IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Lower Court Case No: SH3/151/2017

Appeal Case No. A145/2020

In the matter between:

NOLAN VAN SCHALKWYK **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED: 6 MAY 2021

LE ROUX AJ

[1] The appellant in this case, a man, at the time 31 years of age, was convicted by the regional magistrate, of attempted robbery with aggravating circumstances and sentenced to ten (10) years imprisonment. His application for leave to appeal to the Bellville regional court failed. He then petitioned to this court for leave to appeal against

both his conviction and sentence and was granted leave to appeal against sentence only.

[2] Accordingly, he now appeals against his sentence to this court. The question that thus remains to be decided is whether the trial court exercised its discretion judicially and properly and whether the sentence should accordingly be decreased.

[3] In **S v Rabie**[1] the principles applicable in an appeal against sentence is set out by Holmes JA as follows:

"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."

[4] In **S v Anderson**[2] in dealing with the applicable legal principles to guide the court when asked to alter a sentence imposed by the trial court, Rumpff JA stated it as *follows*

[1] 1975(4) SA 855 (AD) at 857 E

"These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice requires it. Some of the cases in which these principles are mentioned are referred to in the judgment of Selke, J., in Rex v Zulu and Others, 1951(1) SA 489 (N) at p.490.

A Court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised, see Rex v Sandig, 1937 A.D. 296 and Rex v Ramanka, 1949(1) S.A. 417 (A.D.). The decisions clearly indicate that a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great *that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with."*

[2] 1964(3) SA 494 (AD) at 495 D-H

[5] In the present case, the evidence disclosed that the appellant and another man on 31 March 2017 attempted to rob the complainant, who was walking towards the Pentech Station in the Belhar area at around 06h15 in the morning while on his way to work. It was still completely dark. The appellant approached the complainant with a smallish, greyish, imitation toy gun in his hand. The toy gun was pointed to the complainant's body and appellant demanded that complainant give the bag that he had on his back to the person behind him, who was pulling at the bag. While the appellant was pointing the gun at the complainant, the police officer, Constable Grant David Abrahams, approaching from his front, behind the appellant, stopped the attempted crime and arrested appellant.

[6] The appellant's accomplice who was behind the claimant pulling at the bag and demanding that complainant hand it over, also saw the policeman coming and ran away. It was, however, too late for the appellant to run away and he was apprehended by Constable Abrahams.

[7] Constable Abrahams, who acted upon information gained of robberies in that area stood in the dark in the yard when he saw the three men approaching. When he heard a scream, he reacted and the appellant was subsequently arrested. As stated the second assailant, however, ran away.

[8] The appellant at the trial stated that his intentions and actions on that particular morning was to rob people in the area and that he and the second assailant on that particular morning had already robbed someone. The appellant, however, denied that he attempted to rob the complainant. The complainant and Constable Abrahams both testified in the trial court. They did not know each other prior to the date of the incident.

The appellant had according to the evidence of both the complainant and Constable Abrahams an imitation firearm on him when he was arrested by Constable Abrahams.

[9] When the appellant's previous convictions were placed before the court, he admitted that he was found guilty of culpable homicide in 2006 and sentenced to a suspended sentence and correctional supervision of 3 years. In 2011 he was found guilty of assault and given a suspended sentence and in 2011 also found guilty of theft on two counts and given a fine of R2 000.00 or five (5) months imprisonment. In 2012, he was found guilty of robbery and given a two-year imprisonment and declared unfit to possess a firearm. It is to be noted that, save for the conviction of assault, the appellant was imprisoned on each occasion due to breach of correctional supervision or his parole conditions.

[10] A conviction of being found guilty of the possession of drugs in 2016 and for which he was given a fine was however denied by the appellant. The state at that point then forfeited the right to prove the last-mentioned conviction and the presiding magistrate then made it clear that he would disregard it.

[11] Prior to the court having the benefit of the submissions of counsel for the appellant and counsel for the State, both counsel was requested by the court to consider the cases of **S v Chumkumbera**[3] and **S v Swarts**[4]**,** an unreported judgment by Plasket J. In addition, they were asked to also consider the role and effect of section 120(6) of the Firearms Control Act 60 of 2000 on sentencing in *casu*. In terms of section 120(6) read with schedule 4, the Firearms Control Act 60 of 2000 prescribes a maximum sentence of 10 years' imprisonment for the pointing of an imitation firearm.

