



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: A17/ 24

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

31/01/2025

DATE

SIGNATURE

In the matter between:

TUMELO MAHLO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Coram: Msibi AJ et Mashile J

Msibi AJ

Introduction

[1] The appellant, Mr Tumelo Mahlo was convicted in the Mhala Regional Court on the following charges: Count 1, housebreaking with intent to rob and robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997); Count 2, kidnapping and two counts of theft on count 3 and 4.

[2] The events giving rise to the conviction on count 1, 2, and 3 are said to have occurred on 17 October 2011, when appellant and another broke into the home of the complainant, robbed her of cash, a motor-vehicle and a firearm. The complainant was deprived of her liberty, tied with ropes, put in the boot of her car and driven to the bank ATM on the night of the 17th and the morning of the 18th of October 2021 to withdraw money from her bank account. The complainant was a 65-year old female at the time of her ordeal.

[3] The appellant, who was legally represented throughout the trial pleaded not guilty to all 4 counts, for which he was convicted and sentenced as follows: 20 years imprisonment on count 1, 5 years imprisonment on count 2 and 5 years imprisonment on count 3 and 4, which were taken as one for purposes of sentence. The effective term was 30 years imprisonment.

[4] Aggrieved by the sentence the appellant brought an application for leave to appeal on sentence only. The application is opposed by the respondent.

Grounds of Appeal

[5] The grounds of appeal that the appellant relies on are as follows:

5.1 That the trial court erred in finding that the cumulative effect of the appellant's traditional mitigation factors do not amount to substantial and compelling circumstances, warranting a departure from the minimum sentence of 20 years imprisonment.

5.2 That the sentence of 30 years imprisonment is disturbingly inappropriate and induces a sense of shock

5.3 That the court erred in not ordering the sentences on counts 1 to 4 to run concurrently, despite the fact that all counts emanated from the same incident.

The Parties' Contentions in the Appeal

[6] Counsel for the appellant argued that the trial court misdirected itself in sentencing him to an effective term of 20 years imprisonment without informing him of the provisions of section 51(2) of Act 105 of 1997 before the commencement of trial. The court failed to individualise the appellant, in that the sentence was not composed to fit the offender and the particulars of the crime.

[7] The court failed to blend the sentence with mercy and overemphasised the seriousness of the offence at the expense of the accused. Counsel argued that the court attached insufficient weight to the appellant's personal circumstances. Thus, failing to take into account the following circumstances:

- 7.1 that the appellant was 27 years of age at the time of sentencing;
- 7.2 that the appellant passed grade 12;
- 7.3 the appellant was unmarried, however he has one child who was born in 2012;
- 7.4 that the appellant had pending cases;
- 7.5 that the appellant had been in custody since December of 2011

[8] Counsel for the respondent argued that the offence of robbery with aggravating circumstances has become one of the most prevalent and serious offences country wide. The trial court considered the psychological trauma suffered by the complainant, and the humiliation she had to endure at the hands of the assailants at her advanced age of 65 years. The courts have a duty to impose sentences that will reflect the moral outrage of society towards criminal activities, which accordingly will satisfy the need for retribution and operate as a deterrent to other potential offenders.

[9] The appellant and his company knew the complainant very well, and the fact that she was home alone at that time of the day. The offences were carefully planned.

The court did investigate the existence of compelling and substantial circumstances that would justify the imposition of a lesser sentence and found none.

[10] It was further argued on behalf of the respondent that the personal circumstances of the appellant are far outweighed by the aggravating factors in this case, as well as the impact of the offence on the victim. In serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede to the background once it becomes clear that the crime is deserving of a substantial period of imprisonment. The questions of whether the accused is married or single, whether or not he has children, whether or not he is in employment, are largely immaterial, thus the trial court correctly applied the provisions of section 51(2) of Act 105 of 1997 in arriving at the sentence.

The Applicable Law

[11] Section 51 of Act 105 of 1997 provides as follows:

“(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it convicted of an offence referred to in—

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

...

“(3) (a) if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”

[12] In *S v Rabie*¹ the Court of Appeal held as follows:

- “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 principles 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.”

[13] Marais JA provided guidance in *S v Malgas*² as to when can an appellate court interfere with sentence; stating as follows:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”

[14] In *S v Ndlovu*,³ the court stated as follows:

“[W]here the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form,

¹ *S v Rabie* 1975 (4) SA 855 (A) at 857D-E.

² *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

³ *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible consequences.”

[15] During mitigation of sentence at page 239 of the trial court record, Advocate Maphophe for the appellant stated:

“Your Worship in mitigation of sentence the accused indicated to me that he is 27 years old. It has already been proved your worship that he has previous conviction, he is sentenced. He has grade 12 and he indicated further your worship that he has no other pending cases. And he is taking medication for his kidneys your worship.

