

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)****CASE NO: A70/2014**

(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGES:	NO
3 June 2014		<i>ELM busi</i>
DATE		SIGNATURE

9/6/2014

In the matter between:

NKOSOHLANGA MDUDI**APPELLANT**

and

THE STATE**RESPONDENT**

JUDGMENT

Date of Hearing: 26 May 2014

Date of Judgment: 3 June 2014

KUBUSHI, J

- [1] The appellant, Nkosohlanga Mdudi, was charged before the regional magistrate in Springs, with one count of robbery with aggravating circumstances. The appellant pleaded guilty and was convicted as charged. The trial court sentenced him to 15 years imprisonment. He was also declared unfit to possess a firearm. He is before us, leave to appeal having been granted on petition to the High Court against sentence only.
- [2] The factual matrix in respect of the conviction is that the appellant was in the company of two other assailants when they robbed the complainants of their cell phones. The appellant in his plea explanation in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 admitted that he together with his two accomplices waylaid the complainants and robbed them of their cell phones. He in particular grabbed one of the complainants and one of his accomplices threatened the complainants with a knife. After robbing the complainants they ran away. The complainants pointed them out to the police who gave chase and the appellant was as a result apprehended. He was not found in possession of either the knife or the two cell phones.
- [3] The appellant was charged with robbery with aggravating circumstances read with s 51 (2) of the Criminal Law Amendment Act 105 of 1997. The appellant was legally represented throughout the trial and was made aware at the beginning of the trial that s 51 of the minimum sentences Act was applicable in respect of the offence of robbery with aggravating circumstances.

- [4] It is trite that the decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should as such be careful not to erode that discretion and would be justified to interfere only if the trial court's decision is not judicially and properly exercised which would be the case if the sentence imposed is vitiated by irregularity or misdirection or is disturbingly inappropriate. See S v Rabie¹
- [5] When considering the appropriate sentence to impose, the trial court took into account, the nature of the crimes, the interest of society and the personal circumstances of the appellant. The trial court, found, correctly so, that the offence committed by the appellant was serious; the offence of robbery with aggravating circumstances occurs far too frequently and the *modus operandi* of the facts in this instance is also common.
- [6] The trial court did not lose sight of the personal circumstances of the appellant: he was 23 years old at the time of the commission of the offence; not married; had no children; had a grade 11 qualification; was self-employed he owned a tuckshop and earned approximately R1 000 per month; he spent just over 4 months in custody pending trial. No previous convictions were proved against him. The trial court refused to accept his plea of guilty as showing remorse since he was caught red handed.

1

1975 (4) SA 855 (A) at 857

- [7] In terms of s 51 (2) read with s 51 (3) of the Criminal Law Amendment Act, a person who is convicted of the offence of robbery with aggravating circumstances and is a first offender should be sentenced to imprisonment for a period of 15 years unless there are substantial and compelling circumstances justifying deviation from the prescribed minimum sentence. Having considered the circumstances of the case in the light of the well-known triad of factors relevant to sentence, namely, the nature and gravity of the offence, the interest of society and the personal circumstances of the appellant as enunciated in paragraphs [5] and [6] of this judgment, the trial court did not find any substantial and compelling circumstances which justified deviation from the prescribed minimum sentence, it therefore imposed the minimum sentence of 15 years imprisonment.
- [8] The appellant's contention is that the trial court misdirected itself by imposing the prescribed minimum sentence. The contention is based on the following grounds: the appellant was a first offender; he pleaded guilty and did not waste the court's time; he was not the one who was in the physical possession of the knife; the complainant was not injured; and he was not found in possession of the stolen articles.
- [9] The respondent on the other hand submits that there was no misdirection on the part of the trial court. The respondent contends that the fact that there were two people affected by the crime should be taken as an aggravating factor since the appellant was not charged with two counts of robbery with aggravating circumstances. My view on this point is that the appellant should not be prejudiced by the fact that the prosecutor did not proffer two charges against him. As the

matter stands he is facing only one charge and sentence should be considered in respect of that charge alone.

[10] In respect of the sentence imposed by the trial court, it is my view that the circumstances of this case render the prescribed sentence unjust or disproportionate to the crime, the criminal and the legitimate needs of the society and should the sentence be carried out an injustice would be done. It is indeed so that when viewed individually the appellant's personal circumstances cannot be regarded as substantial and compelling to justify deviation from the prescribed sentence. However, when considered cumulatively and balanced against the circumstances that pertain to the commission of the offence and the interest of society they are such that the trial court ought to have characterised them as substantial and compelling justifying the imposition of a lesser sentence. And in this sense the trial court misdirected itself and the sentence ought to be looked at afresh.

[11] In assessing the sentence to be imposed in lieu of the prescribed sentence, I am enjoined not to lose sight of the fact that robbery with aggravating circumstances is a crime that has been singled out for severe punishment and I should as such pay due regard to the bench mark already set in the Act. In the circumstances, in my opinion, a just and appropriate sentence should be imprisonment for a period of 10 years.

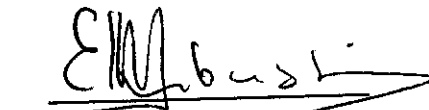
[12] I therefore make the following order:

1. The conviction is confirmed.

2. The appeal succeeds and the sentence is set aside and replaced by the following:

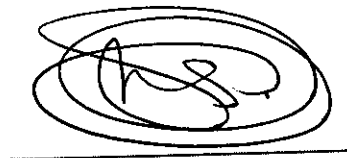
"1. The accused is sentenced to imprisonment for a period of 10 years.

2. The accused is declared unfit to possess a firearm."



E. M. KUBUSHI, J

I concur



S A THOBANE, AJ

Appearances:

On behalf of the appellant:

Adv. M J Mogotsi

Instructed by:

PRETORIA JUSTICE CENTER

FNB Building

2ND Floor, Church Square

PRETORIA 0001

On behalf of the respondent:

Adv C P Harmzen

Instructed by:

DIRECTOR OF PUBLIC PROSECUTIONS

Presidential Building

28 Church Square

PRETORIA 0001