REPUBLIC OF SOUTH AFRICA

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

CASE NO: A313/2015
DPP REF NO: 10/2/5/1 – 2015/423

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

5/3/2019 .....

DATE SIGNATURE

In the matter between:

ZAMOKUHLE BLESSING MAKHANYE Appellant

and

THE STATE Respondent

JUDGMENT

WEINER, J

Introduction

[1] The appellant was charged in the Regional Court for the district of Kempton Park with:-

1.1 Unlawfully and intentionally assaulting Albertus Breytenbach and by force taking a BMW 3 Series and other items from Breytenbach's lawful possession, aggravating circumstances being the pointing of a firearm.

1.2 Unlawfully and intentionally assaulting Odette Bester and by force taking a Mini Cooper from her lawful possession, aggravating circumstances being the pointing of a firearm.

1.3 Unlawfully and intentionally assaulting Suchish Singh and by force taking a Toyota Fortuner and other valuables in his possession, aggravating circumstances being the pointing of a firearm.

[2] This appeal lies against the sentences imposed.

[3] All three offences were in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLA), as amended.[1] In terms of section 51(2)(a) of the CLA, provision is made for a minimum sentence in such cases of 15 years in the case of a first offender. In terms of section 51(2)(c) the minimum sentence is 5 years in respect of a first offender. These sections provides as follows:

'*(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) ...

[1] As amended by section 33 of Act 62 of 2000, and section 36 of Act 12 of 2004 (amended by Act 38 of 2007).

(c) Part IV of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; ...'

[4] The accused was convicted in respect of counts 1 and 2 on a competent verdict of contravening section 36 of the General Law Amendment Act 62 of 1955 (Section 36). Section 36 provides:

'*36 Failure to give a satisfactory account of possession of goods*

Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'[2]

[5] In regard to count 3, the accused was found guilty of robbery with aggravating circumstances.

[6] The accused had a previous conviction of theft from January 1996 in respect of an offence committed on 4 April 1995.

[7] The appellant appeals against the sentences which are:-

7.1 In respect of count 1 – 6 years' imprisonment;

7.2 In respect of count 2 – 6 years' imprisonment; and

7.3 In respect of count 3 – 15 years' imprisonment.

[8] In regard to count 3, the Magistrate took into account that the motor vehicle was taken at gunpoint. Such offence normally attracts a minimum sentence of not less than 15 years. The court a quo remarked that, in terms of section 51(3)(a) of the CLA, it

[2] Section 36 amended by section 4 of Act 18 of 1996.

could deviate from such sentence, provided that there were compelling and substantial circumstances present in the case.[3]

[9] The court referred to the fact that such deviation must be based on convincing reasons. In *S v Matyityi* 2011 (1) SACR 40 (SCA) it was stated:

'Malgas,[referring to *S v Malgas* 2001 (1) SACR 469 (SCA)] *which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from* Malgas*: the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.'*[4]

[10] In *Malgas*, the SCA held as follows:

'....The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'[5]

[11] The court a quo took into account the personal circumstances of the appellant. The appellant was 36 years old, unmarried, and the father of three children. He was employed by his sister in a construction company where he was earning an amount of R10 000 per month. He also had a part-time job tinting window panes of motor

---

[3] Section 51(3)(a): 'If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

[4] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 11.

[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 9. Quoted with approval in *S v Matyityi* (note 4 above) para 18.

vehicles. The appellant's legal representatives submitted to the court a quo that it should not impose the minimum sentence because the appellant had been in custody for a substantial period of time, being 18 months.

[12] In regard to such submission, it is necessary to analyse the reasons why the appellant spent this period in custody.

12.1 The appellant was arrested on 12 September 2011. He made his first appearance on 14 September 2011. He indicated his desire to appoint a private attorney. The matter was therefore postponed to 21 September 2011 for these purposes.

12.2 On such day the attorney was not present and the appellant was afforded another opportunity to appoint an attorney. The matter was then postponed to 28 September 2011. On that date, a Mr Masia appeared on behalf of a Mr Nkosi, who was reported to be the attorney of record. On 5 October 2011 Mr Nkosi appeared and the matter was postponed to 19 October 2011 for a bail application.

12.3 On 19 October 2011, Mr Nkosi reported that he had not been placed in funds and asked for a remand for confirmation of his instructions. The matter was postponed to 11 November 2011. On that date, the attorney was not present and the appellant was not brought from the prison.

12.4 On 22 November 2011, the accused was in court, but the attorney was absent. No reasons were given therefor. The matter was then postponed to 25 November 2011. The appellant was not in court that day because he was apparently involved in another case in the Wynberg Magistrate's Court. The matter was postponed to 9 January 2012, where the appellant was in court but his attorney was absent. A further postponement took place to 16 January 2012.

12.5 On 16 January 2012, the attorney was not in court and the matter was postponed to 23 January 2012, where the attorney was absent once again. The appellant requested that he appoint another attorney and the matter was postponed to 30 January 2012.

12.6 No attorney was present on this date and the appellant then indicated his desire to apply for Legal Aid. He was represented by Ms Moloi at the commencement of the trial on 30 September 2012. After several state witnesses had testified the accused terminated the mandate of Ms Moloi, and on 1 November 2012 informed the court that he had appointed a private attorney. Such attorney was not present in court.

12.7 On 14 November 2012, the appellant was represented by Mr Nkosi. On 6 December 2012 the appellant was in court with Mr Nkosi, who reported that the accused had not placed him in funds and he was therefore withdrawing. At the appellant's request the matter was postponed, although the State had complained that the matter was being unnecessary delayed by the appellant.

