REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A213/2013

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

..... DATE ..... SIGNATURE

In the matter between:

MLANGENI, WILLIAM Appellant

and

THE STATE Respondent

JUDGMENT

MASHILE, J:

[1] On 22 June 2009 the Appellant who was represented throughout the proceedings pleaded guilty in accordance with Section 112 of the Criminal Procedure Act No. 51 of 1977 before the Regional Court of Gauteng held at

Randburg subsequent to a charge of robbery with aggravating circumstances as envisaged in the aforesaid Act.

[2] The trial court accepted the Appellant's plea of guilty and consequent thereupon convicted and sentenced him to a period of imprisonment of 12 years. The magistrate also declared him unfit to possess a firearm in terms of section 103 of Act 60 of 2000. His effective term of imprisonment is 12 years.

[3] The Appellant launched an application for leave to appeal against sentence. On 8 September 2011 the trial court turned down his application. The Appellant now comes before this court following his petition to appeal against sentence having been granted by this court on 11 February 2013.

[4] The facts that led to the Appellant's conviction and sentence are a common cause and I shall therefore not repeat them in greater detail except to refer to them during the analysis and evaluation of the sentence imposed by the trial court.

[5] It is an established legal principle in law that a trial court has a discretion when imposing a sentence. A court of appeal may, however, interfere with the trial court's sentencing discretion provided the trial court failed to exercise its discretion judiciously and properly.

[6] Finding out whether the sentence imposed is shockingly inappropriate or is violated by misdirections and irregularities is the test used to determine how the trial court exercised its discretion. The latest case on the subject is *S v Romer* [2011] JOL 27157 (SCA) having followed a number of decisions such as *S v Anderson* 1964 (3) SA 49 and *S v Rabie* 1975 (2) SA 537 (A).

[7] Accordingly, the issue to be decided by this court is whether or not the 12 years sentence imposed by the trial court is shockingly inappropriate or breached by misdirections and indiscretions. If he did, this court will have the right to interfere by setting aside such sentence and substituting therefor with what it considers an appropriate sentence.

[8] When engaging in this endeavour, this court must have regard to the interest of the society, the seriousness of the crime and the personal circumstances of the Appellant. There is evidence from the judgment of the trial court that he was alive to the aforegoing when he sentenced the Appellant.

[9] Section 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 prescribes a minimum sentence of 15 years direct imprisonment for robbery with aggravating circumstances. The fact that a robbery was committed using a toy gun or not is of no consequence

[10] That notwithstanding, however, a court can depart from the minimum imposable sentence on the condition that there exists substantial and

compelling reasons for doing so. See in this regard, *S v Nkomo* 2007 (2) SACR 198 SCA.

[11] Having gone through the seriousness and the prevalence of the crime in the area, the interest of the society and the personal circumstances of the Appellant, the trial court found that substantial and compelling reasons existed justifying a deviation from the minimum sentence as prescribed by the Act.

[12] These substantial and compelling reasons are:

11.1 The Appellant is a first offender;

11.2 He was employed as a cleaner earning an amount of R1 800.00 per month;

11.3 He was aged 36 at the time of the commission of the crime;

11.4 He has one adult child out of wedlock;

11.5 He showed contrition and accordingly pleaded guilty;

11.6 Some of the items which were taken by the Appellant during the robbery were recovered. These items are an amount of R230.00 and boxes of cigarette;

11.7 The Appellant utilised a toy gun to carry out the robbery; and

11.8 The Appellant is HIV positive.

[12] The trial court in what seems to be an attempt to balance the personal circumstances of the Appellant against the interest of the community, the seriousness and the prevalence of the crime stated that robbery related cases probably constitute approximately 60% of the crimes that come before it these days.

