIGNATURE

In the matter between:

AUBREY MASHISHI

First Appellant

THABISO MOTSATSI

Second Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellants were convicted on a charge of theft and a charge robbery with aggravating circumstances. In respect of the theft, the appellants received a

sentence of six months imprisonment and in respect of the robbery, the prescribed minimum sentence of 15 years imprisonment was imposed.

- [2] The appellants appeal against both conviction and sentence.

THEFT AND SIX MONTHS IMPRISONMENT

- [3] Mr Matlapeng, counsel for the appellants, conceded from the outset that the court *a quo* did not err in convicting the appellants on the charge of theft. He, furthermore, conceded that the sentence of six months imprisonment is an appropriate sentence. Having regard to the record, the concessions were well made.

ROBBERY WITH AGGRAVATING CIRCUMSTANCES

- [4] The only issue in dispute in respect of the robbery charge was the identification of the appellants.
- [5] In respect of identification, the court *a quo* aptly analysed the evidence presented by the state as follows:

“As far as count 2 is concerned, the whole matter revolves around the question of identity of the perpetrators. It is not in dispute that a robbery took place at the house of Mr Mahoza on the date in question. It is not in dispute that candles were used to provide light. From the evidence it appears that the light created by the candles was sufficient to distinguish people from each other. It was sufficient for Ms Mghemo to find money. It was sufficient for the perpetrator to locate the cell phone of Mr Alpheus. Lighting was also sufficient for them to see that one of the perpetrators carried a firearm. One must also bear in mind that clearly this incident did not last just a minute. I do accept that it was something that happened quickly, in the sense that robbery do not normally take hours in those circumstances. One must bear in mind that the people were seen where they stood in the door. They ordered them to go down to the ground.

There was conversation. Ms Mghemo peeped as well as did Ms Zita and most importantly Ms Zita was the one that indicated that she knew both accused 1 and accused 2 prior to the incident.

Mr Mahoza was honest as far as identification was concerned as he only actually identified accused 2 the person carrying the firearm in court, whereas he could easily have indicated that accused 1 was the other perpetrator which he did not. I find that circumstances that prevailed at the time of the robbery was indeed favourable for the witnesses to make a reliable identification of the assailants."

- [6] Having perused the record, I agree with this finding. In the premises, the appeal against conviction on the robbery charge falls to be dismissed.

15 YEARS IMPRISONMENT

- [7] Mr Matlapeng referred to the following mitigating circumstances in his heads of argument:

- "a) both the Appellants were employed before the incident;*
- b) both of them are first offenders;*
- c) the complainant in count 2 and his family members did not sustain physical injuries during the robbery;*
- d) the appellants were severely beaten up by members of the community at the time they were apprehended. The Second Appellant had to be taken to a doctor.*
- e) both Appellants spent more than a year in custody awaiting trial."*

- [8] Mr Matlapeng submitted that the above circumstances, cumulatively considered, constitute substantial and compelling circumstances as contemplated in the Criminal Law Amendment Act, 105 of 1997 justifying a deviation from the prescribed minimum sentence of 15 years imprisonment.

[9] Mr Maritz, counsel for the state, submitted that the court *a quo* did not misdirect itself in imposing the prescribed minimum sentence and referred, *inter alia*, to the following aggravating circumstances in his heads of argument:

“15.1 The Appellants were armed with a firearm (illegal) which was cocked, ready for use during the robbery.

15.2 A shot was fired at Mr Mahoza when he followed Appellants. The shot missed and penetrated the shack wherein his family was at that time, putting their lives in danger as well.

15.3 It can be accepted that the incident was traumatic for the whole family. Ms Mghemo testified that Alpheus, whose cellphone was robbed, did not attend court because he was still traumatised.

15.4 It is clear that the family was not well off and that the loss of the money would have affected them negatively.

15.5 The appellants showed no remorse.

15.6 There must have been a degree of planning, because Mr Mahoza saw them at his workshop previously. The appellants knew accused 3 who stayed in the area and the night of the robbery accused 3 was locked in his house.”

[10] I take due cognisance of the gravity of the offence. Mr Mahoza and his wife were robbed at gunpoint of their hard earned money in the sanctity of their house. Their daughter and her baby were in the room, next to the room where the robbery occurred. It must no doubt have been a horrific experience. The interest of society demands that people who act as callously as the appellants be severely punished. The legislator deems crimes, as the one perpetrated by the appellants, in such a serious light that it promulgated the Act prescribing minimum sentences for robbery with aggravating circumstances.

- [11] A court would, however, fail in its duty, if the personal circumstances of an accused is not properly considered and viewed holistically with the circumstances in which the crime was committed.
- [12] The fact that the appellants are both first offenders and spend more than a year in custody awaiting trial, does, in my view, constitute substantial and compelling circumstances justifying a deviation from the minimum sentence.
- [13] Having regard to the factors and circumstances mentioned *supra*, I am of the view that a sentence of 10 years imprisonment will be an appropriate sentence.

ORDER

I propose the following order:

1. The appeal against conviction and sentence in respect of the theft charge is dismissed.
2. The appeal against conviction in respect of the robbery with aggravating circumstances charge is dismissed.
3. The appeal against the sentence of 15 years imprisonment succeeds.
4. The sentence is set aside and substituted with the following:

"In respect of account 2 the accused is sentenced to 10 years imprisonment."
5. The sentence is antedated to 18 March 2014.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.



MOLOTO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA (ACTING)
GAUTENG DIVISION, PRETORIA

It is so ordered.

ADVOCATE FOR THE APPELLANT

ADVOCATE R S MATLAPENG

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DATE OF HEARING: 11 May 2015