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

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

SIGNATURE DATE:

Case No: A101 / 2021

In the matter between:

DIRK DU PLESSIS Appellant

and

THE STATE Respondent

CORAM: VALLY J and WILSON AJ

JUDGMENT

WILSON AJ:

1 The Regional Court convicted the appellant, Mr. Du Plessis, of attempted robbery with aggravating circumstances, and sentenced him to 15 years' direct imprisonment. With the Regional Court's leave, Mr. Du Plessis now appeals against that sentence.

The conduct underlying the conviction

2 On 15 August 2017, Mr. Du Plessis had been smoking crystal meth at his home in Florida. He had then driven to Braamfontein with two friends to buy more drugs. In Braamfontein, he was separated from his friends, and was left alone without money, and without any means of transport back to Florida.

3 Mr. Du Plessis established that it would cost R260 to get a meter taxi back to Florida. Not having that money readily available, Mr. Du Plessis decided to induce a taxi driver to take him back to Florida on the strength of a promise that he would pay the driver with money he would collect at his destination. However, Mr. Du Plessis had no intention of paying the taxi driver. Instead, he placed a quantity of petrol in a takeaway coffee cup. He planned to empty the cup out in the taxi and set it alight when he reached his destination. This was intended to create a diversion while he escaped without paying his fare.

4 Mr. Du Plessis got into a taxi driven by Patrick Mahlambi. Mr. Mahlambi agreed to take Mr. Du Plessis back to Florida on the assurance that Mr. Du Plessis would collect the fare at his destination and then pay Mr. Mahlambi. During the trip to Florida, Mr. Du Plessis convinced Mr. Mahlambi to lend him his cell phone, which Mr. Du Plessis then decided to steal.

5 When the taxi reached its destination, Mr. Du Plessis poured the contents of the coffee cup onto Mr. Mahlambi and set him alight. He then forced Mr. Mahlambi out of the car. According to the Regional Court’s judgment on conviction, Mr. Mahlambi exited the car “in flames”, passed out, but then woke up a short while later on the ground.

6 Meanwhile, Mr. Du Plessis was trying to get away with Mr. Mahlambi's cell phone and his car. Mr. Du Plessis could not start the car. This delay allowed Mr. Mahlambi to recover to the extent necessary to pull Mr. Du Plessis out of the car, stripping Mr. Du Plessis of his shirt in the act of doing so. Mr. Du Plessis then tried to run away. Mr. Mahlambi pursued him in the car. Where the road met a railway line, Mr. Mahlambi stopped the car and pursued Mr. Du Plessis on foot. Mr. Du Plessis fell, and Mr. Mahlambi caught up with him. Mr. Du Plessis then got up, punched Mr. Mahlambi in the face and attempted to get away again. Mr. Mahlambi was again able to apprehend Mr. Du Plessis, push him to the ground and call for help. A passer-by responded to Mr. Mahlambi's calls for assistance. The passer-by summoned the police and an ambulance.

7 Mr. Mahlambi was taken to hospital, where it was found that he had suffered burns over a large area of the lefthand side of his body and face. He was in excruciating pain and needed multiple skin grafts. His face and body are permanently disfigured. He was unable to work for five months after the incident, and he ran up significant medical bills.

8 These facts are essentially common cause, although Mr. Du Plessis sought to dispute some of the details of the incident at trial. Mr. Du Plessis alleged that he poured petrol onto the taxi's centre console, and not directly onto Mr. Mahlambi. He also sought to mitigate his conduct by saying he was high on drugs at the time. But, even if these aspects of Mr. Du Plessis' version are accepted as true (the Regional Court, correctly in my view, found that they are not true), this was a serious offence. The conduct admitted by Mr. Du

Plessis would clearly have supported a charge of attempted murder, or, at the very least, of assault with the intent to do grievous bodily harm. This was no run-of-the-mill robbery.

9 Considering all this, the State's decision to charge Mr. Du Plessis only with attempted robbery with aggravating circumstances raises an eyebrow. However, since the conviction is not at issue in this appeal, I need not explore that issue further.

