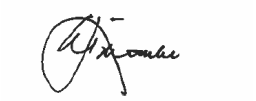
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

CASE NO: A92/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



DATE 20 March 2023 SIGNATURE

In the matter between:

TANDO MOKOENA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

TSHOMBE AJ

INTRODUCTION:

1. On 24 March 2014, and at the regional court of Emfuleni sitting in Vereeniging, the appellant was charged with, and convicted on the following two counts:

1.1 Robbery with aggravating circumstances as envisaged in Section 1 of the Criminal
Procedure Act 51 of 1977 ("the CPA") read with Section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Amendment Act");

1.2 Kidnapping.

2. The appellant pleaded guilty to both counts and a statement of formal admissions in terms of Section 112(2) of the Act was read into the record by his legal representative and handed into court as Exhibit A.[1]

3. The court asked the appellant a few questions which covered: (1) confirmation that the statement was made without undue influence; (2) whether the consequences of a guilty plea together with the minimum sentence provisions in the Amendment Act were explained to him; (3) whether the appellant confirmed the truthfulness of the statement; (4) whether he still wants to plead guilty; and (5) whether the appellant conceded that the statement can be submitted to court as evidence.

4. In an *ex-tempore* judgment straight after the above, the court convicted the appellant of the above charges, the robbery with aggravating circumstances as envisaged in section 51(2) of the Amendment Act. Following the conviction, sentencing was postponed to allow time for the compilation of the pre-sentencing reports, and the court made reference to the

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probation officer's report, the correctional supervision report as well as the victim impact assessment report, all three reports intended to assist the trial court with respect to its sentencing discretion.

5. On 19 June 2014 and in accordance with the minimum sentence provisions of the Amendment Act, the appellant was sentenced to imprisonment for 15 and 5 years for counts 1.1 and 1.2 respectively, the sentence in count 1.2 to run concurrently with the sentence in count 1.1[2] The effective sentence was therefore 15 years imprisonment.

6. Through what appears to have been no fault on his part, the appellant's appeal process including his petition to the Judge President took all of seven (7) years. He has explained the whole fiasco in the founding affidavit he prepared in support of his application for appeal, which includes his application for condonation of the delay and other non-compliances. The explanation is summarized below. The references to the record are purely to highlight the dates and the delays in the steps taken by the appellant to progress his appeal up to petitioning the Judge President.

6.1 In his application to the trial court for condonation of the late filing of his application for leave to appeal appellant advised that following his trial and sentencing he was asked whether he would like to lodge an appeal and because he did not really understand the purpose of an appeal and acting on the advice of his legal representative, he declined the opportunity;

6.2 Upon arrival at Leeuwkop prison, the appellant was advised otherwise, that is to complete documents launching an appeal which were handed to the relevant prison personnel for filing with the Clerk of the court. This was on 23 June 2014[3]. After waiting patiently for a long time, the appellant learnt that the papers were not submitted to the clerk of the court. Out of ignorance of court processes, the appellant did not know that he could have prepared a condonation application. This was the reason why a proper application for

[2] In terms of section 280 of the Criminal Procedure Act 51 of 1977.
[3] Page 46 of Record Lines 18-23

leave to appeal and for condonation for the late filing thereof was only done during 2016 with a hearing date of 8 June 2016.

6.3 On the above date the grounds of appeal by the appellant's representative were limited to the appellant's age, the fact that he pleaded guilty, was a first offender and had received enough suffering from harassment by the media and that he had been permanently expelled from the University of Johannesburg. The court *a quo* declined the application on the basis that it is not likely that another court may interfere with the sentence imposed. Instead, the court *a quo* stated that another court might not make the two sentences to run concurrently[4], which the court believed had been a measure of mercy shown towards the appellant. The court further advised that the next step is for the appellant to approach the Judge President with a petition for application to appeal.

6.4 Subsequent thereto and with the assistance of the Legal Aid Board, the appellant petitioned the Judge President for Leave to appeal on 14 July 2016.[5] The petition was granted on 16 February 2017.[6] As if the previous incidents of delay were not enough, the appellant did not receive notification of the granting of his petition. It was only upon personal enquiries on 28 January 2022 after the appellant had lodged another petition dated 6 November 2019[7] that it was brought to his attention that his initial petition was granted almost 5 years ago.

