REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

19/02/20 .....

Date **ML TWALA**

CASE NO: A149/2018

In the matter between:

NDUMISO THWALA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

TWALA J

[1] The central issue in this appeal is whether the court a quo misdirected itself when it sentenced the appellant to 15 years imprisonment for robbery with aggravating circumstances in terms of section 51 of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA"). Put differently, it is whether the sentence of 15 years imprisonment imposed by the court a quo is shockingly inappropriate or disproportionate in the circumstances of this case.

[2] The synopsis of this case is that on the 27th of September 2011 the appellant, armed with a knife, robbed the complainant of his cell phone. During the robbery, the complainant fought back the appellant and he sustained a cut on his finger and around his neck. The appellant took the complainant's cell phone and ran away. He was accosted by members of the community who assaulted him and handed him over to the South African Police Service and the cell phone of the complainant was also recovered at the time. On the 18th of March 2013 the appellant was convicted of robbery with aggravating circumstances by the Protea Magistrate Court and sentenced to 15 years imprisonment.

[3] Counsel for the appellant, Ms Sidwell submitted that the court a quo failed to consider whether substantial and compelling circumstances existed in this case. The court a quo merely mention that it agrees that the appellant be exposed to the minimum sentence and that it would have approached such

sentence even if there had been no legislation. Further, that the court a quo did not consider whether all the factors which would traditionally and rightly be taken into account in assessing sentence, constituted substantial and compelling circumstances.

[4] The appellant was at the time of commission of the offence, so the argument goes, unmarried and had one child. He was a first offender and 19 years of age, employed and earning a salary of R3 700. He was arrested approximately 30 minutes after committing the offence and was seriously assaulted by the community. The cell phone of the complaint was recovered still in a working condition. The complainant did not sustain any serious injury during the robbery except for a cut on his hand and neck.

[5] Mr Mohamed, counsel for the respondent, contended that the court a quo did consider the existence of the substantial and compelling circumstances in this case since it referred to the minimum sentence legislation. The personal circumstances of the appellant, so it is argued, are not of such a nature as to be regarded as substantial and compelling having regard to the nature of the offence committed by the appellant. There was no misdirection on the part of the court a quo in imposing the sentence which it imposed. The sentence imposed is not disproportionate or inappropriate in the circumstances of this case.

[6] It is trite that sentencing is pre-eminently the domain of the trial Court. The Court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial Court did not exercise its discretion judiciously and correctly. Put differently, if the Appeal Court is of the view that the sentence imposed is disturbingly inappropriate or disproportionate in the circumstances of the case.

[7] In the case of *S v MALGAS 2001 (1) SACR 496 (SCA)* the Supreme Court of Appeal stated the following:

> *"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court."*

[8] I am unable to disagree with counsel for the appellant that the court a quo did not take into account all the circumstances of this case when it considered the imposition of sentence. It is apparent from the record that the appellant was convicted and sentenced on the same day. The court a quo did not even consider to engage the services of a probation officer to find out exactly as to what prompted the appellant at that early age to involve himself in this kind of crime. It seems to me the court a quo rushed through the matter and finalised it without considering all the circumstances of the matter.

[9] I accept it that the appellant was represented throughout the proceedings. However, that does not take away the responsibility and duty of the presiding officer to ascertain that the appellant received a fair trial. The court a quo was fully aware that the appellant was charged with an offence for which the legislator has prescribed a minimum sentence of 15 years. I am of the view therefore that the court was duty bound to consider all the circumstances including the fact that the appellant was hospitalised due to the assault he suffered at the hands of the community. Further, the court a quo should have considered that the appellant spent 18 months awaiting trial and sentence in this case.

[10] In *S v Mhlakaza 1997 (1) SACR 515 (SCA)* the Supreme Court of Appeal stated the following:

> *"The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion, is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."*

[11] In my view, the court a quo misdirected itself when it over emphasised the prevalence of the offence in its area and the plight of the community that it was serving. What the court ought to have done, is to consider each case on its own set of facts and fearlessly impose a fair and appropriate sentence. It is my respectful view that the court a quo failed in this regard as it over emphasised the prevalence of the offence and that it happened in the poor community and neglected to consider all the circumstances of the case.

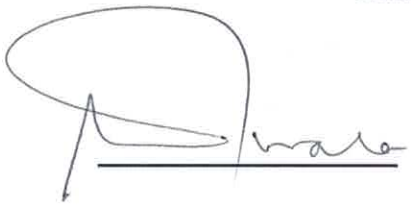
[12] In the Malgas case quoted above, it was stated clearly that courts are a good deal freer to depart from the prescribed sentences than has been imposed in some of the previously decided cases and that it is the courts who are to judge whether or not the circumstances of any particular case are such to justify a departure. However, courts were urged to respect and not merely pay lip service to the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. It is my respectful view therefore that the court a quo did not exercise its discretion judiciously in imposing a sentence of 15 years imprisonment under the circumstances of this case.

[12] In the circumstances, I make the following order:

I. The appeal against the sentence is upheld

II. The sentence of 15 years imprisonment is set aside and replaced with the following sentence:

1. The appellant is sentenced to 10 years imprisonment
2. The sentence of 10 years imprisonment is ante dated to the 18th of March 2013.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree, and it is so ordered.

WINDELL L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 10th February 2020

Date of Judgment: 19th February 2020

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