REPUBLIC OF SOUTH AFRICA

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

CASE NO: A471/2013

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

13/04/2014
DATE SIGNATURE

In the matter between:

NAKANE MISHACK Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] The appellant was one of three accused persons he being the Third. All three appellants were charged on 8 November 2003 in the Regional Court for the region of South Gauteng held at Johannesburg with the following:

1.1 Count 1 : Robbery with Aggravating circumstances in that upon or about 16 February 2003 and at or near Soweto in South Gauteng, they unlawfully and intentionally assaulted Kenneth Mailala and took with force from him R10.00 cash and a wrist watch, his property or property in his lawful possession. A fire-arm was used to threaten the Complainant;

1.2 Count 2: Illegal possession of a firearm in that on or about 16 February 2003 and at or near Soweto in South Gauteng, the accused persons did unlawfully have in their possession a Nonnco 45 automatic pistol, P3 pistol and N275 Nonnco Pistol, without being the holders of licenses issued in terms of the act to possess the arms;

1.3 Count 3: Attempted murder in that on or about 14 February 2003 and at or near Soweto in South Gauteng, they unlawfully and intentionally attempt to kill Thanda Shabalal by shooting her with a firearm;

1.4 Count 4: Robbery with aggravating circumstances in that on or about 14 February 2003 and at or near Soweto in South Gauteng, they unlawfully and intentionally assaulted Thanda Shabalala and did then and there and with force take a Nokia 3210 cell phone and Norneo Pistol, his property or property in his lawful possession. A firearm was used to threaten the

Complainant.

[2] Although there were 3 accused, only the Appellant chose to challenge his sentence. The appellant was legally represented throughout the proceedings. He pleaded not guilty and tendered no plea explanation. The Appellant was warned that the provisions of Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997 (the Act) could be invoked for purposes of the imposition of sentence in the event that he is subsequently found guilty.

[3] On 1 November 2005 the appellant was found guilty as charged and sentenced to direct imprisonment as follows:

3.1 Count 1: 15 (fifteen) years;

3.2 Count 2: 3 (three) years;

3.3 Count 3: 7 (seven) years;

3.4 Count 4: 15 (fifteen) years; and

3.5 The Appellant was declared unfit to possess a firearm in terms of Section 103(1) and (4) of the Firearm Controls Act No. 60 of 2000.

[4] The Appellant applied for leave to appeal against both his conviction and sentence. The Court *a quo* refused the appellants leave to appeal in respect of both his conviction and sentence. However, on petition to this court he was granted leave to appeal against his sentence only. For that reason, the appeal concerns sentence only.

[5] The appeal against sentence is premised on three grounds and these are that:

5.1 The sentence of 40 years direct imprisonment is shockingly inappropriate;

5.2 The period that the Appellant spent in jail awaiting trial was not taken into account when he were sentenced;

5.3 While the court a quo had jurisdiction to increase the minimum sentence up to 5 years in excess of the minimum, it omitted to furnish reasons why it felt it was necessary to exceed the prescribed sentence in respect of the attempted murder.

[6] *S v PB*, 2013 (2) SACR 533 (SCA) at 539 per Bosielo JA sets out the approach that an appeal court must adopt when considering whether or not the trial court imposed the correct sentence in instances where the Criminal Law Amendment Act :

> *"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."*

[7] The court a quo considered the nature and seriousness of the offence, the interests of society as well as the appellant's personal circumstances. The court a quo was obviously alive to the fact that it was required to strike a balance between these aspects when considering what a proper sentence should be.

[8] It also observed in respect of Counts 1 and 4 that robbery is a very serious offence. In consequence of its prevalence and recurrence the Legislature has deemed it necessary to prescribe a minimum sentence of 15 years imprisonment.

