



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

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12/08/2022
DATE

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SIGNATURE

CASE NO: A 40/2020

COURT A QUO CASE NO:

In the matter between:

ZWANE PHIKELA ZINJA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

MATSEMELA AJ (DLAMINI J CONCURRING):

- [1] Mr Phikela Zinja Zwane (the appellant) appeared in the Johannesburg Regional Court on the 17 April 2018 on a charge of robbery with aggravating circumstances as described in Section 1 of Act 51 of 1977 and read with further with section 51 (2) of Act 105 of 1997.
- [2] The appellant appeared as accused 2 during trial and Mr Lebabalo Khumalo appeared as accused 1.¹ The charge of robbery with aggravating circumstances was put to the appellant and his co accused and they pleaded not guilty.² They elected not to provide any plea explanation as described in terms of section 115 of Act 51 of 1977.³
- [3] The *court a quo* proceeded to explain to them, content and effect of section 51 (2) of the Criminal Law Amendment Act, 105 of 1997. This statute is also known as the 'Prescribed Minimum Penalty' Act.⁴ The court also explained the accused's rights during the trial and particularly their right to cross examination.⁵
- [4] The appellant and his co accused were convicted of the said charge on 25 April 2018.⁶ On 24 May 2018, accused 1 was sentenced to 13 years direct imprisonment and the appellant to 15 years direct imprisonment. Both were deemed unfit to possess fire arms and as described in section 103 of Act 60 of 2000.⁷
- [5] The appellant applied for leave to appeal against conviction and sentence on 26 March 2019, 13 June 2019 and 26 July 2019. He was granted leave to appeal by the *court a quo* in October 2019 against his conviction and sentence.⁸ This appeal, is against conviction and sentence.

1 Record: Vol 2 - page 21

2 Record: vol 2 pages 22 - 23

3 Record: Vol 2 pages 23 -24

4 Record: Vol 2 page 23

5 Record: Vol 2 pages 24-25

6 Record: Vol 3 page 147 'S' lines 24 -25

7 Record: vol 1 pages 1 'OO', 1 'RR' Vol 3 pages 177 -181

8 Record: Vol 1 page 1 TT

GROUND OFS OF APPEAL ON CONVICTION

- [6] The appellant raised the following grounds in his application to appeal regarding his conviction;
- 6.1 That the state did not prove its case beyond reasonable doubt;
 - 6.2 That the state witnesses were not reliable and contradicted themselves and or each other;
 - 6.3 That his identity as the culprit in the said armed robbery of the complainant was never firmly or correctly established by the independent proven facts;
 - 6.4. That his version put to the state witnesses was that the complainant's cell phone was kept by him in lieu of compensation of a spilled glass/glass bottle of beer was fair, reliable, reasonable and should have been accepted by the *court a quo*;
 - 6.5. That the complainant did not testify and as a result the independent proven facts do not support a conviction against him.
 - 6.6. That the conviction should rather have been for contravening section 36 of Act 62 of 1955, namely unlawful possession of suspected stolen property.⁹

EVIDENCE

Mr Mboweni

- [7] The evidence of Mr Mboweni (Mboweni) was that the complainant, Mr Shingange (Shingange) and himself were walking together in the area of Jeppetown on 2 December 2016. It was approximately 16:30pm when he and his friend, Shingange, proceeded towards the George Koch train station. They stopped to buy '*mielies*':¹⁰
- [8] It is worth noting that the prosecutor had addressed the *court a quo* at the start of the trial and had informed the *court a quo* that Shingange, will not be testifying in the trial because his employer would not release him.¹¹

