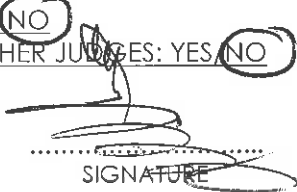


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A420/2013

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>17/04/2014</u> DATE	
 SIGNATURE	

In the matter between:

**THEMBA SAM SIMELANE**

Appellant

and

**THE STATE**

Respondent

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**J U D G M E N T**

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**MASHILE, J:**

[1] This is an appeal against sentence on a charge of robbery with aggravating circumstances as envisaged in the Criminal Law Amendment Act No. 105 of 1997 imposed by the court *a quo*, the regional court for the region of Gauteng held at Germiston, on 19 March 2009.

[2] On 19 March 2009 the Appellant pleaded guilty and the court *a quo* was satisfied that he had admitted all the elements of the crime and accordingly found him guilty. On the same day the court ordered that the Appellant be committed to direct imprisonment for a period of 16 years.

[3] On 11 August 2009 the Appellant sought to appeal his sentence but the court turned down his application. It was only after he had petitioned this court that leave to appeal against his sentence was granted.

[4] The Appellant was warned that due to the nature of the offence the court would invoke the provisions of the Criminal Law Amendment Act No. 105 of 1997 in the event that he is found guilty. The Act prescribes 15 years direct imprisonment to a first offender as the minimum sentence for robbery with aggravating circumstances.

[5] Fundamentally, the appeal against sentence is premised on the ground that the court *a quo* should not have added a year to the minimum sentence of 15 years prescribed by the minimum sentence legislature to which I have referred above.

[6] In imposing the sentence, it did not strike a balance between the seriousness of the offence, the interests of society and that of the Appellant. Moreover, argued Counsel for the Appellant, the court paid lip service to mercy in that it did not show any whatsoever its assertion to the contrary notwithstanding.

[7] In terms of Section 51(3) of the Criminal law Amendment Act No. 105 of 1997, a trial court may decrease the minimum sentence provided it finds substantial and compelling circumstances. Similarly, a trial court is empowered by the provisions of the same legislation to increase the sentence should the existence of aggravating circumstances warrant it.

[8] The trial court could not find any substantial and compelling circumstances to justify a departure from the minimum sentence. However, when it passed sentence it made reference to Section 51(3), which section deals with the existence of substantial and compelling circumstances.

[9] In what appears to be a justification for the imposition of 16, instead of 15 years, the trial court listed the following as aggravating circumstances:

- 9.1 The offence is serious and prevalent in the court's jurisdiction;
- 9.2 No respect for other people's possessions;
- 9.3 A dangerous weapon was used by the Appellant to wit a firearm and knife;
- 9.4 The crime was motivated by greed;
- 9.5 The robbery was committed in pursuance of a common purpose;

- 9.6 The Appellant together with his 2(two) accomplices gained entry into the complainants home under the pretext of fixing her Telkom landline;
- 9.7 The Appellant further produced his Telkom identification appointment card;
- 9.8 The complainant did not recover any of the stolen items;
- 9.9 The complainant was an elderly 53 year old lady;
- 9.10 The attack occurred whilst the complainant was in the company of her son and daughter;
- 9.11 The attack was brutal, the complainant was assaulted and tied during the offence with a cable and placed inside the bathroom;
- 9.12 The Appellant spent 7 years after the incident in the community as if he was not involved in the robbery itself;
- 9.13 The Appellant only accepted responsibility for his actions after he was arrested 7 years later;

9.14 The plea of guilty in itself does not constitute a sign of remorse. It may merely be indicative of an "acceptance of the inevitable. The Appellant was caught and thus pleaded guilty after 7 years;

9.15 The Appellant did not testify in mitigation of sentence nor did he profess remorse of any nature in his statement in terms of section 112 of Act 51 of 1977.

[10] The existence of the above aggravating circumstances are sufficient for the court to impose the minimum sentence. However, they are not so grave to allow the trial court to exceed the minimum sentence prescribed by the legislation. These aggravating circumstances must be balanced against the personal circumstances of the Appellant. The trial court considered the following as personal circumstances of the Appellant:

10.1 The Appellant was 38 years at the time of sentence;

10.2 The Appellant is single but in a cohabitative relationship with his girlfriend;

10.3 The Appellant has three children aged 21 years, 8 years and 7 years respectively;

10.4 The Appellants three children live with their respective mothers;

- 10.5 The Appellant pleaded guilty;
- 10.6 The Appellant was an active member of the Christian fellowship Congregation;
- 10.7 The Appellant was gainfully employed during the time of the robbery at Telkom;
- 10.8 Prior to the Appellants arrest he was gainfully self-employed earning a monthly income of approximately R10 000;
- 10.9 The Appellant was also a Director at Tero Staffing a recruitment agency; and
- 10.10 The Appellant was further a Director at an NGO “NgugulaInkazi” which is responsible for rehabilitating criminal and to educate children not to take part in criminal activities.

[11] Quite evidently, the trial court unquestionably misdirected itself by exceeding the minimum sentence of 15 years. As stated previously, the Act permits a court to do so provided the aggravating circumstances makes it necessary. In addition, it was held in *S v Maake* 2011 (1) 263 SACR (SCA) that where a court foresees the imposition of a higher than the minimum sentence, it needs to invite counsel to address it on the question.

[12] The trial court neither gave reasons for the further one year nor did it call upon the counsel to address it on the subject. The extra one year imposed on the Appellant cannot therefore be allowed to stand.

[13] While it is true that the Appellant spent 7 years without submitting himself to the authorities for his contemptible deed, the fact that he pleaded guilty when the final moment came demonstrates some degree of contrition and ought therefore to have been taken into account when sentence was passed. Without treating his offence as minor, the Appellant has already displayed during the 7 years that he is a good candidate for rehabilitation.

[14] The personal circumstances of the Appellant taken cumulatively do constitute substantial and compelling circumstances entitling the court to deviate from the minimum sentence. Viewed this way, the sentence of the trial court is unjust and accordingly stands to be reduced.

[15] In the premises, I find that:

15.1 The trial court misdirected itself by imposing a higher sentence than that prescribed by the Criminal law Amendment Act No. 105 of 1997;

15.2 The personal circumstances of the Appellant do constitute substantial and compelling circumstances that should have entitled the trial court to depart from the minimum sentence.

[16] The appeal against sentence succeeds and I make the following order:

1. The sentence of 16 years of the trial court is set aside and substituted for:
2. The Appellant is sentenced to 12 years direct imprisonment.



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

**I Agree**



**I OPPERMAN**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Heard: 27 March 2014

Judgment delivered: 17 April 2014

Appearances:

For Appellant: Ms M Botha

Instructed by: Johannesburg Justice Centre

For Respondent: Adv LR Surendra

Instructed by: Office of the Director of Public Prosecutions