REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

29/4/16

CASE NO: A553/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

29/04/16 E M Kubushi

DATE SIGNATURE

In the matter between:

NGOBESE LINDOKUHLE **APPELLANT**

and

STATE **RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The appeal before us is on sentence only. The appellant was charged on two counts of robbery with aggravating circumstances in that a firearm was used in the robbery. The second count is that of attempted murder in that a complainant, Mr van den Berg, was shot at by the appellant. The charge of robbery with aggravating circumstances was read with the provisions of Part II of Schedule 2 of s 51 (2) *(a)* of the Criminal Law Amendment Act No 105 of 1997 ("the Act"), which provides for a minimum sentence of fifteen (15) years imprisonment in a case of a first offender. The charge of attempted murder was read with the provisions of Part IV of Schedule 2 of s 51 (2) *(c)* of the Act which provides for a sentence of five (5) years imprisonment in case of a first offender.

[2] The appellant pleaded not guilty to the two charges. In his plea explanation he stated that at the time of the incident he was in the company of two other persons who perpetrated the two offences and that he did not take part in the commission of the offences. He stated that he was sitting in the motor vehicle when the two persons who perpetrated the offences entered the Coronation store in Northmead Benoni, to buy something and they came back running. The trial court found him guilty on the two counts and having found no substantial and compelling circumstances, sentenced him to fifteen (15) years imprisonment on count 1 and five (5) years imprisonment on count 2. He was also declared unfit to possess a firearm.

[3] The appellant applied and was granted leave to appeal on petition to the High Court on sentence only. He is before us appealing the sentence only.

[4] The appellant applied for condonation for the late filing of heads of argument. There is no opposition and the application is granted.

[5] The appellant was in custody for the duration of the trial and he is still in custody.

FACTUAL BACKGROUND

[6] A brief synopsis of the facts that led to the conviction of the appellant is necessary. The respondent's version is that on the day in question three men entered a certain store known as Coronation and at gun point robbed some of the workers of their cell phones. One of the customers was robbed of her cell phone, her bank cards and bank cards belonging to her mother and her husband. Another customer who was parked outside the store saw the three men exiting the store in haste. He gave chase and apprehended one of the men who is now the appellant before us.

THE EVIDENCE

[7] The respondent's evidence was presented by four witnesses as follows: Ms Chiloane, a worker at Coronation store was one of the workers who were in the shop when the three men entered the shop. She was also one of the three workers who were working behind the counter in the kitchen section of the store. Two of the men approached her asking for food. She referred them to the cashier counter to pay first

before she could give them the food. Instead of going to pay, the two men ordered everyone to lie down. She and another worker did not understand the language the two men were using and did not lie down as ordered. This resulted in one of the two men, who was wearing a blue t-shirt, pulling out a firearm and pointed it at them. They all lay down. Ms Chiloane could see two white customers who were also lying on the floor. Ms Chiloane and the other workers were ordered to hand over their cell phones which they did. Her cell phone was later recovered by the police and handed back to her but the screen was damaged. She was able to identify their assailants, in particular the appellant who was wearing a blue t-shirt on the day in question. She had a good look at them for about three to four minutes. She accompanied the two men, who wanted to buy food, to the cashier counter where they were to pay for the food. The men in the blue t-shirt was one of these two men. When the suspects had first ordered them to lie down she did not respond immediately as she did not understand what they were saying and, as such, she had enough time to see the appellant and was able to identify him. She could also remember that one of the suspects, the appellant before us, was wearing a blue t-shirt on that day.

[8] Ms Prinsloo, one of the two customers who Ms Chiloane saw lying on the floor. On the day in question she went into the store, that is, Coronation store, to buy something. As she entered someone, a man, stopped her and said to her 'this is a hold up'. The man pushed her with the knuckles of his hand towards the back of the shop and she was shown a black and silver revolver. She was ordered to lie on the floor and was robbed of her purse which contained her cell phone, bank cards and other personal documents. She was able to quickly remove her identity document.

The cell phone was later returned to her by the police but the bank cards were never recovered. She could not identify her assailants and could only remember that one of them wore a blue t-shirt.

