REPUBLIC OF SOUTH AFRICA

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

Case Number: SH1/117/2014
13/12/2016
Appeal Number: A224/2016

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

9/12/16
DATE SIGNATURE

In the appeal between:

SANET GOUWS **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGEMENT

PIENAAR A J

[1]Appellant was arraigned in the Regional Court at Pretoria North, Gauteng on 26 August 2014 on one count of a contravention of section 18(2) of The Riotous Assemblies Act, 17 of 1956, as amended, by conspiring to commit robbery and one count of attempted robbery. Both crimes were committed on 12 May 2014.

[2]Appellant pleaded guilty to the counts on which she had been arraigned, and in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, as amended, Appellant's legal representative, (who was not Mr Pistorius who appeared for her on appeal), prepared a written statement setting out the basis of her plea on both counts wherein Appellant admitted each and every allegation contained in the counts with which she had been charged.

[3]On 26 August 2014 Appellant was convicted on both counts on which she had been arraigned.

[4]After conviction on the aforesaid counts, prior to sentence being handed down, a psychosocial report was prepared which concluded that direct imprisonment would be a suitable sentence. A correctional supervision report in terms of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977, as amended, was obtained confirming that Appellant would be a suitable candidate for correctional supervision. A victim impact report was also obtained and presented to the Court *a quo*.

[5]On 16 October 2014 Appellant was sentenced on count one to six years imprisonment and on count two to five years imprisonment, resulting in Appellant being sentenced effectively to eleven years imprisonment.

[6]In terms of section 103(1) of the Fire Arms Control Act, 60 of 2000, Appellant was declared unfit to possess a firearm.

[7]After sentence was imposed Appellant proceeded to apply for leave to appeal on 5 February 2015 against the sentences which had been handed down, that was dismissed by the Court *a quo*.

[8]Subsequent to Appellant's application for leave to appeal being dismissed, Appellant lodged a petition for leave to appeal and on 16 March 2016 Appellant was granted leave to appeal against the sentences handed down by the Court *a quo*.

[9]Heads of argument were filed and served by Mr Pistorius, on behalf of Appellant, and Mr Kotzé, on behalf of the State, to whom the Court is indebted for their able presentations.

[10]As indicated hereinbefore, Appellant pleaded guilty to both counts on which she had been arraigned, notwithstanding the fact that count one was founded thereon that Appellant together with her co-perpetrators had conspired to commit an offence, to wit robbery, which culminated in count two and Appellant's conviction of the subsequent attempted robbery.

[11]From the statement prepared by Appellant in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, as amended, it appears that while Appellant had pleaded guilty, her co-perpetrators had pleaded not guilty, which resulted in a separation of trials. Appellant's statement confirmed that Appellant and her co-perpetrators had planned and discussed how to confront the complainant in order to rob her of her possessions. These facts were accepted by the State and resulted in Appellant's convictions.

[12]It is clear from Appellant's statement that count one was founded on the planning to commit the said robbery, which culminated in Appellant and her co-perpetrators' common purpose to commit robbery.

[13]Having regard to the facts, as confirmed by Appellant and accepted by the State, I am of the opinion that Appellant had been subjected to a duplication of convictions, which would be improper and irregular amounting to a travesty of justice. It is a trite rule that where an accused has committed only one offence in substance it should not be split up and charged against him in one and the same trial as several offences. See **S v Dlamini 2016(1) SACR 229 (KZP) at 234e**.

[14]In **S v Grobler en 'n Ander 1966(1) SA 507 (A)** at **513G** it was stated as follows:

> *"Aan die einde van die saak is dit die taak van die hof om te beslis of daar 'n misdaad bewys is, en welke misdaad bewys is, en hoeveel misdade bewys is. Indien*

dit dan bv., sou blyk dat volgens die bewese feite twee klagtes in die klagskrif een en dieselfde strafbare feit behels, sou die hof die beskuldigde alleen op een klag skuldig bevind."

[15]In order to determine whether there has been a duplication of convictions the rules formulated are not rules of law, nor are they exhaustive. As such they are practical guides supplemented by common sense, wisdom, experience and a sense of fairness and justice of the Court. See **S v Whitehead and Others 2008(1) SACR 431 (SCA)** at **443e – f; S v Dlamini, *supra*,** at **234e.**

[16]Although no appeal had been lodged by Appellant against her conviction of conspiracy to commit a robbery, admirably and in accordance with the honoured tradition of advocacy, counsel for the State, for which he is commended, properly and correctly conceded that Appellant's conviction on count one resulted in a duplication of convictions which could not be sustained and called to be set aside.

