REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:A270/2015

25/1/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

25/1/16

In the matter between:

JAMES KLAAS SKHOSANA	**1ST APPLELANT**
COLIN MASILELA NGWENYA	**2ND APPELANT**
SAKI DAVID MTSWENI	**3RD APPELANT**
JAMES KLAAS SKHOSANA	**4TH APPELANT**

AND

THE STATE	**RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The appeal before us is on sentence only. There are four appellants involved and they are each, respectively, appealing the sentences imposed against them. The appellants were convicted in the High Court of South Africa, Gauteng Division Pretoria, on various counts of murder, robbery with aggravating circumstances, illegal possession of firearms and ammunition and attempted murder.

[2] The factual matrix is that the four appellants accosted the deceased and his co-workers in a shop owned by the deceased with the intention to rob them of money and cellular phones. The perpetrators were armed with firearms. During the fracas that ensued in the shop the deceased was shot and killed by appellant 1. The appellants made off with a firearm, cellular phones and cash in the amount of R12 000. When appellants 1 and 2 were apprehended, they were each illegally in possession of firearms and ammunition. Appellant 1 shot and wounded another person in an unrelated incident.

[3] Appellant 1 was convicted of murder, robbery with aggravating circumstances, attempted murder, two counts of illegal possession of firearms, and two counts of illegal possession of ammunition. He was as a result of the convictions sentenced to life imprisonment for the murder and determinative sentences of fifteen years imprisonment for the robbery with aggravating circumstances; ten years imprisonment for attempted murder; fifteen years imprisonment for the two counts of illegal possession of firearms which were taken together for purposes of sentence; and five years for the two counts of the illegal possession of ammunition which were also taken together for purposes of sentence. As is trite the determinative sentences were ordered to run concurrently with the sentence of life imprisonment imposed for murder.

[4] Appellant 2 was convicted of murder, robbery with aggravating circumstances, two counts of illegal possession of a firearm, and two counts of illegal possession of ammunition. He was sentenced to life imprisonment in respect of the murder and to determinative sentences in respect of the other convictions, namely, fifteen years for

robbery with aggravating circumstances, fifteen years for the two counts of the illegal possession of firearms which were taken together for purposes of sentence, and, five years for the two counts of illegal possession of ammunition also taken together for purposes of sentence. All the determinative sentences were ordered to run concurrently with the sentence of life imprisonment imposed for murder.

[5] Appellant 3 was convicted of murder, robbery with aggravating circumstances, the illegal possession of a firearm and the illegal possession of ammunition. He was sentenced as follows: eighteen years imprisonment for murder; twelve years for robbery with aggravating circumstances; the convictions for the illegal possession of a firearm and the illegal possession of ammunition were taken together for purposes of sentence and he was as a result sentenced to ten years imprisonment. The sentences for robbery with aggravating circumstances, the illegal possession of a firearm and ammunition were ordered to run concurrently with the sentence of eighteen years imprisonment imposed for murder.

[6] Appellant 4, like appellant3, was convicted of murder, robbery with aggravating circumstances and the unlawful possession of a firearm and ammunition. The sentences meted out against him are as follows: eighteen years imprisonment in respect of the murder; twelve years imprisonment for the robbery with aggravating circumstances; and, ten years imprisonment for the unlawful possession of a firearm and the unlawful possession of ammunition, which were taken together for purpose of sentence. The sentences for robbery with aggravating circumstances, the unlawful possession of a firearm and ammunition were ordered to run concurrently with the sentence of eighteen years imprisonment imposed for murder.

[7] The crux of the appellants' appeal against the sentences meted out against them is that when considering their circumstances cumulatively the sentences imposed are shocking and inappropriate.

[8] In respect of appellants 1 and 2, the submission is that the trial court should have found substantial and compelling circumstances to exist justifying deviation from imposing the prescribed minimum sentences. The argument before us was that firstly, the trial court failed to appreciate that the two appellants spent about three years in custody awaiting trial. Counsel for the two appellants contends that from the record it does not appear as if the trial court was aware of the length of time the two appellants spent in jail awaiting trial as same was never conveyed to the trial court. Secondly, in respect of appellant 2, the trial court failed to take his relative youthfulness into account and instead overemphasised his previous conviction of robbery which was not a material factor if compared with appellant 1's previous conviction of robbery.

