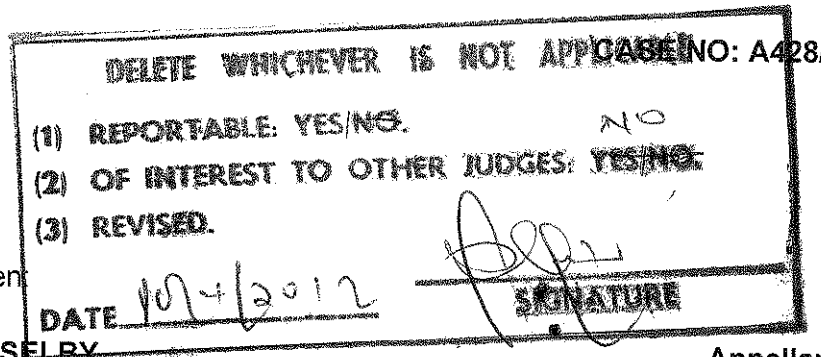
IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT-JOHANNESBURG)

CASE NO: A428/11



In the matter between

MASHIGO THABO SELBY **Appellant**

and

THE STATE Respondent

J U D G M E N T

MUDAU, AJ:

1. The appellant is before this court on appeal only against a sentence by the Regional Court Magistrate, Johannesburg. Leave to appeal the sentence have been granted by the court below.

2. The appellant, having pleaded not guilty, was convicted of the following crimes, viz-

   (i) House breaking with intent to rob and robbery.
   (ii) House breaking with intent to rob and robbery.
   (iii) Robbery.
   (iv) Robbery.
   (v) House breaking with intent to steal and theft.
   (vi) Robbery.

3. He was sentenced on those corresponding counts as follows:

(i) Fifteen (15) years imprisonment.
(ii) Ten (10) years imprisonment.
(iii) Ten (10) years imprisonment.
(iv) Ten (10) years imprisonment.
(v) Seven (7) years imprisonment.
(vi) Ten (10) years imprisonment.

It was ordered that the sentences imposed in respect of counts 2 and 6 were to run concurrently with the sentence referred to in count 1. In addition, the sentence imposed in count 5 was to run concurrently with the sentence in count 4. The cumulative effect of the sentence is therefore 35 years imprisonment.

Finally, an order in terms of section 103 of the Firearms Control Act 60 of 2000, was made to the effect that appellant is unfit to possess a firearm.

4. The appellant contend that the sentence of 35 years imprisonment is shockingly harsh and inappropriate. It was submitted in the papers before us that over emphasis was placed on the seriousness of the offences and the interest of the community without giving the necessary consideration to the interests of appellant and his circumstances. It was further contended on behalf of the appellant that a sentence a sentence between 18-23 years of imprisonment would be adequate. The state as respondent in the papers before us, had initially argued against a reduced sentence. However, in their oral submissions, the state conceded that the proposed sentence ranging between 18-23 years of imprisonment would be adequate.

5. The primary question for consideration is, whether the court below correctly assessed all the factors relevant for purposes of sentence.

6. It is trite law that the imposition of sentence is pre eminently a matter for the trial court to exercise its discretion. An appeal court will only interfere with the

sentence imposed by the trial court if the latter exercised its discretion disturbingly in an inappropriate manner.

7. The circumstances in which an appeal court may interfere with the exercise of which discretion are circumscribed. Holmes JA in *S v Rabie 1975(4) SA 855 (A) at 857 D-F* stated the principle 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 principle that punishment is pre-eminently a matter for the discretion of the 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.*"

8. Scott JA aptly restated this approach in *S v Kgosimore 1999 (2) SACR 238 (SCA) par 10 at 241* as follows:

"*It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startling inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulation, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare S v Pieters 1987 (3) SA 717 (A) at 727G-I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.*"

See further in this regard S v Mtungwa en 'n Andere 1990 (2) SACR (A); S v Salzwedel and Others, 1999 (2) SACR 586 (SCA); S v Sadler 2000 (I) SACR 331 (CSA); S v Dyantyi 2011 (I) SACR 540 (ESG); S v Makena 2011 (2) SACR 294 (GNP) and S v De Venter 2011 (I) SACR 238 (SCA). In S v Malgas 2001 (I) SARC 469 SCA par 1 Marais JA held:

"*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.... However, even in the absence of material misdirection an appellate court may yet be justified in interfering with 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 if can properly be described as "shocking", "startling" or "disturbingly inappropriate*". '

9. Before turning to consider the submissions made with regard to the appropriateness or otherwise of the sentence imposed by the court *a quo*, I find it convenient to summarize the material facts of the crimes the appellant was convicted of.

9.1 **Count 1:** On the 15/01/06, the complainant, an adult female aged 71, was watching television in her house at about 01:30. The appellant had broken into the house by removing roof tiles and breaking through the ceiling. Upon confronting the complainant, he made threats to kill her unless she gave him her cell phone, a Nokia and R250 in cash.

9.2 **Count 2:** On a separate occasion 17/02/06, appellant once again broke into the complainant's house referred to in the first count under circumstances described above. The incident occurred whilst the complainant was watching TV at 10pm. By means of threats, he robbed her of about R150 cash, a cellular phone, T-shirt and a bottle of champagne. On this occasion appellant had ordered the complainant to cook him food whilst he consumed her beer. He left some two and half hours later after eating the cooked meal.

9.3 **Count 6:** On a third occasion (03/07/06) appellant had made his way into the same complainant's house referred to above in the morning. Complainant was outside feeding her birds. When she returned inside the house, by means of death threats, he robbed her of a bottle of Gin that contained alcohol. He also helped himself to her food (i.e. sausage rolls an apples). On this occasion, complainant had no money on her. Appellant had no interest on her very old cellular phone.