7. The hearing by this court is thus finally the appeal following a successful petition by the appellant to the Judge President against the sentence imposed on him by the trial court on 19 June 2014.

8. The reason for making a note of the lengthy process that the appellant had to go through to secure an appeal is to raise the bar on these processes and to pose the question whether there is no better way to deal with litigation processes of especially citizens that are incarcerated and have restricted movements. In this matter, it took the appellant some 7 (seven) years to

[4] Page 4 of Record Lines 1-3
[5] Page 115 of Record
[6] Page 121 of Record
[7] Page 134 of record

progress his appeal to the High court, that is to lodge a petition for appeal; added to which it appears that the appellant could not even secure a copy of the record of his trial until the intervention of an attorney on his behalf in January 2022.[8]

GROUNDS OF APPEAL

9. In both the appellant's heads of argument as well as the affidavit supporting his Notice of Appeal post a successful petition to the Judge President granting him leave to appeal, the appellant submits that the trial court misdirected itself by failing to consider all the mitigating and aggravating factors and affording due weight to their cumulative effect. In support of this ground of appeal the appellant advanced the following:

9.1 The effective sentence of 15 years imprisonment is shockingly inappropriate in view of the mitigating factors and a holistic view of the circumstances of the case;

9.2 There is a reasonable prospect that an appeal court may, upon a proper and reasonable sentencing discretion with the relevant information, impose a lesser sentence.

9.3 The trial court applied too strict a test by considering only the aggravating circumstances and did not have regard to the appellant's personal circumstances in mitigation, which are:

9.3.1 the young age of the appellant - at the time of the commission of the crime the appellant was 19 years old, had just finished Matric and a 1st year BSc Computer Science student at the University of Johannesburg;

[8] Page 135 of Record

9.3.2 appellant was a first- time offender; with no potential of him committing the crime again – instead with good chances of rehabilitation;

9.3.3 appellant handed himself to the police on the same day, admitted guilt, cooperated with the entire court process and investigation, appearing in court for all appearances although he was on bail; the court not making note of this resulted in it not considering all the available information for the exercise of the sentencing discretion.

9.3.4 appellant re-assured the victim right through the commission of the offence that he would not harm her and he in fact did not harm her;

9.3.5 appellant attended a disciplinary process by the university where he was permanently expelled, attended mediation process with the victim and sought forgiveness from the victim and her family and reconciled with victim during the disciplinary and mediation proceedings at the university - demonstrating remorse;

9.3.6 To make sure that the victim does not get harmed appellant dropped her on the side of a busy road - the golden highway, so that she could easily identify her whereabouts and get a lift from other motorists;

9.3.7 appellant demonstrated lack of aggression during the commission of the offence, agreed to tie the victim’s hands in front when she protested to being tied at the back; he also put the gun away at her request;

9.3.8 The court emphasized the need for a deterrent effect on the sentence, the seriousness and prevalence of the offence and did not have much regard for the mitigating factors and in the end sacrificed the appellant on the altar of deterrence and

making an example of him. This is at odds with what was stated in S v Mhlakaza[9] where the court stated that *"the object of sentencing is not to satisfy public opinion but to serve the public interest.";*

9.3.9 appellant took the victim's car to his home where it was tracked to and found on the very same day – this being an indication that the appellant did not have the intention to permanently dispossess the victim of her car;

9.3.10 Post his conviction the appellant waited in vain a whole two months for an approach by department officials for the necessary interviews to compile the reports needed by the court to assist with discretion as to sentence;

9.3.11 At the next court appearance, on 22 May 2014, the court could not determine whether substantial and compelling circumstances existed because the necessary reports had not yet been prepared and the matter had to be postponed for another 2 weeks;

10. During the second period of postponement the appellant and his mother took it upon themselves to go to the office of Social Development in Sebokeng to make the necessary enquiries. During this visit the appellant was introduced to a probation officer, one Ms Petra Trudi Tromp, who there and then conducted a one-hour interview with the appellant and his mother. The appellant was not requested for the details of any other persons that had been a part of his life, schooling and social life and it seemed that the probation officer's report that was ultimately submitted in court was prepared from information gathered during this interview.

11. Because of some inconsistencies between the appellant's evidence and the

[9] 1997(1) SACR 515 (SCA) at 518 b-c

contents of the victim assessment report, the court gave the victim an opportunity to take the stand and give evidence under oath followed by cross examination. However, in spite of the glaring nature of such inconsistencies, the appellant's representative did not put the appellant's version to the victim, neither did the appellant's representative put the appellant on the stand to deal

with the said inconsistencies.

