REPUBLIC OF SOUTH AFRICA

IN THE HIGH COUT OF SOUTH AFRICA

GAUTENG DIVISION

26/10/2016

Case No: A849/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

THABO MORAKANE

AND

THE STATE

Heard: 17 October 2016

Delivered: 26 October 2016

JUDGMENT

Molahlehi AJ with Senyatsi AJ

Introduction

[1] This is an appeal against the decision of the magistrate court made on 7 August 2012. The appellant was charged and convicted of the following offences:

Count 1: Robbery with aggravating circumstances.

Court 2: Theft of a motor vehicle; and

Court 3: Robbery with aggravating circumstances.

[2] The appellant was sentenced to an effective 13 years imprisonment and was declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act.[1] The appellant was legally represented thought the hearing.

[3] The state in support of its case presented the testimony of two witnesses. The first witness, Mr M., testified that he had visited his cousin who stays in Pretoria during September 2008. The incident of the robbery occurred on 21 September 2008. Both witnesses did not know the appellant. They testified that they were robbed by a group of men who took their TV and other items from the flat. The group also stole their motor vehicle.

[4] The appellant, Mr Morokane, was the only witness for the defense. He testified that on the night in question he was at a nightclub where he met with Mr M., one of the complainants, who invited him to his table. He thereafter invited him to his flat where on arrival they played music and watched some gay movies. They thereafter had sex and slept together. In the morning Mr M. dropped the appellant at corners Van Der Walt and Bloed streets in Pretoria. According to him Mr M. then gave him R50,00. It is not clear why the money was given to him.

[5] It is common cause that there was no direct evidence to identify the appellant as part of those who perpetrated the robbery at the complainant's flat. The state in support of its case relied on the fingerprints which were uplifted from the items which were taken from the flat and those from the stolen motor vehicle. The fingerprints were not disputed. The explanation for their presence on the items, according to the appellant, is that he touched those items whilst he was enjoying himself with the complaint and that happened also because he was told to feel free by the person who invited him into the house.

The grounds for appeal

[6] It was submitted on behalf of the applicant that although his offence attracted the

[1] Act number 60 of 2000.

legislated minimum sentence the trial court imposed a sentence less than that because it found substantial and compelling circumstances in his case. It was however, submitted that the sentence of 13 years imprisonment was disproportionate to the circumstances of the offence. In other words, the sentence of 13 years imprisonment was disproportionate when considering the appellant's personal circumstances.

[7] It was further contended that the trial court ought to have been persuaded to impose a sentence less than 13 years particularly when regard is had to the following:

71. The appellant had spent one year in custody awaiting trial;

7.2 The complainants were no injured;

7.3 Most of the properties were recovered; and

7.4 It was not the worst kind of robbery.

The decision of the magistrate court

[8] In its decision the court found that it was common cause that the fingers prints which had been uplifted from the items which were taken from the items in the flat and those from the motor vehicle were those of the appellant. The admission by the appellant was made in terms of s 220 of the Criminal Procedure Act (CPA).[2] It was further found that the admissions complied with the requirements of s 217 of the CPA.

[9] It is eminently clear from the reading of the record that the court was faced with two mutually destructive versions of the parties. It resolved that by following the well-established principles of dealing with two conflicting versions.

[10] As indicated earlier there was no direct evidence to identify the appellant. The court accordingly resorted to the use of circumstantial evidence to link the appellant to the crime. In this respect, the court drew the inference that the applicant was one of the group of people that robbed the complainant of his belongings, from the fingerprints which were found on the stolen items.

The sentencing

[2] Act number 51 of 1997.

[11] It is trite that the trial court has the discretion to exercise when considering the sentence to impose on an accused person who has been found guilty of an offence. It is for this reason that the appeal court will not readily interfere with the sentence imposed by the trial court. The power of the appeal court to interfere with the sentence imposed by the trial court is constrained by the consideration that sentencing is the prerogative of the trial court. There are generally two instances where the appeal court will interfere with the sentence imposed by the trial court and that is where (a) there is a misdirection in the exercise of the discretion or (b) where the sentence is disproportionate to the crime.[3]

[12] The guidelines to follow when dealing with the issue of sentencing on appeal is set out in S v Malgas, by Marais JA in the following terms:

> "[12] A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.' But an appellate court may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'.

[13] In *S v Sadler*, (2000] ZASCA 13; 2000 (1) SACR 331 (SCA) para 10:

> "[10] [I]mportant to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty is chosen by the trial court is not. Sentencing appropriately is one of the most difficult tasks which faces courts and it is not surprising that honest differences of opinion will

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> frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail."

[14] In dealing with the issue of the sentence that is disproportionate to the crime Mpati P, in *S v Cwele & another*,[4] had the following to say:

> "It is in my view unnecessary to consider the question whether the trial court misdirected itself when it considered the existence or otherwise of substantial and compelling circumstances. This is because I consider the disparity between the sentence imposed by the trial court and that which this court would have imposed, had it been the trial court, to be so marked that it can properly be described as disturbingly inappropriate."

[15] It is not every misdirection that would justify interference with the sentence by the Appeal Court. It must be a material misdirection in order for it to vitiate the sentence. It was in this regard stated in S V PILLAY, by Trollip JA, that:

> " ... a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."

Evaluation and Analysis.

[16] In my view the magistrate court cannot be faulted in the approach it adopted in dealing with the sentencing of the appellant for the reasons set out below.

[17] The reading of the judgement reveals clearly that the magistrate applied his mind to all the factors relevant to the consideration of sentencing. In this regard, the magistrate noted at the beginning of this judgement that he was bound by the principles applicable

[4] [2012] ZASCA 155; 2013 (1) SACR 478 (SCA).

in sentencing, which requires the balancing act between the nature and the seriousness of the offence, the interest of the society as well as the personal circumstances of the appellant.

[18] At the time of the sentencing, the appellant was 28 years old, and had two children who are looked after by his mother. The appellant had one conviction for robbery at the time of sentencing.

[19] It was argued on behalf of the appellant during the trial that the magistrate should take into account as substantial and compelling circumstances the fact that the appellant had spent a considerable time in custody awaiting trial.

[20] It seems now well established that the period spent in custody awaiting trial is a factor to take into account when considering sentencing, it does not automatically serve as a substantial and compelling circumstances for the purpose of sentencing. In this respect the Supreme Court of Appeal in *S v Radebe and another*,[5] held that:

> "Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention.... (T)he test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one" .

[21] It is eminently clear from the reading of the judgement that the court cannot be faulted for the approach it adopted in dealing with the period the appellant was awaiting trial. In the present of this case the court found that in the circumstances of this case, the period awaiting trial constituted substantial and compelling reason to deviate from the minimum sentence. The court further found that but for the substantial and compelling circumstances the appellant would have been sentence to the minimum sentence of 20 years.

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[5] 2013 (2) SACR 165 (SCA).

[22] The sentence of 13 years' imprisonment which was imposed was influenced by the seriousness of the offence, committed by the appellant.

[23] In light of the above, I am of the view that the appellant's application for appeal stands to fail.

Order

In the circumstances the appellant's appeal application is dismissed.

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Molahlehi AJ
Acting Judge of the South
Gauteng High Court

I agree and it is so ordered

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Senyatsi AJ

It is so ordered

APPEARANCES
APPLICANT: Mr M B Kgagara for the Legal Aid South Africa.
RESPONDENT: Adv K H Van Rensburg for the Public Prosecutions: Gauteng, Pretoria