The appropriateness of the sentence

10 Given the seriousness of the conduct underlying the offence, the Regional Court sentenced Mr. Du Plessis to 15 years' direct imprisonment – the very maximum of its sentencing jurisdiction. Ms. Henzen-Du Toit, who appeared for Mr. Du Plessis before us, criticised that sentence as excessive. It was submitted that an "ordinary" attempted robbery, even with aggravating circumstances, would normally attract a sentence of five years, and that the imposition of ten more years was disproportionate in the circumstances.

11 I cannot agree. The Regional Court was clearly animated by the very serious injuries Mr. Du Plessis caused, which were an entirely foreseeable consequence of Mr. Du Plessis' voluntary and premeditated acts.

12 The Regional Court found that Mr. Du Plessis had raised fictitious disputes about the extent to which Mr. Du Plessis' conduct could have caused all Mr. Mahlambi's injuries, especially those to his face. The Regional Court also found that Mr. Du Plessis' failure to appreciate and own up to the full extent of Mr. Mahlambi's injuries (which could not have been caused by anything

other than Mr. Du Plessis' premediated assault) demonstrated a lack of remorse.

13 The Regional Court could not, in addition, have been impressed by Mr. Du Plessis' decision to plead not guilty and to subject Mr. Mahlambi to a lengthy and pedantic cross-examination on facts that were essentially common cause. Mr. Du Plessis, who was once an attorney, conducted that cross-examination himself. Ms. Henzen-Du Toit submitted that Mr. Du Plessis' exercise of the right to cross-examination cannot, in itself, aggravate a sentence. That is of course true. But there are limits to cross-examination. Cross-examination is all about the exploration of disputed facts. In this case, there were virtually no material disputes, and no need for Mr. Du Plessis to have put his victim through what must have been a harrowing re-exploration of a deeply painful and disfiguring assault. That must have aggravated matters, both because it re-victimised Mr. Mahlambi, and because it constituted a further reason to doubt that Mr. Du Plessis felt any genuine remorse for what he had done.

14 The Regional Court considered Mr. Du Plessis' personal circumstances, including the fact that he had turned to drugs when his professional and family life had broken down. It also took into account Mr. Du Plessis' offer to pay Mr. Mahlambi's outstanding medical expenses.

15 However, the Regional Court ultimately decided that the offence was so heinous; that the degree of remorse shown was so limited; and that the interests of the community so clearly favoured a lengthy custodial sentence, that a 15-year term of incarceration was appropriate. I cannot fault the

Regional Court's conclusions in this respect. I certainly cannot conclude that the sentence was disproportionate or "disturbingly inappropriate". (See, for example, *S v Malgas* 2001 (1) SACR 469 (SCA) at p 478D-G).

The contention that the Regional Court imposed a statutory minimum sentence

16 Ms. Henzen-Du Plessis further contended that the Regional Court had inappropriately imposed a statutory minimum sentence of 15 years in a case to which it did not apply. The nub of this argument was that both the prosecutor and the probation officer had conducted themselves as if Mr. Du Plessis' offence attracted a statutory minimum sentence of 15 years in terms of section 51 (2) (a) (i) of the Criminal Law Amendment Act 105 of 1997. That provision prescribes a minimum sentence of 15 years for a first offender convicted of robbery with aggravating circumstances, unless substantial and compelling circumstances justify a lesser sentence.

17 It is, of course, true that Mr. Du Plessis was only convicted of an attempt, not of the offence of aggravated robbery itself. It is equally true that section 51 (2) (a) (i) does not apply to inchoate crimes. However, the Regional Court was clearly alive to this, and found that the minimum sentencing legislation did not in fact apply to Mr. Du Plessis' conviction. Whatever misconceptions burdened the probation officer and the prosecutor in this case, they were not carried through into the Regional Court's judgment. There is accordingly no merit to the contention that Mr. Du Plessis was impermissibly subjected to a statutory minimum sentence.

Failure to credit Mr. Du Plessis for pre-trial incarceration

18 It was finally argued that Mr. Du Plessis had served 2 years and 3 months in pretrial detention, for which the Regional Court should have given him credit when it imposed sentence. Here, Ms. Henzen-Du Toit was on much firmer ground. It is plain from the record that the Regional Court refused to credit Mr. Du Plessis for his pretrial incarceration. The Regional Court found that Mr. Du Plessis had himself caused the delays that extended his pretrial detention, by seeking a referral for psychiatric evaluation, and by obtaining postponements to brief private counsel, before ultimately electing to represent himself.

