



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Case No: CA 47/2025

Regional Court Case No: RC 44/2023

In the matter between:

HAMILTON RADEBE

First Appellant

MICHAEL KGWETE

Second Appellant

THABISO KGAME

Third Appellant

and

THE STATE

Respondent

Coram: Petersen ADJP, Masike AJ

Date enrolled and considered on the papers: 28 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 10h00 on 05 February 2026.

Summary: Criminal law – sentence – robbery with aggravating circumstances – whether the trial court misdirected itself in finding that the period spent in custody awaiting trial did not constitute a substantial and compelling circumstance warranting a deviation from the prescribed minimum sentence – whether the sentence of 15 years imprisonment is disproportionate having regard to the approximate two years and three months spent in custody awaiting trial- no misdirection – appeal against sentence dismissed.

ORDER

On appeal from: Regional Court, Klerksdorp (Regional Magistrate Melodi, sitting as court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

PETERSEN ADJP (MASIKE AJ CONCURRING)

[1] This appeal serves before us with the leave of the Regional Court, Wolmaransstad, against the sentence of 15 years imprisonment imposed on each of the appellants for robbery with aggravating circumstances. The leave to appeal was granted principally on the question of whether the trial court correctly exercised its discretion in finding that the period the appellants spent in custody awaiting trial did not constitute a substantial and compelling circumstance warranting a deviation from the prescribed minimum sentence.

[2] The central issue we must determine is the weight to be attached to the pre-sentence detention period of approximately two years and three months.

[3] A plethora authority has evolved from the Supreme Court of Appeal. In the most recent judgment of Supreme Court of Appeal judgment in *Loyiso Ludidi and Others v S*¹, delivered on 29 November 2024, the SCA clarified the approach to pre-sentence detention in the context of prescribed minimum sentences. The SCA re-affirmed its earlier decision in *Radebe and Another v S*², where the appellants had spent some two years and four months as awaiting trial detainees.

¹ *Loyiso Ludidi and Others v S* [2024] ZASCA 162; 2025 (1) SACR 225 (SCA).

² *Radebe and Another v S* (726/12) [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) (27 March 2013).

[4] The body of authority from the SCA re-affirms that there is no automatic deviation from the prescribed minimum sentence when considering the period spent in custody awaiting trial since it is not, *per se*, a substantial and compelling circumstance. It is merely one factor to be weighed in the broader assessment of proportionality. Further, that there is no mechanical formula (such as a “rule of thumb” deduction) for calculating the reduction of a sentence based on time served. As opined in *Radebe*:

‘[13] ... there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced....’ (emphasis added)

[5] As to the “exceptionally long” threshold, the SCA emphasized that pre-sentence detention generally becomes a significant factor for deviation only when it is for an “exceptionally long period of time” and where the delays were not occasioned by the conduct of the accused themselves. In *Ludidi*, a period of five years and eight months was discussed in the context of life imprisonment, with the court noting that delays caused by the appellants’ own conduct (e.g., changing legal representatives) weakened their reliance on this factor. The SCA further re-affirmed in *Ludidi* that proportionality remains key and that the ultimate test remains whether the prescribed sentence is unjust or disproportionate to the crime, the criminal, and the needs of society. The approach adumbrated in *Radebe* remains key in assessing proportionality, where Lewis JA stated:

‘[14] A better approach, in my view, is that the period in detention pre-sentencing 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: whether it is proportionate to the crime committed.

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 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.' (emphasis added)

[6] As in *Radebe*, the appellants in the present matter, planned the robbery, they travelled from Soweto in the Gauteng Province all the way to Wolmaransstad in the North West Province, armed to the teeth. The victims Zaheer Khan, his nephew Zabeer, and a cleaner were subjected to the following treatment by the robbers; accused 1 and 2 in the court *a quo*, upon entering the shop, immediately produced 9mm pistols. Accused 1 cocked his gun and pointed it directly at Zaheer's face. Accused 2 pointed his firearm at Zabeer. The victims were forced into the storeroom at the back of the shop. Once there, they were ordered to lie flat on their stomachs on the floor where the robbers tied their hands behind their backs using cable ties. While the victims were lying prone, the robbers searched them and removed their personal cellphones. Accused 2 was seen emptying the pockets of Zabeer's trousers while he lay on the floor. Zabeer testified that he did not resist because he was "terrified for his life." Before leaving, one of the robbers stayed behind briefly and threatened to shoot the victims if they did not remain calm. Zabeer reported being traumatized by the event. He also felt pain in his side, which required him to seek treatment from a doctor immediately after the incident.

