IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)
CASE NO: A194/2013

In the matter:

MAHUMA, LUCKY **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

THOBANE AJ:

[1] The appellant was arraigned in the Randfontein Regional Court on the following seven charges:

Count 1: Robbery with aggravating circumstances,

Count 2: Attempted murder,

Count 3: Robbery with aggravating circumstances,

Count 4: Robbery with aggravating circumstances,

Count 5: Robbery with aggravating circumstances,

Count 6: Possession of a firearm without a license,

Count 7: Unlawful possession of 2 live rounds of ammunition.

The provisions of section 51 (2) of Act 105 of 1997 were applicable to charges 1, 2, 3, 4 and 5.

[2] The appellant was legally represented throughout the trial proceedings. He pleaded not guilty to all the charges and offered no plea explanation.

[3] The appellant was convicted on all counts with the exception of count 5 on which he was acquitted.

[4] The appellant was sentenced to 54 years imprisonment broken down as follows:

Count 1: 15 years;

Count 2: 5 years;

Count 3: 15 years;

Count 4: 15 years;

Count 6: 3 years;

Count 7: 1 year.

[5] In terms of Section 12 (2) of Act 75 of 1969 read with Section 103 of Act 60 of 2000, the appellant was declared unfit to possess a firearm.

[6] Pursuant to a petition application before this Court, leave to appeal against sentence in respect of all counts was granted. Leave to appeal against conviction on counts 1 and 3 was refused.

[7] A brief background of the offences is necessary. Regarding the first and the second count, the complainant, a taxi driver, was approached at a taxi rank by the appellant whom he subsequently positively identified at an identification parade. A discussion ensued about sale of tyres and after a while the appellant instructed him to drive to certain place. When they came to a stop he was pointed with a firearm and robbed of R1 400-00 plus a further R270-00. He was shot at and injured.

With regard to the third count of robbery, the complainant in that matter was robbed by the appellant with a knife. The following items were taken, a cellphone, wrist watch, gold necklace, the sum of R320, as well as a firearm. The offence was committed with the help of an accomplice. The appellant was positively identified at an identification parade. A version was put to the complainant on behalf of the appellant that the firearm had been handed to the appellant freely for safekeeping.

Regarding the fourth count, a firearm was used to rob the complainant, a taxi driver, of the following items, R600-00 in cash, a cellphone. The complainant had enough time to observe the appellant. They spoke for about an hour, he was therefore certain about his identity.

On count number six and seven, the appellant was found by the police hiding under a bed, after the police had entered the place using a bathroom window. He was found in possession of the firearm as well as ammunition. He did not have a license to possess both the firearm and the ammunition. The cellphone belonging to the complainant in

count number four was found in the possession of the appellant. The firearm found belonged to the complainant in count number three.

[8] The appellant testified in his own defense. No evidence was led with regard to the 5th count.

[9] It is telling that no argument was tendered on behalf of the appellant for his acquittal at the end of the case.

[10] The personal circumstances of the appellant were advanced by him when he testified under oath as follows:

- He was 24 years of age; (when cross examined it came out that he had lied about his age, that he was over 30 years old)
- He was single;
- He had two dependants, one aged 2 and the other was less than a year old;
- He has passed standard 8;
- He was in custody for about 10 months awaiting trial;
- He had previous convictions. On the 17th November 1995 he was convicted of housebreaking with intent to steal and theft and sentenced to 4 years imprisonment suspended in whole for 5 years. On the 28th February 1997 he was convicted of possession of presumably stolen goods and sentenced to 6 months imprisonment wholly suspended for 5 years.

[11] The magistrate was careful to observe that imposition of sentence should not be out of anger. It is clear that the sentencing court was mindful of the principles in **S v Zinn 1969 (2) SA 537 (A)**. The learned magistrate referred to **S v Rabie 1975 (4) SA 865 (A) 862** as well as the following decisions to illustrate the approach to be taken when

imposing sentence:

S v Du Toit 1979 (3) SA 46 (A);

S v Reay 1987 (1) SA 837 (A)

R v Hlongwane 1959 (3) SA 337 (A)

S v Myute and others 1985 (2) SA (KSC)

S v Mahose 1998 (1) SASV 185 (O)

[12] It has been submitted on behalf of the appellant that the cumulative effect of the sentence, being 54 consecutive years, is shockingly inappropriate and therefore a misdirection. Further that the court *aquo* should have ordered some of the sentences to run concurrently.

[13] There was concurrence on behalf of the respondent who submitted that although the individual sentences imposed in respect of each count were not per se harsh, but that the cumulative effect thereof, does induce a sense of shock.

[14] It is trite law that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for discretion of the trial court and should only be interfered with if the discretion to sentence was not judicially and properly exercised. **S v Rabie 1975 (4) SA 855 (A).**

[15] A sentence imposed by a lower court should only be altered if:

a) An irregularity took place during the trial or sentencing stage;

b) The trial court misdirected itself in respect of the imposition of sentence;

c) The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate. **S v Malgas 2001 (1) SACR 469 (SCA).**

[16] I agree that the sentence of 54 years direct imprisonment induces a sense of shock and should be interfered with.

[17] The approach to be adopted is to take all the offences together for purposes of sentence.

[18] I accordingly make the following order:

18.1 The appeal against sentence is upheld, the sentence imposed by the court *aquo* is set aside;

18.2 The offences are taken together for purposes of sentence and the appellant is sentenced to 35 years imprisonment.

SA THOBANE

Acting Judge of the High Court

I AGREE.

B MASHILE

JUDGE OF THE HIGH COURT

Date of Hearing: 17/10/2013

Date of judgment: 08/11/2013

Counsel For Appellant: Adv. Karen Cosyn

Instructed by: Legal Aid Board South Africa

Counsel For Respondent: Adv. SJ Khumalo

Instructed by: National Prosecuting Authority