[9] The court a quo further pointed out that it could only depart from the minimum prescribed sentence if it could find substantial and compelling circumstances. It considered the following:

9.1 The Appellant is a first offender;

9.2 He was still very young;

9.3 He was unemployed;

9.4 He had spent almost 3 years in jail whilst awaiting trial.

[10] These were balanced against what the court a quo considered as aggravating circumstances and they were:

10.1 The offences were extremely serious;

10.2 The crimes were committed within a space of two days;

10.3 The crimes were committed using violence and one of the victims spent approximately 3 days in an intensive care unit fighting for his life;

10.4 The execution of the commission of the crimes was well planned;

10.5 The Appellant did not exhibit any contrition whatsoever and this is plain by his choice not to take the stand.

[11] Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA), stated at paragraph 58:

> *"Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. ..."*

[12] I am completely swayed that the court a quo was correct in imposing the minimum sentence of 15 years on Counts 1 and 4. The aggravating circumstances mentioned in paragraph 10 above do call for such sentence. The personal circumstances that are set out in paragraph 9 are in the context of this case probably what are referred to as 'flimsy reasons', which *S v Malgas*, 2001 (1) SACR 469 (SCA) discourages courts to consider.

[13] I turn now to Count 3. It is trite that if a court of the first instance foresees that it is likely to impose a sentence in excess of the prescribed minimum mentioned in the Act, it is obliged to invite the counsel to make submissions why the minimum should not be exceeded. Furthermore, it is also imperative for the court a quo to furnish reasons why it imposes a sentence in excess of the minimum. See in this regard, *S v Maake* 2011 (1)

SACR 263 (SCA). Its failure to do so makes it necessary for the appeal court to intervene by setting the sentence aside and substituting therefor with what it deems correct.

[14] It is quite clear that the trial court neither invited counsel to make submissions nor gave reasons why it exceeded the minimum sentence by 2 years in respect of Count 3. The minimum sentence for first offenders in terms of the Criminal Law Amendment Act No. 105 of 1997 for Count 3 is 5 years.

[15] Having said that, the effective sentence of 40 years imprisonment does seem to be shockingly inappropriate. This is probably brought about by the cumulative effect of these sentences. It was with this in mind when the court warned in *S v Qamata* 1997 (1) SACR 479 (E) 483c-d that:

> "... *[courts] must bear in mind that the cumulative effect on all counts may produce too harsh a result.*"

[16] The best manner of weakening the harsh cumulative effect of the sentence is by ordering some of the sentences to run concurrently especially those that are related. In this regard I have in mind that Counts 1 and 2 are related in that they were committed on the same date and in respect of interrelated crimes. Similarly, Counts 3 and 4 are closely associated insofar as they were committed on the same day while executing crimes that are closely connected.

[17] While one must acknowledge that the crimes which this young man committed are serious and very prevalent in the whole country, I hold the view that it should be proper that the sentence to be impose should take into account the duration spent while awaiting trial. I am prepared to assume in favour of the Appellant especially in the absence of an explanation by the Respondent that the inordinate delay experienced in finalising the case could not be attributed to him.

[18] In the result the following are the findings of this court:

18.1 The cumulative effect of the 40 years imprisonment sentence is shockingly inappropriate;

18.2 The imposition of the 15 years minimum sentences on Counts 1 and 4 are justifiable regard being had to the aggravating circumstances;

18.3 The trial court's failure to invite counsel to make submissions in respect of sentence in excess of the minimum and omission to furnish reasons for exceeding the minimum sentence prescribed by the Act constitutes a misdirection;

18.4 A show of mercy to this young first offender should have persuaded the court a quo to consider a reduction of the

resultant sentence by a corresponding duration spent in jail while awaiting trial.

[19] Accordingly, the appeal against sentence succeeds and I make the following order:

1. The order of the trial court is set aside and it is substituted for:

   1.1 The Appellant is sentenced to imprisonment for 15 years, 3 years, 5 years and 15 years in respect of Counts 1, 2, 3 and 4 respectively.

2. The sentence in Count 2 is to run concurrently with that in Count 1;

3. The sentence in Count 3 is to run concurrently with that in Count 4;

4. The effective 30 year sentence that remains after the counts have been ordered to run concurrently is further reduced by 3 years.

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

I agree:

L Windell
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Heard: 15 April 2014

Judgment delivered: 15 April 2014

Appearances:

For Appellant: Adv. M Botha

Instructed by: Legal Aid South Africa

For Respondent: Adv. JM Molwantwa

Instructed by: The Office Of The Director Of Public Prosecutions