REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A65/2020

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

In the matter between:

HLONGWANE SIBONISO Appellant

and

THE STATE Respondent

JUDGMENT

MUDAU, J:

[1] The appellant, Mr Siboniso Hlongwane, was one of two accused who appeared before the regional magistrate, Orlando, on charges of robbery with aggravating circumstances, the unlawful possession of a semi-automatic firearm and ammunition as well as attempted murder. The appellant, who had

legal representation throughout the trial, pleaded not guilty to the charges, but was convicted on all counts. He was subsequently sentenced to 15 years' imprisonment for robbery; 15 years' imprisonment for possession of a firearm; three years' imprisonment for possession of ammunition and lastly, five years' imprisonment for attempted murder. The cumulative sentence was accordingly 38 years' imprisonment.

[2] However, in an attempt to temper the effect thereof, the trial magistrate ordered the sentences on counts 3 and 4 to run concurrently with the other sentences, thereby reducing the effective sentence to 30 years' imprisonment. The appellant's co-accused was sentenced to an effective 20 years' imprisonment. In a separate appeal, the latter's conviction and sentence were confirmed. The appellant now appeals against his sentence, with the leave of the trial magistrate.

[3] The appellant applied for condonation for the late prosecution of the appeal in that his heads of argument were filed out of time, not on 15 September 2021 as was required, but only on 5 November 2021. The heads of argument were filed approximately seven weeks late. The appellant's explanation, through his counsel from Legal Aid South Africa, Advocate Guarneri's affidavit, is that he was not aware of the notice of set down until he was alerted to this effect by counsel for the state, Ms Serepo. The condonation application is not opposed by the state. The appellant's explanation is satisfactory, no prejudice will be suffered by the respondent if condonation is granted and it is in the interests of justice that condonation be granted. The state has not argued that it will suffer any prejudice. This is not a case in which the effect on the administration of

justice requires that condonation should be denied. Condonation is in consequence, granted.

[4] Turning to the merits of the appeal, although the charge sheet referred to Sections 51(2) of Act 105 of 1997, there is no indication in the record that the said provisions were explained to the appellant.

[5] The appellant's argument, is that the trial magistrate was precluded from sentencing under the Minimum Sentences Act where an accused person, such as himself, was not made aware of its potential application from the beginning of the trial. The failure to inform him, in this instance, he contends, renders the sentencing procedure unfair and liable to be set aside. It was apparent from the handwritten part of the record of proceedings before the magistrate, which starts only on 28 September 2017, that the handwritten record is incomplete. The matter was adjourned several times, inter alia, not only for the legal aid representative but also for the original record. The crimes were committed on 31 August 2013. In the sentencing proceedings on 24 April 2014, the trial magistrate placed on record that the appellant and his co-accused were well aware of the minimum sentences applicable to three of the four counts as they had been fully explained by him to them.

[6] The Supreme Court of Appeal, with reference to the judgments in *Makatu*[1] and *Legoa,* [2] found that the courts have been reluctant to lay down a general rule as to what the charge sheet must contain. In *Ndlovu v The State,*[3] the court held that:

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1 2006 (2) SACR 582 (SCA).

2 2003 (1) SACR 13 (SCA).

3 (204/2014) [2014] ZASCA 149 (26 September 2014) para 7.

> *"…[t]he question to be answered is whether the accused had a fair trial, and this is a fact based enquiry that entails a 'vigilant examination of the relevant circumstances'".*

[7] Notably, in *M T v S; A S B v S; September v S,*[4] it is stated that:

> *"It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed."*

[8] In *S v Nkadimeng*[5] however, it was held that where the charge sheet makes a clear reference to the fact that the prosecution will rely on the provisions of Act 105 of 1997, and the accused has legal representation, then there is no duty on the trial court to explain the implications of that legislation to the accused.

[9] Before this court, during oral submissions, counsel for the appellant capitulated when it was pointed out that reference was made in the charge sheet in respect of count one, the aggravated robbery charge, to section 51(2) of Act 105 of 1997. Counsel for the appellant also conceded that it was apparent from the handwritten part of the record of proceedings before the magistrate, which

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4 2018 (2) SACR 592 (CC) para 40.

5 2008 (1) SACR 538 (T).

starts only on 28 September 2017, that the handwritten record is incomplete. As stated previously, the matter was adjourned several times, inter alia, not only for the legal aid representative but also for the original record. The argument that the minimum sentencing provisions were not explained was thus abandoned by counsel on behalf of the appellant. In any event, in respect of the charge of the unlawful possession of a firearm, Schedule 4 of the 'Firearms Control Act 60 of 2000', provides for a maximum sentence of fifteen years' imprisonment.

