REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes☐/ No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒
Date:	24 November 2023 WJ du

CASE NO: A43/2023

In the matter between:

MAHLOMULA LEISA **APPELLANT**

and

THE STATE

JUDGMENT

DU PLESSIS AJ

[1] Mr Leisa, a 32-year-old male, was charged in the Regional Court held in Randburg with a count of robbery with aggravating circumstances. He was legally represented and pleaded not guilty on the charge. He was, however, convicted as charged on 3 May 2018, and sentenced to 15 years imprisonment on 8 May 2018, in terms of s 52(2) of the Criminal Law Amendment Act 105 of 1997. On 6 April 2021, the court *a quo* granted the appellant leave to appeal against his sentence, which is the subject matter of this judgment.

[2] The conviction and sentencing stemmed from a robbery where the complainant, a 15-year-old girl, was cut on her forehead during the robbery. She did not need medical attention. She was robbed of her cell phone. She got her phone back after community members intervened. The aggravating circumstances were the use of an okapi knife during the commission of the offence and that he threatened her with grievous bodily harm.[1]

[3] After the robbery, members of the community assaulted the appellant, and an ambulance had to be called for him.

[4] He was arrested on 4 November 2017 and spent approximately six months awaiting trial before he was sentenced to 15 years (the minimum sentence in terms of s 51(2) of the Criminal Law Amendment Act[2]) on 7 May 2018.

[5] The court considered the circumstances of the accused, the nature and prevalence of the crime and the interest of society in his sentencing judgment.[3] It is clear from the judgment that the magistrate viewed the offence in a serious light.

[6] The appellant's personal circumstances were explained as the following: 32 years old, unmarried, and supporting his five nieces and nephews between 13 and 19 in Lesotho. He was employed at a sweets factory and made a further income selling clothes as a hawker. He earned about R2 800 per month and has a grade 7 education. He has no previous convictions. None of this was substantial and compelling enough for the court to consider not imposing the minimum sentence.

[7] After finding that there were no substantial and compelling circumstances, the magistrate briefly considered the time the appellant spent in custody awaiting trial but found that it was not "that long compared to the seriousness of the crime and from the time when the offence was registered up until the end of the sentence".[4]

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[1] CaseLines 003-61.

[2] 105 of 1997.

[3] CaseLines 003-78.

[4] CaseLines 003-84.

[8] In an appeal, the appeal court must consider whether the trial court exercised its discretion properly and judicially in imposing a sentence, not whether it was right or wrong.[5] This is because sentencing is mainly the task of the trial court. The court of appeal should only interfere if the trial court has misdirected itself, where the sentence is inappropriate or induces a sense of shock, or where there is a striking disparity between the imposed sentence and the sentence the court of appeal would have imposed.[6] It is thus for this court to consider whether the trial court misdirected itself in not finding that there are substantial and compelling circumstances to deviate from the minimum sentence and a failure to give credit to the pre-trial detention.

[9] As for the appeal court's approach on minimum sentence and the presence (or not) of substantial and compelling circumstances, the following should guide an appeal court's approach: the minimum sentencing regime may cannot be lightly departed from. In *S v PB*[7] the court restricted itself to only considering the facts which the sentencing courts had considered. However, in *S v GK*[8] the court stated that the facts that the sentencing court had considered does not mean that the appeal court are restricted to those, and that an appeal court should examine all the circumstances to determine whether substantial and compelling circumstances were present. This is because the values of the Constitution are served better with an interpretation that does not fetter the appellate court to consider the presence or not of substantive and compelling circumstances, as this gives greater safeguards to accused persons against the imposition of disproportionate punishment.

[10] The magistrate considered the test in *S v Malgas*[9] and found that considering all the circumstances of the case, namely the offence, notably the nature and the seriousness of the crime, as well as the relevant personal and other circumstances of the offender, there is no substantial and compelling circumstances that warrant

[5] *S v Obisi* 2005 (2) SACR 350 (W).

[6] *S v Kgosimore* 1999 (2) SACR 238 (SCA).

[7] 2013 (2) SACR 533 (SCA).

[8] 2013 (2) SACR 505 (WCC).

[9] [2001] ZASCA 30.

a departure from the minimum sentence of 15 years. If limited to only those factors, I will agree. But as will become evident from the discussion below, I am of the opinion that the trial court error in not finding the time spent awaiting trial as a substantive and compelling reasons to deviate from the minimum sentence of 15 years.

[11] Accused persons often wait many months, if not years, for their trials to commence and to complete. It is not unusual for this factor to be considered to reduce the sentence.[10] The Supreme Court of Appeal in *Dlamini v S*[11] stated that it is trite that such a period is usually taken into account as a distinct ground when deciding an appropriate sentence. How this period must be calculated seems to be a point of disagreement.

[12] In *S v Vilakazi*,[12] the court found it unjust not to consider the period of imprisonment while awaiting trial if the accused is not promptly brought to trial. The court ordered that the sentence of 15 years imprisonment, which commenced on the date of the sentence, is to expire two years earlier, an inexact subtraction.

[13] In *Radebe v S*[13] the court did not want to lay down a rule of thumb regarding calculating the weight to be given to the period spent by an accused awaiting trial and should be assessed on a case-by-case basis. Pre-trial detention is only one factor to take into account when considering a sentence.