⁹ Record: Vol 3 pages 201-206

¹⁰ Record: Vol 2 pages 25-33

¹¹ Record: Vol 2 pages 20-21

- [9] While they were buying '*mielies*' two unknown suspects approached them and one of the two suspects pointed them with a fire arm. They were searched by the suspects at gunpoint. Mboweni managed to flee and left Shingange behind. He was able to observe from a small distance of 20 meters away that the suspects continued to rob the complainant at gun point. The suspects robbed Shingange of his cell phone.¹² He testified that accused 1 was the one who possessed the fire arm and pointed it at them¹³ and he also searched him.
- [10] After Shingange was robbed his cell phone, he approached him and they decided to follow the suspects who were running towards "the shacks". Mboweni then pointed out both the appellant and his co accused in court as the said suspects.¹⁴
- [11] They then saw a police van patrolling the vicinity and they quickly approached the police for assistance. With the assistance from the police, accused 1 was apprehended and arrested. The appellant was only arrested about two days later.¹⁵
- [12] Mboweni confirmed that at some stage while following the said suspects, he lost sight of them.¹⁶ He was able to recognize accused 1 and the appellant from the clothes they wore and their different skin colour.¹⁷ Mboweni stated he was present when the appellant was later arrested.¹⁸
- [13] He denied under cross examination that he had mistaken the times of the said robbery and that the armed robbery did not occur at 16: 30 pm but sometime earlier. He further denied that the description of accused 1's clothing as he testified to is not only incorrect but contradicted by other state witnesses.¹⁹
- [14] He managed to ran away as Accused 1 was searching him he had at that point in

¹² Record: Vol 2 page 26, 31

¹³ Record: Vol 2 page 32 lines 2 -5, 39

¹⁴ Record: Vol 2 page 27 lines 10-19

¹⁵ Record: Vol 2 pages 28 -29; 31

¹⁶ Record: Vol 2 page 28 lines 15- 25

¹⁷ Record: Vol 2 page 29 -31

¹⁸ Record: Vol 2 page 32 lines 10 — 13

¹⁹ Record: Vol 2 page 34- 37

time placed the fire arm in his waist (pants).²⁰

[15] Mboweni recalled that the complainant's phone was a 'Samsung" and was not present when the complainant identified his phone to police.²¹

[16] Accused 1 put the following to Mboweni which he denied:

16.1 That he was present in the area that same day and he was consuming alcohol. He then encountered Mboweni and Shingange. The complainant and himself argued about the fact that the complainant had knocked over accused 1's beer bottle. The beer spilled over and argument between them ensued.²²

16.2 Accused 1 disputed that he was ever in possession of any fire arm and certainly did not point Shingange and Mboweni with a fire arm.²³

16.3 That when Shingange had spilled his beer and an argument ensued, Shingange then ran away and in the process his cell phone fell out of his pocket. The appellant then picked up the complainant's phone and told Shingange that he will receive his cell phone back after he pays for the spilled beer.²⁴

16.4 That Shingange and himself are not reliable and trustworthy witnesses as pertaining to the identity of the suspects because their evidence in certain respects is contradicted by other state witnesses. This can only mean that they had identified the wrong suspects. ²⁵

16.5 That a formal identity parade was never held to identify him and or accused 1. This according to the appellant contributes to his argument that the complainant and Mr Mboweni are falsely implicating him and accused 1. They were all drunk and the complainant and Mboweni were still angry that the appellant claimed the cell phone for compensation of the spilled beer. This altercation which was over the spilled beer occurred at approximately

²⁰ Record: Vol 2 page 40

²¹ Record: Vol 2 page 44-45

²² Record: Vol 2 page 48 lines 1- 10

²³ Record: Vol 2 page 49

²⁴ Record; Vol 2 page 50

²⁵ Record: Vol 2 page 62 lines 19 -24

14:00 pm.²⁶ The complainant and Mboweni were been spiteful and vengeful.²⁷

16.6 That after they collected the complainant's phone, he and accused 1 returned to the same tavern/place where the said altercation occurred.²⁸

16.7 His police statement contradicts some of his evidence. In his statement, he states that he was present when the complainants' cell phone was recovered.²⁹

[17] According to him the robbery occurred at approximately 16:30pm and they followed the suspects for about two hours, at about 18: 30 pm they pointed out the suspects to the patrolling police..³⁰ He had no knowledge of one of the arresting officers contradicting him on the issue of time as to when accused 1 was arrested by them and the time of the robbery. According to this arresting officer the incident occurred at about 14: 30pm and that is when the report was made.³¹ That accused 1 was arrested at approximately 16: 40pm.³²

[18] In re-examination Mboweni confirmed that about two days later, he had identified the appellant to the investigating officer in his office in the presence of several other people. No formal identity parade was then needed.³³

Constable Mgangandeli

[19] Cst R Mgagandeli testified that on 2 December 2016 he was patrolling the area of Jeppe's town with his colleague.³⁴ They had received information from the community that a person was robbed. They reached the victim who identified

²⁶ Record: Vol 2 page 63

²⁷ Record: Vol 2 pages 60-64

²⁸ Record: Vol 2 page 64

²⁹ Record: vol 2 pages 52 - 65, 54

³⁰ Record: Vol 2 page 56, 58

³¹ Record: Vol 2 page 58 - 61

³² Record: Vol 2 page 59

³³ Record: Vol 2 page 66

³⁴ Record: Vol 2 pages 70 -78

himself to him as Mr Shingange. Shingange then pointed out accused 1 as one of the robbers who had robbed him earlier on.³⁵

[20] He stated further that Shingange was at the time with other members of the community.³⁶ That Shingange was not intoxicated as alleged by the appellant and his co accused.³⁷

[21] Shingange told him that he was robbed of his cell phone. He was not present when the appellant was arrested.

