IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no.: A129/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

23 March 2022 [redacted]

DATE SIGNATURE

NKOSANA MBELE **FIRST APPELLANT**

XOLILE MBATA **SECOND APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

BOKAKO AJ (Kooverjie J concurring)

1. Both appellants appeal their sentences. The appellants applied for a leave to appeal against the sentence and the application was granted on 23 July 2019 by the presiding magistrate in the court *a quo*.

2. The two appellants were convicted and sentenced in the Regional Court (Brakpan) for robbery with aggravating circumstances read with the provisions of section 51(2) of Act 105 of 1997 and kidnapping.

3. On 28 June 2019 both appellants were sentenced as follows: count 1: Fifteen (15) years' imprisonment on the charge of robbery with aggravating circumstances and Count 2: Five (5) years imprisonment on the charge of kidnapping. The trial court ordered that the sentence in respect of count 2 to be served concurrently with the sentence on count 1.

4. On 4 April 2018, the appellants accosted the complainant, and robbed him of his money amounting to R 8 250.00 and other items, including his wristwatch and belt. During this robbery the complainant was tied up and left in the veld overnight. He was assaulted, thrown with bricks, stabbed with a knife which was found embedded on his head, whipped with a sjambok, tied up with the wire and a cloth was inserted into his mouth in order to prevent him from screaming.

5. The medical practitioner who attended the complainant testified that when examining the complainant, he noted that there was blood in his urine. This was due to the complainant sustaining internal injuries. Furthermore the complainant was left traumatized after the incident. Consequently he lost his employment as he was not able to cope with his experience.

6. The appellants, conceded that they were convicted of serious offences and that long term imprisonment sentence was unavoidable. However, on appeal, the appellants argued that the court *a quo* did not consider their personal

circumstances and the time already spent in custody whilst awaiting trial. The element of mercy was not taken into consideration. The court *a quo* misdirected itself in this regard.

7. The State opposed both appeals. It was argued that all relevant factors were taken into consideration and the sentences imposed were appropriate and proportionate.

8. The sentence imposed could not be considered to be shockingly inappropriate if one has regard to the following aggravating factors, namely that both appellants carried out this attack in a heinous and cruel manner. Moreover, no substantial and compelling circumstances were present to justify lesser sentences.

9. The respondent cautioned this court not to send a wrong message to the lower courts by interfering with the sentences imposed for serious offences. Cognisance should be taken of the fact that the appellants were convicted of serious crimes and that the community had to be protected.

10. The approach of our courts when considering sentencing was aptly stated in **S v Rabie 1975 (4) SA 855 (A) at 857 D-F** that:

> *"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."

11. Consequently, it is only if there is a finding that the sentence is vitiated by a misdirection or is disturbingly inappropriate, can an appeal court interfere and consider sentence afresh.

12. The powers of the court of appeal to interfere with the sentence imposed are thus limited. It can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all. (**S v Pieter's 1987(3) SA 717 (A)**).

13. Although cognisance is taken of the fact that the charges levelled against the appellants warranted the prescribed minimum sentences, the inquiry is whether the sentences were not too harsh. This robbery count falls within the ambit of section 51(2) read with part II of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997 (the Act). The complainant was severely assaulted and robbed. Such an offence warrants a prescribed minimum sentence of 15 years' imprisonment, unless substantial and compelling circumstances were present justifying a deviation therefrom.

14. In argument, it was contended by counsel for the appellants that the effective sentences imposed on each of the appellants were unduly harsh, shockingly

inappropriate and disproportionate if one considers the mitigating factors and their personal circumstances.

15. It was further contended that, it was important for the *court a quo* during sentencing to have taken into consideration the key objectives of punishment, namely retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. None of the elements must be over or under emphasized when punishment is meted out. Punishment must fit the crime, the criminal and the circumstances of the case.

