

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. A31/2015

In the matter between:

THOBEKANI COLLEN MAHLANGU

1st Appellant

THULANI MKHIZE

2nd Appellant

and

THE STATE_

Respondent

CORAM:

NAIDOO, J *et S* MIA AJ

JUDGMENT BY:

NAIDOO,J

HEARD ON:

25 MAY 2015

DELIVERED ON:

25 MAY 2015

NAIDOO J

[1] The appellants were charged with in the Regional Court, Welkom as follows:

Count1 – Attempted Murder

Count 2 - Attempted Escape from Custody

Count 3 – Possession of Unlicensed Firearm

Count 4 – Unlawful Possession of Ammunition

Count 5 – Pointing a Firearm

Count 6 – Pointing a Firearm

They were convicted on counts 1 to 4 and found not guilty on counts 5 and 6. Each was sentenced to direct imprisonment as follows:

Count 1 - Eight (8) years

Count 2 – Five (5) years

Count 3 – Fifteen (15) years

Count 4 – Five (5) years

The trial court ordered the sentences in respect of counts 3 and 4 to run concurrently, so that the appellants were required to serve an effective sentence of Twenty Eight (28) years' imprisonment.

After their application for leave to appeal against conviction and sentence was dismissed by the trial court, the appellants petitioned the Judge President and were granted leave to appeal against sentence only. They are therefore before us on appeal against sentence. Mr PL Van Der Merwe appeared for the appellants and Ms MMM Moroka appeared for the State.

- [2] The appellants were inmates at the Correctional Centre in Odendaalsrus, awaiting trial for armed robbery, allegedly committed at Wesselsbron. It came to the attention of the Correctional Centre at Odendaalsrus, through information received on 16 November 2010, that certain inmates planned to escape from custody and that a firearm, which was inside the correctional facility would be used in the

escape. An emergency task team was assembled and went to the Correctional Centre on 17 November 2010. They were divided into two teams and began searching cell number 12 and 13. In this process, the first appellant produced a firearm and threatened the correctional officers with it, initially turning his attention to the head of the Correctional Centre, Mr Monumale, who took refuge inside a cell. The first appellant then turned his attention to a senior Correctional Services official, Mr Gerber, by physically taking hold of him. The second appellant also became involved in this scuffle, by grabbing hold of the officer and dragging him out of the cell where he was standing in the doorway.

- [3] A struggle ensued between Gerber and the first appellant, during which the first appellant hit Gerber over the head with the firearm, causing an open wound, which eventually required 9 stitches. Gerber grappled with the first appellant, while the firearm was still in the first appellant's hand. By this time they were both on the ground. A shot went off in the process, without injuring anyone. The first appellant then shouted at the second appellant to "take the firearm and kill him", referring to Gerber. The second appellant picked up the firearm, pointed it at Gerber's head and tried pulling the trigger about 3 or 4 times but the firearm failed to fire. The first appellant then told the second appellant to cock the weapon, which the second appellant did and tried to fire the firearm again, but it still failed to do so. At that stage, another correctional official grabbed hold of the second appellant and took him away. The first appellant was also removed by the

correctional officials and Gerber was taken for medical attention.

- [4] I turn now to deal with the issue of sentence. Both appellants contend that the sentence of an effective 28 years' imprisonment is strikingly inappropriate, in that it was out of proportion to the accepted facts of the case, the personal circumstances of the appellants and the fact that they spent more than two years in custody awaiting trial in this matter. I pause hereto mention that both counsel who appeared before us this morning seem to have some difficulty about which part of the sentence should run concurrently. On page 291 of the record, the magistrate deals with counts 3 and 4. She says "Die beskuldigdes effektiewelik daarop vir 15 jaar gevangenisstraf sal uitdien". The sentence on count 3 was 15 years' imprisonment and on count 4 was 5 years' imprisonment. The sentiments of the magistrate thereafter, in my view, refer to counts 3 and 4, therefore yielding an effective sentence of 28 years' imprisonment. The appellants contend, in addition, that the court erred in over-emphasising the seriousness of the offence, the interests of society and the deterrent effect of sentence. The appellants' personal circumstances, in addition to what has been stated herein, is that they are 39 and 37 years old, respectively, they each have minor children who are living with their mothers and both were first offenders. I pause to note that, at the time of sentencing in this matter, both appellants were first offenders.

- [5] The position in our law regarding the ability of an appeal court to interfere in a sentence has been well settled through the cases over the years. It is generally accepted in our law that an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. The principle in this regard is expressed as follows by Trollip JA in **S v Pillay** 1977 (4) SA 531 (A) at p 535 E-F:

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

In the case of **S v Rabie** 1975 (4) SA 855 (A) Holmes JA set out on page 857 the following guiding principles with regard to interference with a sentence on appeal:

- "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 inappropriate.”

This principle was followed by Holmes JA in **S v Giannoulis** 1975 (4) SA 867 (A).

- [6] The trial court balanced the personal circumstances of the appellants against the aggravating circumstances that it considered were present in this matter, namely, that the offences are very serious, that they were premeditated, that the appellants were in possession of a firearm with live rounds of ammunition in a correctional facility, they attacked and caused injury to a correctional officer, causing him severe emotional trauma, even though he had recovered from his physical injuries, that they conducted themselves recklessly in that they intended to achieve their purpose of escaping from custody with no regard to the consequences of their actions, that the interests of society demanded stern sentences and that the appellants showed no remorse. The court also indicated that they attacked unarmed correctional services officials and regarded this as an aggravating factor. It is apparent from the reasons for sentence that the trial court also took into account that the appellants were before it as first offenders and that they had spent over two years in custody, awaiting trial.

[7] To my mind, the trial court thoroughly interrogated the mitigating as well as the aggravating factors relevant to this case. I cannot find that that the court over-emphasised the aggravating factors and under-emphasised, or attached too little weight, to the personal circumstances of the appellants, as argued by Mr Van Der Merwe in his Heads of Argument and in court this morning. He also referred to a number of cases where very light sentences were imposed for seemingly serious offences. The sentence to be imposed in a matter depends entirely on the circumstances of the particular case, and although sentences imposed in other similar matters are useful guides to sentencing, that is all they are – a guide. In the present matter, in the fine balancing act that it was required to perform, the trial court, in my view, properly balanced the seriousness of the offences, the interests of society and the interests of the appellants. I cannot find any misdirection on the part of the trial court which warrants the interference of this court in the sentences that it imposed.

[8] In the circumstances, the following order is made:

The appeal against sentence is dismissed.

S. NAIDOO, J

I agree

SC MIA, AJ

On behalf of the Appellant:

Instructed by:

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On behalf of the Respondent:

Instructed by:

Ms Ms MMM Moroka

The State

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