REPUBLIC OF SOUTH AFRICA

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

Case No: A72/2020

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

SIGNATURE 26/10/2020 DATE

In the matter between:

RAMAKHUBA: COLLINS Appellant

and

THE STATE Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 26 October 2020

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The appellant was arraigned in the Protea Regional Court on charges of kidnapping (Count 1) and robbery with aggravating circumstances (Count 2). He was legally represented and pleaded not guilty. He was convicted and sentenced to 2 years imprisonment in respect of count 1, and 15 years imprisonment in respect of count 2. The effective sentence is 17 years. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. The court *a quo* refused leave to appeal but in a subsequent petition, leave to appeal was granted in respect of the sentences imposed only.

[2] The provisions of the Criminal Law Amendment Act 105 of 1997, as amended ('*the 1997 Act*') are applicable. Count 2 - robbery with aggravating circumstances - falls within the ambit of Part II of Schedule 2 of the 1997 Act and Count 1 – Kidnapping - falls within the ambit of Part IV of Schedule 2 of the 1997 Act.

[3] The prescribed minimum sentence for robbery with aggravating circumstances for a first offender, is 15 years imprisonment and for kidnapping for a first offender, 5 years imprisonment. A court may only depart from these sentences if the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of lesser sentences.

The salient facts

[4] The facts which underpin the convictions are briefly: The complainant, a taxi owner was lured to a shack in Mdeni under false pretences. He drove there in his Toyota Hilux vehicle valued at R210 000. Upon entering the shack he was confronted by 5 assailants, one of whom was the appellant who was armed with a

firearm and who used it to subdue the complainant. The appellant assaulted the complainant with a machete/panga type weapon in his face. The other assailants joined in on the assaults and one stabbed the complainant with a knife on his upper arm. They took his cell phone, cash of R3000 and his car keys. His legs were tied up. All but the appellant left the shack and the complainant started to plead for his life. The complainant managed to untie some of the ties but the appellant then used shoelaces to tie him up further. Another person from outside the shack called the appellant, looked into the door and announced that the appellant and his cohorts had detained the wrong person and announced that the appellant should release the complainant. The appellant left the shack to discuss the situation during which time the complainant managed to untie the bonds. When he got out, he was told that he could only leave once he had washed off all the blood, which he did. They threw his shoes at him – these had been removed in the shack. He found his way home and was shortly thereafter hospitalised. More about the injuries sustained later.

The approach to sentence ito the 1997 Act

[5] In *S v PB*[1] at para [20] Bosielo JA formulated the approach by a court on appeal against a sentence imposed in terms of the 1997 Act as follows:

> "[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

[1] *S v PB,* 2013 (2) SACR 533 (SCA)

> 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."

[6] In other words, as Rogers J held in *S v GK*[2] whether or not there exists substantial and compelling circumstances, is not a discretionary issue but rather a value judgment which judgment a court of appeal is obliged to bring to bear on the facts presented in the court *a quo*.

[7] *S v Vilakazi*[3], Nugent JA said at 562G : " *it is enough for the sentence to be departed from that it would be unjust to impose it* ". To determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing and referred to as "*mitigating factors*".

[8] In *S v Nkomo*[4], Lewis JA at 201e-f held as follows:

> "But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

Consideration of the circumstances

[9] I turn now then to the central issue and consider all the circumstances available to the court *a quo* to assess whether the facts which were considered are substantial and compelling or not, or, put differently, whether it would be unjust to impose the minimum sentences.

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[2] 2013 (2) SACR 505 (WCC)
[3] 2009 (1) SACR 552 (SCA)
[4] 2007 (2) SACR 198 (SCA)

Aggravation

[10] The magistrate quite correctly acknowledged that the offences are prevalent and serious, that dangerous weapons were used in the commission of the offences being a firearm and a panga and that the crime was motivated by greed. The court *a quo* found that the Appellant was the person responsible for most of the injuries sustained by the complainant and not his cohorts. The attack was brutal and cruel. The complainant was unarmed and helpless. The amount of violence used by the appellant and his cohorts was totally gratuitous and unwarranted as the complainant posed absolutely no threat to them.

[11] The injuries sustained by the complainant were grave and serious. His jaw was broken in 2 places; he had to undergo facial reconstructive surgery in order to reconstruct his broken jaw. He had to have braces and wires affixed onto his teeth to hold his jaw in place. He is still suffering and has long terms effects such as only being able to eat on one side of his jaw. He had sustained a massive cut on his face and received about 17 stiches for this.

[12] The Court *a quo* correctly found that the appellant's acts of kidnapping and robbery were not impulsive or committed on the spur of the moment. The appellant and his cohorts had adopted elaborate means to get the complainant to their shack. The complainant was deprived of his freedom of movement and locked inside a shack against his will, feared for his life and had his hands and feet tied.

[13] The complainant's cell phone and R3000 cash were never recovered and although the police recovered the complainant's motor vehicle on 16 June 2017, this was largely due to the astute and quick-witted actions of police officers.

[14] The appellant pleaded not guilty and showed no remorse during the course of the trial. He only did so after he was convicted.

Mitigation

[15] The appellant was 25 years old at the time of the commission of the offence. He is single with one dependant aged 4 although he is not the primary caregiver. The child resides with his biological mother who is unemployed. He was responsible for the payment of the child's crèche fees of R350 per month. He has no previous convictions. He was gainfully employed at a Construction company prior to his arrest earning R1000 per week but he lost that job on his arrest and whilst on bail pending finalisation of this trial, he became employed at Tiber Stock earning R1900 per month.

[16] He spent 1 month in custody on his arrest and was released on bail. He thereafter spent a further 4 weeks in custody from the time he was convicted (12 February 2019) until he was sentenced (12 March 2019).

Evaluation

[17] The learned magistrate quite correctly observed that in respect of robbery of a vehicle where no firearm is involved, a sentence of 15 years would be considered proportional. Contrasted to that, the facts under consideration reveal the use of a firearm, a panga and the infliction of very serious injuries. The magistrate argued that such facts would justify the imposition of a period of imprisonment of 18 years on count 2. I agree for the reasons articulated by him.

[18] The magistrate expressly had regard to the cumulative effect of the 2 sentences and accordingly did not increase the sentence in respect of count 2 to 18 years imprisonment but kept it at 15 years. He had regard to the time spent awaiting trial and after conviction and reduced the minimum sentence in respect of count 1

from 5 years to 2 years ie he concluded that such factors constituted substantial and compelling circumstances in the context of this case.

[19] I can see no difficulty with the manner in which the magistrate applied the relevant legal principles and no injustice occurred.

Order

[20] I accordingly make the following order:

The appeal is dismissed.

I. OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

pp
B WANLESS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Appellant: Adv S Simpson
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Date of hearing: 13 October 2020 - matter decided on papers only
Date of Judgment: 26 October 2020