REPUBUC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO:456/2017

30/1/2019

In the matter between:

LINDA NDLOVU **Appellant**

and

THE STATE **Respondent**

JUDGMENT

COLLIS J (SWANEPOEL AJ concurring)

[1] This is an appeal against sentence with leave of the regional magistrate, Benoni *("the court a quo"*).

[2] The appellant, a 31 year old male at the time of the incident, was charged with Robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of i997 {count 1) and assault with the intent to do grievous bodily harm (count 2). It is alleged that on 13 July 2015 and .at Etwatwa, the appellant unlawfully and intentionally acting i11 common purpose with an unknown person, with force deprived Portia Nkambulo of her handbag and its contents by making use of a firearm. In around the same vicinity the appellant also unlawfully and intentionally assaulted Vusi Mnguni by hitting him with a ·firearm butt.

[3] The appellant legally represented at the time. pleaded not guilty to the charges and elected not to disclose the basis of his defence. On 8 June 2016 he was subsequently convicted on both counts. He was sentenced to a cumulative sentence of 18 years imprisonment as follows:

3.1 Count 1: Eighteen (18) years imprisonment.
3.2 Count 2: Two (2) years' imprisonment.

The sentences were ordered to run concurrently in terms of section 280 (2) of the Criminal Procedure Act. Act 51 of 1977.

[4] On 23 January 2016, the *court a quo* granted the appellant leave to appeal his sentence.

[5] Briefly, the evidence presented before the *court a quo* can be summarized as follows: The complainant, Ms Portia Nkambule, testified that on the 13th July 2015 at around 06h30 she was walking on her way to work when she met up with two unknown men. They first greeted her as she was passing them. She responded and immediately one of them came standing in front of her an d blocked her way. This gentleman holding a firearm then demanded her handbag and also ordered her to take off her rings. He then instructed her to leave and she proceeded to run away. After running for a while she then looked back and could no longer see any of her assailants. She then, decided to tum back in the direction of her house in order to report to her family what had happened to her. Upon doing so, her family then decided to set off using their vehicle to look for her assailant. As luck would have it, along the way she then spotted her assailants going into a passage. They called in the assistance of a passer-by, Mr. Vusi Mnguni and reported to him that she had been robbed. He then gave chase after her assailants and later returned having caught the appellant with the assistance of members of the public. Upon Mr. Mnguni returning he was bleeding above his right eye and reported to them that he had been struck by the appellant with the butt of a firearm, The appellant when apprehended. was then searched and the cellphone of the complainant was recovered from him. The police were

also called and the appellant then took them to a shack where her rings were retrieved together with other stolen items.

[6] Mr. Vusi Mnguni corroborated the evidence of the complainant that he had chased after the appellant and when he caught up with him, he was assaulted by the appellant above his right eye using a firearm, before he was able to disarm him. As he had sustained an injury and was bleeding, he was unable to testify as to what items were retrieved from the appellant.

[7] The appellant when he testified, denied that on the day in question he had either robbed or assaulted the complainant It was his evidence that on the day, he was walking in the street from Barcelona when he came across July Khoza, a person staying In the same street as him. As they were walking along they were then approached by a vehicle, which nearly ran them over. July then started to run away and a gentleman alighted from the vehicle and gave chase after him. There was a commotion, but he did not run away. He was then falsely accused by the complainant that he and July had robbed her. He denied this and when the police arrived, he also denied it to them that he had earlier robbed the complainant. In his possession was found his own two cellular phones and R 350 which he was carrying. He later accompanied the police to point out where July was staying but was never shown by the police what was recovered from the room of July.

[8] Albeit, that sentencing is inherently within the discretion of the sentencing court, the powers of an appeal court to interfere with the sentencing court's discretion in imposing a sentence are limited, unless the sentencing court's discretion was exercised improperly. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the sentencing court exercised its discretion properly and judicially. If the discretion was exercised improperly, the appeal court will interfere with the sentenced imposed.[1]

[9] It is further trite that where the sentence is deemed to be "startlingly inappropriate" or induces a ·sense of shock, with there being a striking disparity between it and the sentence the appeal court would have imposed, the Appeal

Court is entitled to “interfere with such sentence because such sentence shows that the court imposing the sentence failed to properly and reasonably exercise the discretion bestowed upon it.”[2]

[10] The appellant assails the sentence on the assertion that the effective of 18 years imprisonment imposed in respect of count 1 is more than the prescribed minimum sentence for a first offender convicted with robbery with aggravating circumstances, and therefore shockingly harsh and inappropriate. Furthermore. that the *court quo* failed to make a finding that there were no substantial and compelling circumstances present which would result in the imposition of the prescribe minimum sentence.