[17]I am satisfied that the concession made by counsel for the State was proper and well founded, and therefore the conviction and sentence handed down has to be set aside.

[18]The problem which arises is that leave to appeal was granted on petition only with regard to the sentences handed down and at no time did Appellant apply to amend her notice of appeal by the addition of further grounds of appeal on the merits as well as an appeal against the sentences.

[19]Nonetheless, I am satisfied that in order to prevent an injustice to Appellant, it would be proper for the Court to exercise its inherent jurisdiction to review the matter in order to prevent a travesty of justice occurring, as provided for by the provisions of section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended.

[20]In the result therefore, I am satisfied that Appellant's conviction of a contravention of section 18(2) of the Riotous Assemblies Act, 17 of 1956, as amended, in having conspired to commit a robbery, and the sentence handed down is to be set aside on appeal. See **S v Mafu 1966(2) SA 240 (EC) at 241H**; **S v Eli 1978(1) SA 451 (EC)** at **452C**.

[21]Turning to the appeal on the sentence handed down on count two, it was submitted by Mr Kotzé that the sentence of five years imprisonment on the count of attempted robbery be set aside and that the matter be remitted to the Court *a quo* to consider and sentence Appellant afresh.

[22]Thereanent, Mr Pistorius vigorously opposed the submission and request by Mr Kotzé that the matter be remitted to the Court *a quo* in order to consider and sentence Appellant afresh.

[23]I am satisfied that all the relevant facts have been presented with regard to sentence and that this Court is in a position to hand down an effective sentence. The dictates of justice and equity militates against the matter being referred back to the Court *a quo* in order to pass sentence afresh.

[24]Turning to the appeal on the sentence of imprisonment handed down, it was submitted by Mr Pistorius that a sentence of five years imprisonment was harsh and inappropriate, and considering Appellant's personal circumstances, as well as the circumstances peculiar to the case, the Court *a quo* should have concluded that there were mitigating circumstances justifying the imposition of a sentence of correctional supervision rather than imprisonment.

[25]It was further submitted that the Court *a quo* had misdirected itself by failing to properly evaluate Appellant's personal circumstances when weighed against the particular circumstances that had prevailed and that were peculiar to the case.

[26]The result, it was submitted, was therefore that the Court *a quo*, due to the aforesaid misdirection, had over emphasised the aggravating circumstances present in the case to the detriment of Appellant's personal circumstances and the nature and seriousness of the crime committed, which ultimately resulted in a sentence of imprisonment for five years being imposed, which was shockingly inappropriate and disproportionate inducing a sense of shock. Mr Kotzé, on behalf of the State, contended that no misdirection had been committed by the presiding magistrate and that the sentence handed down, although harsh, was appropriate and proportional to the nature and seriousness of the crime committed, especially if regard was had to the aggravating factors that complainant had been assaulted and that entry had been gained by deceit, and although Appellant had attempted to intervene, it had been to no avail.

[27]It is trite law that the Court handing down a sentence is called upon to consider the personal circumstances of the accused, the nature of the crime committed and the interest of society in order to determine an appropriate sentence. See **S v Zinn 1969(2) SA 537(AD)**.

[28]I have no doubt that the presiding magistrate misdirected himself by over emphasising the seriousness of the crime committed by Appellant thereby neglecting to properly consider Appellant's personal circumstances and the interest of an informed society. This resulted in the Court *a quo* concluding that the crime Appellant was convicted of was serious which society expected to be dealt with sternly, justifying a term of imprisonment to be a deterrent, not only to Appellant, but to others too.

[29]It is apposite to have regard to the facts and circumstances that pertained in this matter. It is common cause that Appellant was at the time of her conviction a single mother, 38 years of age, pregnant and the mother of three minor children and the principal and primary caretaker of her minor children. Appellant accepted responsibility for her deeds, and expressed genuine remorse for her conduct by pleading guilty, which was substantiated by the fact that during the commission of the attempted robbery Appellant had tried to intervene when her co-perpetrators assaulted the complainant, but to no avail. The only disturbing fact is that Appellant elected not to testify on her own behalf with regard to sentence, although the contents of the presentencing reports were common cause between the Appellant and the State.

[30]It was submitted by Mr Pistorius that other sentencing options, other than direct imprisonment, was available which the Court *a quo* had failed to consider. In this regard it was submitted that having regard to the facts and circumstances peculiar to this case, the Court *a quo* should have concluded that a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977, as amended, alternatively, imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977, as amended, would have been appropriate.

[31]I am apt to agree that the presiding magistrate was unduly influenced by the gravity of the crime committed, when called upon to determine whether a sentence other than direct imprisonment was justified. The aforesaid conclusion arrived at by the presiding magistrate undoubtedly weighed heavy on his mind and influenced him to consider and hand down a sentence of direct imprisonment for five years.