16. The appellants argued that the court *a quo* erred in over emphasizing the interest of the community when imposing the sentences that were disturbingly inappropriate. The *court a quo* ordered some sentences to run concurrently but not sufficiently so.

17. The purpose of sentencing is usually measured to be threefold, namely to punish the wrongdoer, to deter or discourage both the wrongdoer and society generally from offending and lastly to rehabilitate the offender so that he turns away from crime. In order to accomplish these purposes in determining the appropriate sentence the court takes into account the following factors, the nature and the details of the crime which have been committed, the personal circumstances of the accused and the needs of and the response of society generally.

18. In the present case the offences of which the two appellant's have been convicted each have a specified sentence. They are convicted of robbery with aggravating circumstances read with the provisions of section 51(2) of the Act and kidnapping.

These are crimes which the Act identified as crimes attracting a prescribed minimum sentences. Robbery, where there are aggravating circumstances attracts a prescribed minimum sentence of not less than 15 years. In the present case the robbery was considered to be one committed with aggravating circumstances. It is noted harsh instruments were used particularly wires, a sjambok and a knife.

19. The court *a quo* took into consideration the fact that the appellants had been held in custody for a period of fourteen months prior to sentencing, but concluded that there were no substantial and compelling circumstances justifying a sentence less than the minimum of 15 years.

20. Both counsel addressed the court as to how a lengthy period in custody prior to sentencing where the minimum sentencing provisions of section 51 of the Criminal Law Amendment Act should be considered. The period in custody prior to sentencing is referred to as '*pre-sentence detention*' (see *S v Radebe and another* 2013 (2) SACR 165 (SCA) at [13]).

21. In the heads of argument subsequently filed and submissions made in court counsel referred to certain authorities, including ***S v Vilakazi 2009(1) SACR 552(SCA)*** and ***S v Kruger 2012(1) SACR 369 (SCA)***, to support the argument that the fourteen-month period in custody should be deducted from the 15 years imposed and antedated to the date when the magistrate handed down the sentence. It was submitted that a lengthy period in custody constitutes a substantial mitigating factor warranting a departure from the prescribed minimum sentence.

22. Counsel for the appellant further argued that the period of incarceration prior to sentencing is an important factor to consider when adjudicating whether the cumulative factors constitutes substantial and compelling circumstances.

23. The State also relied on the approach set out in the ***Vilakazi*** and ***Kruger*** matters. It was submitted that these cases supported the proposition that it was only fair to consider the period in custody particularly if it was lengthy. However it was argued that the period of fourteen months is not that long.

24. The proper approach would be to have regard to the main findings of the trial court and with reference to the triad of factors relevant to sentencing and to weigh whether substantial and compelling circumstances were present[1].

25. If the period in custody is properly a factor to be considered under section 51(3)(a) of the Act, then the question that would arise is whether the magistrate was obliged to consider the effect it would have on the actual period that the appellant may be subjected to loss of freedom as a consequence of his crime.

26. In the present case the magistrate concluded that the lengthy period in custody prior to sentencing was not a substantial and compelling matter either when the mitigating and aggravating factors were viewed in their totality or in isolation.

27. In ***S v Radebe and another 2013 (2) SACR 165 (SCA)*** it was held pre-sentence period in detention is only one factor 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"*.

[1] See *S v Zinn* 1969(2) SA 537 (A) at 540G-H and *S v Rabie* 1975(4) SA 855(A) at 862G-H. The effect on the victim or victim's family may be conveniently considered within the context of the triad of factors either when dealing with the nature of the crime or the interests of society.

28. Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances. It must be weighed as factor and as part of the consideration of other mitigating and aggravating factors in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed.

29. Our courts are precluded from considering the period of pre-sentence detention independently of all the other mitigating and aggravating circumstances. It becomes a part of the totality of factors that must be weighed in order to determine whether substantial and compelling circumstances exist to reduce the sentence from the prescribed minimum. In *casu* the trial court did not find any substantial and compelling reasons to deviate from the prescribed minimum sentences.

30. In applying the said approach we do not find any substantial and compelling reasons to deviate from the sentence imposed. The aggravating factors outweigh the mitigating circumstances. As submitted by counsel for the Respondent "had it not been for the appearance of the person the complainant referred to as "white boy by the name of Chris" the complainant could have suffered more harm than what he has already suffered". The complainant was robbed of his belongings, he was assaulted, hit with bricks and stabbed with a knife which was found embedded in his head, whipped with a sjambok, tied up with wire and gagged with a cloth in his mouth.

31. In ***S v Madikane***[2] the court aptly stated that '*the value of human dignity lies at the heart of the requirement that a sentence must be proportionate to the offence'.* It has been said that: "*there is no principle which could justify, for the sake of deterrence, a sentence clearly in excess of what all the relevant circumstances require in respect of the individual offender."* (See: S v Collett[3] and S v Maseko[4]).

32. We are mindful of the constitutional importance of the right to a fair trial[5]. The court held that, '*the right to a fair trial is, amongst other things, "a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed, from being considered by the sentencing court."'*

33. Having heard argument and considering the record we find no misdirection on the part of the court *a quo*. The offence of robbery with aggravating circumstances was a serious offence.

34. The facts of the present matter justified the sentence imposed for the offence of robbery with aggravating circumstances. The circumstances in which the complainant was robbed warranted the imposition of the minimum sentence of 15 years.

35. The court *a quo* had indeed considered the personal circumstances of the appellants. In respect of the first appellant he was 24 years of age, unmarried,

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[2] 2011 (2) SACR 11 (ECG)
[3] 1990 (1) SACR 465 (A)
[4] 1982 (1) SA 99 (A)
[5] 2000 (4) SA 1078 CC; S v Dzukuda and Others; S v Tsilo 2000 (4) SA 1078 CC

with a 3-year-old child, uneducated and only passed grade 6 at school, he was earning R500.00 per month as a waste picker, and had no previous convictions. Furthermore, the appellant spent 14 months in custody, awaiting trial.

36. The second appellant was 32 years of age, unmarried, with no dependents, he left school after he completed grade 10, was employed and earned R 750.00 per month. He had previous convictions for possession of drugs; for which he was fined R100.00 or 10 days' imprisonment in 2013. Thereafter he was sentenced to 18 months' imprisonment, which was wholly suspended, for a housebreaking.

37. Upon taking all the facts into account, the interests of society, the personal circumstances of the appellants, the seriousness of the offences and the cumulative effect of the sentences imposed by the trial court, we find that the individual sentences imposed by the court *a quo* were appropriate and should be served concurrently as directed by the court *a quo*. The appellants' personal circumstances do not contribute substantial or compelling circumstances that warranted a deviation from the minimum sentence.

38. As alluded to above, in respect of the issue of ante-dating a sentence to first set out the main findings of the trial court by have regard to the triad of factors relevant to sentencing[6] and to weigh whether substantial and compelling circumstances were present. In the absence of such factors, the appellants have been correctly sentenced to 15 years' imprisonment.

39. In the result, the appeal is dismissed.

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[6] See S v Zinn 1969(2) SA 537 (A) at 540G-H and S v Rabie 1975(4) SA 855(A) at 862G-H. The effect on the victim or victim's family may be conveniently considered within the context of the triad of factors either when dealing with the nature of the crime or the interests of society

[redacted]

H KOOVERJIE

Judge of the High Court

Gauteng Division, Pretoria

[redacted]

TP BOKAKO

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances

Counsel for the appellants:	*Mr HL Alberts*
Instructed by:	*The Legal-Aid Board*
Counsel for the respondent:	*Adv. S Lalane*
Instructed by:	*Director of Public Prosecutions*
Date heard:	*9 February 2022*
Date of Judgment:	*23 March 2022*