12. The relevant inconsistencies referred to are: (1) the appellant took and did not return the victim's personal assets for which the victim had to lodge a claim with the insurance – the appellant states that the victim's belongings were returned to her and this appears to have been contained in the docket; (2) the appellant brought with him the cable tie he used to tie the victim with – the appellant states that he did not bring a cable tie but he found cable ties in appellant's boot; (3) the amount withdrawn by the appellant from the victim's bank account was R3 500 and not R700 as per the appellant; - With reference to the withdrawals of money, a copy of the victim's bank account statement was produced, which reflected a withdrawal of R700 on 1 August, which is the date of the incident. There were then two withdrawals of R1000 each a withdrawal of R100 all made on 5 August, 4 days after the event. When asked about this by the prosecutor who led her testimony, the victim said *"the way I believe it works is that once it goes into the overdraft, they only went of (sic) at a later date, the amount, so the bank statement will show on that day."*[10] (4) the damage to the car consisting of the carpeting ripped out, panels ripped out and damage to the bumper on the front of the car.

13. The upshot of the above is that the only pre-sentence information the court had about the appellant before passing sentence was gleaned from Exhibit A, the victim impact assessment report, the probation officer's report and the victim's sworn testimony in court.

THE PROBATION OFFICERS REPORT

[10] Page 21 of court record, lines 9-11

14. Although at the trial court there had been an indication that a correctional services report would be prepared as well, such a report was not applicable because with the seriousness of the offence that the appellant had been convicted of, the applicability of the minimum sentence legislation, there was no possibility that the sentence could be community-based. However, none of the authorities including the appellant's representative advised him of this and as a result the appellant expected that such a report would be compiled and submitted to court.

15. As indicated above, there were thus two reports before court prior to sentencing: the victim impact assessment report and the probation officer's report. The appellant submitted that the probation officer's report was inadequate in that:

15.1 The report was prepared following a one-hour interview with the appellant and his mother. Indeed, other than the appellant, his mother and sister the only other person that the probation officer interviewed is Vincenza Smith, the youth leader at the appellant's church;

15.2 The report had no information regarding the appellant from his educators and friends, all of whom who would have known him well and for a long time given the amount of time spent at school; and would have assisted with information with regard to the character of the Appellant;

15.3 The report was prepared with no approach to appellant's previous medical practitioners and notably his psychologist who he had started sessions with in spite of advising the probation officer of this fact;

15.4 The report had no information about the appellant's social life, neighbours, friends, lecturers at the university and the appellant submitted that it did not fulfil its purpose of better informing the court about his character and possible future;

15.5 The report was prepared without information from the disciplinary process, notably the mediation that the appellant referred to and how the victim responded to the mediation. This would have given the court a view with regard to the appellant's state of remorse;

15.6 The report did not provide information on the process of how he was arrested, did not provide information on any process embarked upon to establish why the appellant committed the offence as well as the appellant's view regarding the offence;

15.7 The report did not contain information for the court to determine whether the offender is remorseful about the offence or not;

15.8 The report did not have information to enable the court to exercise its discretion properly;

15.9 The appellant alleged that the trial court erred in attaching insufficient weight on the appellant's personal circumstances as well as a holistic picture of the commission of the crime, failed to individualise the appellant and failed to strike the appropriate balance between the appellant's circumstances, the circumstances surrounding the commission of the crime and the moral reprehensibility of the appellant, the result being that the sentence did not fit the offender and the particulars of his offence as closely as possible;

15.10 The appellant therefore submits that the court was not in possession of sufficient and proper pre-sentencing reports or an adequate report, which would contain all the information it needed in order to exercise a proper judicial sentencing discretion. According to the appellant, the probation officer's report, compiled on the basis of just an hour's interview, contact with just his sister and the church youth leader, could not have contained any useful information about the appellant, his family, his character, his future and his morality. Of note, the appellant submits that the report did not have any information from people who knew the appellant, for instance people who had interacted with the appellant at high school (where he was head boy only a year before the crime), professional people who treated him, for instance the

psychologist who he was seeing at the time and other medical practitioners that had been exposed to him before and after the crime.