[3] 2015 JDR 0037 (GJ)

[4] Review case No. 20170042 in the Eastern Cape Division, Grahamstown, delivered on 18 August 2014 by Plasket J with Bloem J concurring.

Both *Chumkumbera and Swarts supra* deals with the situation where a toy gun was used in the committing of the crime and the appropriate sentence in respect thereof considered on appeal. Although in the present case, the appellant was not charged in terms of the Firearms Control Act 60 of 2000, the role that it plays in sentencing in the present matter had to be considered. The Court had the benefit of the submissions in regard to the aforesaid in addition to the other submissions from both counsel for the appellant and counsel for the State.

[12] *Section 120(6) of Act 60 of 2000 reads as follows:*

> *"(6) It is an offence to point-*
>
> *(a) Any firearm, an antique firearm or an air gun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or*
> (b) *Anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an air gun at any other person, without good reason to do so"*

[13] In **S v Matloung**[5] the Supreme Court of Appeal, in relation to the question namely, did the Firearms Control Act 60 of 2000 implicitly amend the Criminal Law Amendment Act 105 of 1977, found as follows:

> *"[23] In relation to these two statutes there is no indication that the Firearms Control Act intended to repeal the earlier Act. Accordingly, the court a quo erred in its finding that the Firearms Control Act repealed s 51 of the Criminal Law Amendment Act, as is also the case with the conclusion of the full bench of the Western Cape Division, Cape Town, in* ***S v Baartman*** *2011(2) SACR 79 (WCC). Baartman was correctly overruled in the unreported decision of the full court of that division in S v Swart 2016(2) SACR 268 (WCC)."*

[5] 2016(2) SACR 243 (SCA) at 251 J -252a

The two acts accordingly co-exist.

[14] It is common cause that the Criminal Law Amendment Act 105 of 1997 does not prescribe a minimum sentence for the attempt of the crime the appellant was convicted of. Both counsel for the appellant and counsel for the State shared the view that the fact that the Firearms Control Act 60 of 2000 provides a maximum sentence of 10 (ten) years imprisonment for the contravention of section 120(6) should be taken into account as a guideline in the imposing of an appropriate sentence despite the fact that the appellant was not charged under the provisions of section 120(6) of the Firearms Control Act 60 of 2000.

[15] From the record of the proceedings, the judgment and sentence in the court *a quo*, it is clear that the appellant and his accomplice, who ran away, planned the robbery which was only unsuccessful due to the intervention by Constable Abrahams.

[16] It was submitted that the regional magistrate misdirected himself by failing to attach sufficient weight to the substantial factors placed on record on behalf of the appellant who was 31 years of age at the time the sentence was imposed, an unmarried man, father of an eight-year-old child, who is living with his mother in George and that the family assist in supporting the child. Further, that the appellant progressed to grade 11 and successfully completed a one-year course in Business Management, was employed on a temporary basis as a cleaner, working one day per week and earned an income of R100 – R200 per day and he was kept in custody upon his conviction on attempted robbery.

[17] In addition to the fact that no minimum sentence applied to the conviction on a single count of attempted robbery, the victim impact report merely indicated that the complainant is after the attempted robbery more vigilant or aware of his surroundings when he is walking in the street, the complainant did not sustain any injuries, did not suffer financial loss and having regard to the various gradations of seriousness of the offence, the attempted robbery in the present matter fell short of the most serious type of attempted robbery for which a long term of direct imprisonment would be a just sentence.

[18] Section 1(1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA") defines aggravating circumstances in relation to robbery or attempted robbery, as follows:

> *"(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;"*

[19] In the matter of *S v Swarts* supra in reference to Section 1(1)(b) of the CPA, and *S v Anthony*[6] it was found that in order for aggravating circumstances as envisaged by sub-section (i) to be present, the firearm had to be a real firearm: a toy firearm does not suffice. That does not end the enquiry. A toy firearm (or a real firearm that does not work) can still be used as a means of threatening to inflict grievous bodily harm, for purposes of sub-section (iii) of the definition.

