

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED: Yes

CASE NO: A147/2022

18 July 2024

DATE

SIGNATURE

IN THE MATTER BETWEEN:

PETRUS SEANEGO

Appellant

and

THE STATE

Respondent

Coram: Collis J et Matthys AJ

Heard: 7 May 2024

Delivered: 18 July 2024

JUDGMENT

Matthys AJ with Collis J concurring

A. Introduction

[1] This is an appeal against conviction and sentence. The Regional Court¹ at Benoni convicted the appellant on a charge of robbery with aggravating circumstances² and sentenced him to 15 years imprisonment. The appeal is with leave granted by the Regional Court.

B. Background facts

[2] The following salient facts found the conviction. The evening of 7 October 2017 the complainant (Mr Jan Nkosi) entered a tuck-shop situated at Mogoba Village. He noticed that the owner of the shop was being robbed. He turned around to exit the shop, when he was confronted by the appellant and an unknown co-perpetrator. The appellant pointed the complainant with a firearm and dispossessed him of his licensed firearm and a wallet containing money and bank cards. He was forced to the back of the shop counter together with the owner of the shop. The assailants left the crime scene.

[3] It was not in issue that the visibility in the shop was good and that the complainant was able to identify the appellant from a distance of 1 meter, during the robbery. He also observed a tattoo on the appellant's arm at the time.

¹ Regional Magistrate I Cox presiding

² Read with section 51(2) of the Criminal Law Amendment Act 105/97

[4] The accepted evidence is that the complainant knew the appellant from 2016 by sight, as he frequently saw the appellant loitering outside the truck shop. The complainant did not know the appellant's name or place of abode. It transpired that the complainant after the day of the robbery, saw the appellant at a gambling pool. He then phoned the investigating officer (Sgt Koko) for the appellant to be arrested.

[5] The investigating officer attended to where the appellant and the complainant were, however the appellant avoided arrest, by running away. The investigating officer recognized the appellant from a previous encounter and informed the complaint of that. The investigating officer subsequently attempted to find the appellant without success. The appellant was only arrested on the 15th of March 2019, through information received from an informer.

[6] The appellant's defence was a bare denial of the State's case.

C. The appeal on conviction

[7] The appellant's appeal against the conviction is based on the following grounds.

- i. That the State failed to prove its case beyond reasonable doubt;
- ii. That another court will come to a different conclusion regarding the merits of the case.

[8] The State opposes the appeal against the conviction. It is contended for the State that the available evidence proved the appellant's guilt beyond reasonable doubt and that the trial court correctly convicted him.

[9] In deciding the appeal against the conviction, I considered the record, mindful of the principle governing the hearing of appeals, against findings of fact. On appeal it is trite that, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and it will only be interfered with, if the recorded evidence shows it to be clearly wrong. See *S v Hadebe and Others* 1997 (2) SACR 641 SCA.

[10] It is significant to note that the appellant's grounds of appeal on the conviction, are phrase in general terms and do not set out any specific criticism of the findings made by the trial court. A careful reading of the trial court's judgment will show, that the Regional Magistrate evaluated the evidence as a whole in the context of the criminal onus that rest on the State.

[11] He was mindful of the cautionary approach to be adopted to the evaluation of the complainant's single evidence on the identity of the appellant. The Regional Magistrate considered the circumstances under which the complainant had to make the identification and found it to have been favorable for a correct identification. I further considered that as explained by the Supreme Court of Appeal in *S v Dladla* 1962 (1) SA 307 (A), the probability that an identification is reliable is increased, where an identifying witness had prior knowledge of the alleged offender's identity.

[12] The trial court properly evaluated the evidence with reference to the reciprocal corroboration in the two state witnesses' testimony and found it to be reliable.

[13] Due consideration was afforded to the general probabilities of the case and the appellant's bare denial of the allegations, was correctly rejected as false and not reasonably possibly true. I am satisfied that the recorded evidence justifies the findings made by the trial court. The appellant's guilt, as a perpetrator of the robbery is proved beyond reasonable doubt. Counsel for the appellant, correctly conceded that the appeal on the conviction holds no merit and must fail.

D. The appeal on sentence

[14] I turn to consider the appellant's grounds of appeal on the sentence. In brief, the appellant's contention is that the term of 15 years imprisonment imposed is strikingly inappropriate and induce a sense of shock. It is vied that the trial court misdirected, by not considering that the appellant was held in custody for 10 months awaiting the finalization of the case. Also, that the trial court over-emphasized, the seriousness of the offence and the interest of the community, at the expense of the appellant's personal circumstances. It is submitted that the trial court misdirected by not finding that substantial and compelling circumstances exist to deviate from the prescribed minimum sentence.

[15] State counsel, argued that the aggravating circumstances of the case and the interest of society by far outweigh the appellant's personal circumstances. It is contended that the trial court correctly found that there are no substantial and compelling circumstances on the facts of the case, that justify a deviation from the prescribed minimum sentence.

[16] Sentencing resorts primarily within the scope of the trial court's discretion and a court on appeal, shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise its discretion judiciously. See *S v Malgas* 2001(1) SACR469(SCA).