15.11 None of the above are disputed in the Heads of Argument by the State (the respondent). Instead, the respondent's heads of argument dwell on three points, which were disputed at the court a quo, and were not at the time sufficiently investigated to establish proof of their occurrence beyond a reasonable doubt. For instance, three of the bank withdrawals that the victim claimed were made by the appellant reflect a different date (5 August 2013) from the date of the incident, which is 1 August 2013. The explanation provided by the victim needed to have been investigated. This also flies in the face of the probation officer's report where the appellant is said to have stopped twice to withdraw money because the first withdrawal attempt failed.

THE LAW

16 When the appellant's application to this court was moved, he had already served half of his sentence and has since been out on parole. While in prison he studied a law degree and passed it.

16.1 The Amendment Act was passed by the legislature as an attempt to deter the prevalence of violent crime in South Africa. Indications are that the legislation was intended as a temporary measure and as such it was meant to avoid disparity among other things. Section 51(3)(a) contains the main exception to the sentences prescribed by the Amendment Act. It reads as follows:

> *"(a) if any 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 the proceedings and must thereupon impose such lesser sentence."*
> (Emphasis provided).

16.2 The fact that before applying the exception the court must be 'satisfied' requires some attention as to what being *satisfied* means. This has been considered in a number of cases even before the minimum sentence legislation given that the word 'satisfied' is often used in the Act as well. Having looked at a number of cases, which do not provide consistency, this standard of proof (that is 'being satisfied') is preferred by the courts and academics justified by its flexibility and the fact that it is commonly used by the legislature as a standard in connection with sentencing. This is because a court may proceed on the basis of being *'satisfied'* as it relates to the appropriate sentence because some considerations involve more than just facts but other factors such as considerations of the future and the making of a value judgment with reference to which there can be no onus of proof.

16.3 For purposes of sentencing three basic elements, which have come to be known as the triad of Zinn, were espoused the case of S v Zinn[11] and remain relevant, albeit with some clarification with regard to the third component set out in the case. The first element, that is *'the crime'* is considered the most important and influential element on the nature and extent of the sentence. The proportionality requirement, which drew constitutional support for the minimum sentence legislation, reflects the importance of tailoring the sentence to the seriousness of the crime.

16.4 The second element to be considered in terms of the triad of Zinn is *'the criminal',* and because of the nature of the analytic factors involved in considering the criminal, this element has been referred to as the *'individualisation'* of the offender. Although this kind of investigation is often not done, it is nonetheless an important aspect as it enables the sentencing officer to get to know the offender, his/her character and motives. The necessary information in this regard includes age, marital status, the presence of dependents, level of education, employment and health. Owing to the shortcomings of this process and the lack of exposure time between the sentencing officer and the offender, this aspect of the elements needs a system of rigorous pre-sentence reporting which would assist the presiding

[11] S v Zinn 1969(2) SA 537 (A)

officer to have a better understanding of the offender, personal circumstances, character, motives and why the rime was committed.

16.5 The third leg of the triad of Zinn is '*the interests of society'.* In the face of some difficulty in expressing what is actually meant by this phrase, it has been suggested that this leg be interpreted to mean *'serving the interests of society'.* It has been cautioned that this leg must not be interpreted to mean the *satisfaction of public opinion*,[12] instead its value must be in the deterrent and retribution effects of a sentence, the protection of the society and the reformation or rehabilitation of the offender.

16.6 From a constitutional perspective, the constitutional court in S v Dodo[13], endorsed proportionality as a requirement in the sentencing regime. The constitutional court explained that, *"proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhumane or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."*[14] The court referred to section 12(1)(a) of the Constitution, which provides that a person *"not be deprived of freedom arbitrarily or without just cause"* and found that when a person commits a crime the crime provides the just cause to deprive the offender of freedom.

16.7 The constitutional court judgment in Dodo and other judgments stress the requirement of proportionality even in the prescribed minimum sentences regime. The courts have thus come into agreement[15] that even though the prescribed sentences should be religiously followed, once a sentence is disproportionate to the crime, the criminal and legitimate interests of society, it is no longer appropriate. Accordingly, proportionality to the seriousness of the crime has been elevated to a higher value which overrides the minimum sentence provisions, since the absence thereof would render the imposition of the prescribed minimum sentence unconstitutional.

