



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A331/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
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SIGNATURE	DATE

In the matter between:

SKHUMBUZO MATSHIKA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

MOSOPA, J

1. The appellant was convicted on a charge of robbery with aggravating circumstances, read with the provisions of section 51(2) of Act 105 of 1997, in the Benoni Regional Court.
2. The appellant who was legally represented throughout the trial was sentenced to fourteen (14) years imprisonment following his conviction.

3. The appellant appeals to this court against the sentence, with leave of the trial court granted on 15 June 2017.

BACKGROUND

4. The conviction of the appellant has its genesis in the incident which occurred on 8 March 2017, at 22h30, when the complainants were accosted on the street by three men.
5. The complainant, Ms Ngitukulu, was robbed of her handbag which contained two (2) cellphones and a Bible, to the value of R3000.00. One of the attackers wielding a knife, prevented Ms. Ngitukulu to pick up her handbag that fell during the commotion.
6. The security officers who were deployed near where the robbery took place, assisted, after hearing the commotion, but the assailants fled the scene before the security officers arrived at the scene.
7. Both the complainants identified the appellant as one of the people who attacked them and robbed them. Ms Ngitukulu's husband saw the appellant as they were approaching them and said to his wife, "there is our boy", referring to the appellant. They knew the appellant before the incident as the appellant and his friends were always in the vicinity where the complainants conduct their business. On the day of the appellant's arrest, Ms Ngitukulu saw the appellant around the vicinity of their place of business and alerted her husband who was then alerted the police of the presence of the appellant in the area, which led to the arrest of the appellant. Upon his arrest, the appellant stated that the complainants should have informed him of the value of the cellphone, so that he could have given them the money, with the assistance of his mother.

SENTENCE

8. When dealing with the appellate court's power to interfere with the sentence imposed by the court *a quo*, the Constitutional Court, in the matter of **S v Bogaards 2013 (1) SACR 1 (CC)** at 15 para 41 said:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

9. The trial court considered the period the appellant spent in custody awaiting finalisation of the trial matter and found the existence of substantial and compelling circumstances and thus, deviated from the imposition of the prescribed minimum sentence.
10. The issue which arose in this appeal as the primary matter for determination is that the trial court failed to afford appropriate weight to the technical context in which the offence complies with the definition of aggravating circumstances, along with the appellant's personal circumstances, to deviate to a greater extent from the prescribed minimum sentence. Put differently, that the offence under which the appellant was convicted cannot be equated to a robbery committed with the use of a firearm, where the victim was injured or with cash-in-transit heists.
11. The robbery of which the appellant was convicted resorts within the ambit of section 51(2) and Part II of Schedule 2 of Act 105 of 1997,. A minimum sentence of fifteen (15) years imprisonment is prescribed in the event of a conviction. Section 51(3)(a) of Act 105 of 1997 empowers the court to deviate from the prescribed minimum sentence in event that substantial and compelling circumstances are found to be present.
12. In the seminal judgment of **S v Malgas 2001 (1) SACR 469 (SCA)** at 481, the Supreme Court of Appeal cautions us not to depart from specified sentences lightly and for flimsy reasons. It further states that speculative hypotheses

favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-accused are excluded.

13. When sentencing the appellant, the trial court adequately considered the personal circumstances of the appellant and the fact that at the age of twenty-nine (29) years, he is still a young man and the fact that he is a family man with an unblemished criminal record. The trial court also took cognisance of the fact that the offense the appellant was convicted of is prevalent in that jurisdiction and mostly committed by people of the appellant's age. After considering the personal circumstances of the appellant, the trial court found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence bar for the fact and to accommodate the fact that the appellant have been in custody for two and a half months.
14. The personal circumstances of the appellant in cases of serious crime recedes to the background (see ***S v Vilakazi 2009 (1) SACR 552 (SCA)*** at 574). However, a material consideration is whether the appellant can be expected to re-offend. This cannot be predicted, but the fact that the appellant refuses to take responsibility for his actions does not reflect well for him and he cannot with no doubt be considered a suitable candidate for rehabilitation.
15. The complainants were robbed by a person whom they know. The appellant's appearance that night made them feel safe and at ease, only to find that he was on a mission to rob them. He knew that the complainants conducted their business and that the possibility that they were in possession of money, specifically cash, is not remote. This is borne out by the fact that when he approached them, he asked Ms Ngitukulu to give him R20, and when her husband tried to explain that they did not have money, the appellant swore at him and said that he was not speaking to him, but to Ms Ngitukulu.
16. The complainant was permanently deprived of ownership of her possessions, as a result of greed. Little is known regarding what prompted the appellant to go

back to the place where they used to smoke near the complainants' business place, after robbing them of their possessions. Despite conceding at the time of his arrest that he could have asked his mother to assist him in replacing the robbed items, the appellant pleaded not guilty to the robbery charge. I am alive to the fact that it is the appellant's constitutional right to plead not guilty and to test the State's case against him, but pleading not guilty in a case where the evidence against him is overwhelming, is an aggravating factor and lack of remorse on the part of the appellant.

17. The court below did not misdirect itself when sentencing the appellant to fourteen (14) years imprisonment. The learned Regional Magistrate held that a deviation from the prescribed minimum sentence is justified to accommodate the time the appellant was incarcerated while awaiting the finalisation of the trial in circumstances more dire than when time is served post-sentence. This was found to constitute a substantial and compelling circumstance. As such, there is no need for this court to interfere with the sentence imposed by the trial court.

ORDER

18. Consequently, the following order is made;

- 1) The appeal against sentence is hereby dismissed.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

I agree,

E VAN DER SCHYFF
JUDGE OF THE
HIGH COURT, PRETORIA

APPEARANCES

For Appellant: Mr HL Alberts
Instructed by: Legal Aid South Africa
For Respondent: Adv PW Coetzer
Instructed by: The DPP

Date of hearing: 10 May 2022
Date of delivery: Electronically transmitted