[9] It is not in dispute that when passing sentence the trial court took into consideration the fact that, appellants 1 and 2 spent 'some time' in custody awaiting trial. What is at issue is that the trial court was not aware of the length of time they spent. This is so because the appellants' counsel, when addressing the trial court in mitigation of sentence did not state that period. The trial court was in that way not informed about the period the appellants spent in custody awaiting trial and could not have been otherwise aware of that period.

[10] However, it has been held that the time spent in custody awaiting trial is not in itself a substantial and compelling circumstance which would warrant deviation from the prescribed minimum sentence. It is only but a factor which should go into the basket with other factors for consideration by the sentencing court. This principle was enunciated in *Radebe and Another v S* (726/12) [2013] ZASCA 31 (27 March 2013) para 14 where the court in that case stated the following:

> "A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention

> and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the 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."

[11] This is the only factor that was argued in favour of appellant 1 and is in fact the only one that counts in his favour. Even if the trial court had been aware of the custodial period it would not, in my view, have made any difference in the sentence imposed whether considered individually or cumulatively with appellant 1's other personal circumstances. Instead, the trial court considered the appellant's previous conviction of robbery and lack of remorse to have aggravated sentence and as such, correctly so, could not find any substantial and compelling circumstances to be present.

[12] It has become trite that specified sentences are not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.[1]

[13] Even in this instance, appellant 1's personal circumstances cannot withstand scrutiny. He was 28 years old at the time of sentencing and was 25 years old when the offences were committed. His education goes as far as Grade 12 which he completed in Kwaggafontein. He was at the time of arrest unemployed, though he sometimes did piece jobs. He was unmarried but had two children, ages 8 and 6, who stayed with their mother who was also not employed but did a little bit of hairdressing on the side. His mother was 65 years old and a pensioner. The appellant was in 2003 convicted of robbery and sentenced to R3 000 or six months imprisonment which was wholly suspended for five years on condition that he is not convicted of robbery during the period of suspension. The present offences were

[1] See S v Malgas 2001 (1) SACR 469 (SCA) 469 (SCA) ay 476 (e) to 476 (e) to 477 (b).

committed a few months before the expiry of his suspension. To my mind, appellant 1' personal circumstances are overshadowed by his moral blameworthiness in the commission of these offences. He is the one who appeared to be the leader of the group. He shot and killed the deceased at point blank range, as the trial court found. His sentence is aggravated by the previous conviction. The trial court correctly made a finding that the sentence imposed for the previous conviction was not effective in that from a simple robbery appellant 1 has now graduated to a more serious offence of robbery in the form of robbery with aggravating circumstances, where a firearm was used and another firearm found in his possession. And to add to that he shot and killed a person. I am as a result constrained to can find that there are substantial factors which would have compelled the trial court to deviate from the prescribed minimum sentences imposed in respect of him. The trial court did not misdirect itself in this regard.

[14] In respect of appellant 2, besides the custodial period spent awaiting trial, the argument is that the trial court should have considered his youthfulness at the time of the commission of the offences – he was 21 years old. Similarly as in the custodial period, youthfulness in itself is not a substantial and compelling factor which would warrant deviation from the imposition of the prescribed minimum sentence. Counsel for the respondent argued, correctly so, that there was no evidence before the trial court that indicates the immaturity of the appellant or that he was influenced by the others and the trial court did not make such a finding as well. I am, however, inclined to think that if appellant 2's circumstances are taken cumulatively, the trial court should have found substantial and compelling circumstances to exist and should have deviated from imposing the prescribed minimum sentence in his case. And in failing to do so the trial court erred in that it did not exercise its discretion judicially.