[22] In cross examination by accused 1 he insisted that the suspect that they arrested was wearing red tekkies blue jeans and blue T-shirt. However it was put to him that the other state witness said he was wearing black clothes.³⁸

[23] According to him accused 1 was arrested at 16: 40pm and had no knowledge of the state witness saying it was 18:30.³⁹

[24] He confirmed that the complainant and Mr Mboweni had arrested accused 1 and handed him over to them.⁴⁰

Sergeant Makamu

[25] Sergeant Makamu testified that he is the investigating officer in the matter.⁴¹ He noted that the content of his criminal docket only reflected the arrest of accused 1. After perusing the said criminal docket he had noted that there was a second suspect involved in the armed robbery on 2 December 2016.⁴²

[26] He noted that the second suspect was known as 'Zinza'. He investigated the whereabouts of the person 'Zinza'. He enquired from the community members at accused 1 home address and he received the appellants address. He found the appellant at the said address and the appellant introduced himself as Zwane. He then questioned the appellant. He confirmed the community calls him 'Zinza'.

³⁵ Record: vol 2 page 72-73

³⁶ Record: Vol 2 page 74-75

³⁷ Record: Vol 2 page 75

³⁸ Record: Vol 2 page 81-82

³⁹ Record: vol 2 page 80-81

⁴⁰ Record: vol 2 page 86 - 87

⁴¹ Record: Vol 2 page 92

⁴² Record: Vol 2 page 93

[27] At some stage while questioning the appellant in his police office the complainant and other witnesses arrived. The complainant immediately pointed to the appellant as his assailant.⁴³ The appellant then provided Sergeant Makamu with a cell phone number of a person who was in possession of the complainant's cell phone.⁴⁴

[28] A meeting was arranged with the person in possession of the complainant's cell phone. This person did not appear at the allocated meeting spot but send another person with the said cell phone.⁴⁵

[29] He further explained that a formal identity parade was not arranged or held because the complainant had already identified the appellant in his office.

[30] In cross examination of Sergeant Makamu by accused 1, he identified the name of 'Zinza' in the police investigation diary. He confirms he did not mention this in any statement. He confirms he did not make this entry in the diary. The arresting officer made the entry.⁴⁶

[31] The following were put by the appellant and were denied by Sergeant Makamu:

31.1 That he had confused 'Zinza' for "Zwane" and these names represent two different people. As a result, the appellant who is Zwane' was mistaken for the real culprit 'Zinza' This was denied by Sergeant Makamu.⁴⁷ Sergeant Makamu denied accused 1's version that he told Makamu that the appellant was known as Zinza. He insisted he found the name of Zinza as an entry by the arresting officer in the police diary.⁴⁸

31.2 That he was specifically brought to Makamu's office for the complainant to identify

him and he was misled to accompany Sergeant Makamu to his office. Sergeant Makamu denied this and insisted he had no idea that the complainant will also arrive at his office.⁴⁹

43 Record: Vol 2 page 96-97

44 Record: Vol 2 page 96 lines 19-25

45 Record: Vol 2 page 97

46 Record: Vol 3 page "101- 103

47 Record: Vol 3 page 105

48 Record: Vol 3 page 108

49 Record: Vol 2 page 120

31.3 That he took himself to the police station after he had heard that accused 1 was arrested for robbery of the cell phone. He was concerned that accused 1 was arrested for this cell phone because he had kept this cell phone as compensation for the spilled beer and had in turn handed it to his cousin for safe keeping. At the police station he was told that so no such robbery case exists. He decided to rather wait for police to come to him.⁵⁰

31.4 That there never was any robbery of any kind. There was only a squabble about spilled beer. The complainant dropped his cell while running away from the squabble. He collected the phone in lieu of compensation of the spilled beer.⁵¹

[32] The appellant and his co- accused both moved section 174 applications for discharge

and acquittal. They argued that their identity was never established and that far too many contradictions appeared within the state's case and these contradictions were of a material nature. The State's case was of such a weak and lame nature that the appellant and his co accused were not required to respond to the states weak case. This application was dismissed by the court a quo.

