



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

CASE NO: A59/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 23rd May 2023

In the matter between:

HLATINI: TATENDA

APPELLANT

and

THE STATE

RESPONDENT

ALLY AJ et RAMLAL AJ

NEUTRAL CITATION: *Hlatini Tatenda v The State* (Case no: A59/2022) [2023]

ZAGPJHC 539 (23 May 2023)

JUDGEMENT

ALLY AJ

- [1] The Appellant was arraigned in the Regional Court on a charge of robbery with aggravating circumstances read with Section 51(2)(a) and part 2 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 and further read with Section 260 of Act 51 of 1977.
- [2] The Appellant pleaded not guilty and was ultimately found guilty as charged and sentenced to a custodial sentence of 15 years imprisonment.
- [3] This matter serves before this Court as a result of leave to appeal having been granted by the Court *a quo* on sentence. The Appellant had only applied for leave to appeal his sentence.
- [4] The Appellant was represented in this Appeal by Ms Bovu and the State Adv. TJ Mbodi.
- [5] At the outset the Appellant applied for condonation for the late filing of his heads of argument. After hearing Counsel for the Appellant and the State not having opposed the application, the Court granted condonation in the interests of justice.
- [6] The Appellant, a 28 [twenty-eight] year old at the time of the commission of the offence, robbed the complainant, Ms Thandeka Magagula, whilst she was stuck in traffic on the M1 highway in Johannesburg. The Complainant testified that she was lost and was using her cellphone to get directions when the Appellant opened her door and robbed her of her cellphone at gunpoint.
- [7] It became common cause in the Court *a quo* that the firearm was a toy and that the cellphone was retrieved from the Appellant shortly after the robbery.
- [8] The Appellant's grounds of appeal in a nutshell are that the Magistrate committed a misdirection by not informing the Appellant of the implications of the minimum sentence regime¹ and that the Magistrate misdirected himself in not finding substantial and compelling circumstances not to apply the minimum sentence.
- [9] It is trite that a Court of Appeal is loath to interfere or overturn the judgement of the Court *a quo* unless it shown that there has been a material misdirection

¹ Section 51 of Act 105 of 1997

or where the sentence is 'startling', 'shocking' or 'disturbingly' inappropriate in the given circumstances.².

[10] The Appellant relied on the case of **S v Chowe 2010 (1) SACR 141**³ to indicate that the Magistrate committed a material misdirection in not warning the Appellant of the minimum sentence regime. Now this Court is bound by the **Chowe** judgement insofar as it states that:

"...a perfunctory approach by the lower courts with regard to the minimum sentence regime is not to be countenanced. The fact that the accused was legally represented, in my view, does not take away the need to inform the accused that such minimum sentencing dispensation of the Act would be relied upon for sentencing. Section 35(3)(a)⁴ of the Constitution requires that the accused be informed of the applicability of the minimum sentencing provisions of the Act"

[11] This judgement as quoted above, however, does not go further to state that the absence of such a warning, in and of itself is a material misdirection. The judgement, in my view, does state that in a given circumstance, the absence of such a warning might interfere with an accused's fair trial rights, in that the accused would not be given a fair opportunity to present his defence.

[12] In this case, the Appellant was legally represented and indicated to the Court that he understood the charge as read out by the prosecutor. The Legal Representative in the Court *a quo*, informed the Court that the Appellant's plea was in accordance with his instructions. The Legal Representative also had the opportunity to present the Appellant's defence⁵.

[13] In my view, whilst the Magistrate did not warn the Appellant of the minimum sentence regime, in this particular case, there was no material misdirection.

[14] This, however, is not the end of the appeal for the Appellant. The Appellant also relies on the ground that the Magistrate in failing to find substantial and compelling circumstances existed cumulatively, committed a misdirection.

² S v Malgas 2001 SCA @ para 12

³ At para 23

⁴ Constitution of the Republic of South Africa, 1996

⁵ S v Ndlovu 2003 (1) SACR 331 at para 12

- [15] It is clear, in my view, that the Magistrate took into account the personal circumstances of the Appellant. However, it is my view that the Magistrate failed to give due consideration to the fact that the cell phone of the complainant was retrieved. Furthermore, the Appellant was a first-time offender and due weight should have also been given to this fact.
- [16] This Court agrees with Ms Bovu that cumulatively, the Magistrate should have found substantial and compelling circumstances existed to deviate from the minimum sentence regime in this particular case.
- [17] Accordingly, this Court is entitled to interfere with the sentence imposed by the Court *a quo*.
- [18] The Appellant was 28 years old at the time of the commission of the offence. The cellphone of the complainant was recovered almost immediately. The complainant was not injured during the commission of the offence. As a result, it is my view that the minimum sentence of 15 [fifteen] years direct imprisonment in this case is shockingly inappropriate and taking into account the triad principles, a sentence of 10 [ten] years imprisonment would be appropriate.

ORDER

- [19] As a result the following order is made:
- a). Condonation for the late filing of the Appellant's heads of argument is granted;
 - b). The appeal against sentence is upheld;
 - c). The sentence of 15 years imprisonment is set aside;
 - d). The Appellant is hereby sentenced to a term of imprisonment of 10 [ten] years.
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G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

I concur

A RAMLAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down in Court and circulated electronically by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **234 May 2023**.

Date of hearing: 13 February 2023

Date of judgment: **234** May 2023

Appearances:

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