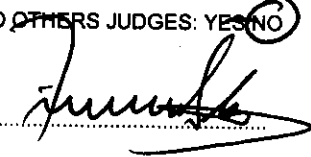


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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(2)OF INTEREST TO OTHERS JUDGES: YES/NO	<input type="radio"/> YES <input checked="" type="radio"/> NO
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CASE NO. A940/2013

In the appeal between:

OUPA HAPPY KHOZA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

BOTES AJ

1. INTRODUCTION

The Appellant was convicted on charges of robbery with aggravating circumstances (Count 1) and a contravention of Section 3 of Act 60 of 2000, being in unlawful possession of a firearm (Count 2) in the Regional Court of Benoni.

1.1 The Appellant was the second accused in the Court *a quo*.

1.2 Mr T P Maleka was the first accused in the Court *a quo*.

1.3 Both accused were convicted on the aforementioned charges and both accused were sentenced to 15 years imprisonment in respect of count 1 (robbery with aggravating circumstances) and 5 years imprisonment in respect of count 2 (the unlawful possession of a firearm). The Court *a quo* furthermore ordered that the aforementioned sentences must be served concurrently so that both accused are accordingly sentenced to serve an effective period of 15 years imprisonment.

2. THE CHARGES AGAINST THE APPELLANT

2.1 The Appellant (accused no 2 in the Court *a quo*) was initially charged with robbery with aggravated circumstances in that on or about 29 January 2007, at or near Etwatwa, he unlawfully and intentionally

assaulted Mr J B Qunebe and that he robbed him of an amount of R600,00 cash.

2.2 Accused no 1 (and not the Appellant) was also charged with the possession of a firearm, being a 9 mm Norico pistol.

2.3 At the stage when the prosecutor presented accused no 1 with the second charge (possession of a firearm) the Court *a quo* intervened and directed the prosecutor's attention to the fact that if a robbery is committed with a firearm, that that firearm can actually be possessed by both the accused through the principle of common purpose. The prosecutor consequently charged the Appellant with the aforementioned contravention and both the accused pleaded not guilty.

3. **THE CONVICTION : ARMED ROBBERY WITH AGGRAVATING CIRCUMSTANCES**

The Court *a quo*, correctly in our view, convicted the Appellant on charge no 1.

3.1 On the evidence which was presented by the Respondent in the Court *a quo*, it is evident that the Appellant participated in the robbery and that he co-operated with accused no 1 in committing this crime.

3.2 On a proper interpretation and analysis of the evidence which was adduced in the Court *a quo*, we are unable to come to a different conclusion. The Court *a quo* consequently came to the correct conclusion and we could not find any reason or basis to interfere with the Court *a quo*'s judgment in this regard. This conviction therefore stands.

4. **THE CONVICTION : POSSESSION OF A FIREARM**

It is common cause that accused no 1 (and not the Appellant) was at all relevant times in possession of the firearm which was used in committing the offence.

4.1 In our view the Appellant should never have been charged with a contravention of Section 3 of the Firearms Control Act, No 60 of 2000.

4.2 We do not suggest that common purpose should not prevail in certain specific circumstances. The evidence which was adduced in the Court *a quo* does not justify a finding insofar as common purpose is concerned and the manner in which this specific charge against the Appellant in the Court *a quo* was dealt with, is irregular. In as much as it was initiated at the instance of the Magistrate when the prosecution did not prefer the said charge against the Appellant.

4.3 We therefore find that the Respondent failed to adduce sufficient evidence pertaining to the doctrine of common purpose is concerned in order to substantiate this charge.

4.4 We therefore come to the conclusion that the appeal in respect of this charge should be upheld and that the conviction should be set-aside.

5. **THE SENTENCE IMPOSED ON THE APPELLANT**

5.1 It is trite that a Court of Appeal may not and will not interfere with an imposed sentence unless it is convinced that the sentence's discretion has been exercised improperly or unreasonably, or where the sentence induces a sense of shock or is startlingly inappropriate or where the Trial Court misdirected itself.

5.2 The provisions of the Act on Minimum Sentences are applicable on the count in terms of which the Appellant was convicted and the Court *a quo* was therefore obliged to impose a sentence of 15 years imprisonment, unless substantial and compelling circumstances were present in order not to have imposed the prescribed minimum sentence.

