REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A432/13

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

27/03/2014
DATE SIGNATURE

In the matter between:

LUCAS RAMOKGADI	1st Appellant
KAGISO MOLEFE	2nd Appellant
HERMAL SOLAR KHONOU	3rd Appellant

and

THE STATE	Respondent

J U D G M E N T

MASHILE, J:

[1] The Appellants appeared before the Regional Court of Gauteng held at Johannesburg on 22 January 2004 subsequent to the following 12 charges:

1.1 Robbery with aggravating circumstances as envisaged in Section 51 of the Criminal Law Amendment Act No. 105 of 1997 (Count 1);

1.2 Attempted murder of Cassiem Abrahams (Count 2);

1.3 Pointing of a firearm (Count 3);

1.4 Attempted murder of Chris Lourens (Count 4);

1.5 Attempted murder of Petros W J Du Randt (Count 5);

1.6 Possession of illegal firearm being a 9mm Short with serial number BE1776 (Count 6);

1.7 Possession of illegal ammunition being 6 live rounds (Count 7);

1.8 Possession of illegal firearm being a 9 mm semi automatic bearing Serial number BE8190259 (Count 8);

1.9 Possession of illegal ammunition being 8 live rounds(Count 9);

1.10 Attempted murder of Redwan Bedat(Count 10);

1.11 Pointing of firearm (Count 11);

1.12 Pointing of firearm (Count 12).

[2] The Appellants were legally represented throughout the proceedings. They pleaded not guilty to all the charges preferred against them and tendered no plea explanation. On 25 August 2005 the trial court nonetheless found them guilty and convicted them.

[3] All three Appellants were acquitted on Counts 10, 11 and 12 while accused 2, the Appellant before these present proceedings, was in addition discharged on Counts 2, 3, 8 and 9. He was then sentenced to direct imprisonment on the remaining charges as follows:

3.1 12 years on Count 1, armed robbery;

3.2 3 years on Count 4, attempted murder;

3.3 1 year imprisonment on Count 5 attempted murder

3.4 4 years on Count 6, Illegal possession of firearm; and

3.5 4 years on Count 7, illegal possession of ammunition.

[4] The trial court ordered the sentences on Counts 4 and 5 to run concurrently with the sentence on Count 1. That leaves the Appellant with an effective imprisonment sentence of 20 years.

[5] Following the Appellant's application for leave to appeal, the trial court granted leave to appeal against both conviction and sentence on 24 March 2006. The Appellant has, however, elected to proceed against the sentence imposed by the trial court only. For that reason the Appellant's appeal is only against sentence.

[6] I do not intend to set out the facts that led to the Appellant's conviction since the appeal concerns sentence only. Needless to state however that I may during the judgment make reference to portions of the facts that led the trial court to conclude that the appropriate sentences in the circumstances were as outlined in Paragraph 3 *supra*.

[7] It is trite that a trial court has a discretion when imposing a sentence. A court of appeal may interfere with the trial court's sentencing discretion if it believes that the trial court failed to exercise its discretion judiciously and correctly. See *S v Rabie* 1975 (4) SA 855 (A).

[8] If a court of appeal finds that the sentence of the trial court is disturbingly inappropriate or is violated by misdirections and indiscretion it will follow as a matter of course that the sentencing discretion was not properly applied. See in this regard, *S v Romer* [2011] JOL 27157 (SCA).

[9] In the premises this court must decide whether or not the effective 20 years direct imprisonment sentence imposed by the trial court invokes one's sense of shock, or that it is blemished by misdirections and irregularities. If it

did, this court will have the right to interfere by setting aside the sentence and imposing what it may consider appropriate in the circumstances.

[10] In pursuit of establishing the above this court needs to resolve whether or not the trial court considered the personal circumstances of the Appellant on the one hand and the interests of the society, the seriousness of the offence and its prevalence, on the other when exercising its sentencing discretion.

[11] To turn therefore first to the Appellant's personal circumstances. The following are the Appellant's personal circumstances:

11.1 The Appellant is 30 years old;

11.2 He is married and has a three-year-old girl;

11.3 His wife is unemployed;

11.4 He matriculated in 1994;

11.5 He does not possess any formal qualifications;

11.6 He was unemployed at the time of his arrest;

11.7 He relied on part-time work to survive;

11.8 He is a first offender;
11.9 He has no pending cases against him.

[12] The Appellant was only 30 years old when he was sentenced suggesting that he can certainly be given a chance to reform especially as a first offender. This is not to take away the horrendous and vicious nature of the crime that he committed. Since it is settled in our law that sentencing needs to take into account rehabilitation, retribution and reform, courts must strive to strike some kind of a balance to guarantee that the sentences that they pass becomes the epitome of the three.

[13] Perhaps the following passage of Nicholas JA uplifted from *S* v Skenjana 1985 (3) SA 51 (AD) at 55 D may just be one of the most relevant to illustrate the point:

> *"...it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. "Wrongdoers must not be visited with punishments to the point of being broken"."*
>
> *See also S v Sparkes and Another 1972(3) pg 410 G.*

[14] The personal circumstances of the Appellant coupled with a show of mercy, as courts are often urged to do, should have led the trial court to impose a lesser sentence. The sentence that should be imposed on the Appellant should, however, accommodate retribution, rehabilitation and the society must be convinced that the justice system is not failing it lest it takes the law into its hands.