Your worship we will submit before this court that when considering a suitable sentence for this accused the court needs to take into account the personal circumstances of the accused, it also takes into account the prevalence of the said offence your worship.”
(sic)

[16] It was further placed on record that the appellant is 27 years of age and not married. He was not a first offender. He had one minor child who was born in 2012. He passed matric in 2007. He was once employed for 3 months at Bradley, in Randfontein, Gauteng. He has no pending cases.

[17] During aggravation of sentence the state addressed the court regarding the seriousness and prevalence of armed robberies country wide. What is aggravating is the fact that the complainant was 65 years of age, old enough to be a grandmother to the appellant and his co-perpetrator. She was blindfolded, tied and put in the boot of her own car when she was taken to the ATM to withdraw money. The appellant had a previous conviction of robbery with aggravating circumstances. As a result, the state applied for an additional 5 years on the minimum applicable sentence.

[18] Throughout the trial, the appellant never showed any remorse and refused to take responsibility for his actions. The complainant was still traumatised by the ordeal, she broke down and cried during her evidence.

[19] In its judgment on sentence the trial court referred to the seriousness of the offence, that the complainant was a vulnerable woman, who was mishandled by the appellant and his co-perpetrator. The court further referred to their previous

convictions which ranged from murder, robbery and possession of unlicensed firearm. The appellant's personal circumstances, that he is unmarried with 1 minor child, has minor dependants, and the fact that an appellant has been in custody while awaiting trial, have been found not to constitute compelling and substantial circumstances warranting a deviation from the prescribed sentence.

Analysis

[20] It is trite that the appeal will only succeed once it is demonstrated that the trial court misdirected itself in assessing the facts and circumstances placed before it. The trial court had a duty to assess the facts of the matter, the appellant's personal circumstances and contrast them with the aggravating circumstances in order to determine whether substantial and compelling circumstances exist which would justify the imposition of a lesser sentence than the one imposed. I am also cognisant of the fact that prescribed minimum sentences are not to be deviated from for light and flimsy reasons.

[21] When the charges were put to the appellant, the charge of housebreaking with intent to rob and robbery with aggravating circumstances was read with the provisions of section 51(2) of Act 105 of 1997 as amended. The appellant was legally represented throughout the trial. As it was held in *S v Ndlovu (supra)* it is more desirable that the applicable sentencing regime be pertinently brought to the attention of the accused; however, reference to the applicable minimum sentence in the charge sheet, as in the present matter, is also sufficient.

[22] The complainant was known to the appellant and his co-perpetrators. They knew that she was home alone on the date in question. They broke into her house, demanded money and a gun from the safe. The appellant was the one who took the firearm from the safe, took her bank card from her purse and demanded the ATM pin. She was tied, hands and feet, with ropes. This caused swelling on her hands and feet, since she is suffering from arthritis. When she needed the bathroom to relieve herself, the appellant accompanied her and waited for her to finish. He is the one who came up with a plan to blindfold her and drive to the ATM with her. At his instruction she was

deprived of her freedom, while they drove around with her until the next morning where a second withdrawal was made.

[23] From the evidence on record, it is clear that the appellant has no respect for other people's rights to bodily integrity, privacy and property. Some of the stolen properties and money were never recovered. The appellant is a danger to other law-abiding citizens. After his conviction the state proved previous convictions of murder, robbery with aggravating circumstances, possession of firearm and ammunition without a licence. It is clear that the appellant was never rehabilitated by the sentences that he received in respect of his previous convictions. His conduct still militates against his possible rehabilitation. When considering his propensity to commit violent crimes, it is clear that he is likely to reoffend.

[24] The trial court correctly considered the circumstances of the accused and the circumstances of the case as a whole in assessing the presence of compelling and substantial circumstances and found none.

[25] It is my considered view that the trial court has not misdirected itself pertaining to the non-existence of compelling and substantial circumstances. The abovementioned factors, even when taken cumulatively, do not constitute compelling and substantial circumstances which justify a departure from the prescribed minimum sentence. That said, the collective effect of not ordering counts 2 to 4 to run concurrently with count 1 has resulted in an unjust thirty-year imprisonment term.

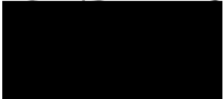
[26] It is trite that where an accused person has been found guilty on several counts, a trial court should consider ordering some of the counts to run concurrently. Accordingly, the order that the sentences imposed on the various counts are to run consecutively constitute a misdirection by the court a quo and induces a sense of shock. Thus, this Court is entitled to intervene to correct the misdirection.

[27] In the result, I propose the following order:

1. The appeal on sentence is upheld and is substituted for the following:

“(a) The sentences on count 2, 3 and 4 are ordered to run concurrently with the sentence on count 1.

(b) The sentence is antedated to 16 October 2014.”



S MSIBI

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION MBOMBELA

I agree,



B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Appellant:

Mr P Mafadza

Instructed by:

Legal Aid South Africa- Mbombela

Counsel for the Respondent:

Adv T L Shongwe

Instructed by:

Director of Public Prosecutions- Mbombela