[33] The appellant and accused 1 elected neither to testify in their defense nor to call defense witnesses. They both closed their cases without leading any evidence.⁵²

AD CONVICTION

[34] In *S v Hadebe*⁵³ the Court says the following:

"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against

⁵⁰ Record: Vol 3 page 122

⁵¹ Record: Vol 3 page 123

⁵² Record: Vol 3 pages136 -138

⁵³ 1998 (1) SACR 422 at 426 para a-b

finding of facts. In short in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong, The reason why this deference is shown by appellate courts to factual findings of the trial court is so well known that restatement is unnecessary”

- [35] Two significant legal principles appear in the facts of this matter. The first one is that of the issue of identity of the said suspects and the second is the fact that neither the appellant nor accused 1 chose to testify in their own case or lead evidence of any nature.
- [36] The question of identity must be considered together with the arguments raised by the appellant, namely, that the state witnesses contradicted themselves in material respects. The appellant provided a version placing . himself at the crime scene and in the company of the complainant and Mboweni. The appellant admits been in possession of the complainant's cell phone but justifies it that he had no intention to commit theft or robbery of the said phone. This is further compounded by the fact that the appellant elected not to testify in his own defence or lead any evidence.
- [37] Mboweni was a single witness whose evidence is regulated in terms of section 208 of Act 51 of 1977. A conviction can follow on the evidence of a single witness and as long as the evidence of the said single witness is satisfactory in all material respects. Independent corroboration for the evidence of the single witness contributes to the relaxing of the cautionary rule applicable to single eye witness evidence.⁵⁴
- [38] In *Sv Sauls*⁵⁵ the following was said:
'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, consider its merits and demerits and, having done so, decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told.'

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S V SAULS 1981 3 SA 172 A at page 181.

⁵⁵ 1981 (3) SA 172 at page 181

[39] The identity of suspects must also be treated with caution and especially identity from single eye witnesses. In *S v Mthetwa*⁵⁶ it was said:

"Because of the fallibility of human observation evidence of Identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's' face, voice, build, gait, and dress.... These factors must be weighed one against the other in the light of the totality of the evidence and the probabilities."*⁵⁷

[40] I am of the view that not every mistake or contradiction made by a witness negates the said witness's evidence as a whole. Contradictions must be carefully considered with all the other independent proven facts.

[41] In *Sv Mkhohle*⁵⁸ the following was said:

"Contradictions per se do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility. In each case the trier of fact has to make an evaluation, taking into account such matters as the nature of contradictions, their number and importance and their bearing on other parts of the witness's evidence".

[42] In *Sithole v S*⁵⁹ the following was said:

"It is trite that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies and other defects in the evidence and in the end to decide whether the totality of the evidence the state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the

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1972 3 SA 766 A AT 768 A

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S v CHARZEN AND MSIBI 2006 2 ALL SA 371 SCA S v MEHLAPE 1963 2 SA 29 A; S v MAJIAME 1999 1 SACR 204 0

58

1990 (1) SACR 95 PARA B-C

59

[2007] JOL 18374 (SCA) at para 7

*circumstances under which the observations were made and the different **vantage** points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witness.”*

- [43] The contradictions between Cst Mgagandeli and Mboweni regarding the times of the robbery, the times of accused 1 arrest and the clothing description of the suspects were not material. This is further supported by the appellants own version that he himself places himself at the crime scene and in the company of Shingange and Mboweni.
- [44] The question of whether the said contradictions are material or not becomes completely irrelevant when the appellant places the issue out of dispute by placing himself at the crime scene at approximately the same time as the occurrence of the armed robbery and furthermore in the company of the complainant and Mboweni. The appellant admits possession of the complaints' cellphone.
- [45] The appellant attempted to justify his possession of the cell phone by fabricating a version of the spilled beer. This version was denied by all the state witnesses. The appellant elects not to testify to explain the version of the spilled beer.
- [46] The independent proven facts show that the appellant and accused 1 had robbed the complainant in execution of a common purpose. The independent proven facts show that aggravating circumstances were present during the course of this robbery, namely the use of a fire arm was wielded during the robbery.
- [47] The appellant attempted to confuse the issue of identity even further by arguing with the investigating officer that he had confused two different people, namely Zinza . and Zwane. This too was a futile exercise which was negated by the appellants own version of placing himself at the crime scene, in the company of the complainants an admitting possession of the complainant's cell phone.
- [48] There is absolutely no point in arguing that a formal identity parade must be held when firstly identification of the suspects was established during the arrest of the suspects and secondly when the appellant himself places identity out of dispute with his version of events. I am of the view that the response about the

identity parade by Sergeant Makamu is correct. An identity parade was not required because an identification of both suspects had already occurred. Identification parade only occurs when there is no identity whatsoever of the suspects in the docket pending consideration for enrollment and or prosecution.

