

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

CASE NO: A685/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

DATE

SIGNATURE

17/10/2016

In the matter between:

ERNEST VILANKULU

Appellant

and

THE STATE

Respondent

JUDGMENT

Baqwa J

- [1] The appellant was convicted on 26 August 2011 in the Regional Court sitting at Secunda on numerous counts of attempted housebreaking with intent to commit robbery, three counts of possession of a firearm without a license, two counts of housebreaking with intent to rob and robbery with aggravating circumstances, four counts of attempted murder, theft of a motor vehicle, kidnapping and two counts of possession of ammunition without a license or permit.

- [2] He was sentenced on the same day as follows: on count 3 he was sentenced to seven years imprisonment; on count 5 he was sentenced to three years imprisonment; on count 6 he was sentenced to 15 years imprisonment in terms of section 51 (2) of Act 105 of 1997; on count 7 he was sentenced to seven years imprisonment; on count 8 he was sentenced to three years imprisonment; on count 9 he was sentenced to one year imprisonment; on count 10 to seven years imprisonment; on count 11 to eight years imprisonment; on count 12 he was sentenced to 15 years imprisonment in terms of the Minimum Sentences Act; counts 13, 14 and 15 were taken as one with 15 years imprisonment; on count 16 to three years imprisonment and finally on count 17 to one year imprisonment.
- [3] The court further ordered that the sentences on counts 3, 5, 7, 8, 9, 10 and 11 were to run concurrently with the sentence imposed on count 6. The sentences on counts 13, 14, 15, 16 and 17 were ordered to run concurrently with the sentence on count 12. The appellant was accordingly to serve an effective thirty years imprisonment. He was also declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.
- [4] After the trial in the court *a quo* the appellant had applied to appeal against sentence but that was dismissed.
- [5] Leave was only granted after the appellant petitioned the Judge President of this Court on 21 August 2015.
- [6] The personal circumstances of the appellant had been recorded as that he was married; that he had spent some time in custody awaiting trial and that he was a first offender.

- [7] As decided in numerous decisions of our courts, punishment is pre-eminently a matter for the discretion of the trial court and an appeal court should be careful not to erode such discretion. The test whether or not an appeal court should interfere with sentence is whether the sentence is vitiated by irregularity or misdirection or is shockingly inappropriate.
- [8] The appellant submits that the court **a quo** erred in over-emphasizing the seriousness of the offences which the appellant committed and the interests of society whilst the personal circumstances were under-emphasized.
- [9] This submission is made in the face of a litany of serious offences which were committed in quick succession.
- [10] The crimes were committed in a callous, merciless and brutal manner that served as aggravating factors in the consideration of sentence. These factors lead to the trial court concluding that *"On the totality of the evidence the court cannot find that there are any compelling and/or substantial circumstances which warrant the imposition of a lesser sentence."*
- [11] The submission that the court **a quo** under-emphasized the personal circumstances of the appellant simply does not accord with what is recorded in the judgment which is being appealed against. This is what was said on record:
- "Your personal circumstances were taken into account by the court and the only factors that the court can give recognition to is the time spent in custody awaiting trial and the fact that you are still relatively young and that the State had proved no previous convictions against you."*

[12] In **S v Vilakazi** 2009 (1) SACR 552 (SCA) par 58 the following was said:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again."

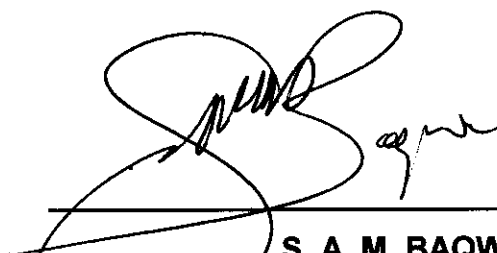
[13] **In casu** it would appear to me that the length of the sentence is a direct result of a number of factors: The Minimum Sentences Act, the multiplicity of the offences, the seriousness of the crimes committed, the aggravating factors present in the commission of these crimes to mention but a few. The determination of sentence is not a simple mathematical calculation but a process in which a court has to weigh all the relevant factors.

[14] It is evident from the record that the court **a quo** did not misdirect itself and that it carefully weighed all the relevant factors. The fact is there were more aggravating circumstances than mitigating factors. The personal circumstances are neither substantial nor compelling.

[15] Despite the presence of the aggravation mentioned above, the court **a quo** took into account the time spent in custody by the appellant awaiting trial and the cumulative effect of the sentences and ordered the sentences to run concurrently. In other words, the court still bent over backwards, properly so I may say, not to overlook the element of mercy which should always feature in appropriate circumstances when handing down sentence.

[16] In the circumstances I come to the conclusion that the appeal against sentence is totally devoid of merit and I propose that the following order be made:

The appeal against sentence is dismissed.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



L. BAM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 17 October 2016

Delivered on:

For the Appellant: Advocate

Instructed by:

For the Defendants: Advocate

Instructed by: The State Attorney