[6] 2002(2) SACR 453 (C) at 454j-455a

[20] The court *a quo* apart from considering the personal circumstances of the appellant, then turned to the aggravating factors and referred thereto that if it was not for the conduct of Constable Abrahams, the appellant would not have been caught and that the appellant testified that he and his accomplice, who ran away, had indeed committed a crime of robbery in the area that morning and were looking for other victims to rob. The court *a quo* then referred thereto that this clearly indicated that the attempted robbery was premeditated and that the appellant willfully and intentionally committed the crimes to prey on victims, that appellant was an offender who repeatedly and repetitively commits crimes. In addition, the court *a quo*, despite the fact he stated at the stage when appellant's previous convictions were dealt with, that it would be disregarded, took into account an alleged previous conviction of the possession of drugs.

[21] It is trite law that in sentencing, the punishment should fit the crime, as well as the offender, be fair to both society and the offender, and be blended with a measure of mercy.[7]

[22] In **S v Masda**[8] in referring to the case of **S v Mhlakaza** and Another[9] Saldulker AJA quoted as follows:

> "*The object of sentencing is not to satisfy public opinion but to serve the public interest…. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."*

[7] S v Rabie 1975(4) 855 (AD) at 862 G
[8] 2010(2) SACR 311 (SCA) at 315
[9] 1997(1) SACR 515 (SCA) at 315

[23] The court *a quo,* further found that although the crime was not completed and no valuables was secured from the complainant, it remained a very serious crime and prevalent in the area of jurisdiction of the court. The court *a quo* also mentioned that it was the appellant who pointed the toy gun at the complainant, who perceived it to be a real gun and that it was subsequently found in his possession.

[24] The facts in *Chukumbera* (referred to above) were similar to the present case. There the appellant was also 31 years old and the father of an 8-year-old child. Unlike the present matter, however, he only had one previous conviction (for theft) for which he had been sentenced to 3 years' imprisonment.

[25] In that matter, the appellant was one of two accused who after assaulting the complainants, attempted to rob them, with the appellant wielding a toy firearm which the complainants perceived to be real. The appellant and his accomplice subsequently fled but were apprehended nearby. The trial court had sentenced the appellant to 8 years on the count of attempted robbery with aggravating circumstances.

[26] On appeal it was held that the trial court overemphasized the seriousness of the offence, predominantly because it is "legally indefensible" to elevate a person who uses a toy firearm to carry out an attempted robbery to one who uses a real firearm. Although the desired result (the threat to inflict grievous bodily harm) is similar, the moral culpability is distinguishable, since the assailant with the real firearm foresees the possibility of potential fatal repercussions if he encounters resistance and discharges it. The sentence was reduced to 5 years' imprisonment.

[27] Counsel for appellant argued that the sentence in the circumstances of the case is strikingly inappropriate and that the trial court erred by imposing a sentence that

is out of proportion to the totality of the accepted circumstances in aggravation and mitigation. Counsel for appellant, however, correctly conceded that a sentence of less than 5 (five) years would not be appropriate.

[28] Counsel for the State was rightly constrained to concede that the effective sentence was excessive.

[29] It would in the circumstances, apart from all of the aforesaid also be appropriate that guidance be taken and regard be had to the fact that the maximum sentence prescribed in terms of the Firearms Control Act is 10 (ten) years and especially more so if regard is had to the fact that the Criminal Law Amendment Act 105 of 1997 does not prescribe a minimum sentence for the attempt of the crime the appellant was convicted of.

[30] In the circumstances, it is my view that the court *a quo* misdirected itself in that the sentence imposed on the appellant is disturbingly inappropriate, and there was furthermore a material misdirection in taking into account an unproven previous conviction.

[31] Accordingly, I propose the following order:

a. The appeal against the sentence imposed by the court below is upheld to the extent set out in paragraph b.
b. The order of the trial court is set aside and substituted with the following:

"*The appellant is hereby sentenced to a term of eight (8) years imprisonment*."

c. The sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977 to 28 November 2018.

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LE ROUX, AJ

ACTING JUDGE OF THE HIGH COURT

I agree, it is so ordered.

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CLOETE, J

JUDGE OF THE HIGH COURT