[32]It is apposite to keep the following dictum of Nugent JA in **S v Vilakazi 2009(1) SACR 552 (SCA) at 562c** in mind:

> *'Whether the prescribed sentence is indeed proportionate and thus capable of being imposed is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed*

sentence is seldom proportional to the offence. For the essence of Malgas and of Dodo is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.'

[33]This the presiding magistrate failed to comprehend and comply with when he concluded and determined that a sentence of direct imprisonment for a period of five years was proportional and appropriate in this particular case.

[34]Without detracting from the gravity of the crime committed by Appellant, I am satisfied that when measured on the barometer of seriousness, the crime committed does not fall in the utmost callous and brutal category, *per se* indicative thereof that Appellant was inherently wicked. No evidence was presented that in Appellant's case the prognosis for rehabilitation was out of the question or negligible.

[35]Although the current and unprecedented wave of violence, murder, homicide, robbery and rape imposes a responsibility on the Courts to act fearlessly and in unambiguous terms to announce to the world its repugnance of such conduct, the sentence ultimately handed down should nonetheless be blended with a measure of mercy. Such is the hallmark of an informed and civilised society. See **S v Kumalo 1973(3) SA 697 (AD)**; **S v Sparks 1972(3) SA 396 (AD)**. The fact that the Court *a quo* handed down a sentence of direct imprisonment substantiates the conclusion that the sentence was not blended with a measure of mercy.

[36]The repugnance and abhorrence with which a committed crime is viewed is not necessarily dependant on the term of imprisonment imposed. See **S v Whitehead 1970(4) SA 428 (AD)**; **S v Holder 1979(2) SA 70 (AD)**. A necessary corollary of the aforesaid, is the fact that it is imperative to meet out punishment, not in a standardised format, but with due consideration of the particular facts peculiar to each case. See **S v Vilakazi, *supra* at 560g – 561c**; **S v Sangweni, *supra* at 424b – g**.

[37]On a proper appreciation and evaluation of the circumstances in this case, I am of the view that the age of Appellant, the fact that Appellant was a first offender, supporting her children, that she had attempted to intervene to prevent the complainant being injured, that she pleaded guilty and that she confirmed being willing to testify against her co-perpetrators undoubtedly substantiating her remorse and the fact that she had spend five months in jail awaiting trial were mitigating circumstances justifying the imposition of a sentence other than mere imprisonment for a period of five years.

[38]Having regard to the aforesaid circumstances, I am satisfied that the Court *a quo* had failed to consider and evaluate the factors enumerated and to consider the said factors in their proper perspective to the detriment of Appellant. Therefore the Court *a quo* had misdirected itself by over emphasising the gravity of the crime committed which resulted in a sentence being handed down which was shockingly inappropriate inducing a sense of shock, with the result that this Court is at liberty to set aside the sentence of direct imprisonment for five years handed down. Under the circumstances, I am of the view that imposing a sentence of imprisonment for five

years, renders the sentence inappropriate calling for it to be set aside. Therefore this Court is at liberty to consider an appropriate and just sentence afresh.

[39]Consequently I propose that the appeal against the sentence imposed and handed down by the Court *a quo* be upheld and set aside on appeal to be substituted with the sentence set out hereinafter.

[40]In the result I propose the following order to be handed down:

1. The conviction and sentence for a contravention of section 18(2) of the Riotous Assemblies Act, 17 of 1956, as amended, conspiring to commit a robbery, is set aside.

2. The appeal against the sentence of five years imprisonment on count two is upheld and set aside, and Appellant is sentenced to imprisonment for five years in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977, as amended.

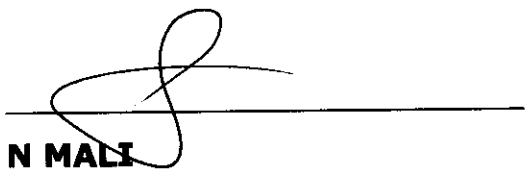
3. In terms of section 282 of the Criminal Procedure Act, 51 of 1977, as amended, the sentence is antedated to 16 October 2014.

4. In terms of section 103 of the Firearms Control Act, 60 of 2000, Appellant is declared unfit to possess a firearm.

W. F. PIENAAR

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.



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JUDGE OF THE HIGH COURT

FOR APPELLANT:	ADV P PISTORIUS
ATTORNEYS:	EMILE VIVIERS ATTORNEY PRETORIA
FOR THE STATE:	ADV JJ KOTZÉ