REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: A319/2014
DPP REF: 9/2/5/1 – 2014/0397

Reportable: No
Of Interest To Other Judges: No
Revised.

19 March 2015 .....
SIGNATURE

In the matter between:

Sakhile Mtshali **First Appellant**

Irvin Zwane **Second Appellant**

and

The State **Respondent**

Judgment

Vally J

1. The appellants were indicted in the Regional Court, Orlando, on 8 May 2012 on charges of Robbery with aggravating circumstances in that they: unlawfully and intentionally assaulted Siphiwe Mphakana (Mphakana) and/or Sibongile Molefe (Molefe) on 7 November 2010 had taken the following property belonging to either or both of them:

1. R150.00 in cash
2. R100.00 in cash
3. One X1 Nokia handset.

The aggravating circumstance was the fact that they pointed a firearm at both Mphakana and Molefe.

2. They were duly informed that s 51, as well as Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), provided that minimum sentences, would be applicable to them should they be found guilty.

3. They pleaded not guilty and did not take advantage of their right to a provide a plea explanation in terms of s 115 of the Criminal Procedure Act of 1971 (the CPA). The trial commenced and ran until 8 October 2012 when judgment on the issue of their guilt was handed down. They were both convicted of the offences referred to in the indictment. On 21 January 2013 they were each sentenced as follows:

Appellant 1 was sentenced to spend fifteen years in prison;

Appellant 2 was sentenced to spend eighteen years in prison.

4. They both appeal against their respective convictions and sentences. On conviction they both claim that the State had failed to prove their guilt beyond reasonable doubt. They further contend that in any event the sentence meted out to each of them is shockingly inappropriate.

Conviction

5. The State led the evidence of two witnesses: Mphakana and Molefe. They were both witnesses to the robbery. They were also the victims of the robbery. Their testimonies, read cumulatively, established the following facts:

5.1. They are in a relationship with each other. Late at night on 7 November 2010, which was a Sunday, they were walking towards the home of Molefe in Noordgesig when they realised that they were being followed by two young men, who it turned out were the two appellants. Molefe looked back at both appellants and discovered that she knew them both. She had never spoken to them but knew them, and in particular had come to regard appellant 2 as a troublesome person.

5.2. As they crossed the road, they were accosted by the two appellants. Appellant 2 brandished a firearm and pointed it at them. Appellant 1 searched them both and found R150.00 on Mphakana and R100.00 on Molefe which he took from them. In the meantime appellant 1 also took a cell phone handset - a Nokia from one of them. After taking their possessions, the two appellants left them and proceeded on their way.

5.3. Mphakana told Molefe to proceed home on her own, while he surreptitiously followed the two appellants. He saw them enter a certain house. Thereafter he retreated to his own home. The next day he visited the police station where he laid a charge of armed

robbery against the appellants. Molefe on the other hand had returned home, and did not go to work the next day. The money taken from her was the only money she had, which she had intended to use as taxi fare to get to work the next day. She met Mphakana the next day and he told her that he had laid a charge of armed robbery against the appellants. She did not lay a charge against the two appellants.

6. The appellants both testified in their respective defences.

7. The facts established as a result of the evidence presented by the State witnesses show that:

7.1. Mphakana and Molefe were robbed at gunpoint by two young men on the night of 7 November 2010;

7.2. The two appellants were known to Mphakana and Molefe;

7.3. Both Mphakana and Molefe identified the appellants as the two young men that accosted them that night and robbed them at gun point of R250.00 and a Nokia handset.

8. Appellant 1 claimed that he was not in Noordgesig on the night of 7 November 2010. He was many kilometres away in Randfontein, where he was employed by a company operating under the name and style of

Erbacon Construction Company. He knew both Mphakana and Molefe. He claimed that they both had a "*vendetta*" against him and had therefore falsely accused him of robbing them. In support of this statement he said that a long time ago he was romantically involved with Molefe's friend but had terminated that relationship, which gave her cause to be angry with him. Her anger eventually led her to become vengeful towards him. Mphakana on the other hand merely acted upon orders of Molefe by laying the charge against him.