[15] For some perplexing and inexplicable reasons the trial court drew a distinction when imposing sentences on charges that are obviously similar or slightly different between the First and the Second Appellant.

[16] The trial court imposed on each count, 6 and 7, 4 years direct imprisonment on the Appellant. In doing this it differentiated the Appellant from the First Appellant under circumstances which did not warrant it.

[17] Appellant 1 was sentenced to 3 years direct imprisonment after having been found guilty on count 8, the unlawful possession of a *semi-automatic* firearm.

[18] Conversely, the Appellant was sentenced to 4 years direct imprisonment on Count 6 for being guilty of the unlawful possession of a 9 mm short pistol, which is not a semi-automatic firearm.

[19] Appellant 1 was found guilty on count 9 being the unlawful possession of 8 live rounds ammunition and sentenced to 1 (one) year imprisonment while Appellant 2 was convicted (on count 7) for the unlawful possession of 6 live rounds ammunition and sentenced to 4 (four) years direct imprisonment.

[20] Aberrantly, the trial court directed the sentences in Counts 8 and 9 in the case of Appellant 1 to run concurrently with Count 1 and yet the Appellant

did not receive the same benefit in that the sentences in Counts 6 and 7 are cumulative.

[21] I have already indicated supra that this distinction was completely pointless and beyond comprehension. Besides, the trial court did not justify its pronouncement in that regard.

[22] It is perhaps worth remarking that the Appellant was found in possession of 6 live rounds ammunition for which he received 4 years for it. Appellant 1 on the other hand who was in possession of 8 live rounds ammunition was sentenced to 1 year direct imprisonment. This differentiation is totally inconceivable.

[23] The only other conspicuous and salient difference is about the types of firearms that were found in the possession of each appellant. The Appellant was found in possession of a firearm that is not semi-automatic while Appellant 1 was.

[24] If one of the two Appellants could have received the benefit of a lesser sentence on those counts, it should have been the Appellant and not Appellant 1

[25] Section 51 of the Criminal Law Amendment Act No. 105 of 1997 prescribes a minimum direct imprisonment sentence of 15 years for robbery

with aggravating circumstances unless there exists substantial and compelling circumstances justifying a departure from the prescribed sentence.

[26] It appears that the trial court correctly found the presence of such circumstances in the fact that the appellants had already spent more than two years in jail by the time the sentences were imposed hence the 12 year direct imprisonment for all the appellants on Count 1. Accordingly, I cannot find fault with the sentence in Count 1.

[27] The difference that the trial court drew between the Appellant and Appellant 1 is indefensible. The personal circumstances of the appellants did not attract discrimination on the resultant sentences especially on charges that are virtually similar.

[28] The result of not ordering sentences to run concurrently may, in some instances, be a sentence that is disproportionate with the crime committed. In this regard see *S v Qamata* 1997 (1) SACR 479 (E) to which the Appellant's Counsel has referred this court.

[29] While the cumulative effect of the sentence imposed on the Appellant is harsh, his sentence should nonetheless demonstrate that he had been found guilty of two attempted murders whereas Appellant 1 was not found guilty of any of the attempted murders.

[30] The Appellant's Counsel has suggested that the sentences in Counts 4, 5, 6 and 7 should be ordered to run concurrently. The effect of doing so is the reduction of the effective sentence of 20 years imprisonment to 16 years. Similarly, ordering Counts 6 and 7 to run concurrently will yield the same result. I prefer the latter as it does not interfere with the order of the trial court that Counts 4 and 5 should run concurrently with Count 1.

[31] In the circumstances the appeal on sentence is upheld and the order of the trial court is set aside and substituted for:

1. 12 years direct imprisonment on Count 1, robbery with aggravating circumstances;

2. 3 years imprisonment on Count 4, attempted murder;

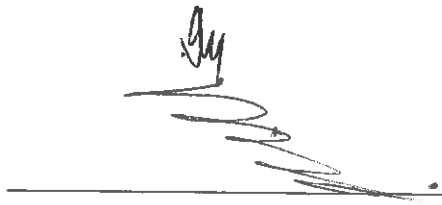
3. 1 year imprisonment on Count 5, attempted murder;

4. 4 years imprisonment on Count 6, possession of illegal firearm;

5. 4 years imprisonment on Count 7, possession of illegal ammunition being 6 live rounds;

6. The sentences in Counts 4 and 5 will run concurrently with that in Count 1; and

7. The sentence in Counts 6 and 7 will run concurrently with each other.



B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

T OPPERMAN
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 24 March 2014

Date of Judgment: 27 March2014

Counsel for the Appellant: Adv. M Botha

Instructed by: Legal Aid South Africa

Counsel for the Respondent: Adv. SH Rubin

Instructed by: Office of The Director of Public Prosecutions