[9] Mr van den Berg, a police reservist, had stopped outside the store in his Ford Bantam motor vehicle, waiting for his worker who had gone into the store to buy something to drink. He saw the three suspects as they ran out of the shop and climbed into a white Ford Dash motor vehicle which was parked outside the shop. The owner of the store, Mr Murray Omala, came running out of the shop following the three men and reported to Mr van den Berg that the three men running to the white Ford Dash motor vehicle had robbed them. Mr van den Berg immediately followed the Ford Dash across the town of Benoni keeping it in sight all the time until the motor vehicle stopped. Several shots were fired at Mr van den Berg during the chase but missed him. These shots were according to Mr van den Berg fired by the suspect in the now famous blue t-shirt. Mr van den Berg shot back at the Ford Dash, when it was safe to do so, and managed to hit one of the tyres of the Ford Dash. Mr van den Berg was joined in the chase by Mr Bookhalane, a Metro Police Officer, who was at that time driving an unmarked motor vehicle along Snake Road in Benoni. Mr Bookhalane saw the two motor vehicles chasing each other and also gave chase. What attracted him to the motor vehicles was that the one in front was driving in a zigzag fashion between other motor vehicles and even skipped a red robot. The Ford Dash eventually stopped on a gravel road and its occupants alighted and fled into the long grass. The appellant was found sitting in the motor vehicle. It seems that he was hit by one of the bullets in the lower back. On the rear seat of the motor

vehicle there were a lot of coins, cigarettes and cell phones. The police came and arrested the appellant.

[10] It is the evidence of Mr van den Berg that when he saw the three men run out of the store to the waiting white Ford Dash motor vehicle, he wrote down the motor vehicle's plate numbers. He was able to identify the three suspects by the clothes they were wearing on that day. One of the suspects, who is the appellant before us, was dressed in a blue t-shirt with white stripes and a blue-denim; the other two suspects were dressed in khaki colours. The one with the blue t-shirt was carrying a light blue bag which was found in the Ford Dash when the appellant was apprehended.

[11] The appellant in his evidence insisted that he had nothing to do with the commission of the offences. He did not go into the store, he was outside waiting for his colleagues to come back and on their return they had a little bag and cigarettes. As the motor vehicle they were in, sped off, his colleagues kept looking behind them. The motor vehicle went through several red robots and at one point a gun went off from outside the motor vehicle which resulted in him being hit in the lower back. He confirmed that on that day he was wearing a blue t-shirt with white stripes as defined by respondent's witnesses.

GROUNDS OF APPEAL

[12] The appellant in his heads of argument raises the following grounds of appeal:

12.1 That the sentence imposed (20 years imprisonment) is inappropriate and induces a sense of shock.

12.2 That the trial court overemphasised the seriousness of the offence;

12.3 That the trial court erred in finding that there are no substantial and compelling circumstances justifying a departure from imposing the prescribed sentences;

12.4 That even though a firearm was used during the robbery no one was shot and/or injured, the items have been recovered and therefore twenty (20) years imprisonment is in the circumstances inappropriate and induces a sense of shock.

THE ISSUE

[13] The issue before us is whether the effective sentence of twenty (20) years imprisonment imposed by the trial court is inappropriate and induces a sense of shock.

THE LAW

[14] It has been held that in every appeal against sentence whether imposed by a magistrate or 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.[1] It is trite that the test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.[2]

AD SENTENCE

[15] Having found the appellant guilty, the trial court in sentencing him applied the provisions of the Act. In terms of the Act, the trial court was obliged to sentence the appellant, as a first offender, to imprisonment for a period of not less than fifteen (15) years in respect of the conviction of robbery with aggravating circumstances and to a period of five (5) years imprisonment in respect of the conviction of attempted murder, unless it found that substantial and compelling circumstances which justified the imposition of a lesser sentence exist. The trial court found such circumstances not to exist and correctly so, imposed prescribed sentences.

[16] The contention by the appellant is that the trial court erred in finding that there are no substantial and compelling circumstances justifying a departure from imposing the prescribed minimum sentences.

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[1] See S v Rabie 1975 (4) SA 855 (A).
[2] See R v Mapumolo and Others 1920 AD 56 at 57.