[10] The salient facts of the case against the appellant are as follows. During midday on 31 August 2013, the complainants were, at gunpoint, accosted by three men and robbed of two cell phones at Mofolo, Soweto. The appellant and the third man pointed firearms at the victims whilst the appellant's co-accused searched and dispossessed one of the victims of two cell phones. The victims were ordered into a nearby stream which contained raw sewage. The appellant and his companions fled from the scene. After getting out of the stream, the complainants reported the incident to members of the Johannesburg Metro Police Department, who were driving by. The appellant and his companions were still in sight.

[11] A chase ensued which resulted in a search of the area covering numerous residential properties. During the chase, the appellant fired shots at members of the police several times, which gave rise to the attempted murder charge. In the process other units, such as ordinary SAPS members and specialised task teams joined in the chase, which took approximately three hours in total. The appellant was eventually cornered and arrested while trying to hide in a

neighbourhood yard. A firearm with only one live round of ammunition was found in his possession at the time of his arrest. The cell phones were recovered from the appellant's co-accused, who had dispossessed the complainants of them. The third culprit evaded arrest and was never charged.

[12] The appeal is premised on the contention that the sentence imposed by the regional magistrate is unjust and disproportionate to the appellant's personal circumstances, the seriousness of the offence and the interests of society. Fifteen years' imprisonment is the minimum sentence that is prescribed by Section 51(2) of the 'Criminal Law Amendment Act 105 of 1997' for robbery with aggravating circumstances. The imposition of the prescribed sentence could only be deviated from had the court *a quo* been satisfied that substantial and compelling circumstances existed. None were found to exist by the court *a quo.*

[13] The appellant did not give evidence in mitigation in the trial. His counsel furnished the court with an account of his personal circumstances. The appellant's personal circumstances as placed on record where the following. He was 29 years old with no dependents. He was self-employed. The highest standard he passed was standard 8. He had spent 8 months in custody as an awaiting trial prisoner. The appellant was already a repeat offender when he came before the trial court: he admitted to three previous convictions: housebreaking with intent to steal, theft and possession of dependence producing substance.

[14] It is trite that a court of appeal will not readily interfere with the sentence imposed by the court *a quo* unless the sentence is vitiated by misdirection or it

is manifestly inappropriate and induces a sense of shock or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed.[6] If there is a misdirection, it must be of such a nature, degree or seriousness, that it shows, directly or inferentially, that that 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.[7]

[15] It is trite that minimum sentences are not to be departed from lightly and for flimsy reasons which do not withstand scrutiny. Importantly, the appellant was the one who discharged the firearm numerous times. Fortuitously, none of the pursuing police officers and those who eventually effected the arrest fell victim to the appellant's shots. By shooting at the police, this was no doubt, an affront to the authority of the state which cannot be tolerated, and must be condemned. The police are often in the front line in the detection and investigation of crimes of this nature, which contributes to the high number of fatalities of members of the SAPS in the line of duty. The appellant also put the lives of ordinary members of society at risk by firing shots in a residential area.

[16] Moreover, it was not submitted on the appellant's behalf that any remorse was evident, and nothing in the record suggests that the appellant's counsel erred in that regard. In this case there are multiple convictions, but all of them arise out of what might be called a "single event". This is indeed a case where punishment and deterrence must come to the fore. I conclude with reference to the following dictum of Harms JA, in *S v Mhlakaza:* [8]

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6 S v Kruger 2012 (1) SACR 369 (SCA) para 8.

7 S v Pillay 1977 (4) SA 531 (A) at 535E – F.

8 1997 (1) SACR 515 (SCA) at 523.

> " Sentences of imprisonment in cases where the death penalty would have been imposed before the advent of the new Constitution will inevitably be long and such sentences may become more common. Lengthier sentences may well be justified by the heightened incidence of violence. But whether or not such sentences fall within the bounds of what may be considered proper or appropriate will inevitably depend upon the facts of each particular case".

The sentences are, in the circumstances alluded to previously, just and appropriate and not shocking.

[17] Order

The appeal against the sentences imposed against appellant is dismissed.

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T P MUDAU
JUDGE OF THE HIGH COURT

I agree

Barnes AJ

Heard on: 17 November 2021

Appearances

For the Appellant: Adv. L Mosoang

Instructed by: Legal Aid South Africa

For the Respondent: Adv. N P Serepo.

Instructed by: DP- JHB

Date of judgment: 30 November 2021