[7] The appellants made off with a substantial loot. Personal cellphones of the three victims, including an iPhone 13 Pro Max belonging to Zabeer Khan was

taken from his pocket; a Samsung S20 belonging to Zaheer Khan was taken from his hand; and the cleaner's cellphone was also taken. Customers' cellphones that had been brought in for repairs were taken from a table in the storeroom; and additional customers' cellphones were removed from drawers in the shop. New contract cellphones stored in boxes in the storeroom were stolen; approximately 4 to 5 new cellphones were included in the haul. The robbers took "everything that was in the drawers and on the desk". All the stolen items were loaded into a backpack that the robbers also took from the shop. The total value of the stolen cellphones was estimated to be over R200,000.

[9] The period spent in custody as awaiting trial detainees in the present matter is on all fours with that in *Radebe*. The facts in the present matter are also greatly analogous to those in *Radebe*. Placing the present matter in proper context, the appellants in this matter were in custody from December 2022 to April 2025, a period of roughly two years and three months.

[10] In *Radebe*, the SCA found that:

'[16] ... the prescribed sentence of 15 years' imprisonment is fully justified in respect of the robbery committed by both appellants. The robbery was planned; firearms were used; Mr Henning was assaulted, and held naked at gunpoint; all three complainants were held at gunpoint during the course of the robbery; the complainants were deeply distressed during and after the robbery; and a firearm was stolen, as were jewellery and cellphones. The first appellant had a previous conviction for theft (a competent verdict on a charge of robbery) and the second appellant was convicted only three months before the commission of the offences in issue on charges of unlawful possession of a firearm and ammunition.' (emphasis added)

[11] When applying the principles from *Radebe* and *Ludidi*, a period of two years and three months, while not insignificant, does not rise to the level of being "exceptionally long" in the context of serious regional court litigation, unlike the

five-plus years seen in *Ludidi*. The record does not indicate systemic delays caused solely by the State that would render this detention “unjust” to a degree requiring a reduction in sentence. The offence was armed robbery with aggravating circumstances using firearms and involving the terrorizing of staff at a Vodacom shop. The legislature has ordained a minimum sentence of 15 years for such offences to address the scourge of violent crime.

[12] The trial court reasoned that the personal circumstances of the accused and the time spent in custody did not outweigh the seriousness of the offence and the interests of society. While the Magistrate granted leave to appeal on the *possibility* that another court might view the custody period differently, *Ludidi* constrains this court from treating that period as an automatic ticket to a lesser sentence. Notably the trial court in our view applied the incorrect test in granting leave to appeal. The standard is not a *possibility* that another court might come to a different decision on the period of imprisonment. The test is whether there is a *probability* that another court *would* not *might* come to a different decision.

[13] We are not persuaded that a pre-sentence period of just over two years constitutes a “substantial and compelling circumstance” sufficient to displace the legislative mandate of 15 years for armed robbery. To deviate on this ground alone, given the relatively standard duration of the trial, would undermine the minimum sentencing regime as interpreted by the SCA. The sentence of 15 years is not disproportionate to the crime committed.

[14] Whatever sympathy one might have for time spent in custody, *Radebe* and *Ludidi* dictates that it must be weighed strictly. The period here is not exceptionally long, nor does it render the 15-year sentence shockingly inappropriate. Accordingly, the trial court did not misdirect itself, and there is no basis for this court to interfere.

Order

[15] In the result, the following order is made:

The appeal against sentence is dismissed.



A H PETERSEN

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**

I agree.



T MASIKE

**ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**

Appearances

For the appellant:

Mr T R Semino

Instructed by:

Legal Aid South Africa

Mafikeng

For the respondent:

Adv E C Manicus

Instructed by:

**The Director of Public
Prosecutions,**

Mmabatho