9. Appellant 2 too, maintained that Molefe had a *vendetta* against him. He claimed that he had had an argument with her "*before 2002*", when they were "*children*", and that at the time she had falsely laid a charge against him. He could not specify what the charge was however nothing came of it. Since then she had acted "strangely" towards him and much so that for the next ten years they did not speak to each other. He, however, was unable to locate this *vendetta* in any actual event. Finally, he claimed that on the night in question he was at home asleep.

10. Both their versions are lacking in detail as well as substance. They are also devoid of rational explanation. They provide no basis for their claim that Molefe would falsely implicate them in something as serious as an armed robbery with aggravating circumstances, and would influence Mr Mphakana to lay the charge on her behalf. On their own versions, there was nothing that occurred between each of them and Molefe in recent times for her to suddenly decide to influence Mphakana to lay a charge

against each of them. She would have had to bear so much dislike that would falsely implicate them in a very serious crime, one that will place them in serious jeopardy: facing an indictment so serious that they could lose their freedom for many years should she succeed in her design to falsely implicate them. She would also have had to be very cunning and imaginative to devise a scheme that falsely alleged that she and her lover, Mphakana, were the victims of a robbery with aggravating circumstances, which took place late on a Sunday night. The scheme would also have required her to succeed in getting Mphakana to falsely lay a charge against them. This last part would have been absolutely necessary for she herself was not prepared to lay any charge against the appellants. There was nothing in the evidence to support any suggestion to this effect and any such suggestion would be fanciful in the extreme.

11. In the circumstances, I hold that their respective versions are not reasonably possibly true.

12. In my judgment the State had, therefore, proven beyond any shadow of doubt that the appellants were guilty of committing the offence of robbery with aggravating circumstances. For this reason, I hold that their respective appeals against their convictions are without merit.

Sentence

13. It is now settled law that an appeal court can only interfere with the sentence imposed if it finds that the trial court misdirected itself in a material manner.[1] The appellate court is not entitled to usurp the discretion of the trial court and impose a sentence of its own choosing simply because it prefers its own sentence to that of the trial court. However, it can interfere in a situation where it finds the sentence imposed by the trial court is so different from the one it would impose that it can be said that the sentence imposed by the trial court "*induces a sense of shock*". Important to note is that it can only interfere if it finds the difference between the sentence it would impose and the one imposed by the trial court is of a significant magnitude. As Marais JA observed:

> "Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."[2]

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[1] *S v Cornick and Another* 2007 (2) SACR 115 (SCA) at [46]
[2] *S v Malgas* 2001 (1) SACR 469 (SCA) at [12]

14. At the commencement of the trial the magistrate informed them of the applicability of the minimum sentence legislation applicable to their case and they both indicated that they comprehended the consequence of being found guilty of so serious a charge.

15. In the case of appellant 1 the *court a quo* applied s 51(2) read with Schedule 2 of the CLAA and imposed a sentence of 15 years imprisonment. Section 51(2) provides:

> "51 Discretionary minimum sentences for certain serious offences
>
> (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
>
> (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
>
> (a) Part II of Schedule 2, in the case of-
>
> (i) a first offender, to imprisonment for a period not less than 15 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
>
> (b) ..."

16. The relevant portions of Schedule 2 Part 2 provide:

> "Murder in circumstances other than those referred to in Part I.
>
> Robbery-

(a) when there are aggravating circumstances; or

(b) involving the taking of a motor vehicle."