[11] In order to determine this appeal, it is important to have regard to the provisions of section 51(2) of the General law Amendment Act 105 of 1997. It reads as follows:

S 51(2): Notwithstanding any ether !aw but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule .2, in the case of -

(i) a first offender, to imprisonment for a period not fess than 15 years;

(ii) a second offender' of any such offence, to Imprisonment for a period not less than 20 years; and

……

……

……

……

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years."

---

[1] S v Malgas 2001(1) SACR 469 (SCA)

[2] S v Wright 2000 (1) SACR 322 (SCA) at 324h & S v Michael and Another 2010 (1) SACR at

[12] Section 3 (a) further provides as follows:

"It a court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

[13] Before the *court* a *quo,* the following factors were placed before the court in mitigation of sentence. The appellant was 23 years old, unmarried and the father of one minor child with whom he was residing with. At the time of his arrest he was self-employed. During mitigation of sentence the appellant testified that during 2005 he was convicted of robbery in respect of which he received an eight years imprisonment sentence and during 2007 he was convicted of dealing in a dependency producing drug, in respect of which he received 6 years direct imprisonment.

[14] The *courts quo,* when imposing sentence took into account the previous convictions of the accused, more so his previous conviction of robbery, which the court considered to be similar to the one he was to be sentenced on by the court.[3] It also took into account. the appellant's other personal circumstances, the seriousness of the offence and the interest of society.

[15] When the *court* a *quo* sentenced the appellant in respect of count 1, the record is silent as to whether the sentence of 18 years so imposed, was in terms of section 51(2) (a) (i) which carried a mandatory minimum sentence of 15 years which could be increased by no mora than 5 years, or whether the sentence of 18 years imposed was in terms of section 51(2)(a)(ii), which carried the mandatory minimum sentence of 20 years, unless the court finds substantial and compelling circumstances present calling for a deviation from the minimum .sentence. In either instance the *court a quo* should have recorded reasons for

either- increasing the minimum sentence or deviating from imposing 5qme.In the present instance the court failed to do so.

[16] I*n casu,* it is unquestionable that *the* appellant stood before the *court a quo* as a first offender for robbery with aggravating circumstances which carried a mandatory minimum sentence of 15 years.

[17] The failure however by the *court a quo* to clearly and expressly record the reasons for an increase to the mandatory minimum sentence of 15 years in terms of section 51(2) (a) (i) constitutes a misdirection which calls for an interference with the sentencing court's discretion.

[18] Having said that, robbery with aggravating circumstances and in this instance where a firearm was used to induce fear to the victim is a serious offence. Apart from the aforesaid, this offence was committed in the neighbourhood of the complainant early one morning as she was going out to earn a decent living, seemingly perpetrated by members of her own community. This is in my mind an aggravating circumstance.

[19] Our courts further carries the responsibility to send a clear message to our communities that crime will not be tolerated. This can only be shown by the sentences meted out by om courts. However, *in casu* having regard to the facts and the absencec-1f clearly and expressly recorded reasons for deviation, a deviation from the mandatory minimum sentence was not warranted.

[20] Accordingly, I conclude that the appeal on sentence must succeed.

[21] In the result the following order is made:

21.1 The appeal against sentence is upheld.

21.2 The sentences imposed by the *court a quo* are set aside and replaced with the following;

21.2.1 In respect of count 1, Robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 the appellant is sentenced to a period of 15 years imprisonment.

21.2.2 In respect of count 2, Assault with the intent to do

---

[3] Transcribed Record pg 76 Lines 1-4

grievous bodily harm the appellant is sentenced to 2 years imprisonment.

21.2.3 The sentenced imposed on count 2 is to be served concurrently with the sentenced imposed on count 1.

2.1.2.4 The appellant is also d dared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

21.2.5 The sentences are antedated to 8 June 2016 in terms of Section 282 of the Criminal Procedure Act, Act 51 of 1977.

C.J COLLIS

JUDGE OF THE HIGH COURT

I agree

J.J.C.SWANEPOEL

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

Appearances:

For the Appellant: Ms. M.B. Moloi

Instructed by: Legal Aid South Africa

For the Respondent:	Adv. C. Pruis
Instructed by:	Director of Public Prosecutions Pretoria
Date of Hearing:	03 December 2018
Date of .Judgement:	30 January 2019