[49] The question of an accused's right of silence and his right to elect whether to testify or not must be considered with all the independent proven facts of the state's case during the trial.

[50] The accused has a right to be silence and to be presumed innocent before and during the trial, The pre-trial right to silence under sect 35(1) (a) of Act 108 of 1996

must be distinguished from the right of silence during the trial in terms of sect 35(3)(h) of Act 108 of 1996. No adverse inference can be drawn from an accused exercising his right to silence before the trial commences. But this right to silence undergoes a change when the trial commences and the state leads evidence which in turn is tested and proven in cross examination.

[51] It was stated clearly in the constitutional case of *S v Thebus and Another*⁶⁰ that an arrested person certainly has a right to silence and is not required to say or do anything but this right of silence is weighed up with the state's evidence in the trial and if found lacking carries detrimental consequences for the accused.

[52] In *Osman and Another v Attorney General Transvaal* 098 (11) BCLR 1362 CC at paragraph 22:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk.'

[53] In *S v Boesak*⁶¹ the following was said:

The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be

⁶⁰ 2003 (2) SACR 319

⁶¹ 2001 (1) BCLR 36 CC at page 36 parag 24: See also *S V SCHOLTZ* 1996 (2) SACR 49 NK; *S V BROWN* 1996 (2)

SACR 49 NK; *S V FRANCIS* 1991(1) SACR 198 A; *S V HLONGWA* 2006 JOL 16648 T

compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent and not testify during

proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial,, if there is evidence calling for an answer and an accused parson chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove guilt of the accused.”

- [54] The court *a quo* was correct to dismiss the application for section 174 discharge. The evidence of the state's case was independently corroborated and the appellants own version corroborated the states independent facts.
- [55] The appellant erred when he chose not to testify to explain his version of the 'spilled beer' and that he was only keeping the complainants cellphone in lieu of compensation of his 'spilled beer'. He had to explain that he had never sold this cellphone to anybody. He should have called his cousin to testify that he had handed this cell phone to him merely for safe keeping and no other reason.
- [56] The court *a qou* was correct when it stated in its judgment that all versions must be repeated under oath and tested in cross examination before any court can accept any fact(s) and in turn attach evidentiary weight to the said evidence. Versions put to state witnesses must be repeated under oath and be tested in cross examination before any party can argue that the truth was told and such a witness is in turn trustworthy and reliable. If this is not done then the risk would be that the opposing parties' evidence which was tested in cross examination may be accepted as conclusive.
- [57] The fact that the complainant did not testify does not automatically mean that a conviction could not follow. In order for a conviction to follow the state must show that there are independent proven facts beyond . reasonable doubt showing the accused's guilt. These independent facts can be circumstantial or other direct evidence. Inferences can also be drawn from all the independent proven facts as described in the case of *R v Blom* 1939 AD 188.

[58] In the *court a quo* the state proved beyond reasonable doubt that Shingange existed, was robbed by the appellant and co accused at gun point and the police even recorded a statement from him which was used by defense in cross examination of state witnesses. The appellant himself in his own version confirms the existence and presence of the complainant.

[59] It is my view that the appellant was correctly convicted and that the learned magistrate's judgment is sound in law and well-reasoned. The appellants' application against conviction stands to be dismissed.