[13] The trial court added further that it did not doubt that ordinary law abiding citizens in the region are 'sick and tired of these violent crimes'. It is plain that rightly or wrongly the magistrate was somewhat emotional when delivering his judgment and this is clear from the preceding sentence and the following passage below:

> "*In this case you and your friends decided to rob a business premises. Your co perpetrators are at large. You were shot after security officers responded to this incident. That is what led to your apprehension. Otherwise you would have disappeared or ran away as you co perpetrators did. Dealing with the interest of society as indicated above.*
>
> *Ordinary law abiding citizens are sick and tired of these kinds of crimes. It is trite law that where serious crimes are rife, the interest of an offender play a second role visa vie the interest of the community. To this extent therefore I am inclined to agree with the submissions made by the prosecutor that you were arrested shortly after the incident of robbery had occurred and after being shot.*
>
> *Not only were you apprehended, but you were also arrested whilst in possession of some of the goods. It would seem to me therefore that the case against you on the part of the state, it is very strong. In as much as you pleaded guilty it would seem to me that the case that you*

face it is very strong. That in any event the state had a formidable case against you. This court therefore cannot just take on face value that you pleaded guilty. Although, this I must add, can counts in your favour."

[14] It is apparent that while the trial court recognised that there were substantial and compelling reasons entitling it to deviate from the mandatory minimum sentence as prescribed by the Criminal Law Amendment Act No. 105 of 1997, it fell short of the balance that it needed to strike between the seriousness of the crime, the interest of the society on the one hand, and the personal circumstances of the Appellant on the other. It obviously over emphasised the interest of the society and the seriousness of the crime and fell foul of what the court stated in *S v Zinn* 1969 (2) SA 537 (A) 541 B.

[15] The trial court regarded, for example, the tendering of a plea of guilty by the Appellant as an aggravating factor. It is clear from the paragraph that I have quoted above that the trial court's opinion is that the Appellant pleaded guilty because the case of the Respondent was alarmingly overwhelming against the Appellant. I do not think that one can necessarily infer that the Appellant pleaded guilty because the case of the Respondent against him was formidable.

[16] That certain of the items were recovered also did not play, it would seem, a substantial role in its imposition of a sentence of 12 years. Instead the recovery of those goods was also treated as damning. While that is true the point is that the loss of the business robbed is not what it could have been

had the items not been recovered. It is for that reason that it should have been treated as a mitigating factor.

[17] Having recognized the existence of substantial and compelling reasons justifying its departure from the minimum sentence, it imposed an imprisonment sentence of 12 years. Counsel for the Appellant contends that a sentence to a direct imprisonment of 12 years is shockingly inappropriate, is not commensurate with the seriousness of the crime and fails to properly take into consideration the personal circumstances of the Appellant as set out hereinbefore.

[18] No doubt, the crime committed by the Appellant is serious. The fact that he utilised a toy gun to commit it does not make it less so especially because it accomplished the intended results. However, while the Appellant should be punished, it should be borne in mind that his moral blameworthiness cannot be at the same level as a person who uses a true firearm to commit the same crime. Yes, this court is acutely mindful of the prevalence of the crime in the area of jurisdiction of this court and that the interest of the community should be protected.

[19] Once a sentence provokes a sense of shock, as this one does, this court has an inherent discretion to intervene. In doing so I shall take into account the personal circumstances already outlined hereinbefore and will show some mercy as I am required to do in cases that are befitting and deserving.

[20] The Respondent has referred this court to an extremely helpful judgment of *S v Luthuli* [2005] JOL 16046 (E) which was at the point seized with facts that were considerably similar to the present, the Appellant was sentence to a direct imprisonment of 10 years.

[21] In the circumstances I find that the sentence imposed by the magistrate is shockingly inappropriate and it is breached by misdirections and indiscretion. This court is therefore obliged to interfere. I make the following order:

1. The appeal against sentence succeeds;

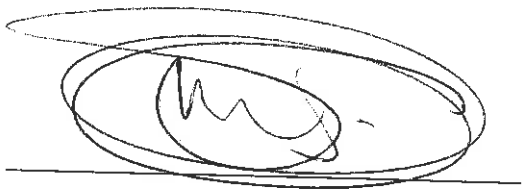
2. The sentence imposed by the magistrate is set aside and is replaced with:

> *"A direct imprisonment of 10 years 3 of which is suspended for a period of 5 years provided the Appellant does not commit a similar offence within the period of the suspension."*

2. The Appellant is declared unfit to possess a firearm as envisaged in Section 103 of Act 60 of 2000.

B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I AGREE:



SA THOBANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Date of hearing: 15/10/2013

Date of judgment: 23/10/2013

Counsel for Appellant: Adv. C Xamsana

Counsel for Respondent. Adv. G Baartman.