



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

NOT REPORTABLE

Case no: CA& R 6/2020

In the matter between:

SAKHUMZI MTHI

Appellant

and

THE STATE

Respondent

EX-TEMPORE JUDGMENT

Govindjee J

[1] The appellant was found guilty of the following offences:

- a) Robbery with aggravating circumstances, in that he assaulted a 72-year-old male person on 16 October 2012 and forcibly took various items from him, using a firearm in the process and seriously injuring the complainant.
- b) Contravention of the Firearms Control Act, 2000 ('the Act'), in that he was found to be in unlawful possession of a semi-automatic pistol.
- c) Contravention of the Act by being in unlawful possession of 36 rounds of live ammunition.

- d) Robbery with aggravating circumstances, in that he assaulted an 82-year-old male on 9 November 2012 and forcibly took various items from him by threatening him with a firearm.

[2] The court *a quo* was unable to find substantial and compelling circumstances to deviate from the prescribed minimum sentences for the various offences. The presiding magistrate appears to have considered the fact that both complainants were robbed at their homes to be an aggravating feature of these offences. Fifteen years' imprisonment was imposed for each of the robbery convictions, as well as for the unlawful possession of the firearm, the sentences to run concurrently. Five years' imprisonment was imposed for the unlawful possession of live ammunition. In total, the appellant was sentenced to direct imprisonment for a 20-year period. Following a successful application for condonation, leave to appeal against sentence was granted during 2019.

[3] It is trite that the imposition of sentence is pre-eminently a matter for the discretion of the trial court. This means that the trial court is free to impose whatever sentence it deems appropriate provided that it exercises its discretion judicially and properly. Accordingly, the trial court must impose a sentence on the correct facts and must take the correct legal position into account. The test in a criminal appeal is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. As the Court held in *S v Pillay*:¹

'As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence: it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.'

[4] It remains open for a Court of appeal to interfere with a sentence that is excessive or disturbingly inappropriate. The manner in which the Court evaluates this possibility is to consider all the relevant circumstances as to the nature of the

¹ *S v Pillay* [1977] 4 All SA 713 (A) at 717; 1977 (4) SA 531 (A) at 535F-G.

offence committed and the person of the accused, before determining what a proper sentence ought to be. 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.² If the cumulative effect of a sentence is too severe, that will also constitute a sentence that is disturbingly inappropriate.³

[5] The appellant had previously been found guilty of unlawful possession of a firearm and ammunition without a licence, and declared unfit to possess firearms during 2004. He was 46-years of age at the time of sentencing in this matter and had been working on a part-time basis earning minimal income. He had two minor children, who lived with their mothers, and offered them limited financial support. He had been in custody for almost two years at the time of his sentencing.

[6] The state argued that the prior convictions, location of the offences and age of the complainants served as aggravating features. In addition, one of the complainants had suffered physical injuries at the hands of the appellant, so that deviation from the prescribed minimum sentences was unwarranted.

[7] The appellant argued, in essence, that the sentence imposed was strikingly inappropriate and disproportionate to the mitigating factors present. I disagree. The appellant was convicted of various offences for which the legislature has imposed 15-year minimum periods of imprisonment. The court *a quo* cannot be criticised for having failed to identify any substantial and compelling circumstances. Indeed, none appear to be present and the legislature's intention in setting prescribed periods of imprisonment would be negated by any decision to the contrary. There is no weighty justification or truly convincing justification for departing from the prescribed minimum sentences in the circumstances of the various offences committed in this instance. Each of the individual sentences imposed cannot be held to be disproportionate to the crime, the criminal and the needs of society, so that an injustice was done by imposing those sentences, bearing in mind that the

² *S v Salzwedel* [2000] 1 All SA 229 (A) para 10.

³ *S v Whitehead* [1970] 4 All SA 340 (A).

legislature has singled out these crimes for severe punishment. The notice of appeal did not suggest otherwise.

[8] This leaves the issue of the cumulative effect of the sentence. It is true that the 20 years imposed, when taken together with the two years spent in custody prior to sentencing, amounts to only three years' less than the sentence of 25 years imprisonment, which is a sentence reserved for exceptional circumstances. The court *a quo* imposed the prescribed minimum sentences for the various offences and considered the cumulative effect in ordering that the robbery and firearm offences run concurrently, to avoid an excessive total period of imprisonment. The court *a quo* cannot be faulted in that respect and, given the nature of the offences, the interests of the offender and society, the outcome is not disturbingly inappropriate or so severe as to warrant reduction. The appellant, who had a previous firearm-related conviction, made use of a firearm to rob two older persons in their homes, seriously injuring one of the victims in the process. The sentencing court exercised its discretion judicially in the circumstances, and any difference between what this court might consider to have been appropriate, and the sentence imposed, is not so great so as to warrant any interference.

Order

[9] The appeal is dismissed.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

M. CHITHI
JUDGE OF THE HIGH COURT

Heard:02 October 2022
Delivered:02 October 2022

Appearances:

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