[15] Appellant 2 was, as already stated, 21 years old at the time of the commission of the offence and was 24 years old when he was sentenced. He went up to Grade 11 which he completed in 2005 at Kwaggafontein. He could not go to school because of financial problems. He tried his hand at security studies. At the time of

the commission of the offences he was upgrading his education at a college in Middelburg. He also did piece jobs. The appellant's father passed away when he was still young. His mother was unemployed and as such he assisted her to take care of his nieces, aged 11, 21 and 18 – one of them is still at school. In 2005 appellant 2 was convicted of robbery and sentenced to six months imprisonment. It is my view that the trial court erred in not finding substantial and compelling circumstances in respect of appellant 2. For, even though appellant 2 was in possession of a firearm during the commission of the offences, which is a factor in aggravation of sentence, the fact remains that he did not pull the trigger that killed the deceased. His oblique intent is a factor which should be considered as having minimised his moral blameworthiness. I do agree with the trial court that individually taken, these factors are not substantial and compelling, but, when they are considered cumulatively they are substantial and compelling and warrant deviation from the prescribed minimum sentence. This court is therefore at large to temper with the sentences imposed by the trial court against appellant 2.

[16] No argument was raised in respect of the determinative sentences imposed on appellant 2, and I will have to assume that the appellant's counsel was not concerned about the other sentences imposed except that of life imprisonment. Counsel as such, when asked, suggested that a period of 20 years imprisonment be imposed in place of the life imprisonment should this court find substantial and compelling circumstances to exist. I am of the view that, in the circumstances of appellant 2, a sentence as suggested by his counsel is just and appropriate and all the other sentences should run concurrently with this sentence. The new sentence should be ante dated to 26 September 2011 being the date on which the initial sentence was imposed.

[17] When arguing before us, counsel for appellant 3 and 4 made no submissions pertaining to appellants 3 and 4. Counsel contended that he has been instructed to appeal the sentences on the basis of the grounds raised in the heads of argument and did not have anything more to add.

[18] It appears from the evidence that lack of previous convictions on the part of appellants 3 and 4 caused the trial court to deviate from the prescribed minimum sentence. It can also be safely added that, even though they were each in possession of firearms during the commission of the offences, they, however, did not discharge their firearms and were as a result found guilty of murder on the strength of the principles of common purpose. Their oblique intent should be taken as a weighty mitigating factor.

[19] But, I do not think that their sentences should be tempered with. The trial court, in imposing sentence against the two appellants, considered all the factors which were in their favour, and correctly so, found substantial and compelling circumstances to exist and thus deviated from the prescribed minimum sentence. The sentences are, in their circumstances, just and appropriate and not shocking.

[20] In the premises, I make the following order:

1. The appeal against the sentences imposed against appellant 1 is dismissed.

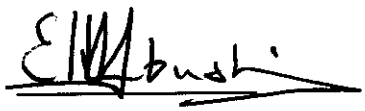
2. The appeal against the sentences imposed against appellant 2 succeeds to the extent that the sentence of life imprisonment is replaced with a sentence of 20 years imprisonment and that all the sentences are to run concurrently with the sentence of 20 years imprisonment.

3. The sentence of life imprisonment against appellant 2 is set aside and substituted with the following:

   "(a) Accused 2 is sentenced to 20 years imprisonment.
   (b) The sentence is ante dated in terms of section 282 of Act 51 of 1977 to 26 September 2011."

4. The appeal against the sentences imposed against appellant 3 is dismissed.

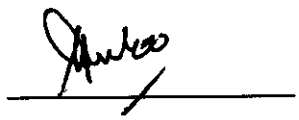
5. The appeal against the sentences imposed against appellant 4 is dismissed.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I concur and it is so ordered



W.R.C PRINSLOO

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellants: **Adv. A.L. ALBERTS**

Instructed by:

PRETORIA JUSTICE CENTRE

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On behalf of the respondent: **Adv. B.E MAOKE**

Instructed by:

DIRECTOR OF PUBLIC PROSECUTIONS

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28 Church Square

PRETORIA 0001

MULLER, AJ

[20] This is a minority judgment. I will be brief in stating the reasons for my dissent because it will not have any effect on the outcome of the appeal. I am in agreement with the majority that the appeal of the appellant 1 3 and 4 in respect of the sentences imposed on the charges of murder and robbery with aggravating circumstances should fail and also that the appeal of appellant 1 in respect the sentence for attempted murder should fail. I am also in agreement that the appeal in respect of appellant 2 with regard to the sentence of life imprisonment should succeed to the extent suggested by my learned sister.

