IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT PRETORIA)

CASE NUMBER: A73/2009

DATE: 03 AUGUST 2009

In the matter between:

SIPHO OWEN TSHONGWENI	**FIRST APPELLANT**
FIKILE PHILE MDAKWENDE	**SECOND APPELLANT**
AND	
THE STATE	**RESPONDENT**

JUDGMENT

TLHAPIAJ

[1] The appellants appeared before the Regional

magistrate court sitting at Heidelberg on charges of robbery with aggravating circumstances, read with Act 51/1977. The appellants were legally represented. They pleaded not guilty and were convicted and sentenced to15 years' imprisonment. They petitioned the High Court for leave to appeal their conviction and sentence and were granted leave to appeal against sentence only.

[2] On the 20 March 2004, the complainant, his friend Tebogo and others were playing pool at a tavern which also happened to be complainants home. It is alleged that the two men whom complainant described as older men entered, purchased cool drink, sat down to drink and left. They returned after a while. The first appellant, who was known to the complainant was in possession of a fire arm and the second appellant in possession of a knife. The latter held the complainant by the neck while the first pointed a firearm at him. The second appellant robbed him of his I.D. document, drivers licence and cellular phone. The second appellant then took an iron bar, broke the pool table and removed the coins that were in the slot. The coins collected over a period of three weeks would range between R600 and R800. The complainant was not hurt during the robbery. Both appellants fled the scene and a shot was fired outside the premises. It was denied that the appellants had bought beer that evening. The complainant's version was corroborated by the second witness Tebogo Mokgomong.

[3] The first appellant testified that he was in the company of the second appellant and other friends at the tavern playing pool and drinking liquor. The second appellant broke a pool cue and he denied that the pool table was broken. They were informed that the tavern was closed for business after the cue was broken. They left the premises with their beers. The fled when they saw a police vehicle approaching them because they were afraid of being arrested for drinking in public. The second appellant corroborated the first in as far as the version relating to the incident inside the tavern was concerned.

[4] It was submitted on behalf of the appellants that the learned magistrate had erred in finding that no substantial and compelling circumstances were present.

After conviction the magistrate forewarned the prosecution and defence of the implications of Act 105 of 1997 ('the Act') with regard to the prescribed minimum sentences. Neither the defence or state addressed the court on whether or not substantial and compelling factors were present. Without dealing with the matter further the magistrate in sentencing made a finding that substantial and compelling factors were not present without substantiating such finding and proceeded to impose sentence.

[5] While it is assumed that the legal representative would have advised the accused of the implications of the Act, It is doubtful whether they were advised because the charged sheet made no reference to the Act. It is my view that even where the appellants were legally represented it remained the responsibility of the presiding officer to ensure that the accused persons appearing before him or her were aware of the implications of the Act in relation to the offence they were charged with. This responsibility should permeate the proceedings. Where the legal representative and prosecutor failed to address the court on whether or not substantial and compelling factors were present, it was incumbent on the magistrate to take the matter up with them before pronouncing without giving any reasons that there were none present. On reading the record it does not appear that the appellants were properly advised of the consequences. In **S v Ndlovu 2003 (1) SACR 331 (SCA)** at **para 12** Mpati JA said after referring to the **S v Legoa 2003 (1) SACR 13 (SCA):**

> "…………..The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be bought to the accused at the outset of the trail, if not on the charge sheet then in

> some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as the consequences Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is no: necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused is given sufficient notice of the State's intention to enable him to conduct his defence properly."

[6] Again it is my view that where there was scant information from the evidence and from which it could be determined whether or not substantial and compelling circumstances were present or not, it was the responsibility of the magistrate to enquire from the legal representative whether he or she advised the accused of the advantages and disadvantages of testifying in mitigation. If the accused elected not to testify in mitigation, then in the legal representative's address in mitigation, the magistrate should draw the attention of both sides of the scarcity of factors from which the court could draw information. In this instance it cannot be concluded that the appellants were aware of the Act in order to enable them to give proper instructions to their legal representative. The fact that the legal representative failed to address the court makes me doubt whether she was aware of the provisions of the Act

and, that she gave proper advise to them regarding the implications. Given the fact that the appellants were first offenders and, in the absence of proper information available to the court, pre-sentencing reports could have been requested in view of the long terms of imprisonment the appellants would be subjected to. Pre-sentencing reports are meant to source additional information about the accused, his background and other factors which may assist the court in its consideration of sentence.

[7] It is for this reason that I conclude that the trial of the appellants in the sentencing stage was substantially unfair and that the sentence imposed was shockingly inappropriate and should be set aside.

> In considering substantial and compelling factors the court takes into account the cumulative effect of those factors given in mitigation and other factors. The offence was a very serious one in that a firearm and knife were used. The court however aid not take into account the fact that the complainant was not injured during the attack. In **S v Abrahams 2002 (1) SACR** 116 **(SCA)** at 127c-f the court considered the fact that the conduct of the appellant to have been motivated by amateurish folly. In this instance the appellants attacked a complainant who was well known to them in that they frequented his home which was also a tavern

where they used to drink. The complainant knew the parental home of the first appellant which he pointed out to the police. The appellants were first offenders, though unemployed and unmarried they did part time jobs. The second appellant had a minor child to support. All this factors cumulatively constitute in my view substantial and compelling factors which should have been taken into account in considering a partially suspended sentence Again, the appellants spent a period of six months in prison, awaiting trial. In **S v Brophy and Another 2007 (2) SACR 56 (W)** it was held that 'time spent as an awaiting-trial prisoner was 'equivalent to time served without remission' and that the fact that they did not qualify for the many benefits enjoyed by sentenced prisoners e.g. participation in rehabilitative programmes. Time served as an awaiting-trial prisoner was 'equal to double the time served by a sentenced one'. All these factors cumulatively constitute in my view substantial and compelling factors which should have been taken into account in considering a partially suspended sentence. The term of 15 years imprisonment should be set aside. The appellants were sentenced on the 1 September 2004. To date they have served a term of imprisonment of four years and eleven months.

In the premises, I would make an order as follows:

1. **The appeal on sentence is upheld;**
2. **The sentence of 15 years imprisonment is substituted by the following:**

   (a) **Appellants are sentenced to seven years imprisonment;**

   (b) **The seven years imprisonment is antedated to the 1 September 2004;**

V. V. TLHAPI

(ACTING JUDGE OF THE HIGH COURT)

I, agree

M**. F. LEGODI**

(JUDGE OF THE HIGH COURT)

JUDGMENT RESERVED : 31 JULY 2009

JUDGMENT HANDED DOWN : 3 AUGUST 2009