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[12] S v Mhlakaza 1997(1) SACR 515 (SCA)
[13] 2001 (1) SACR 594 (CC)
[14] At paragraph 37
[15] See in addition S v Vilakazi 2009 (1) SACR 552 (SCA)

16.8 In *S v Homareda*[16] Cloete J and Robinson AJ proposed what they referred to as the correct approach in exercising the discretion conferred on the court in section 51 of the Amendment Act and it is that:

- The starting point is that a prescribed minimum sentence must be imposed;
- Only if the court is satisfied that substantial and compelling circumstances exist whish justify the imposition of a lesser sentence may it do so;
- In deciding whether substantial and compelling circumstances exist each case must be decided on its own facts and the court is required to look at all factors and consider them cumulatively;
- If the court concludes in a particular case that a minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate it is entitled to impose a lesser sentence.

16.9 The above jurisprudential approach is the essence of the reasoning of the Supreme Court of Appeal (SCA) in S v Malgas[17], which is recognized as the seminal judgment on how courts should deal with substantial and compelling circumstances. The approach adopted by the court in Homareda blends with the view expressed by the SCA that, in the prescribed minimum sentences regime it is longer *"business as usual"*[18]*,* meaning that the sentencing court does not start the sentencing process from a clean slate, but must start by imposing the prescribed minimum sentence. The SCA further held as follows:

a. Section 51 has limited, but not eliminated the court's discretion in imposing sentence. The limitation stems from the fact with prescribed sentences, the sentencing court does not start the process from a clean slate, but with reference from the periods of imprisonment prescribed by the legislature. The section has thus not eliminated the court's discretion in that it has left it to the courts to decide whether the circumstances of any particular case call for a departure from a prescribed sentence.

[16] 1999(2) SACR 319 (W)
[17] 2001 (1) SACR 469 (SCA)
[18] At Paragraph 7

b. If the circumstances of a case call for a departure from imposing a prescribed minimum sentence, the court should not hesitate to depart. In this regard the Supreme court held that part of the sentencing process is that a court has to consider what an appropriate sentence would have been without the prescribed minimum sentences. Such a process requires the court to consider all the factors traditionally taken into account in sentencing, whether or not they diminish moral guilt. This becomes evident when one considers the wording of section 51(3) of the Amendment Act, which by reference to the court being *"satisfied that substantial and compelling circumstances exist…"* indicates that the sentencing court is vested with not just the power but the obligation to consider whether the particular circumstances of the case require a different sentence to be imposed.

c. The sentencing court is further and most importantly required to impose a sentence that is proportionate to the offence. This requirement has been referred to in quite a number of judgments dealing with the prescribed minimum sentence regime and is particularly important because it is on the basis thereof that the Constitutional court in the Dodo case (*supra)* did not find the provisions of the Amendment Act unconstitutional. This has been discussed above.

d. In deciding whether substantial and compelling circumstances exist, the court is to consider all factors relevant to sentence, both aggravating and mitigating **cumulatively** and circumstances do not have to be exceptional in order for the court to depart from the prescribed minimum sentence.

e. The influence of youth is accepted as a factor that will always be relevant in the formulation of the cumulative effect that results in expressing whether substantial and compelling circumstances are present or not.

17 Therefore, in order for a sentencing court to place itself in a position to decide whether there are substantial and compelling circumstances that justify a departure from the minimum sentences as legislated such court needs to proceed as follows: (1) use the minimum sentence as a point of departure; (2)

weigh all considerations traditionally relevant to sentencing, that is, **mitigating circumstances,** for instance: (young age of the offender, having no criminal record, the presence of real remorse (not regret) coupled with a plea of guilty, various mental and emotional factors, financial need and social status, character of the offender, the reason why the crime was committed, the offender's background etc.) **aggravating circumstances** for instance: (the seriousness of the crime, after-effects of the crime, planning or pre-meditation, previous convictions, motive, lack of remorse, vulnerable victims, prevalence of crime, the need for deterrence and retribution, the protection of society, punishment to fit the crime, rehabilitation etc.) In other words, the sentencing court is called upon to **individualise** the offender.