AD SENTENCE

[60] The appellant had noted in his notice to appeal against sentence that:

(a) That the effective term of direct imprisonment of fifteen years is strikingly inappropriate and shocking;

(b) That another court would have imposed a lesser sentence because he had shown substantial and compelling factors to allow for a deviation from the prescribed sentence of fifteen years

(c) That the *court a quo* overlooked his personal circumstances;

(d) That the *court a quo* overemphasized the seriousness of the offence and the prevalence of the offence;

[61] The principles of the prescribed minimum sentence act, Act 105 of 1997 find application in this matter. The *court a quo* applied principles of the triad as stated in *S v Zinn*.⁶² I am of the view that the *court a quo* correctly took cognisance of the crime, the criminal, the interests of society, deterrence, retribution and punishment.⁶³

[62] The *court a quo* took into account that⁶⁴ he was young 33 years old, lived with the mother of his 8 year old child before his arrest. He is the bread winner, had 'peace jobs' and was earning about R2000 per month. He has grade 11 schooling and

⁶² 1969 (2) SA 537 A; See Record: Vol 3 pages 164

⁶³ Record: Vol 3 pages 164-174

⁶⁴ Record: Vol 3 pages 164-165

was in custody for one year and 6 months⁶⁵

- [63] The *court a quo* also took into account as aggravating that this was serious offence and prevalent. The appellant showed no true remorse. The complainant must have suffered some level of trauma in spite of the fact that he did not testify. The appellant has previous convictions and the appellant is undeterred by his previous 'brushes' with the law. The appellant acted together with accused 1 and in execution of a common purpose and accused 1 used a dangerous weapon to commit this violent crime and this fire arm was never recovered.
- [64] The *court a quo* gave careful consideration to the legal principles of the prescribed minimum sentence Act, 105 of 1997.⁶⁶ It correctly mentioned the well-known case of *S v Malgas*. This SCA matter states clearly that the provisions of the prescribed act cannot be departed from for 'flimsy' reasons. The legislatures' intention in this regard cannot be over looked or disregarded.
- [65] Balancing of all the aggravating and mitigating factors will determine whether the appellant has shown substantial and compelling grounds to allow for a deviation of the prescribed sentence of fifteen years direct imprisonment for all first offenders convicted in terms of an offence described in part 2 of schedule 2, section 51 (2) of Act 105 of 1997.
- [66] The *court a quo* was correct to reason that the appellants' personal factors either individually or collectively do not amount to substantial and compelling grounds. As a result, a deviation from the prescribed provisions cannot occur.⁶⁷
- [67] The fact that the appellant was financially supporting his family does not necessarily mean that this factor alone allows for a deviation from the prescribed minimum sentence act. The appellant in this matter is not the 'primary care giver' as described in the constitutional case of *S v M*⁶⁸ There are

⁶⁵ Record: Vol 3 pages 166 -167

⁶⁶ Record: Vol 3 pages 167 — 171

⁶⁷ Record: Vol 3 page 172

⁶⁸ 2008 (3) SA 232 CC at page 251 par 28 and 30

No sufficient facts on record to suggest that the appellant was and is a primary care giver.

[68] No social workers report was submitted by the appellant to show he was the primary care giver. In *S v M* supra the constitutional court stated that a 'primary care giver' is a person who tends to the needs of a minor child on a daily basis and not just from time to time, This includes basic needs like transportation to school, doing homework, going to the doctor.⁶⁹

[69] The appellant cannot be allowed to justify his conviction and behaviour by tempting to escape the full consequences of the law by using a false and misleading defense of been a 'primary care giver'..⁷⁰ It is my view that the term of direct imprisonment of fifteen years imposed by the *court a quo* is not only just and fair but does not induce a sense of shock.⁷¹

[70] My view is that the *court a quo* did not commit any irregularity when sentencing the appellant. The *court a quo* had correctly considered all the applicable facts and the law. *S v Salzwedel and Others. 199 (2) SACR 586 SCA at 588 a-b* The Appeal Court stated that a court of appeal may only interfere with the sentence of the *court a quo* in a case where the court a quo imposed a sentence which is disturbingly inappropriate or it is clear that the *court a quo* did not apply its mind appropriately to all the facts.

[71] Having said that I therefore make the following order

ORDER

The appeal against the conviction and sentence is dismissed.

⁶⁹ S v M SUPRA at page 251 parg 28 and 30

⁷⁰ S V M supra at page 253 paragraph 34

⁷¹ S V KOPSANI AND ANOTHER 2019 (2) SACR 53 ECG S V MAKHOKHA 2019 (2) SACR 198 CC

MOLEFE MATSEMELA
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I concur

JABU DLAMINI
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 09 MAY 2022
Date of judgment: 12 AUGUST 2022

APPEARANCES:

For the Appellant	Adv L Musekwa
Instructed by	Legal Aid Johannesburg
For the Respondent	Adv M Papachristoforou
Instructed by	DPP Johannesburg

