IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A143/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED 5 April 2019

19 MARCH 2019 .....
RAMAPUPUTLA AJ

In the matter between:

ERIC MASONDO First Appellant

CHRISTOPHER NCUBE Second Appellant

and

THE STATE Respondent

J U D G M E N T

RAMAPUPUTLA AJ:

[1] On 17 April 2015 the two appellants were convicted and sentenced by the Regional Court sitting at Randburg with one count of robbery with aggravating circumstances as follows: appellant 1 was sentenced to 18 (eighteen) years direct imprisonment and appellant 2 to 16 (sixteen) years direct imprisonment. Both the appellants were declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

[2] The said robbery occurred on 21 August 2013, at Linden, Johannesburg. The court *a quo* found that the appellants intentionally and unlawfully robbed the complainant, Fransa Kruger of R 500.00, a cell-phone and car keys using a firearm. During the robbery, the complaint was assaulted with hands and butted with the fire-arm.

[3] After they were sentenced, the appellants applied for leave to appeal against both conviction and sentence. The magistrate refused leave to appeal against both conviction and sentence.

[4] Leave to appeal was granted only in respect of sentence on petition to the Judge President. Therefore the matter is before this court on appeal against sentence only.

[5] The record of the trial proceedings that was filed in the appeal was incomplete. The entire judgment on sentence by the court *a quo* was missing. However, the sentencing procedures were included in the record.

[6] The learned Magistrate was requested to provide reasons for judgment by this court. She did so on 28 November 2018, pursuant to an order of this court granted on 23 November 2018. In her reasons, the learned Magistrate stated that she considered the following personal circumstances of the appellants:

[6.1] the first appellant has a related previous conviction involving violence, as well as a previous conviction for house breaking. He was also convicted for escaping from lawful custody. He was sentenced to two periods of imprisonments and a fine. He is 40 (forty) years old, single and has one child. His income is described as 'MINIMUM' by his legal representative;

[6.2] the second appellant has no previous convictions. He is 40 (forty) years old and single with two children. One child is cared for by the child's unemployed mother. The mother of the other child is employed. Before his arrest he was in gainful employment.

[7] It is an established principle that when passing sentence, the trial court must consider the personal circumstances of the accused, the interests of society and the seriousness of the crime.[1] The court *a quo* does not seem to have balanced these three factors when sentencing the appellants. It also does not give reasons how it arrived at the sentence imposed on the appellants, bearing in mind that their charges attracted a prescribed minimum sentence. Further, it fails to give reasons why a sentence in excess of the prescribed minimum sentence is an appropriate sentence to be imposed on the appellants.

[8] The reasons for judgment furnished by the court *a quo* in compliance with this court's order of 23 November 2018 still omitted to address the above

[1] *Zinn v The State* 1969 (2) SA 537 (A)

issues. Be that as it may, I consider the record to be adequate for the purpose of considering the appeal. In the case of *S v Chabedi*[2] the appeal court held that it does not require a perfect recordal of everything that was said at the trial. The requirement is that the record must be adequate for proper consideration of the appeal.

[9] The absence of reasons for imposing a sentence in excess of the prescribed minimum sentence is fatal to the sentences imposed by the court *a quo.* This court is entitled for that reason alone to depart from the sentence imposed by the court *a quo*.

[10] It was argued on behalf of the appellants that the fact that they spent a period of 20 months in custody awaiting finalization of this matter was not afforded sufficient weight by the court *a quo*. It was further argued that this period constitutes substantial and compelling factors justifying a departure from the prescribed minimum sentence. It is further argued on behalf of the first appellant that his previous convictions are not relevant for the purpose of sentence as they do not relate to the current charge. Therefore, the first appellant should have been treated as a first offender for the purpose of sentence. Accordingly, counsel for the appellant submitted that this court is at large to interfere with the sentence imposed by the court *a quo*.

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[2]2005 (1) SACR 415 (SCA) F at 417.

[11] For the State it was submitted that the appeal against the sentence in respect of the first appellant be dismissed for the reason that he has no respect for other people's property. The State further submitted that the appeal against the sentence for the second appellant be reduced as he is a first offender.

[12] The court *a quo* claims to have considered the fact that the appellants were incarcerated for a period of almost 2 (two) years while awaiting trial but fails to state what bearing this has on the sentence it considers an appropriate sentence.

[13] In the case of *S v Radebe*[3] it was held that the time an accused person spent in custody while awaiting trial is only one of the factors that should be taken into account when determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate for the crime committed. Therefore the test is not whether on its own the period of detention while awaiting trial constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence, is a just one, taking into account the conditions affecting the accused in detention and the reason for the prolonged period of detention.

[14] This court does not find that there are substantial and compelling circumstances that justify a deviation from the prescribed minimum sentence.

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[3] 2013 (2) SACR 165 (SCA) held at paras [13] and [14]

[15] No reason is provided as to how the previous conviction are related the offence the first appellant is currently sentenced for. No reason is provided why the second appellant was subjected to the same treatment as he has no previous convictions. This is very inconsistent and can only lead to an improper exercise of the discretion by the court *a quo.* Therefore, for the purpose of sentence, this court finds it appropriate to regard both appellants as first offenders.

[16] A record of the pre-trial proceedings in the court *a quo* reveals that another person who was charged with the appellants was largely responsible for the long delay in the commencement of the trial. Ultimately his trial was separated from the appellants' trial. Following the separation, the appellant's trial including sentencing was concluded within a week. It is therefore appropriate that the period the appellants spent in custody while awaiting trial is taken into account when sentencing the appellant. Considering that the prescribed sentence of 15 years is applicable, this court finds that a sentence of 13 years and 6 months imprisonment is the appropriate sentence to impose on each appellant.

[17] Therefore the appeal against sentence by the first and second appellants stands to be upheld.

[18] In the premises, I proposed the following order:

ORDER

1. The appeals against sentence by the first and second appellants is upheld.

2. The sentence of 18 (eighteen) years imprisonment imposed on the first appellant on the charge of robbery with aggravating circumstances is set aside and substituted with a sentence of 13 (fifteen) years and 6 (six) months imprisonment.

3. The sentence of 16 (sixteen) years imprisonment imposed on the second appellant on the charge of robbery with aggravating circumstances is set aside and substituted with a sentence of 13 (thirteen) years and 6 (six) months imprisonment.

4. The sentences imposed in paragraph 3 and 4 above are ante-dated to the date of sentencing, being 17 April 2015.

4. The declaration against the appellant that they are unfit to possess a firearm in terms of section 103 of Act 60 of 2000 is confirmed.

I agree and it is so ordered.

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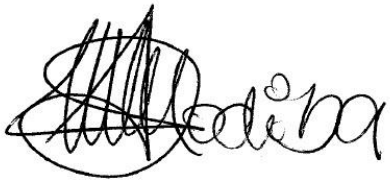
MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG



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SIGNED ON BEHALF OF NE RAMAPUPUTLA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES:

Applicant's Counsel: E Tlake
Instructed by: Johannesburg Justice Centre

Respondent's Counsel: SJ Khumalo
For the Director of Public Prosecutions, Johannesburg
Date application heard: 22 November 2018
Date of judgment: 19 March 2019