9.4 **Count 3:** on the 27/05/06, appellant had confronted the complainant, a 64 years old female, inside her house. As usual, by means of death threats, he robbed the complaint of two cellular phones, cash and some coins.

9.5 **Count 4;** on the 28/05/06, applying the same *modus operandi* described in count 3, appellant had robbed another female complaint inside her house of about R500 in cash, a cellular phone, as well as cellular charger.

9.6 **Count 5:** on the 19/06/06, appellant had broken into the complainant's house referred to in count 4 and stole a DVD player, a pair of Nike takkies as well R300.00 in cash.

9.7 The incidents had occurred generally in the same neighbourhood. Appellant's reign of house breaking and robbery came to an end when he was eventually caught and arrested. It is common cause that despite his protestations to the contrary, appellant was linked to all these crimes and was subsequently convicted.

10. It is trite that the determination of an appropriate sentence requires that proper regard be heard to the well known triad of the crime (the seriousness of the crime), the circumstances of the offender as well as the interest of the society. Equally important is the aspect of mercy which is a concomitant of justice. A sentence must be individualized and each case must be dealt with in its own peculiar facts (see State v Samuel 2011 (1) SACR 9 (SCA) par 9.

11. In sentencing the appellant, the learned trial magistrate dealt with the appellant's personal circumstances viz:-

11.1 Appellant was 22 years at the time and a first time offender.

11.2 Appellant had attended school until standard 5 but left school due to financial constraints.

11.3 Appellant is a father of a minor child then 1 year old.

11.4 Appellant did jobs odd jobs from the age of 13.

11.5 In addition, the magistrate dealt with the crimes that appellant was convicted of.

11.6 The magistrate took note that the crimes were carefully planned. Victims were attacked on the main, whilst in the sanctity of their homes. Furthermore, all the victims except for one, were elderly people. As a result of these crimes, all the victims were severely traumatized. He noted that the first complainant was forced to vacate her house because of the constant attacks and threats by the appellant that he will return.

11.7 The trial court dealt with the interests of society, high lighting, *inter alia*, the well known excerpt from *R v Karg 1961 (1) SA 231 (A) at 236A-B, where Schreiner JA noted:*

"*While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration may fall into disrepute and injured person may incline to take the law into their own hands. Naturally righteous anger should not becloud judgement*".

12. As pointed out above at paragraph 4 and at the risk of repetition, it was submitted that the sentence imposed (35 years) is too harsh, further that a shorter period of imprisonment will still have the desired effect.

13. In *State v Makena 2011 (2) SACR 294 (GNP) at par 13, Webster J, put it* appropriately when he stated:

"*It is my considered view, based on the sentences emanating from the Supreme Court of Appeal, that effective sentences exceeding 25 years' imprisonment are not confirmed lightly. Again, the basis for this may be the emphasis on reformation and rehabilitation, based, inter alia, on the constitutional precept that punishment should not be cruel or be deemed to be such... The need to have regard for a convicted person's personal circumstances serves precisely to balance the principles that must be considered when sentencing – as set out in S v Rabie 1975 (4) SA 855 (A) at 862G where Holmes JA said: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.*"

15. The trial court noted, and correctly so in my considered view, that the appellant showed no remorse for his crimes.

16. Whilst a prison terms is quite clearly justified as it was submitted by Ms Singh for the respondent, I am not persuaded to find, considerations being had to all the factors in this matter, that 35 years imprisonment were no extreme violence was shown, is warranted.

In my view, the trial Magistrate overemphasized the seriousness of the crimes; the community's interest, at the expense of the appellant's personal circumstances viz: - his relative youth and the fact that he was a first offender.

17. Granted, robbery in its nature entails an element of violence (or the threat thereof), but in this case the conduct of the appellant was not accompanied by extreme or aggravated violence.

18. For some inexplicable reasons that are not apparent *ex facie* the record on sentence, 15 years imprisonment was imposed in respect of count 1. However, 10 years imprisonment was imposed in count 2. The offences are not only the same, but the victim is the same and the circumstances under which the offences were committed except for the difference in dates and time, were the same.

19. It is my view with due regard to the facts in this matter, that the 35 years of effective imprisonment imposed by the trial Magistrate is excessive and startlingly inappropriate. As a consequence, it is my judgment that there is a striking disparity between the sentence imposed and the sentence this court (sitting as a court of appeal), would have imposed.

20. in the result I propose the following order:

21.1The appeal against sentence partially succeeds.
21.2The sentence imposed is set aside.
21.3 In its place the following sentence is imposed:

(I)Count 1: Housebreaking with intent to rob and robbery-ten (10) years imprisonment.
(ii)Count 2: The sentence of ten (10) years imprisonment imposed in respect of this count (housebreaking with intent to rob and robbery) remains unchanged.
(iii) Count 3: Robbery- eight (8) years imprisonment.
(iv) Count 4: Robbery- eight (8) years imprisonment.
(v) Count 5: Housebreaking with intent to steal and theft- six (6) years imprisonment.
(vi) Count 6: Robbery- eight years imprisonment.

(vii) It is ordered that the sentences imposed in respect of count 1, 2 and 6 run concurrently. It is further ordered that the sentence imposed in respect of counts 3, 4 and 5 run concurrently. The effective sentence is therefore 18 years' imprisonment which is antedated to the date of the original sentence (viz: 27/10/2006).

(viii) Appellant is in terms of section 103 (1) deemed unfit to possess a firearm.

T P MUDAU
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree and it is so ordered

G S S MALULEKE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG