IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

21/11/16

CASE NO: A934/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

21 November 2016

(Signature)

In the matter between:

THEMBA MTHIMKHULU **Appellant**

and

THE STATE **Respondent**

JUDGMENT

DE VILLIERS, AJ:

1 This is an appeal against the conviction and sentence of the appellant. He was charged in the Regional Court, Lesedi, Heidelberg with robbery, with aggravating circumstances, as intended in section 1 of the **Criminal Procedure Act** 51 of 1977[1] (“***the Act***”).

[1] “(1) In this Act, unless the context otherwise indicates-

2 The appellant was legally represented at the trial. He pleaded not guilty. He endeavoured to plead guilty in terms of section 112 of the **Act** to the receipt of suspected stolen property,[2] but the learned magistrate rejected the plea and entered a plea of not guilty. In terms of section 113(1) of the **Act** (underlining added):

> "*If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.*"

3 The trial commenced on 19 October 2015 and the appellant was convicted on 21 October 2015 on the charge and sentenced to fifteen years imprisonment.

4 The sentence of fifteen years imprisonment is the minimum prescribed sentence in terms of section 51(2)(a) of the **Criminal Law Amendment Act 105 of 1997** as read with Part II of Schedule 2. In terms of section 51(3)(a) of that act, the court must impose a lesser sentence than the minimum prescribed sentence if it is satisfied that "*substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed*".

'aggravating circumstances', in relation to-
(a) .....
(b) robbery or attempted robbery, means-
(i) the wielding of a fire-arm or any other dangerous weapon;
(ii) the infliction of grievous bodily harm; or
(iii) a threat to inflict grievous bodily harm,
by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence";

[2] Section 37 of the **General Law Amendment Act** 62 of 1955;

5 The appellant obtained leave to appeal against his conviction and sentence from the Regional Court on 4 November 2015.

6 The facts of the matter are uncomplicated.

6.1 A Mr Patel and his mother were robbed at gunpoint at their home on Friday 3 April 2015 in the evening at about 21h10. He was tied up and they were placed in a bedroom whilst the robbery proceeded. Mr Patel did not see the appellant, but he had heard a robber or robbers he did not see;

6.2 Amongst the stolen items was a Nissan MP300 vehicle, a so-called *"bakkie"*. Two security officers found the vehicle parked in front of a shebeen about five hours after they had started to look for it and followed it when it drove away;

6.3 A chase ensued, and the driver, the appellant, endeavoured to speed away from his pursuers. The appellant lost control and the vehicle crashed into a wall. The security officers apprehended the appellant; and

6.4 The events took place on Good Friday night until early in the morning of the Saturday that followed.

7 The appellant in his purported guilty plea admitted that he was found in the possession of the Nissan vehicle at about 03H00 on 4 April 2015 by (employees) of a tracking company, whilst he was driving it.

8 The appellant did not testify in his own defence. He was found guilty in essence based upon the doctrine of recent possession.

9 This finding was questioned in the appellant's heads of argument, but not really in argument. The submission in the heads of argument was that possession of the vehicle five or six hours after the robbery (during the

same night) is not recent possession in that vehicles are easily disposable or changes hands quickly. The argument was based on **S v Mothwa** 2015 JDR 2096 (SCA)[3].

10 The short duration and the date and time when the events occurred in my view satisfy the requirements set out in at Para 8 of the **Mothwa**-judgment. In any event, in that case, the accused was found in the possession of a vehicle three days after the robbery, the vehicle already had different registration numbers and it was already registered in the name of a third party, and the accused testified and provided an explanation. It is not comparable on the facts to the present case.

11 I do not believe that the Magistrate erred in relying upon the doctrine of recent possession in coming to a conclusion that the state had proven the appellant's guilt. The Magistrate found that the inference establishes the appellant's guilt beyond reasonable doubt. I see no reason to interfere in the Magistrate's reasoning.

12 The case argued on appeal was that the appellant's version in his rejected plea explanation reasonably and possibly could be true. This aspect was debated in argument, and we were not referred to any authority for a submission that such an explanation constituted evidence apart for the limited application as set out in section 113(1) of the **Act** referred to earlier.