18 It has also been considered what manner of proof and degree of formality is required if evidence has to be led in the above exercise. The courts and some academics[19] treat this question as one dependent on the circumstances of the case and the importance of the material. However, the Supreme Court of Appeal has made it clear that material factual allegations, whether aggravating or mitigating, should be proved in the normal fashion[20]

19 The sentencing court must then balance all the factors that come into play in a particular case and upon a **holistic and cumulative consideration,** exercise the sentencing discretion. As difficult as this exercise may be, sentencing courts are required and obliged to take into account what courts call the cumulative effect. In S v Muller[21] the court noted that *"a sentencing court must **have regard** to the totality of the offender's criminal conduct and moral blameworthiness."*[22] Further, sentencing courts are required to do something about the cumulative effect. In Muller's case (*supra)* the court interpreted this to mean *"what an effective sentence should be imposed should be, in order to ensure that the aggregate penalty is not too severe."*[23]

[19] S v Shangase 1972 (2) SA 410 (N) at 432B-C
[20] S v Olivier 2010 (2) SA 187 (SCA) "If the evidence is in the form of oral testimony, it has to be done under oath or confirmation as required by the Criminal Procedure Act Ss 161 to 167, which apply to the adducing of evidence during the trial, apply equally to evidence presented during the sentencing stage" – see Kriegler and Kruger 686 -687
[21] 2012(2) SACR 545 (SCA)
[22] At Paragraph 9; see also S v Mthethwa 2015 (1) SACR 302 (GP) at Paragraph 21
[23] At Paragraph 9

SENTENCING FOLLOWING A PLEA OF GUILTY

20. To do justice to the requirement of a cumulative and holistic consideration of factors in order to establish whether substantial and compelling circumstances exist the court is also entitled to consider further evidence as envisaged in the provisions of section 274(1) of the CPA. The subsection provides that the court may "*before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed".* The evidence referred to in the subsection may be presented to the court either orally or via written reports prepared by various experts or officers whose evidence may be of assistance to the court to understand the offender better and to even gather the reasons why the crime was committed, the offender's view of the crime – all for purposes of the exercise of the sentencing discretion.

21. *In casu,* the appellant's representative failed to call the appellant to the witness stand in order to give the court the opportunity to get more information about the appellant. Indeed, this would probably also have put before the court the disciplinary process, the mediation process and all the conciliatory efforts that the appellant refers to in his heads of argument. Instead, the appellant's representative gave mitigatory evidence from the bar, without putting the appellant his mother or any other relevant person in the witness stand to testify and be cross examined. Such evidence may have been of the nature that would enhance the probation officer's report and thus the ability of the court in individualizing the offender.

THE DISCRETION AS TO SENTENCE BELONGS TO THE TRIAL COURT

22. The principle that the sentencing discretion belongs to the trial court was espoused many years ago in *R v Mapumulo* where the court said:

"the infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and better

estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal"[24]

23. The discretion referred to would indeed be properly seated with the trial court especially in the light of all the information that the trial court becomes exposed to during the trial, and via all the other mechanisms that enable the trial court to get information as discussed above. In spite of the diminished importance of the motivation, the principle remains to remind courts of appeal that they should not simply replace the imposed sentence with their own. This was fortified in S v Pieters[25], where the court clarified that the determination of a term of imprisonment does not occur in accordance with any exact generally accepted yardstick and there will be areas where opinions on an appropriate term of imprisonment may differ with good reason. However, to fortify the basic principle, the courts have developed some refinements which explain circumstances where an imposed sentence can be interfered with and of these a misdirection of any kind by the trial court is a proper basis.

24. The above ties in with one of the principles that came out of Malgas (supra); that if a departure is called for the court should not hesitate to depart. In the above regard the court in Malgas, opined that: *"What stands out clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed from some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure."*[26]

25. The clear message in this sentencing regime is therefore that the court is required

to start the sentencing process with the prescribed minimum sentence, consider

what an appropriate sentence would have been, even without the prescribed minimum sentences. In this process, the court must therefore consider such

[24] 1920 AD 56 at 57
[25] 1987(3) SA 717(A)
[26] Per Marais JA in Malgas (supra) Page 481 Paragraph 25

an appropriate sentence with due regard to all the factors traditionally taken into account when sentencing an offender, while recognizing that the crime is of a particular kind that has been singled out for severe punishment and that the benchmark that the legislature has provided is given due regard.

26. The court must weigh all the traditional sentencing considerations. Under this heading the principle espoused is that in order for the court to be able to assess the proportionality of a particular sentence in a particular case, the court must determine what a proportionate sentence would be, taking into account all the circumstances traditionally relevant to sentencing cumulatively.