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[10] *S v Goldman* 1990 (1) SACR 1 (A) at 4g; *S v Dzukuda* 2000 (2) SACR 51 (W) at 71gh; *S v Olyn* 1990 (2) SA 73 (NC) at 75I76B; *S v Markus* 1997 (2) SACR 538 (C) at 539f; *S v Maki* 1994 (2) SACR 414 (E) at 420h; *S v Ndima* 1994 (2) SACR 525 (D) at 533gh*; S v Makoae* 1997 (2) SACR 705 (O) at 707fg, 709j.

[11] 2012 (2) SACR 1 (SAC).

[12] 2009 (1) SACR 552 (SCA).

[13] 2013 (2) SACR 165 (SCA).

[14] The court in *S v Hawthrone*[14] merely subtracted the time spent in custody. *S v Brophy*[15] (agreeing with *S v Stephen*[16]) treated the time spent in custody as the equivalent to the time served without remission. This approach typically requires proof that the accused suffered great hardship during the awaiting trial period.[17] There is even authority[18] that imprisonment while awaiting trial is the equivalent of a sentence twice that length, amongst other reasons, because such prisoners are not entitled to a presidential pardon, cannot partake in rehabilitation or education programmes, and do not earn privileges through good behaviour. This time is also not used to calculate eligibility for parole.

[15] All this should be considered in the constitutional framework that values the right to freedom and security of the person, which includes the right not to be detained without a trial,[19] read with the right of every accused person to have the trial begin and conclude without reasonable delay.[20] The issue of equality also comes into play if one considers the fact that the pre-trial period is not considered when eligibility for parole is determined.[21] This inadvertently means that pretrial detention should be considered during the sentencing inquiry, regardless of the reason of the delay. The purpose of pretrial detention is not to punish an accused, but to ensure his attendance at trial, or prevent interference with the investigation, for instance.[22]

[16] What is evident from the case law is that an offender is entitled to have this period considered when an appropriate sentence is decided; this might make the period

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[14] 1980 (1) SA 521 (A) at 523F-G.

[15] 2007 (2) 56 SACR (W) at para 18.

[16] 1994 (2) SACR 163 (W).

[17] *S v Mahlangu* 2012 (2) SACR 373 (GSJ) at 376c-d.

[18] *S v Stephen* 1994 (2) SACR 163 (W) at 168f; *S v Brophy* 2007 (2) SACR 56 (W) at para 18.

[19] S 12(1)(b).

[20] S 35(3)(d).

[21] *Mqabhi v S* 2015 (1) SACR 508 (GJ) para 40.

[22] *Du Plessis v S* [2022] ZAGPJHC 116 par 20.

of imprisonment imposed shorter than it would otherwise have been; but it is unclear on how the period must be factored in.[23]

[17] This can be specifically problematic in the case of minimum sentences. Counsel for the appellant argued that the effect of the sentence is that the appellant will now spend 15 years and 6 months in prison. This exceeds the prescribed minimum sentence, and thus required the magistrate to give reasons why he departed from the minimum sentence. The problem, however, is that such reasoning goes against the prescripts of s 51(4) of the Criminal Law Amendment Act[24] that states that "[a]ny sentence contemplated in this section shall be calculated from the date of sentence".

[18] If the magistrate then deems it necessary to factor in the pretrial detention, it will necessarily depart from the minimum sentencing that it is bound by in terms of s 51(2), which means that it must give substantial and compelling reasons to do so in terms of s 51(3). The issue of pre-trial detention should thus be part of the "substantial and compelling" inquiry. In that regard, *S v Malgas*[25] emphasised,

> 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[19] In my view, a sentence that does not give credence to pretrial detention, is disproportional. In this case, this is a substantive and compelling reason to depart from the minimum sentence.

[20] Based on the law set out above, and mindful of the limited powers of a court of appeal to interfere with the discretion of the trial court when it comes to sentencing, I am of the opinion that the refusal of the court *a quo* to credit Mr Leisa for his pretrial incarceration is a misdirection. There is no reason to deny Mr Leisa credit for the time spent in prison awaiting trial. Even if the magistrate is of the view that 6

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[23] *Mqabhi v S* 2015 (1) SACR 508 (GJ) para 26.

[24] *Mqabhi v S* 2015 (1) SACR 508 (GJ) para 26.

[25] 2001 (2) SA 1222.

months is a relatively short period, every day that Mr Leisa spent in prison in excess of 15 years is a day taking away the liberty of Mr Leisa. There is thus a substantive and compelling reason to deviate from the minimum sentence.

[1] Order

[21] I, therefore, make the following order:

1. The appeal on sentence is upheld;
2. The court a quo's order is set aside and replaced with the following order: The appellant is sentenced 14 years and 6 months imprisonment, commencing on 8 May 2018 being the date that the appellant was sentenced.

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WJ DU PLESSIS

Acting Judge of the High Court

Gauteng division

I agree and it is so ordered

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PJ JOHNSON

Acting Judge of the High Court

Gauteng division

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the appellant:	Mr EA Guarneri
Instructed by:	Legal Aid South Africa
Counsel for the respondent:	Mr NP Tyeku
Date of the hearing:	30 October 2023
Date of judgment:	24 November 2023