13 In the absence of a version under oath, the appellant in fact has not provided an explanation that reasonably and possibly could be true, and the state has discharged the onus on it. In my view, the appellant had to provide rebutting evidence, but failed to so. See too **S v Boesak** 2001 (1) SA 912 (CC) at Para 24.

14 The remaining issue is the sentence of fifteen years, subject to the test to be applied in this court. That test has been set out in **S v Rabie** 1975 (4) SA 855 (A) at 857B – E (underlining added):

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[3] Neutral citation: **Mothwa v The State** (124/15) [2015] ZASCA 143 (1 October 2015)

"*1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -*

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

See, as to all of the foregoing, ***R. v Mapumulo and Others****, 1920 AD 56 at p. 57;* ***R. v Freedman****, 1921 AD 603 at p. 604 in fin.;* ***S. v Narker and Another****, 1975 (1) SA 583 (AD) at p. 585C."*

15 More recently in **S v Blignaut** 2008 (1) SACR 78 (SCA)[4] the approach on appeal with regard to a minimum sentence was set out in Para 3 to 5 (underlining added):

"*[3] The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the* ***Act*** *is to be found in the detailed judgment of Marais JA in* ***S v Malgas*** *2001 (1) SACR 469 (SCA). The main principles appearing in that judgment which are of particular application to the present appeal are: First, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. Secondly, for circumstances to qualify as substantial and compelling, they do not have to be exceptional in the sense of seldom encountered or rare. Thirdly, although the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework nonetheless left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence. (See also* ***S v Fatyi*** *2001 (1) SACR 485 (SCA) para 5;* ***S v Abrahams*** *2002 (1) SACR 116 (SCA) para 13.)*

[4] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated in ***Malgas*** *(para 12), where Marais JA held:*

'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. . . . However, even in the absence of material misdirection an appellate court may yet be justified in interfering with the sentence imposed by the trial

[4] Neutral citation: **Blignaut v The State** [2007] SCA 94 (RSA)

court. It may do so when the disparity between the sentence of 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".'

*[5] The question therefore is whether there was a material misdirection by the trial court in the manner in which it weighed the factors relevant to the determination of sentence or, if not, whether the sentence imposed was in any event so shockingly inappropriate as to give rise to the inference that there had been a failure to properly exercise the sentencing discretion (**Abrahams** para 15).*"

16 Later in that judgment the court held in Para 8 the Court summarised its finding as follows:

"*[8] In my view the cumulative effect of the aforegoing factors, all of which the sentencing court failed to take into account, constitute substantial and compelling circumstances within the meaning of that expression. I am thus persuaded that a departure from the prescribed minimum is justified on the basis that such a sentence would be disproportionate to the crime, the criminal and the legitimate interests of society (**S v Mahomotsa** 2002 (2) SACR 435 (SCA) para 20). It follows that the fifteen years' imprisonment imposed on the appellant by the regional magistrate is not a just sentence. Plainly, for an offence of the kind encountered here, a custodial sentence is clearly warranted. Reconsidering the matter, I consider a sentence of 5 years' imprisonment to be appropriate in respect of count 1 – the robbery with aggravating circumstances.*"

17 The appellant did not testify and led no evidence on mitigation.

18 We were not referred to any comparable case authority.

19 Leaving aside speculative submissions, and the only factors relied upon for showing substantial and compelling circumstances which would have justified the imposition of a lesser sentence, were that:

19.1 The appellant was 31 years old;

19.2 The appellant's two previous convictions were not for robbery with aggravating circumstances;

19.3 The robbery did not involve severe physical harm;

19.4 The vehicle was recovered.

20 I am not convinced that these factors constitute substantial and compelling circumstances which would have justified the imposition of a lesser sentence. However, that is not the test on appeal. No case has been made out to bring this matter within the tests set out in the **Rabie-case** or in the **Blignaut-case**.

Consequently, I make the following order:

1 That the appeal be dismissed

DP de Villiers
Acting Judge of the High Court
Gauteng Division

I agree, it is so ordered.

N Janse van Nieuwenhuizen
Judge of the High Court
Gauteng Division

Heard on:	**15 November 2016**
On behalf of the Appellant:	**Adv Moeng (Ms MMP Mastete prepared the heads of argument)**
Instructed by:	**Pretoria Justice Centre**
On behalf of the Respondent:	**Adv L Williams**

Judgment handed down: **21 November 2016**