17. That the provisions of s 51(2) of the CLAA have application in this case is not disputed, and their application bears the consequence of imposing a minimum sentence of 15 years on the first appellant unless the court found compelling and substantial circumstances to detract from such a sentence. In casu the court *a quo* indicated that even if s 51(2) of the CLAA was not applicable it would have imposed a sentence of 15 years on appellant 1. This, the court *a quo* said, was based on the fact that the offence for which the two appellants were convicted is rife within its jurisdiction causing a great deal of pain and suffering for members of the community affected thereby. There is no doubt in my mind that the court *a quo* was correct to take these factors into account, for they address the issues of the gravity of the offence and the interests of society. The court *a quo,* however, did not give any consideration to the interests of appellant 1. It also failed to take note of the fact that he spent more than one year in prison awaiting trial; that he was a first offender who was gainfully employed and had two minor children that he was providing for. On the other hand it has to be noted that appellant 1 showed no remorse for what he had done.

18. Nevertheless balancing these factors, I come to the conclusion that there are compelling circumstances warranting a reduction in the minimum sentence prescribed by s 51(2) of the CLAA with regard to Appellant 1. In my view an appropriate sentence would be that of 12 years imprisonment.

As this sentence is substantially different from the one meted out by the court *a quo*, I believe this court should intervene by setting aside the sentence imposed by the court *a quo* and replace it with one of 12 years imprisonment.

19. During the process of considering an appropriate sentence, the court *a quo* was afforded the benefit of evidence showing that the second appellant had accumulated a number of previous convictions. These are:

19.1. On 24 January 2005 he was convicted of

19.1.1 Count 1: robbery and sentenced to 3 years, the whole of which was suspended for a period of 5 years on condition that he was not found guilty of the same offence during the period of suspension;

19.1.2 Count 2: possession of a weapon without a licence

19.1.3 Count 3: possession of unlicensed ammunition.

He was sentenced to 6 months for counts 2 and 3 (taken together), the whole of which was suspended for a period of 3 years.

19.2 On 6 June 2006 he was convicted of possession of a weapon without a licence and sentenced to six years imprisonment.

20 The provisions of s 51(2) of the CLAA have application in the case of appellant 2 as well.

21 In his case, because of his previous convictions, he was liable to be sentenced to 20 years imprisonment. However, the court *a quo* found substantial and compelling circumstances to depart from this prescribed minimum sentence. It found that as he was in custody for over a year, together with the fact the he was a father of a minor child, as compelling facts warranting a reduction of his sentence to 18 years imprisonment. Strangely, the court *a quo* refused to take precisely the same factors into account when considering an appropriate sentence for appellant 1. In my view the court *a quo* committed a misdirection when it came to appellant 2. I am unable to find any circumstances, let alone compelling and substantial ones, to justify a departure from the prescribed minimum sentence. He has a previous conviction for the same or a very similar offences, added to that he was declared unfit to possess a firearm, yet he was convicted in this case of being in possession of an unlicensed firearm. His conduct demonstrates contempt for the previous court order. Further it evidences an unwillingness on his part to abide by the law. In my view a fair balance of the interests of society, the gravity of the crime and the interest of Appellant 2 should result in a sentence of 20 years imprisonment, that is the sentence I would have imposed. Bearing in mind that there is no cross-appeal before us and since we have not given appellant 2 notice of an intention to increase his sentence, I believe that this court is unable to interfere with the sentence of the court *a quo*.

22 In conclusion, I would dismiss his appeal against his sentence.

Order

23 The following order is made:

23.1 The appeals of the appellants against their convictions are dismissed.

23.2 The appeal of appellant 2 against his sentence is dismissed.

23.3 The appeal of appellant 1 against his sentence succeeds. The sentence of fifteen (15) years imposed by the court *a quo* is set aside and replaced with a sentence of twelve (12) years imprisonment.

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Vally J
Gauteng High Court, Johannesburg Local Division

I agree.

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Mahalelo AJ
Gauteng High Court, Johannesburg Local Division

Appearances:

For the appellants	:	Adv Ms M Botha from Legal Aid South Africa
For the State		Adv S H Rubin from Office of Director of Public Prosecutions
Date of hearing	:	19 March 2015
Date of judgment	:	19 March 2015