IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION)

(1) NOT REPORTABLE
(2) NOF OF INTEREST TO OTHER JUDGES
(3) REVISED.

Case No. A25/2017
3/8/2018

In the matter between:

EUGENE MKHABELA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MILLAR, AJ

1. On 21 November 2016, the appellant, a 20-year-old man was convicted in the Regional Court of Mpumalanga, held at Mhala of attempted murder (Count 1) and robbery with aggravating circumstances (Count 2). He was sentenced to 10 years imprisonment for the attempted murder and to 15 years imprisonment for the robbery with aggravating circumstances. It was also ordered that 5 years of the sentence on Count 1 would run concurrently with the sentence on Count 2 resulting in an effective sentence of 20 years imprisonment. The appellant was also declared unfit to possess a firearm.

2. The appeal before this court is against conviction and sentence.

3. The appellant was legally represented throughout the proceedings. He pleaded not guilty to both counts. The state called 7 witnesses to testify. The appellant was the only witness for the defence.

4. The state called G M ("M") as a witness. She testified that she lived in Ga-Matibidi with her family. On the property was a garage which housed a tenant who ran a shop. The tenant was known as "D". On the evening of 14 March 2015 and at approximately 19h30, she went to the garage and came upon the appellant and another man who were standing over David who was lying face down on the ground. The inside of the shop was illuminated by an electric light. The appellant looked at her and she at him for about 2 minutes and as she started to back away the appellant shot her. She was hit by a bullet in the left arm. The appellant and his co-perpetrator ran to a motor vehicle, got into it and drove away.

5. M described what the appellant was wearing and testified that she knew him as he had worked in the area building a house for a certain Ms. D in 2013. He had worked on that house every day for a month and she had seen him. Subsequent to 2013, she had seen him in the area during the early part of 2015 with his friends and had recognized him. He lived in the area and she knew where he lived. She had observed what he was wearing on the evening in question and had recognized him even though he had been wearing a cap and sunglasses at the time.

6. The police had been called to the scene and she had subsequently, after being treated at the Mapulaneng Hospital later the same night, given a statement to the police two days later. She had informed the police that she knew the appellant by sight and they proceeded to investigate. She had subsequently attended an identity parade and had identified the appellant as the person who was in the shop on the night in question and had shot her.

7. The state also called Y A ("A"). He testified that he was the tenant on the property and that on the evening in question, he had been robbed at gunpoint by two men who were unknown to him. They had entered his

shop which was illuminated by an electric light, asked for cigarettes and then drawn a gun and pointed it at him. He was ordered to give them the keys to the shop and to then lie down. He testified that due to difficulty in pronouncing his name, local people knew him as "D". His evidence was that he had been lying face down when he heard a gunshot and that when he had looked up after a few minutes, he saw that M had been injured. He testified that he discovered that cigarettes worth R340,00 together with R700,00 in cash and airtime vouchers to the value of R 2000,00 had been stolen from his shop.

8. V M and D D both testified and confirmed that V M had indeed together with the appellant undertaken building work in the area during 2013.

9. Various police officers were also called by the state. Their evidence related in the main to the taking of the statement from M and how the appellant had come to be arrested on 25 March 2015.

10. The appellant testified in his defence. He denied any knowledge of the incident or that he knew M. He testified that on the day in question he had been at home nursing his ill mother. No other witnesses were called by the appellant to corroborate his evidence.

AD CONVICTION

11. The evidence of both A and M as to the events in the shop on the evening in question was unchallenged. The appellant's counsel argued that M did not have a "proper" opportunity to observe the robbers, the scene was "mobile" and that the fact that she could not describe what one of them was wearing was indicative of this.

12. It was also argued that M had testified that there were 3 robbers in the shop while A had testified that there were only 2. A reading of the transcript readily reveals this to be erroneous. They both testified that there were 2 robbers. The criticism of the evidence of M is unwarranted. She knew the appellant by sight and had minutes to observe him. It is because she knew him that she was able to recognize him notwithstanding that he was wearing a cap and sunglasses.

13. The appellant called no witnesses to corroborate his version and tendered no explanation for this. His defence was nothing more than a bare denial[1] and the learned Magistrate, correctly so, found that the state had proven its case beyond a reasonable doubt.

14. There is in the circumstances, no reason to interfere with the factual findings of the court a *quo* in respect of the convictions on Counts 1 and 2.

AD SENTENCE

15. The appellant was convicted, on Count 1 of attempted murder. He was sentenced to 10 years imprisonment of which 5 years was ordered to run concurrently with the sentence on Count 2. The effective sentence on this count is thus only 5 years.

16. The appellant was convicted, on Count 2 of robbery with aggravating circumstances , a crime referred to in Part II of Schedule 2 of The Criminal Law Amendment Act 105 of 1997, and the court a *quo* was obliged to impose the prescribed minimum sentence of 15 years in terms of Section 51(2)(a)(i) of that Act, absent substantial and compelling circumstances[2].

17. The appellant was also declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act 60 of 2000.

18. Consideration must be had to whether the effective sentence on Count 1 was appropriate and whether the prescribed minimum sentence on Count 2 was also appropriate or whether there were substantial and compelling circumstances to impose a lesser sentence/s.

19. The test to be applied is set out in S v Kgosimore[3] - *"It is trite law that sentence is* a *matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce* a *sense of shock or whether there is* a

[1] See Molema v The State (555/10) (2011) ZASCA 62 (1 April 2011) at paragraph 19 and the authorities referred to therein.
[2] S v Malgas 2001 (1) SACR 469 (SCA) at paragraph 8
[3] 1999 (2) SACR 238 (SCA) at paragraph 10

striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence."

20. Neither the state nor the appellant led any evidence at the sentencing stage of the proceedings. Both were content to argue the matter on the evidence already before the court.

21. It was argued for the appellant, that his personal circumstances should be taken into consideration. The appellant is a 27-year-old male. He was 24 at the time of the commission of the offences and a first offender. He completed school to grade 8. The appellant was at the time of the offences working,doing odd jobs earning R1 500,00 per month and supported his wife and a 7-year-old child. It was argued for the state that the prevalence of the offences for which the appellant had been convicted and the interests of both the complainants and the community[4] militated the imposition of the minimum sentence in respect of Count 2.

22. The trial court did not overemphasize the interests of the community and was not dismissive of the personal circumstances of the appellant[5]. Both aspects were dealt with in the judgement on sentence and I find that the learned magistrate exercised her discretion properly and reasonably in the circumstances[6].

23. The sentence imposed in respect of Count 1 was appropriate in the circumstances. There are furthermore however, in the present case, no substantial and compelling reasons for the court to have departed from the minimum sentence in respect of count 2.

24. In the circumstances, I propose the following order:

    24.1 The appeal against the convictions on counts 1 and 2 is dismissed.

    24.2 The appeal against sentence on counts 1 and 2 is dismissed.

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[4] See S v Nhlapo 2012 (2) SACR 358
[5] See S v Beyi 2011 (2) SACR 23 at 25e
[6] S v Kgosimore supra

A MILLAR

ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED

D.S. MOLEFE

JUDGE OF THE HIGH COURT

HEARD ON:	31 JULY 2018
JUDGMENT DELIVERED ON:	3 AUGUST 2018
COUNSEL FOR THE APPELLANT:	ADV JK KGOKANE
INSTRUCTED BY:	LEGAL AID SOUTH AFRICA
COUNSEL FOR THE RESPONDENT:	ADV H VAN RENSBURG
INSTRUCTED BY:	THE STATE ATTORNEY