[17] In determining whether substantial and compelling circumstances which may justify the imposition of a lesser sentence exist, a court has to consider the well-known traditional triad of factors relevant to sentence – the crime, the criminal and the needs of society.[3]

[18] It is common cause that, in this instance, the trial court did consider the triad of factors traditionally considered when imposing sentence, in coming to the conclusion that there are no substantial and compelling circumstances in this instance.

[19] The trial court considered the gravity of the offences and the interest of society in that the workers and customers at the shop were robbed at gun point and, as such, traumatised in that they did not know whether they were going to be shot at or not. By shooting at Mr van den Berg as he did during the chase, Mr van den Berg could have been hit by a bullet and seriously injured and/or killed. The random manner in which the appellant shot at Mr van den Berg in total disregard of the members of the community – members of the community and perhaps children could have been hit by stray bullets.

[20] The trial court also considered the personal circumstances of the appellant in mitigation of sentence. The following circumstances can be gleaned from the record: the appellant was 31 years old at the time of sentencing; he has three children aged

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3 S v Malgas 2001 (1) SACR 469 (SCA) at 482C.

6, 4 and 2 years of age respectively; at the time of arrest he was a taxi driver earning R2 800 *per* month; he was maintaining the children, his mother and three (3) siblings; very importantly he was a first offender; even though it was of his own doing, he was injured during the shooting; it appears that a substantial portion of the goods stolen were recovered - the record does not state which items were not recovered, if any; none of the persons at the scene of the robbery were assaulted or sustained injuries, as is usually the case – only threats were used to induce them to submit when their property was taken; he spent almost one year in custody awaiting trial; Mr van den Berg who was chasing them was shot at during the chase but sustained no injuries; there is no evidence that any of the members of the public was hit by a stray bullet pursuant to the random shooting by the appellant; and there is no evidence on record that the appellant was incapable of being rehabilitated.

[21] The following factors in aggravation of sentence can be gleaned from the record: the nature and gravity of the offences; the prevalence of the offences; the robbery was premeditated and planned; the appellant shows no remorse; the appellant and his colleagues acted in total disregard of the law by robbing the store and its customers in broad day light and openly shooting Mr van den Berg throughout the streets of Benoni, thereby endangering the lives of innocent members of the community; and the appellant showed no respect of human life.

[22] It is my opinion that the trial court was correct to have found substantial and compelling circumstances not to exist in this instance. The personal circumstances of the appellant whether individually or cumulatively viewed, do not warrant any

scrutiny. The gravity of the offences and aggravating factors as well as the societal needs, are, in the circumstances, overwhelming.

[23] In argument before us the appellant's counsel submitted that the effective period of twenty (20) years imposed by the trial court is very long and thus induces a sense of shock and requires to be tempered with by the appeal court. The submission is that the two offences of robbery and attempted murder are closely linked as to time and proximity and should have been taken together for purposes of sentence or the two sentences should have been ordered to run concurrently. I agree.

[24] While, it is so that, individual sentences are not to be interfered with where there is no misdirection by the sentencing court, however, it is my view that, in the circumstances of this instance, twenty (20) years' imprisonment is too excessive. It induces a sense of shock and would not serve the interest of justice. It is my view that the trial court should have ordered the sentences to run concurrently. I would, as a result, propose that an order be made for the two sentences to run concurrently.

ORDER

[25] I would in the circumstances propose the following order be made:

1. The convictions are confirmed.

2. The appeal against sentence is upheld.

3. The sentences imposed by the trial court are set aside and substituted with the following:

"1. Count 1: the accused is sentenced to fifteen (15) years imprisonment.

2. Count 2: the accused is sentenced to five (5) years imprisonment.

3. The two sentences are to run concurrently.

4. The effective period should be fifteen (15) years imprisonment.

5. In terms of section 103 (1) of the Firearms Act 60 of 2000, no determination is made, and the accused will remain unfit to possess a firearm"

4. The sentence is, in terms of section 282 of the Criminal Procedure Act 51 of 1977 ante dated to 13 February 2014.

E.M.KUBUSHI

Judge of the High Court

I concur and it is so ordered

P.M. MABUSE

Judge of the High Court

Appearances:

On behalf of the appellant:	Adv. Matlapeng Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv. M. J. Makgwatha Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001