12.8 On 25 January 2013, the appellant appeared and informed the court that Advocate Bopape would represent him. Such advocate was not in court on the date. The matter was further postponed to 30 January 2013 to allow for the appellant's counsel to appear. However, on 30 January 2013, he was still absent. Again the appellant requested to apply for Legal Aid and the matter was postponed to 31 January 2013.

12.9 The appellant was then represented by Advocate Bapela who was instructed by Malatji Attorneys. A date was arranged for the further hearing of the case with Advocate Bapela on 28 March 2013. On 28 March 2013, there were no legal representatives present on behalf of the appellant. On 3 April 2013, Mr Masia was once again brought into the case who proceeded with the matter until the finalisation thereof.

[13] In *S v Radebe* 2013 (2) SACR 165 (SCA) the Court held as follows:

'*In my view there should be no rule of thumb in respect of the calculation of the weight to be given for the period spent by an accused awaiting trial... A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced...*

A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors to be taken into account in determining whether the effective period of imprisonment to be imposed is justified ... the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'[6]

[14] In the present case, the court a quo held that the delay in bringing the matter to trial, and the reason that the appellant was an awaiting trial prisoner for 18 months, was largely a result of problems with his legal representatives, and thus not the fault of the State. As stated above, a delay is one of the circumstances which can be taken into account in assessing whether the minimum sentence should be reduced. It is important to bear in mind that this is a prescribed minimum sentence and a court can impose a harsher sentence if indicated.

[15] The Magistrate found that the appellant and his co-accused were involved in an organised plot of acquiring stolen vehicles. In all three cases, a firearm was used to rob the owner of the vehicle.

[16] On counts 1 and 2, the Magistrate did not find that there was sufficient evidence to convict the appellant of robbery. The Magistrate instead convicted him of contravening section 36, in that he was found in possession of motor vehicles, where there were suspicions that they were stolen, and he was unable to give a satisfactory account for his possession of them. On count 3, the fingerprints of the appellant were found on the vehicle shortly after the robbery, and the accused was found guilty of robbery with aggravating circumstances.

[17] The appellant argues that the sentences induce a sense of shock and are inappropriate. It is trite that a court of appeal will not interfere with an imposed sentence unless: it is convinced that the discretion has been exercised improperly or unreasonably; or where it is clear that the sentence is shockingly harsh and inappropriate; or where a misdirection is apparent.[7]

---

[6] *S v Radebe and Another* 2013 (2) SACR 165 (SCA) paras 13-14.
[7] See *S v Vilakazi* 2009 (1) SACR 552 (SCA).

[18] The appellant submits that the effective sentence of 27 years' imprisonment is shockingly harsh and inappropriate. He further submits that the Magistrate should have taken the amount of time spent in incarceration into account.

[19] The appellant makes reference to the matter of *S v Msimango* 2018 (1) SACR 276 (SCA) where the Court found:

'*As to whether there were substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence of 15 years' imprisonment, the appellant's personal circumstances were not on their own sufficient to pass muster. However, he had spent 21 months in a correctional centre awaiting trial. This tilts the balance in his favour and makes the sentence of 15 years' imprisonment disproportionate in all the circumstances. Justice and fairness require that the appellant should be credited with those years.*'[8]

[20] The appellant further contends that even if there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence pertaining to count 3, the Magistrate erred in not taking into account the cumulative effect of the sentences imposed on all three counts.

[21] The appellant thus contends that in imposing a 27 year period of imprisonment, the Magistrate erred in over-emphasising the seriousness of the offences and the interests of justice and under-emphasising the personal circumstances of the appellant. The Magistrate did not offer the appellant any opportunity to rehabilitate himself as he imposed a sentence which would break the appellant.

[22] The State contends that the Magistrate correctly exercised his discretion in regard to the imposition of sentence. The State emphasises the aggravating circumstances, being the use of a firearm, and also that the Magistrate was correct in holding that the delay in the finalisation of the trial was due to the appellant's conduct.

[23] In regard to the appellant's personal circumstances, one of which was his duty of support to his children and his family, it is useful to have regard to the judgment of Nugent JA in S v *Vilakazi* 2009 (1) SACR 552 (SCA), where it was stated:

---

[8] *S v Msimango* 2018 (1) SACR 276 (SCA) para 26.

'The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. 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.'*[9]

[24] It would therefore appear that the only circumstance which might play a part is the fact that the appellant spent some time incarcerated prior to the finalisation of the trial. The Magistrate found that this was a result of the appellant's own conduct. Appellant's counsel argues that the entire delay cannot be laid at the Appellant's feet. He was incarcerated and relied upon his legal representatives being present. I believe that this Court can take this into consideration when dealing with the cumulative effect of the sentences.

[25] In my view, the cumulative effects of the three sentences do amount to a disproportionate sentence. The appellant was 36 years of age; an effective sentence of 27 years (absent parole) would see him released at 63 years of age. Therefore taking all of the above considerations into account, I believe that the sentences for Counts 1 and 2 should run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977.[10]

---

[9] *S v Vilakazi* (note 7 above) para 58.

[10] Section 280 of the Criminal Procedure Act provides as follows:
Cumulative or concurrent sentences.—
(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

Accordingly the following order is made:

1. The appeal succeeds partially.

2. The sentence imposed in respect of counts 1, 2 and 3 is upheld.

3. The sentences imposed for counts 1 and 2 are to run concurrently with each other. The effective sentence is 21 years.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

J. J. BRETT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	5 March 2019
Date of judgment:	5 March 2019

Appearances:

Counsel for the Appellant:	Adv. Van Wyngaard
Instructing Attorneys:	Steve Nkosi & Partners
Counsel for the Respondent:	Adv. M Masilo
Instructing Attorneys:	State Attorney