5.3 The Court *a quo* found that no substantial and compelling circumstances were present and therefore the minimum sentence of 15

years was imposed. We are not in agreement with the approach that was adopted by the Court *a quo* and in our view the following circumstances should have been taken into account by the Court *a quo*:

5.3.1 At the time of the commission of the offence, the Appellant was 29 years of age. It is noteworthy to mention that accused no 1 was only 18 years old when the crime was committed;

5.3.2 The Appellant did not have any relevant previous convictions;

5.3.3 The Appellant has to support three children;

5.3.4 The Appellant was gainfully employed;

5.3.5 The complainant was not injured during the robbery; and

5.3.6 The Appellant is still young enough to be rehabilitated.

5.4 The Full Court (Pickering et Plasket JJ) held as follows in the matter of **S v Madikane 2011(2) SACR 11 (ECG) at par 3 on page 13:**

"In circumstances such as this, a Court is required to impose the sentence that is prescribed, unless substantial and compelling

circumstances, as contemplated by section 51(3) of the Criminal Law Amendment Act, No 105 of 1997, are present and justify a less severe sentence. Such circumstances may be comprised of any of the factors that occurs traditionally take into account as mitigation, and may be the cumulative effect on a number of such factors. Furthermore, if the imposition of the prescribed sentence would be 'disproportionate to the crime, the criminal and the legitimate needs of society' that, on its own, constitutes a substantial and compelling circumstance, justifying and, indeed, requiring the imposition of a less severe sentence."

- 5.5 In our view sufficient circumstances are present in order not to impose the prescribed minimum sentence of 15 years.
- 5.6 We, however, align ourselves with the arguments advanced by counsel who appears on behalf of the State, pertaining to the seriousness of the crime. Offences of this nature (specifically robbery with aggravated circumstances) are increasing on a daily basis and it is incumbent upon this Court to send a clear message to criminals. This Court should not, and will not, tolerate the conduct of criminals and this Court will not abdicate its responsibility to impose the prescribed minimum sentence in appropriate circumstances.

6. **ORDER**

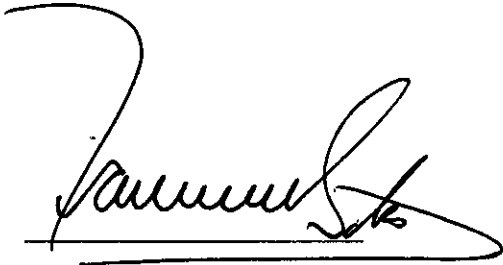
In the premises the following order is made:

1. The appeal against the conviction of count 1 (robbery with aggravating circumstances) is dismissed;
2. The appeal in respect of count 2 (possession of an unlicensed firearm) is upheld and the conviction is set-aside;
3. The appeal in respect of the sentence of 15 years imprisonment is upheld and replaced with the following order:

"Accused no 2 is sentenced to 12 years imprisonment."

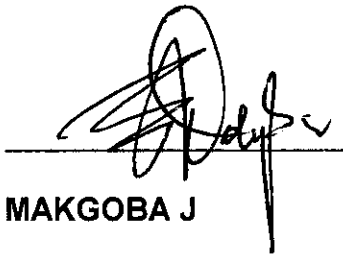
4. The sentence, referred to in paragraph 3 *supra*, is antedated to 28 August 2007 in accordance with the provisions of Section 282 of the Criminal Procedure Act, No 51 of 1977.

2007 in accordance with the provisions of Section 282 of the Criminal
Procedure Act, No 51 of 1977.

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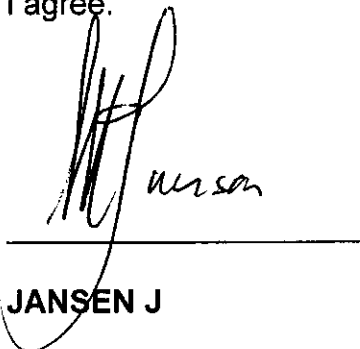
F W BOTES AJ

I agree.

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MAKGOBA J

I agree.

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JANSEN J