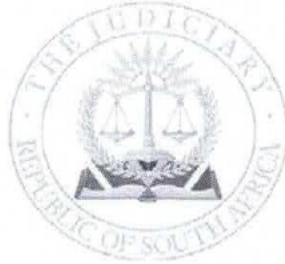


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

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

21 OCTOBER 2024

DATE

SIGNATURE

Case Number: A315/2023

In the matter between:

THAPELO PATRICK SBENGE

Appellant

And

THE STATE

Respondent

JUDGMENT

Bokako A J (Mosopa J concurring)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 21 October 2024.

A. Introduction

1. The Appellant was brought before the Regional Court in Brakpan and charged with one count of robbery with aggravating circumstances, as defined in Section 1 of the Criminal Procedure Act 51 of 1977, in conjunction with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("CLAA"), as amended. The aggravating circumstances involved the use of a firearm and a knife during the commission of the crime.
2. The Respondent alleged that, on 2 November 2022, at Brakpan in the regional division of Gauteng, the Appellant, with his accomplice, unlawfully and intentionally took items belonging to Taelo Gilbert Mabela by force. They took his house keys and wallet containing his bank card, which was in his lawful possession. Aggravating circumstances were that a firearm and knife were used during the commission and furthering of the crime.
3. On June 6, 2023, the Appellant, who had legal representation throughout the proceeding, submitted a guilty plea under Section 112(2) of the Criminal Procedure Act 51 of 1977. The plea acknowledged involvement in certain elements of the robbery with aggravating circumstances.
4. The Respondent did not accept the plea, and a plea of not guilty in terms of section 113 of Act 51 of 1977 was noted.

5. The Appellant was convicted on 7 July 2023 and was sentenced to 15 years of imprisonment.
6. On 7 July 2023, the trial Court granted the Appellant leave to appeal against sentence only.
7. The Appellant appeals against the 15-year imprisonment sentence imposed by the trial Court.

BACKGROUND

- i) On 2 November 2022, the appellant and his accomplice walked past the train station on their way home. They came across the complainant and accosted him, searching him and forcefully taking his belongings. The accomplice was carrying a firearm, and the appellant had a knife. The complainant gave the accomplice, Sipho, two PINs, and Sipho handed the appellant two bank cards and PINs, instructing him to go and withdraw the money at the Spar ATM.
- ii) The appellant went to the ATM to withdraw money. While at the ATM, he noticed the complainant and a security guard. The complainant ran towards the appellant and pointed at him, accusing the appellant of taking his belongings. As a result, the security guard arrested the appellant, and the police were called. The appellant was then detained at Brakpan Police Station.

Ground of Appeal (Ad Sentence)

8. In summary, the basis of the appeal, as contended by the Appellant's representative, is that:
 - a. The effective term of 15 years imprisonment is shockingly inappropriate,

- b. The court a quo erred in not taking into account the time spent by the Appellant while awaiting trial,
 - c. The court erred in overemphasizing the following factors: the seriousness and prevalence of the offence and the fact that society's interest can only be satisfied by imprisonment.
9. The grounds of appeal are based on the argument that the lower court made an error in deciding that there were no significant and compelling reasons to justify a lighter sentence. Specifically, the Appellant contends that (a) He was 27 years old and single, (b) had a pregnant girlfriend who was unemployed, and (c) had dropped out of college after completing matric. At the time of his arrest, (d) he was unemployed and (e) had been in custody for eight months awaiting the trial's conclusion.

LEGAL PRINCIPLE

10. The court of appeal does not intervene lightly in the trial court's decision-making. In this situation, the court's responsibility is not to replace the trial court's judgment but to examine its decision for any significant misdirection or error that may have impacted the case's outcome.¹ In Du Toit's well-known commentary The learned authors observe that:

'A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of the sentence as if it were the trial court and then substitute the

¹See S v Romer 2011 (2) SACR 153 (SCA); S v Hewitt 2017 (1) SACR 309 (SCA); and S v Livanje 2020 (2) SACR 451 (SCA)

*sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...*²

11. Case law supports the cautious approach to be taken by a court of appeal. In *S v Bogaards*,³ Khampepe J held, at [41], that:

*'It can only do so, i.e., interfere with the sentence imposed where there has been an irregularity that fails justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'*⁴

12. In *S v Hewitt*⁵ where, Maya DP held that:

'It is a trite principle of our law that the imposition of sentence is the trial court's prerogative. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its choice of penalty would have been appropriate. Something more is required; it must conclude that its choice of penalty is appropriate and that the penalty chosen by the trial court is not. Thus, interference is justified only where there exists a "striking," "startling," or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed.

² See, too, *S v Malgas* **2001 (1) SACR 469** (SCA); *S v Fielies* **[2014] ZASCA 191** (unreported, SCA case no 851 / 2013, 28 November 2014); *S v Matheka and another* **2020 (2) SACR 559** (SCA); and *S v Gebengwana and another* (unreported, ECG case no CA&R 186 / 2015, 21 September 2016)

³ 2013 (1) SACR 1 (CC)

⁴ In paragraph [41].

⁵ 2017 (1) SACR 309 (SCA)

ANALYSIS

13. Accordingly, this court may only intervene with the sentence in the current case when the trial court's use of discretion was erroneous. Otherwise, the sentence should remain unchanged. These principles should govern the assessment of the grounds of appeal presented by the Appellant.

14. The record lacks substantial evidence in support of the Appellant's case on appeal. His legal representative provided minimal submissions. Furthermore, the trial Court should have considered the Appellant's age of 27, his potential for rehabilitation, and the eight months he spent in custody awaiting the finalisation of the matter when determining the sentence.

