



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **YES**

Date: **13 September 2022** Signature:

Case Number: A27/2022

In the matter between:

MABUZA; DENNIS ERNEST

1st Appellant

SITHOLE; FABIANO ARLINDO

2nd Appellant

and

THE STATE

Respondent

JUDGMENT

NYATHI J

A. Introduction

- [1] The appellants were charged in the Gauteng Regional Court in Benoni with the following counts:
- 1.1 Count 1: Robbery with aggravating circumstances;
 - 1.2 Count 2: Contravention of section 3 of the Firearms Control Act, Act 60 of 2000 – Possession of an unlicensed firearm
 - 1.3 Count 3: Contravention of section 90 of the Firearms Control Act; Act 60 of 2000 - Possession of ammunition.
- [2] On the 9th June 2017 both appellants were convicted of all the above counts and sentenced as follows:
- 2.1 Count 1: 15 years' imprisonment.
 - 2.2 Counts 2 and 3: taken together for purposes of sentencing: 5 years' imprisonment. It was ordered that 2 years' imprisonment would run concurrently with the sentence in respect of count 1.
- The effective sentence was thus 18 years' imprisonment.
- [3] The Appellants application for leave to appeal against their convictions and resultant sentences was refused.
- [4] The Appellant then directed a Petition to the Judge President of the Gauteng High Court, and were granted leave to appeal against their **sentences** on the 06th December 2021. Their appeal is before this court with the said leave.
- [5] The appellants were legally represented during their trial.

B. Grounds of appeal

[6] The appellants contended that the trial court had misdirected itself *inter alia*:

- 6.1 By finding that there were no substantial and compelling circumstances to enable the court to deviate from imposing the minimum sentence as set out in the minimum sentences legislation, namely, The Criminal Law Amendment Act 105 of 1997, in respect to Count 1;
- 6.2 By imposing a sentence that is shocking and disproportionate to the facts of the case in respect to Count 1;
- 6.3 By not considering an alternate form of punishment;
- 6.4 By not suspending a portion of the sentence;
- 6.5 By over-emphasizing the seriousness of the offence and the interest of the society;
- 6.6 By failing to take into account the prospects of rehabilitation; and
- 6.7 That the Court had erred in not finding that there were substantial and compelling circumstances to deviate from the prescribed minimum sentences.

C. Legal guidelines to sentencing and applying the law to the facts

- [7] It is trite law that punishment is pre-eminently a matter for the discretion of the trial court, and that a court of appeal should be careful not to erode that discretion.¹
- [8] The sentence imposed should only be altered if the discretion has not been “judicially and properly exercised.” The consideration by the appeal court is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.²
- [9] In *S v Ncheche 2005 (2) SACR 386 (W)* it was re-iterated that a court of appeal, even if it is of the opinion that it would have imposed a lighter sentence, is not free to interfere if it is not convinced that the trial court could not reasonably have passed the sentence that it did.
- [10] The court in deciding on an appropriate sentence, took into account the traditional triad stated in *S v Zinn 1969 (2) SA 537 (A)* to wit the crime, the offender and the interests of society.
- [11] In this case the court found the following to be aggravating factors in considering a just sentence:
- 11.1 The prevalence of the offences in its area of jurisdiction;
- 11.2 The seriousness of the offences of robbery.
- 11.3 That a firearm was used during the commission of the robbery.
- [12] The court a quo found that no substantial and compelling circumstances existed which could oblige it to deviate from imposing the mandatory minimum sentence envisaged in the Criminal Law Amendment Act 105

¹ *S v Rabie 1975 (4) SA 855 (A); S v Pillay 1977 (4) SA 531 (A); S v Shapiro 1994 (1) SACR 112 (A) at 119J – 120C.*

² *Rabie (supra)*

of 1977. This was a correct approach to the injunctions laid down by the Supreme Court of Appeal in *S v Matyityi 2011 (1) SACR 40 (SCA)*.

- [13] Despite finding no substantial and compelling circumstances to justify deviating from the prescribed minimum sentence, the court nevertheless tempered the harsh effect of the sentence in Count 2 by ordering two years of the sentence to run concurrently with that in Count 1. It bears noting that the firearm used in the robbery was loaded and ready to overcome any resistance.
- [14] Mr Botha, on behalf of the appellant, contended that the second appellant was not found in possession of a firearm when he was arrested and also it is the evidence of the complainant that he was only pointed with a firearm by the first appellant and as such the second appellant cannot be held liable and be sentenced in respect of an offence relating to unlawful possession of a firearm and ammunition the same manner as the first appellant as it was decided in the matter of *S v Makhubela, S v Matjeke 2017(2) SACR 665 (CC)*. The approach adopted by Mr Botha, even though in terms of the law is the correct approach, is problematic as the attack is mainly directed to conviction. This court was not seized with an appeal on conviction, but on sentence only. I doubt that this court has inherent jurisdiction to deal with an issue which was not properly placed before it, but only arose during argument.
- [15] In *S v Khumalo 2009 (1) SACR 503 (T)* it was stated that the appeal court does not have power to hear a matter that was not properly before the court. Moreover, section 19(a) of the Superior Court Act 10 of 2013, which deals with the powers of the court on hearing of appeals, provides that the court can either confirm, amend, or set aside the decision which

is the subject matter of the appeal and render any decision which the circumstances may require.

[16] I am therefore satisfied that the sentence meted out in this case is fair and just and there is no need to interfere with the learned magistrate's exercise of his discretion.

[17] The appeal against sentence is dismissed.

J.S. NYATHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree,

M.J MOSOPA

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 03 August 2022

DATE OF JUDGMENT: 13 September 2022

APPEARANCES

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