JUDGMENT

27. In imposing sentence in *casu* the trial took into account evidence that was testified to by the victim, to which, as indicated above, the appellant was not given an opportunity to respond in the face of glaring inconsistencies. This court is of the view that the process of hearing this testimony was not properly handled at the trial court. This arises from the fact that the appellant was not given an opportunity to deal with the sworn evidence of the victim; and while the court did not raise an inquiry about this, the court considered the victim's evidence and made reference to it during the sentencing of the appellant. This obviously had the effect of adding aggravating evidence on oath without having tested such evidence against the appellant's version. The inconsistencies have now been put before this court and the disadvantage to the appellant is that he has now already served half of his sentence.

28. The information contained in the probation officer's report was glaringly inadequate and incomplete to enable the court to have a picture of the appellant's character. In sentencing the appellant, the court placed reliance on comments from the probation officer's report and made the remarks dealt with hereunder.

29. The trial court treated it as a foregone conclusion that 'the appellant had a good upbringing', solely from comments in the probation officer's report without any testimony from the mother. Secondly, the court, once again relying on comments from the probation officer's report, pronounced the appellant as 'not less mature', 'leader in the community', 'not more susceptible to the influence from others' 'had emotional responsibility' by virtue of being a student at the University of Johannesburg, 'not irresponsible' and had the 'emotional adulthood to know' that he was busy doing a serious offence.[27] All of this went into the record as aggravating circumstances without any evidence from people like the appellant's teacher/s at school, his psychologist or any person who would have sufficient personal, social, psychological and general information about the appellant. One major question that did not but should have arisen for consideration by the court is **"WHY"** did such an exemplary student and young man with a clearly promising future commit an offence so totally out of character. What happened to cause the appellant to stray so much away from the well-behaved and responsible young man that he was?

30. On the question of remorse, the appellant advised the probation officer that he was subjected to a disciplinary hearing in the process of which he participated in a mediation with the victim and apologized to her and pleaded guilty to the offence. While the appellant states that he advised the probation officer of this process, there was no reference thereto in the report. Of course, the courts need to be and have been careful with respect to factors to be taken into account to establish the presence or otherwise of compelling and substantial circumstances. For instance, a plea of guilty in an open and shut case against an accused may be considered a neutral factor, since either way such an accused may be aware that they don't stand a chance. Further, the courts have stated that *"…there is a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not, without more, translate into remorse. Remorse is a gnawing pain of conscience for the plight of another…Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused,*

[27] Page 40 of Record Lines 5 - 12

rather than what he says in court, that one should rather look."[28] It is for the above reasons that the trial court needed to have had a proper report regarding especially the participation and behavior of the appellant in the disciplinary and mediation processes in order to apprise the court of whether there was real remorse, as seems to have been the case.

31. At the time the Appellant was 19 years old. In the Matyityi case (*supra),* the court stated the position with regard to age as follows:

"Although the exact extent of mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult[29] *. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable the court to determine the level of maturity and therefore moral blameworthiness." The question, in the final analysis is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness"*[30]

32. In this case, the above direction was not followed.

ORDER

In the result:

32.1 The appeal on sentence succeeds.

32.2 The sentence imposed by the court below in respect of the robbery with aggravating circumstances is set aside and in its stead is substituted with the following:

(a) In respect of count 1, the robbery with aggravating circumstances, the Appellant is sentenced to 7 year's imprisonment.

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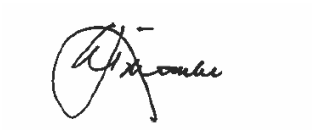
[28] Per Ponnan JA in Matyityi page 47 Paragraph 13 a - b

[29] S v Mohlobane 1969 (1) SA 561 (A) at 565 C-E

[30] Per Ponan JA at Pages 47 – 48 Paragraph 14

(b) In respect of count 2, the kidnapping the Appellant is sentenced to 3 year's imprisonment;

(c) Both sentences are to run concurrently making the effective sentence 7 years.



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TSHOMBE AJ

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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TLHAPI J

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANTS	: IN PERSON
FOR RESPONDENTS	: ADV. A P Wilsenach
INSTRUCTED BY	: NDPP
HEARD ON	: 6 October 2022
DATE OF JUDGMENT	: 20 March 2023