[21] I part ways with regard to the appropriateness of the sentences imposed on all the appellants in respect of the counts of unlawful possession of firearms and the unlawful possession of ammunition.

[22] I am ever mindful that sentencing rests pre-eminently in the discretion of the trial court.[2] I am equally mindful that in the absence of a material misdirection by the trial court, an appeal court cannot interfere with the wide discretion entrusted to the trial court only because the sentence is not one that the court itself would have imposed.[3] To do so would amount to usurping the discretion of the trial court[4] and it would erode the discretion of the trial court.[5] An appeal court may be justified in interfering with the sentence imposed by the trial court in the absence of a material misdirection, when the disparity between the sentence of the trial court and that which the appellate court would have imposed is so marked that it can properly be described as shockingly, startlingly or disturbingly inappropriate.[6]

[23] The learned trial Judge paid scant attention to the possession of the firearms and ammunition charges in her judgment on sentence, save to state that the appellants were convicted of murder and robbery with aggravating

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[2] *S v Barnard* 2004 (1) SACR 191 (SCA) at 194 c - d.
[3] *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.
[4] Ibid para 12.
[5] *S v Rabie* 1975 (4) SA 855 (A).
[6] *S v Malgas* (above) para 12.

circumstances whilst being in possession of semi-automatic firearms. The learned trial judge deals with those factors as follows:

> "The sentences imposed, which were imposed were not effective in that from simple robberies, they graduated to more serious robberies in the form of robbery with aggravating circumstances, where firearms were used and where firearms were found in their possession..... Taking all factors into consideration, they deserve in my view, sentence as prescribed for the offences."

[24] All the appellants were charged of being collectively in unlawful possession of firearms and ammunition on 14 June 2008 when the murder and robbery were committed. Appellant 1 (counts 6 and 7) and appellant 2 (counts 8 and 9) in addition to counts 4 and 5, were charged, of the unlawful possession of firearms and ammunition found in their possession on 1 July 2008 and 13 July 2008 respectively. They were each sentenced to 15 years imprisonment in respect of the unlawful possession of firearms charges taken together for purpose of sentence and 5 years imprisonment in respect of the possession of ammunition also taken together. Appellant 3 and 4 were sentenced to 10 years imprisonment on counts 4 and 5 taken together for sentence.

[25] The use of a firearm to kill the deceased to overcome resistance during the robbery was, no doubt, taken into account in the sentences passed on the appellants in respect of the murder and robbery with aggravating circumstances.[7] Those facts, in my respectful view, may not be taken into account again when sentence is considered in respect of the unlawful possession of firearms and ammunition charges. The aggravating facts, namely, the use of firearms, had already been taken into account in respect of the sentences imposed for murder and robbery with aggravating circumstances.[8] It is in my respectful view a misdirection to have done so.

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[7] "'aggravating circumstances', in relation to 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;"

[8] *S v Bafela and Another* 1985 (1) SA 236 (AD) at 247 D-F.

[26] It is also clear that the trial Judge was of the view that s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (the "Act") is applicable in respect of the unlawful possession of firearms and ammunition.[9] The Act came into operation on 13 November 1998. When the Act came into operation the repealed Arms and Ammunition Act 75 of 1969 was still in operation. The Firearms Control Act, 60 of 2000 provides for a maximum sentence of 15 years imprisonment for the unlawful possession of a firearm (which includes a semi automatic firearm), whereas s 51(2) imposes a minimum sentence of 15 years imprisonment in the absence of substantial and compelling circumstances for the possession of a semi automatic firearm.[10]

[27] In *S v Baartman*[11] the court held correctly in my respectful view, that the Firearms Control Act impliedly repealed the minimum sentence regime in respect of semi automatic firearms.[12]

[28] In *S v Thembalethu*[13] the Supreme Court of Appeal stated the following with reference to s 51(2) of the Act and the provisions of the since repealed Firearms and Ammunition Act 75 of 1969:

> '[6] In my view properly construed the above provisions mean that a court convicting an accused person of any offence referred to therein is obliged to impose a sentence of 15 years' imprisonment unless such court finds that substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one are present.