[17] There can be no doubt that the offence of robbery with aggravating circumstances is omnipresent country wide. It is the type of offence which pesters the people of our democracy, like a malignancy. Members of the public need to be forever vigilant of persons like the appellant, who without sparing a thought for the wellbeing, bodily integrity or dignity of others, with premeditation engage in such violent and dishonest conduct for selfish gain.

[18] Further thereto, the offence no doubt, impacts negatively on the economy of the country and has cast a dark shadow over the confidence of the community in policing, prosecution and the administration of justice. Despite the discretionary minimum sentences prescribed by the Legislature and the reported robust sentences imposed by the courts, robbery incidences continue to be the order of the day.

[19] The pervasiveness of the crime of robbery with aggravating circumstances, justifies for our courts to give recognition to the plight of society, in its demands for protection through the imposition of deterrent sentences. Therefore, persons like the appellant, is required to receive a stern message, that our courts will not hesitate to recognize and implement the policy considerations of the Legislature, to the extent that robbery with aggravating circumstances is grave and that robust sentences are warranted.

[20] It cannot be brushed aside, that the facts of this matter hold aggravating features. The appellant wielded a dangerous firearm during the robbery. When dangerous weapons are used in the commission of crime, the prospects of death or injury looms large. Although there was no physical injury caused to the complainant, the evidence is clear that he was immensely traumatized by the appellant's violent conduct.

[21] In addition, the appellant robbed the complainant of his licensed firearm, which no doubt caused him psychological stress, him having been responsible to account for the loss of his licensed firearm. There is also no evidence that the goods robbed from the complainant were recovered. The fact that the owner of the shop was also robbed during the same incident, makes it clear that the type of offence is rife.

[22] Having regard to the peculiar facts of this case, I am of the considered view that the appellant's conduct is not the sort of transgression, where sentimental pity should be allowed to prevail over common sense and the community interests at large. The prescribed minimum sentence is the bench mark and should ordinarily be imposed in the absence of substantial and compelling circumstances, which justifies the imposition of lesser terms of imprisonment than that provided for in section 51(2) of Act 105/1997.

[23] In *S v Malgas* it was held that-

'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[24] Further, it has been authoritatively acknowledged that the concept ‘substantial and compelling circumstance’ in the context of the provisions of Act 105/1997, denote an amalgamation of factors that defies precise definition. In general, the existence of such weighty circumstance will be present when it is found that the case is one in which the prescribed sentence, would be unjust or disproportionate to the crime, the offender and the legitimate needs of society. Should that be the case, a court is entitled to find the individual or combined weighty factors as substantial and compelling and deviate from the sentence prescribe by the Legislature. See *Tafeni v S* [2016] JOL 34336 (WCC).

[25] I considered that nowhere in the appeal record is there any reference to the appellant having expressed remorse for his atrocious conduct. Having found that there is no merit in his appeal against the conviction, he had to admit his guilt from inception. However, the appellant played “catch me if you can” by challenging the overwhelming evidence against him. Contrition stems from an appreciation and acknowledgement of the extent of one’s error, however that is not demonstrated in this case. See *S v Matyityi* 2011(1) SACR 469 (SCA).

[26] It appears from the record that the appellant spent 10 months in custody awaiting the finalization of the case. He was initially held in custody for 7 months, since the State opposed his release on bail. There after he was granted bail and later held in custody for 3 months after the conviction.

[27] On the period spent in custody prior to sentencing, I align myself with the following statement by the Supreme Court of Appeal in *Radebe v S* 2013(2) SACR 165 SCA:

‘the period in detention pre-sentence 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 ...Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act...the test is not whether on its own the period of detention constitute a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime’

[My emphasis]

[28] The time spent in custody by the appellant, prior to the sentence imposed, cannot on its own serve as substantial and compelling circumstances justifying a lesser sentence than the minimum term of imprisonment prescribed by the Legislature. It is permissible in cases of serious crime (like the one at hand) for the personal circumstances of the offender, to ebb into the background.

[29] In this regard it was held in *S v Vilakazi* 2009(1) SACR 552(SCA) at para 16 that:

‘Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again’. [My emphasis]

[30] This is such a case. By his violent conduct, the appellant has proven himself to be a danger to society and for that reason, he needs to be removed from society.

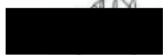
[31] It is clear from the record that the trial court made effort to have the appellant's personal circumstances investigated and placed on record through a pre-sentence report. All of his personal circumstances were adequately weighed by the Regional Magistrate. After a conscientious consideration of the magistrate's reasons on sentence, it cannot be said that he in any material respects, misdirected in the execution of his sentencing discretion. It was correctly found that there is no weighty justification for a deviation from the minimum term of imprisonment prescribed. I am further of the view that no injustice will result, should the appellant be ordered to serve the sentence imposed.

[32] Accordingly, the following order is made.

- a. The appeal against conviction and sentence is dismissed.


Matthys AJ
Acting Judge of the High Court
Gauteng Division (Pretoria)

I concur and it is so ordered.


Collis J
Judge of the High Court of South Africa
Gauteng Division (Pretoria)

Appearances

Counsel for the appellant: Mr Riaan Du Plessis [Legal Aid SA –Pretoria]

Counsel for the state: Adv J Cronje [DPP Pretoria]