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IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CA 10/2025

COURT A QUO: RC H28/2018

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:

GONTSE STEVENS NKADIMENG

Appellant

AND

THE STATE

Respondent

DATE OF HEARING : **19 March 2026**

DATE OF JUDGMENT : **23 March 2026**

FOR THE APPELLANT : **Mr. Semino**

FOR THE RESPONDENT : **Adv. Phetlhu**

Corum: HENDRICKS JP & WESSELS AJ

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email. The date and time for hand-down is deemed to be 10h00 on 23 March 2026.

ORDER

Resultantly, the following order is made:

- (i) The appeal against sentence is upheld.
- (ii) The sentence of 15 years imprisonment is set aside and is substituted with a sentence of 10 years imprisonment.
- (iii) The sentence is ante-dated to 19 December 2019.

JUDGMENT

Summary

Sentence – minimum sentence – for the offence of robbery with aggravating circumstances – whether appropriate when the ‘firearm’ used was a toy. Minimum sentence of 15 years imposed shockingly severe and excessive. Sentence set aside and substituted with a sentence of 10 years imprisonment. Sentence to be ante-dated.

HENDRICKS JP

- [1] The appellant, Mr. Gontse Stevens Nkadimeng, together with his co-accused Mr. Louis Zebilion Tipe, were arraigned before the Regional Court, Ga Rankawa and charged with robbery with aggravating circumstances, in that a fire-arm was used. They pleaded guilty to the charge and were each sentenced to an effective term of 15 years imprisonment on 19 December 2019. Leave to appeal against sentence was refused on 24 August 2023. The appellant successfully petitioned and leave to appeal against sentence was granted on 10 November 2023.
- [2] This appeal is one which was to be dealt with as part of the appeals project embarked upon in an endeavor to eradicate the appeals backlog in this division. A panel consisting of two acting judges were assigned to deal with this appeal on 13 June 2025. The attempt to deal with this matter as expeditiously as possible did not yield any positive results. On the contrary, regrettably to state, the matter was even further delayed. The file was re-allocated to the present panel of judges on 19 March 2026, to be finalized without any further delay. The delay is indeed regrettable.
- [3] The appellant, as well as his co-accused, pleaded guilty to robbery with aggravating circumstances. A plea explanation was read into the record and confirmed by the appellant. It reads thus:

“Statement in terms of section 112(2) of act 51 of 1977, as amended:

I, the undersigned Gontse Stevens Nkadimeng, with ID number 9[...], do hereby make oath and state that:

I am the accused in this matter and make this statement freely and voluntarily, without undue influence and while in my sound and sober senses.

I understand the charges against me and wish to plead guilty to the charge of one count of robbery with aggravating circumstances, read with the provisions of section 51(2), 52(A) and 52(8) of the Criminal Law Amendment Act 105 of 1997 contained in the charge sheet and to make the following admissions as set out herein.

I admit that on or about the 7th January 2018 at Kgabalatsane in the North West Regional Division, we unlawfully and intentionally assaulted Poppie Masike and did then and with force take the following items: two cell phones, bankcards, shopping cards and R340 cash and a wallet.

I gave a lift to the complainant. When she was about to alight, we had a disagreement as to how much she was willing to pay for the lift. She told us that she had no money. That then irritated us and I demanded her handbag. I ordered her to get out of the motor vehicle and I sped off with her handbag.

The firearm shown to her was a toy gun and it would not have hurt anybody but it is conceded that a person being robbed will not think of it as a harmless toy gun.

We then went on to divide the proceeds of the crime but we were naive to commit such a serious crime without any thought of covering our tracks."

"The complainant reported the crime and she remembered the car number plate, make and the two perpetrators. We were apprehended the same day and everything stolen was recovered.

We did not deny our crime and cooperated with the police as soon as they contacted us. I admit that this act was unlawful and intentional.

I admit that I knew at the time of the commission of the offence that what I was doing was wrong. I knew that there was no legal justification for my action and that I acted unlawfully and that my actions were punishable by law.

I admit all the facts as set out in the charge sheet. I admit that I knew at the time of the offence that my conduct was unlawful and that I could be punished for such conduct.”

“I therefore admit that I am guilty of one count of robbery with aggravating circumstances, read with the provisions of section 51(2), 52(2), 52(A) and 52(8) of the Criminal Law Amendment Act 105 of 1997 contained in the charge sheet.”

As can be gleaned from the plea explanation, the appellant admitted all the elements of the offense, but stated that the firearm that was used in the commission of the offence was a toy and not a real fire-arm. This explanation was accepted by the State (respondent), which makes it common cause.

- [4] The Regional Magistrate in the judgment on sentence stated that there are no substantial and compelling circumstances present in this case that warrants a deviation from imposing the prescribed minimum sentence or 15 years imprisonment. The sentence imposed is assailed on the basis that the Regional Magistrate erred in this regard and that the minimum sentence of 15 years imprisonment is shockingly severe and excessive.