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[9] "(2) Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
(a) Part II of Schedule 2, in the case of-
(i) first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years imprisonment."
Part II of Schedule 2 refers, inter alia, to:
"Any offence relating to-
(a) the dealing in or smuggling of ammunition, firearms, explosives or armament: or
(b) the possession of an automatic or semi-automatic firearm, explosive or armament."

[10] s 3 provides: "No person may possess a firearm unless he or she holds a licence permit or authorisation issued in terms of the Act for that firearm".

[11] 2011 (2) SACR 79 (WCC) at para 32 – 35.

[12] *S v Motaung* 2015 (1) SACR 310 (GJ) at para 16 – 19 (Spilg J did not specifically disapprove of the judgment in Baartman)

[13] 2009 (1) SACR 50 (SCA)

> The prescribed minimum sentence of 15 years' imprisonment applies to first offenders only. The phrase "Notwithstanding any other law" in the section (ie s 51(2) clearly indicates that the provisions supersede all other laws on sentence and apply to all offences listed in Part II of Schedule 2. That list includes an offence referred to as the possession of a "semi-automatic firearm". The section's wording is couched in unambiguous and peremptory terms (shall), and the offences to which it applies are stipulated".[14]

[29] The appellants as stated earlier were charged under the provisions of the Firearms Control Act.

[30] The sentences of 15 years and 10 years imprisonment respectively imposed by the learned trial judge are exceptional for the possession of semi automatic firearms[15]. The sentences are disproportionate to the crimes, the criminals and the interests of society. I am firmly of the view that the disparity between the sentences imposed in respect of their unlawful possession of the firearms and ammunition and the sentences which this court would have imposed is so markedly different that the sentences can rightly be described as startlingly inappropriate.

[31] In my view the appeal in respect of all the appellants should succeed in respect of the sentences imposed on counts 4, 5, 6, 7, 8 and 9.

Appellant 1:

The sentences imposed on counts 4, 5, 6 and 7 are set aside and replaced by the following:

Counts 4 and 6 are taken together for purpose of sentence. 5 years imprisonment.

Count 5 and 7 are taken together for purpose of sentence. 1 year imprisonment.

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[14] At 53 f – 54 j.

[15] *S v Moleme* 1994 (1) SACR 1 (A); *S v Zondi* 1995 (1) SACR 18 (A); *S v Mooleele* 2003 (2) SACR 255 (T); *S v Manana* 2007 (1) SACR 62 (T); *S v Khonye* 2002 (2) SACR 621 (T); *S v Meyer* 1992 (1) SACR 685 (E); *S v Ndwalame* 1995 (2) SACR 697 (A); *S v Madikane* 2011 (2) SACR (ECG)

Appellant 2:

The sentences imposed on counts 4, 5, 8 and 9 are set aside and replaced by the following:

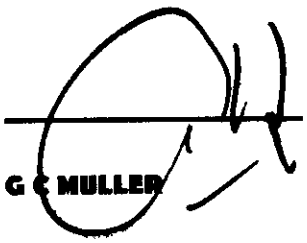
Counts 4 and 8 are taken together for purpose of sentence. 5 years imprisonment.

Count 5 and 9 are taken together for purpose of sentence. 1 years imprisonment.

Appellant 3 and 4:

The sentences imposed on counts 4 and 5 are set aside and replaced by the following:

Counts 4 and 5 are taken together for purpose of sentence: 3 years imprisonment.



G C MULLER

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellants:	Adv. A.L. ALBERTS Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street Pretoria
On behalf of the respondent:	Adv. B.E MAOKE Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001