REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: A229/2013

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

18 NOVEMBER 2013 **FHD VAN OOSTEN**

In the matter between

ISHMAEL MOREMI **APPELLANT**

and

THE STATE **RESPONDENT**

Criminal procedure - appeal against sentence - appellant convicted of robbery with aggravating circumstances, attempted murder and unlawful possession of firearm and ammunition - effective sentence of 30 years' imprisonment imposed by trial court - repeated warnings by courts against excessively long sentences - court a quo misinterpreted its jurisdiction to impose sentence in excess of statutory provisions of s 51(2) of Act 105 of 1997 - interference by court on appeal warranted – seriousness of offences justifying long term of imprisonment - sentence set aside and substituted with an effective sentence of 23 years' imprisonment.

J U D G M E N T

VAN OOSTEN J:

[1] The appellant together with Lungile Nkabinde (accused 2) were convicted in the Regional, Orlando of robbery with aggravating circumstances (count 1), attempted murder (count 2) and unlawful possession of a firearm and ammunition (counts 3 and 4). They were each sentenced on 15 October 2004 to an effective term of 30

years imprisonment. The appeal is directed against sentence only and is with leave of this court on petition.

[2] The charges on which the appellant was convicted arose from a single hi-jacking incident on 4 May 2002. The complainant and his brother on this Saturday afternoon were at the complainant's home in Diepkloof, watching television, when he decided to buy liquor at a nearby bottle store. He proceeded outside and got into his vehicle which was parked in the driveway. The appellant and accused 2 approached him. Accused 2 was in possession of a firearm which he pointed at the complainant. The complainant opened the driver's door of his vehicle and as he was getting out, he was ordered to get into the back of the vehicle. The appellant approached him and he was now in possession of the firearm. The appellant ordered him to move over while pointing the firearm at him and got into the vehicle next to him. Accused 2 had in the meanwhile already gotten into the driver's seat and he was somewhat clumsily attempting to reverse the vehicle. The complainant's brother arrived on the scene. He was holding a stone which he threw at the driver's side of the vehicle in an attempt to scare the robbers. It missed accused 2 but struck the vehicle. Accused 2 instructed the appellant to shoot the complainant. The complainant however, went for the firearm got hold of the barrel and succeeded in pointing it down. The appellant's finger was on the trigger and shot went off which struck the complainant in the thigh. A struggle ensued for possession of the firearm. Accused 2 joined in and assaulted the complainant in hitting him in the face. The complainant's brother fled the scene. His neighbour however, came to his rescue. He succeeded in pulling accused 2 away from the complainant but the appellant managed to gain control of the firearm. The appellant pointed the firearm at him when he was on the ground sand tried to fire shots but the firearm failed. They then fled but were shortly thereafter arrested and the firearm was retrieved.

[3] It does not bear repetition that the crimes the appellant has been convicted of are extremely serious. The Regional Magistrate duly considered the seriousness of the crimes and the interests of society to justify the imposition of a long term of imprisonment. I do not consider it necessary to repeat the reasoning of the court a quo. As for the appellant's personal circumstances, he was 24 years old at the time the offences were committed, he had no previous convictions and was awaiting trial

in prison for more than two years. These however, pale into insignificance against the seriousness of the crimes. The Regional Magistrate carefully considered all relevant circumstances and came to the conclusion that a long term of imprisonment is warranted. In this regard he cannot be faulted.

[4] The court a quo sentenced the appellant as follows on the individual charges: on the robbery with aggravating circumstances charge, 15 years' imprisonment, on the attempted murder charge also 15 years' imprisonment and on the unlawful possession of a firearm and ammunition charges 3 years' and 1 year imprisonment respectively. The only concurrency ordered was that the sentences in respect of the unlawful possession of a firearm and ammunition were to be served concurrently with the sentence on the robbery charge.

[5] Counsel for the appellant submitted that the sentence on the attempted murder charge was *ultra vires* in view of the minimum sentence legislation (s 51(2) of Act 105 of 1997) providing in the case of a first offender, for a minimum sentence of 5 years' imprisonment and a maximum of 10 years. I agree. The Regional Magistrate in imposing 15 years' imprisonment wrongly reasoned that he was entitled to do so in accordance with the court's ordinary statutory jurisdiction. It follows that the sentence imposed on count 2 falls to be reduced to the maximum sentence provided for, as I have dealt with, which is 10 years' imprisonment.

[6] The only remaining question concerns the cumulative effect of the sentences and therefore the effective term of imprisonment to be served. A sentence of 30 years' imprisonment no doubt is a long term. The Supreme Court of Appeal has in a number of cases pronounced on the undesirability of excessively long sentences being imposed by trial courts. It is only necessary, for present purposes, to cite the latest judgment of the SCA in *Zondo v S* (627/12) [2012] ZASCA 51 (28 March 2013), where Mbha AJA, writing for the court, said:

'This court has repeatedly warned against excessively long sentences being imposed by trial courts. In *S v Mhlakaza* [1997 (1) SACR 515 SCA at 519 g] the court had to consider whether sentences of imprisonment, which are cumulatively far in excess of 25 years, are proper. Harms JA, dealing with the element of deterrence, noted that although it remained, according to judicial precedent, an important consideration when imposing sentence, its effectiveness in deterring others from committing (similar) offences was unclear. He further

stated that '(a)s far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is *always* proportionate to its length' before going on to state that a lengthy term of imprisonment would serve none of the purposes of punishment and would simply serve to appease public opinion. He pointed out, accordingly, that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption. See also: *S v Skenjana* 1985 (3) SA 51 (A) at 55 C-D; *S v Siluale* 1999 (2) SACR 102 (SCA) at 106g-107a; *S v Bull*; *S v Chavulla* 2001 (2) SACR 681 (SCA) para 22 and *S v Matlala* 2003 (1) SACR 80 (SCA) para 7-3.'

Although extremely serious (See *S v Khambule* 2001 (1) SACR 501 (SCA)), the offences were committed during one incident. The court a quo in my view, should have afforded more weight to this aspect in the consideration of an appropriate sentence. It follows that this court is entitled to interfere with the sentences imposed to extent of reducing the effective period of imprisonment. In my view an effective sentence of 23 year's imprisonment, in the circumstances of this case, is appropriate. To that extent the appeal against sentence must succeed.

[6] In the result the following order is made:

1. The sentences imposed by the court a quo on counts 1, 3 and 4 are confirmed.
2. The sentence imposed by the court a quo on count 2 is set aside and substituted with a sentence of 10 years' imprisonment.
3. The appeal against the sentence is upheld to the extent that the concurrency ordered by the court a quo is set aside and substituted with the following:

"The court orders that:

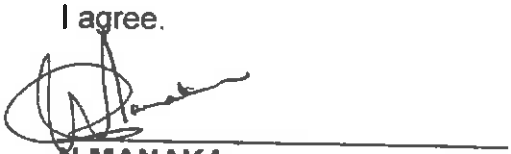
1. The sentences of 3 years' and 1 year imprisonment imposed on counts 3 and 4 respectively are to be served concurrently.
2. 5 years of the sentence of 10 years' imprisonment imposed on count 2 are to be served concurrently with the sentence of 15 years' imprisonment imposed on count 1."

The effective sentence accordingly is 23 years' imprisonment.

The date of commencement of the sentence above is backdated to 15 October 2004.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.



N MANAKA
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV C MEIRING***
COUNSEL FOR THE RESPONDENT	***ADV KT NGUBANE***
DATE OF HEARING	***18 NOVEMBER 2013***
DATE OF JUDGMENT	***18 NOVEMBER 2013***