19 It is not clear to me from the record that Mr. Du Plessis either sought a psychiatric evaluation, or caused any unreasonable delay in order to obtain legal representation. But that is beside the point. Even if Mr. Du Plessis were responsible for the delays attributed to him, I cannot see why that would, in itself, disentitle him to credit for pretrial detention at the sentencing stage.

20 We do not send people to prison for wasting a court's time, or for causing undue delay in judicial proceedings, and it would not be fair to prolong Mr. Du Plessis' sentence even if that is what he did. Depending on the context of a particular case, there may, of course, be circumstances where an accused person seeks to delay proceedings as a means to evade an appropriate conviction or a proper sentence. For example, delaying the proceedings might be calculated to bring about the unavailability of a material witness, or

the destruction of evidence. This, if demonstrated, might ultimately be an aggravating factor when a court considers the sentence it should impose.

21 But that is not the case here, and there is no reason to deny Mr. Du Plessis credit for the time he spent in prison awaiting trial. The Regional Court was bound to give that credit, and it misdirected itself when it declined to do so.

22 The extent to which pretrial detention should count towards the sentence finally imposed has been a point of debate in the cases. In *S v Stephen* (1994 (2) SACR 163 (W) at 168F), Goldstein J held, relying on authority produced in Canadian courts, that "[i]imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length". In *S v Brophy* (2007 (2) SACR 56 (W) at para 18) Schwartzman J endorsed this conclusion. He bolstered it by taking judicial notice of the conditions in which awaiting trial prisoners are kept and by relying on reports from the Judicial Inspector of Prisons.

23 However, the Supreme Court of Appeal has consistently declined to follow this approach. In *S v Dlamini* (2012 (2) SACR 1 (SCA)), Cachalia JA questioned its appropriateness, but ultimately left the issue open. In *S v Radebe* (2013 (2) SACR 165 (SCA)) and in *DPP v Gcwala* (2014 (2) SACR 337 (SCA)), Lewis JA rejected it. Lewis JA held that the period of pretrial detention must be considered, but that there is no general rule applicable to determining the credit to be given for it. It may be appropriate to consider the conditions under which the pretrial detention was endured, and any reasons contributing to its prolongation. The ultimate question, though, is whether the sentence is, overall, proportionate to the offence.

24 I have already concluded that the 15-year sentence the Regional Court imposed cannot be criticised as disproportionate. The problem, though, is that, because the Regional Court declined to give Mr. Du Plessis any credit for the time he had already served, 15 years was not really the sentence imposed. The sentence imposed was effectively one of 17 years and 3 months, which would, in itself, have been beyond the Regional Court's jurisdiction had it been imposed in those terms.

25 Mr. Du Plessis ought to have been credited in full for his pretrial detention. For that reason, and only that reason, the appeal should succeed, and Mr. Du Plessis' sentence ought to be reduced by 2 years and 3 months.

26 It was contended during argument that Mr. Du Plessis ought to be given a greater reduction in sentence, owing to the poor conditions in which he was incarcerated before trial. The problem with this contention is that there are no facts before us to demonstrate that Mr. Du Plessis' pretrial detention was appreciably worse than his incarceration as a sentenced prisoner. Mr. Du Plessis' application for leave to appeal makes some allegations about his pretrial conditions, but none about those he has had to endure while serving his sentence. An informed comparison is accordingly impossible. I am not satisfied that the difference between pretrial and post-trial prison conditions is so well-known as to be capable of judicial notice. However, this does not mean that, on properly adduced evidence, and in a proper case, pretrial detention ought not to count for more than the period actually served. I conclude only there are no facts on which I can reach that conclusion in this case.

Order

27 For all these reasons, I propose that we allow the appeal and set aside the sentence imposed by the Regional Court. I would replace the Regional Court's sentence with a sentence of direct imprisonment for 12 years and 9 months, to run from 17 September 2019.

S D J WILSON
Acting Judge of the High Court

I agree. It is so ordered

<u>VALLY J</u>:

.

HEARD ON:	24 February 2022
DECIDED ON: Cvsv	28 February 2022
For the Appellant:	J Henzen-Du Toit Instructed by Legal Aid South Africa
For the Respondent:	VE Mbaduli Instructed by the National Prosecuting Authority