[5] Sentencing is pre-eminently in the discretion of the trial court. A court of appeal will not lightly interfere with the exercise of the discretion by the trial court. A court of appeal can only interfere in certain limited instances with the sentence imposed by the trial court. This is trite¹. A court of appeal will only interfere if there is a serious misdirection(s) committed; or where an irregularity is committed by the trial court that vitiates the proceedings; or where the sentence imposed is shockingly severe and excessive and therefore disturbingly inappropriate to such an extent that no reasonable court would have imposed it. The disparity between the sentence imposed by the trial court and the sentence that the court of appeal would have imposed had it been the trial court, must be significantly different to such an extent that the sentence imposed is rendered grossly unfair. If it is not, a court of appeal will not interfere with the sentencing discretion exercised by the trial court².

[6] With regard to the toy which was used as a fire-arm, the Regional Magistrate stated:

“That despite the fact that the firearm was used was a toy gun and that was established from the ballistic report results, that in itself does not render the offence to be less blameworthy or reprehensible.

The facts of this case are such that on the day in issue, you had a firearm, or what accused 2 called as a gun and that it has been qualified today that it has been a toy gun or a pellet gun, whatever

¹ S v Bogaards 2013 (1) SACR 1(CC),
S v Rabie 1975 (4) SA 855 (A),

² S v Petkar [1988] 2 All SA 550 (A).

the case may be but that was an instrument that resembles a firearm and that was the very instrument that was used to inspire fear and the one that had traumatised subsequently the victim in the circumstances.

That is the reason why the criminal justice system had described a firearm as being so many, including an air gun and other instruments that resembles a gun or a firearm and the argument that the conduct of both the accused on the day in issue were of impulsive, error in judgment and it was driven by some kind of naivety and youthfulness, that kind of argument by your legal representative is very problematic because it is in itself opportunistic and then it is ingenious because on that particular day, I think you were carrying this kind of instrument inside the car for a purpose.”

[7] This is a misdirection. There is no evidence that the appellant and his co-accused ‘were carrying this kind of instrument inside the car for a purpose’. The appellant stated that no harm would be suffered by the complainant as the fire-arm is a toy, to which the Regional Magistrate found ‘that in itself does not render the offence, to be less blameworthy or reprehensible.’ I don't agree. Whilst it may well be that the toy was used in order to induce the complainant into compliance and be robbed and therefore constitute one of the elements of the offense, it should surely be taken into consideration in imposing a suitable sentence.

[8] The following personal circumstances and mitigating factors are placed on the record. The appellant was 24 years of age; was unmarried and had no children; he was a first offender; he pleaded

guilty to the offence which is a sign of remorse or contrition; all the items were recovered; and the complainant was not assaulted nor sustained any injury as a result of this ordeal.

[9] In finding that there are no substantial and compelling circumstances present in this case, the Regional Magistrates state:

“As I have said, Malgas said the Court does not have any opinion because the offence you have been convicted of has been read with the provisions of section 51, which obliged the Court to mete out a prescribed minimum sentence and it has to, if circumstances are of such a nature, it has to ordinarily, it says it has to ordinarily imposed the sentence unless if there's something else that is compelling and substantial.

The fact that you have pleaded guilty to the offence, that in itself, it is something that is conventional. There is nothing extraordinary about pleading guilty to the offense.

The fact that you have given the police officers the cooperation, you had no option but to because they had information at the disposal and then you had no option but to cooperate.

The fact that you are first offenders, does not have any bearing in this kind of an offence because that very factor is the one that is assisting the Court in making a determination with an assessment as to which one is the sentence that is required or obliged to mete out.

If you are first offender, the legislature says 15 years' imprisonment. If second, it is 20. A third is 25. It is as simple as that.”

The Regional Magistrate erred in this regard too.

[10] In **S v Malgas**³ to which the Regional Magistrate refers, it is categorically stated that all the personal circumstances as well as mitigating factors, taken cumulatively, should be taken into account to determine whether substantial and compelling circumstances exist. In my view, taken all these factors holistically into account, substantial and compelling circumstances do exist in this case. It therefore places this Court at liberty to interfere with the sentence imposed and to substitute it with an appropriate sentence.

[11] Mr. Semino who represented the appellant submitted in his heads of argument that under the circumstances of this case, a sentence of 10 years imprisonment would be an appropriate sentence. I agree. Taking into account that the appellant is a youthful first offender that can be rehabilitated, as well as all the other personal circumstances and mitigating features present in this case, an effective term of 10 years is indeed appropriate. The sentence should also be ante-dated to 19 December 2019.

Order

[12] Resultantly, the following order is made:

- (i) The appeal against sentence is upheld.
- (ii) The sentence of 15 years imprisonment is set aside and is substituted with a sentence of 10 years imprisonment.

³ S v Malgas 2001 (1) SACR 469 SCA at par [9].

- (iii) The sentence is ante-dated to 19 December 2019.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

M WESSELS
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG