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

CASE NO: A107/2021

DPP REF NO: 10/2/5/1-2021/072

DATE OF APPEAL: 17 MARCH 2022

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

28 April 2022 .....
DATE SIGNATURE

In the matter between:

MBHELE SIFISO Appellant

and

THE STATE Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This is an appeal in respect of sentence only. The matter was determined on the papers in that an electronic link could not be established from the court room on the day

of the hearing. The parties were afforded an opportunity to deliver additonal heads of argument should they wish to do so and both parties' representatives agreed to the matter being determined on the papers.

[2] The appellant sought condonation for the late filing of the heads of argument in that an undue workload prevented counsel from attending to the heads of argument timeously. As a result, an alternate advocate was called in to assist with the matter in early February 2022 whereafter the heads of argument were drafted urgently.

[3] The deponent, being the Unit Manager of the Johannesburg Legal Aid office, Enrico Agostino Guarneri, stated that the appellant had prospects of success and that it was in the interests of justice that condonation be granted.

[4] Notwithstanding the absence of diligence on the part of the appellant's representative, I am inclined to grant condonation given that the appeal is a serious matter for the appellant.

[5] The appellant stood trial in the Orlando Regional Court on:

5.1 Count 3 – robbery with aggravating circumstances read with the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997;

5.2 Count 4 – kidnapping.

[6] The appellant had legal representation throughout the proceedings and pleaded not guilty to all of the charges. The appellant was duly informed of the provisions of the minimum sentencing legislation.

[7] The appellant was convicted on counts 3 and 4 and sentenced on 5 June 2018 to 15 years direct imprisonment in respect of the robbery with aggravating circumstances, and 5 years imprisonment on the kidnapping conviction. The learned magistrate ordered that the two sentences run consecutively, amounting to an effective sentence of twenty (20) years imprisonment.

[8] The court *a quo* granted the appellant's application for leave to appeal in respect of sentence.[1] Neither the application for leave to appeal nor the lower court's order reflected whether leave to appeal was sought or granted in respect of either or both sentences.

[9] In the circumstances, I intend dealing with the sentences imposed on both convictions.

[10] The basis of the appellant's appeal is that an effective sentence of 20 years is harsh and induces a sense of shock pursuant to which this Court should interfere and set the sentence aside.

[11] The respondent contended that the sentences imposed by the court *a quo* were appropriate and that the appeal should be dismissed given the serious nature of the offences.

[12] Briefly stated, the factual background to this matter is that the appellant together with a companion, used a firearm in order to rob the complainant of his motor vehicle at about midnight on 15 March 2018. The appellant and his companion placed the complainant in the boot of the vehicle and drove around Soweto and the Vaal area for a

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1 004-153 line 16.

number of hours. They attempted to arrange for the removal of any possible tracking device from the vehicle, conversing with each other and with a third party.[2]

[13] Thereafter, at around dawn on 16 March 2015, the appellant became aware of the presence of the SAPS in the area, the appellant's companion fled and the appellant made arrangements to dispose of the vehicle and the keys to the vehicle.

[14] The SAPS arrested the appellant who was held in custody thereafter.

[15] The learned magistrate found that the appellant planned the theft of the motor vehicle in advance.

[16] The appellant relied on *State v Kgosimore*[3] in respect of the well-established test on when an appeal court can interfere in a sentence imposed by a trial court, sentencing being a matter that lies within the discretion of the trial court.

[17] An appeal court may only interfere in a sentence imposed by a lower court if the latter failed to exercise its discretion in respect of the sentence in a judicial manner. This is notwithstanding that an appeal court may have imposed a different sentence. If the lower court exercised its discretion properly there is then no basis for an appeal court to interfere and it will not do so.[4]

[18] In the event that there is a vast disparity between the sentence imposed by the trial court and the sentence that the appeal court would have imposed, such that the trial

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2 004-131.
3 *State v Kgosimore* 1999 (2) SACR 238 (SCA) *('Kgosimore')*.
4 *Kgosimore* note 3 above para 10.

court's sentence can be described as disturbingly inappropriate, an appeal court will interfere.[5]

[19] Robbery with aggravating circumstances attracts a minimum sentence of fifteen (15) years direct imprisonment upon conviction in terms of s 51(1) of the Criminal Law Amendment Act, 105 of 1997.

[20] Counsel for the appellant contended that the court *a quo* misdirected itself in imposing a prison term of 15 years and by ordering that the sentences on the two convictions run consecutively as opposed to concurrently.

[21] In addition, the appellant submitted that the court *a quo* did not take the appellant's personal circumstances into account in that a trial court may deviate from the prescribed minimum sentence if substantial and compelling circumstances exist.[6]

[22] The alleged substantial and compelling personal circumstances upon which reliance was placed by the appellant were his age of 27 years, his status as single with three children (all financially dependent on him) from three different mothers, that he was self-employed as a DJ and held a diploma in Human Resources obtained from the Johannesburg Central College. Furthermore, the approximately three (3) years that the appellant spent in custody awaiting trial.[7]

[23] The appellant's representative alleged that the appellant was capable of rehabilitation and reintegration into society.

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5 *State v Malgas* 2001 (1) SACR 469 (SCA) para 12.
6 Id.
7 *State v Radebe*[7]2013 (1) SACR 165 (SCA).

[24] In *State v Makamu*[8] the court stated that sentences in multiplicity offences run consecutively in terms of s 280 of the CPA, although a court has a discretion to order that they run concurrently[9]. In sentencing an offender in circumstances where more than one conviction is obtained, the appropriate starting point is to consider whether the sentence imposed on each separate conviction is appropriate. Thereafter, whether or not the cumulative effect of the sentences 'reflects the totality of the criminal conduct, the circumstances in which the offences were committed, the period between when the offences were committed, the area or areas where the offences were committed'.[10]

[25] Furthermore, the court opined that 'where two offences are committed during the course of a single incident involving more than one person, ... the sentences for both offences should run concurrently.'[11]

[26] Each matter must be assessed on its own individual facts.

[27] In this matter, the sentence imposed in respect of each respective offence was appropriate to the circumstances of the offence.

[28] As regards the order that the sentences run consecutively and the cumulative effect of the sentences, although the complainant was kidnapped at gun-point during the hijacking and the offences carried out almost simultaneously, the kidnapping was unnecessary for the purpose of accomplishing the hijacking. Moreover, the appellant could have hijacked the vehicle and driven away in it without kidnapping the complainant.

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8 *State v Makamu* (A145/2019) [2020] ZAGP JHC 54 (26 February 2020) ('*Makamu*').
9 Section 280(2) CPA.
10 *Makamu* note 8 above para 31.
11 Id.

[29] The latter was forced to endure a number of hours held captive in the boot of his vehicle listening to his captors, for no reason whatsoever. The hijacking took place at approximately midnight. The dawn was breaking when the complainant was released from the boot of the vehicle. The complainant, accordingly, was confined in the boot of the vehicle for a number of hours for no purpose whatsoever.

[30] It is evident from the record of the proceedings that the learned magistrate considered ordering that the appellant not be eligible for parole. That did not transpire. However, the court a quo ordered that the sentences run consecutively as it was entitled to do.

[31] A court is enjoined to impose sentences that serve the public interest and serve as a deterrent to potential offenders.[12] In this regard, the learned magistrate had regard to the premeditated nature of the offences, the gravity of those offences, the prevalence of hijacking and robbery utilising firearms and the increase in kidnapping within the jurisdiction of that court.

[32] Furthermore, the trial court noted that the victims of crimes such as those committed by the appellant, being the complainant, should be recognised in terms of the sentence to be imposed on the appellant.

[33] In the circumstances, the court a quo did not misdirect itself or fail to exercise its discretion in a judicial manner in dealing with the convictions separately for the purposes of sentencing.

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12 *Makamu* note 8 above para 23.

[34] The learned magistrate afforded 'special consideration'[13] to the long period of time already spent by the appellant in custody and to the appellant's personal circumstances including his young children who, as a result of the sentence to be imposed, would be deprived of a father figure and a breadwinner. Furthermore, the trial court took account of the fact that the children's mothers themselves were tending school still. Thus, direct imprisonment of the appellant would serve to place an undue burden on the children's mothers and their families.

[35] The trial court considered the appellant's age, that he committed the offences at the relatively young age of 23 and was sentenced approximately three years later. Additionally, that the appellant had taken steps to educate and improving himself.

[36] However, the appellant was not a first offender. His related conviction of theft occurred only three years prior to the commission of the offences in this appeal. Furthermore, the absence of remorse by the appellant in respect of the offences committed by him together with his failure to take the trial court into his confidence, and thus accept responsibility for his deeds, weighed heavily with the learned magistrate.

[37] In the light of the seriousness of the appellant's offences, the court *a quo* weighed the appellant's personal circumstances against the seriousness and prevalence of those offences. Whilst robbery is a serious offence, premediated robbery with aggravating circumstances is even more serious.[14] In this matter, not only was the hijacking premediated but the appellant's attempt to secrete the vehicle away from the police and his disposal of the car keys demonstrated a continuation by the appellant of his plans for the furtherance of the crime.

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[13] CaseLines 004-147.
[14] *State v Rabie* 1975 (1) SA 855 (A).

[38] The magistrate's finding that the convictions of the community regarding such offences outweighed the appellant's personal circumstances was justified by the pre-planned and serious nature of the offences. Increasing lawlessness in society, the free and easy use of firearms during robberies and the fact that kidnapping the victim increased the potential for harm to the victim, necessitated sentences that would serve as a deterrent.

[39] Notwithstanding, the learned magistrate paid due regard to the aims of sentencing and was careful not to over-emphasise any single factor against another and to balance the interests of society with those of the appellant.

[40] As stated afore, a court of appeal will not easily interfere with the exercise of the trial court's discretion on sentencing. The critical issue is whether or not that court exercised its discretion properly and judicially.[15]

[41] By reason of the aforementioned, there is no basis to find that the learned magistrate misdirected himself or failed to exercise his discretion properly and judicially. Accordingly, the sentences imposed by the court *a quo* must be and are confirmed by this Court.

[42] In the result the appeal is dismissed.

I hand down the judgment.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

15 *State v Pillay* 1977 (4) SA 531 (AD) at 535; *R v S* 1958 (3) SA 102 (AD) at 104.

GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree:

pp.

MOLOHLEHI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 28 April 2022.

COUNSEL FOR THE APPELLANT:	Mr L L Makoko.
INSTRUCTED BY:	Legal Aid Bureau, Johannesburg.
COUNSEL FOR THE RESPONDENT:	Mr M M Phaladi.
INSTRUCTED BY:	Office of the Director of Public Prosecutions, South Gauteng High Court, Johannesburg.
DATE OF THE APPEAL:	17 March 2022.
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