15. The counsel for the Appellant mentioned the important decision in *S v Malgas*, which is still relevant when determining if there are substantial and compelling circumstances. My understanding of the *Malgas* judgment is that the minimum prescribed sentence can be deviated from if, after considering all the factors that influence a fair sentence, the court decides that imposing the minimum sentence would result in an injustice in the specific case or would be "disproportionate to the crime, the criminal, and the legitimate needs of society."

16. In considering the case at hand, it is crucial to consider the traditional triad of the crime, the offender, and the interests of society, as established in the case of *S v Zinn*. The current case involves robbery under aggravating circumstances. On 2 November 2022, in Brakpan, the Appellant and an accomplice forcibly and intentionally seized possessions belonging to Taelo Gilbert Mabela. They unlawfully took his house keys and wallet, which contained his bank card and were rightfully his. The aggravating

circumstances were that a firearm and a knife were used during the commission of the crime.

17. On that day, the Appellant and his accomplice accosted the complainant and restricted his freedom of movement for a while, searching him and forcefully taking his items, as mentioned above. They used a firearm and a knife.

18. Counsel for the Appellant stated that proportionality is at the heart of the inquiry into whether punishment is shockingly inappropriate.

19. It is further argued that the trial court failed to consider specific factors supporting the existence of substantial and compelling circumstances. These factors include the recovery of all stolen goods except for the cell phone, the lack of injuries to the complainant, and the use of the knife and firearm solely to obtain submission from the complainant. It is also noted that the Appellant was not present when the shooting occurred, and the value of the stolen cell phone is unknown.

20. Just as during the trial, it is crucial to have the necessary evidence and conduct a thorough analysis during sentencing. The court has a significant responsibility to ensure that the punishment aligns with the severity of the crime, and fulfilling this duty heavily depends on the quantity and quality of the information presented to the court.

21. In the present matter, the submissions made in mitigation and aggravating were extensive. The defence contended that it is substantial and compelling that the complainant did not suffer any physical injuries during the Robbery.

22. Counsel for the state contended that the Appellant and his accomplice fired two gunshots to threaten the victim. Such an act is considered an aggravating factor. It escalates the threat level and adds to the severity of the offence, potentially causing fear and trauma to the victim. The

use of weapons like a firearm and a knife can significantly increase the danger and harm posed to the victim.

23. Some personal items of the complainant were recovered on the same day. These are not substantial and compelling reasons to deviate from the prescribed minimum sentence.

24. This court did not deem the appellant's argument that they spent eight months waiting for the matter to be resolved significant or compelling, concurring with the lower court's decision. The period spent in custody awaiting trial must be weighed alongside other factors to determine if it constitutes substantial and compelling circumstances.

25. This court has considered the mitigating factors alluded to by the Appellant. However, it concludes that the aggravating circumstances in this matter far outweigh the mitigating factors.

26. This court has considered the sentence in line with the principles set out in *S v Zinn*. *S v Zinn* **1969 (2) SA 537** (A). The offence committed by the Appellant remains a severe offence. This kind of violent crime should be visited with sentences that should deter the Appellant and others from committing them. These factors need to be considered together with the nature and seriousness of the offence, the interests of society, and the interests of the accused persons.

27. It is trite that sentence is the prerogative of the trial court. The court of appeal must be hesitant to interfere unless some irregularity vitiates the sentence, or the discretion has not been judicially or properly exercised or is disproportionate to the crime committed, or the court has misdirected itself or where there is a striking disparity between the sentence and the sentence this court considers appropriate. See *S v Rabie*⁶.

⁶ 1975(4) SA 855 (A)

28. The lower court ruled and imposed the minimum sentence set by the legislature. Deviating from the legislature's minimum sentences requires substantial and compelling reasons. In *S v Jimenez*⁷ the court held:

"The imposition of minimum sentences indicates what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when sentencing discretion is exercised."

29. The trial court considered the Appellant's personal circumstances and weighed them against the crime that he had committed. The court has carefully considered the matter and has not found substantial and compelling reasons to justify deviating from the prescribed minimum sentence.

30. The Appellant and his accomplice were carrying weapons, indicating they were prepared in case the victims resisted. During the trial, it was observed that the Appellant did not express any remorse for his criminal actions. The court agrees with the trial court's assessment that no significant and compelling circumstances warrant lesser sentences than the law prescribes.

31. This court endorses the court's a quo finding that no substantial and compelling circumstances could have persuaded the trial court to depart from imposing the prescribed minimum sentences.

⁷ 2003(1) SACR 507 (SCA) at 512 f

32.The trial court provided a comprehensive overview of the Appellant's behaviour. This conclusion was based on the evidence that the Appellant and his accomplice were armed with a firearm and a knife during the robbery, and shots were discharged during the commission of the crime.

33.The sentence imposed was per the prescripts of s 51(2) (a) of the CLAA. As indicated, the trial court did not err or misdirect in sentencing the Appellant.

34.This court has no reason to interfere with the sentence. The imposition of 15 years is appropriate, and this court is satisfied that the sentence is proportionate to the offence.

35.In so far as the sentence is concerned, this court believes that the trial court exercised its discretion judicially and cannot be faulted in the circumstance.

36.In the premises, the appeal cannot succeed, and the following order is made:

ORDER

1. The appeal is dismissed.



TP BOKAKO

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered


M.J MOSOPA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant: Adv. L A Van Wyk

Instructed by: Legal Aid South Africa, Johannesburg.

For the State: Adv. F Rasakanya

Date of Hearing: 4 September 2024

Date of Judgment: 21 October 2024.