



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

Case No: **A133/23**

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

.....
SIGNATURE

..... 02 APRIL 2024

DATE

In the matter between:

SHAUN NHLEKO

Appellant

And

THE STATE

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties and /or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing down is deemed to be 02 April 2024.

JUDGMENT

BALOYI-MERE AJ

INTRODUCTION

[1] This is an appeal against the sentence only brought with leave of the Court *a quo*.

[2] The Appellant, accused number 1 was charged together with accused number 2. Both the Applicant and accused number 1 were found guilty of four charges of robbery with aggravating circumstances read with section 51(2) of the Criminal Law Amendment Act 105 of 17 and sections 256, 257 and 260 of the Criminal Procedure Act 51 of 1977.

[3] The Court *a quo* found that both the Appellant and accused number 2 on the 26th August 2016, in the area at or near Barcelona in the Regional Division of Gauteng, unlawfully and intentionally and in common intent assaulted four ladies (“victims”) and using force, took the victims’ possessions *to wit*, cellphones, a bag containing clothes and identity documents.

[4] These crimes attracted the minimum sentence of 15 years imprisonment in the case of a first offender, 20 years imprisonment in the case of a second offender and 25 years of imprisonment in the case of a third and subsequent offenders.

[5] The Appellant was legally represented throughout the trial, pleaded not guilty to all the four counts and elected to exercise his right to remain silent.

[6] For the purposes of the sentence, the court *a quo* considered all the offences together as one because they were committed at the same time against the

same four victims. The Court *a quo* further held that it could not find any substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[7] The Appellant was then sentenced to 15 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act. The Appellant was declared unfit to possess a licensed firearm in terms of section 300(1) of the Firearms Control Act 60 of 2000.

[8] The merits of this case are adequately stated in the judgment of the Court *a quo* and I do not wish to repeat them here.

THE APPEAL

[9] The Appellant applied for leave against both his conviction and the sentence in the Court *a quo*. The court *a quo* granted leave to appeal in respect of the sentence only.

[10] The reasons given by the court *a quo* for the granting of leave to appeal the sentence are, among others:

10.1 That it did not take the three years that the Appellant spent in prison while awaiting trial into consideration during sentencing;

10.2 That it did not consider the age of the Appellant as at the time when the crimes were committed during the sentencing stage¹;

[11] Before dealing with merits of this appeal, I need to comment on the preparedness of the Counsel representing the Appellant. Counsel for the

¹ Judgment pages 358 – 35.

Appellant submitted 7 paged heads of argument which merely regurgitated the submissions made by the Appellant's legal representations during leave to appeal. Counsel for the Appellant was not fully prepared to address this court on why this Court should interfere with the sentence from the Court a *quo*. It is trite that it is incumbent upon the Counsel representing a litigant in court to be fully and adequately prepared to address the court on any issue be it legal or factual. The Counsel was not.

THE SENTENCE BY THE COURT A QUO

[12] As previously stated, all the counts were taken together, and the Appellant was sentenced to an effective imprisonment term of 15 years.

[13] This Court is guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and this court should be careful not to erode that discretion². A sentence should only be altered if the discretion of the sentencing court has not been judicially and properly exercised. The test is whether the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate and induces a sense of shock³.

[14] In ***State v Sadler***⁴ it was indicated that where there is a striking, startling, or disturbing disparity between the trial court's sentence and that which the appellate court would have imposed, interference is justified.

² **S v Rabie** 1975 (4) SA 855 (A).

³ **S v Shapiro** 1994 (1) SACR 112 (A).

⁴ 2000 (1) SACR 331 (SCA).

[15] Hefer JA decided that there exists no catalogue of sentences for crimes and that the court ought to consider the facts and the circumstances of each particular crime⁵.

[16] In considering the sentence imposed, this court considered all the evidence both by the State and the defense that served before the court *a quo*. The state argued that the Appellant did not show any remorse as the Appellant and his co-accused chose to plead not guilty and not give any pre-explanation. That was taken as a sign of not showing any remorse.

[17] From the record, it appears that the Appellant produced and returned the cellphone that was in his possession, he identified accused number 2 and directed the complainants and one of their fathers to accused number 2's place of residence. At the time, the Appellant was 18 years old and in grade 11 when the crime was committed. He too was a first time offender. These cumulatively are factors for consideration which were not taken into account by the Court *a quo*.

[18] The question of minimum sentences imposed in terms of sections 51, 52 and 53 of Act 105 of 1997 was considered by the Supreme Court of Appeal⁶[SCA]. The SCA held, among others, that section 51 has limited but not eliminated the court's discretion in imposing sentence. The SCA further held that all the factors traditionally taken into account in sentencing whether or not they diminish moral guilt, will thus continue to play a role, and that if a sentence called for after consideration of the circumstances of a particular case render a prescribed sentence unjust in that it would be disproportionate

⁵ **S v Nkosi** 1993 (1) SACR 709 (A).

⁶ **S v Malgas** 2001 (1) SACR 469 (SCA).

to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, the court is entitled to impose a lesser sentence.

[19] The fact that Counsel for the Appellant failed to give circumstances that could render a prescribed sentence unjust, does not automatically translate into the absence of such circumstances. The court has a discretion to *mero mutu* consider those circumstances, especially if they are evident from the record of the proceedings in the Court *a quo*. Substantial and compelling circumstances may be inferred or be present in the state case or in the evidence presented by the state witnesses or the prosecution itself.

[20] Considering the factors set out in paragraph 17 above, I find that there are circumstances which, when viewed cumulatively, renders the imposition of the minimum sentence on the Appellant disturbingly inappropriate which constitute substantive and compelling circumstances to justify a deviation from the prescribed minimum sentence. It is trite that the determination of the term of imprisonment in a particular case cannot be based on any exact standard. Often there will be an area of uncertainty within which views about a suitable term of imprisonment may validly differ⁷. This Court is satisfied that the Court *a quo* has not exercised its sentencing discretion reasonably in failing to consider all the cumulative factors before it.

[21] In general, a Court of Appeal will be slow to reduce a sentence that was properly imposed, save in exceptional circumstances where the interest of justice require it⁸. Even where there was no misdirection and the court had

⁷ **S v Pieters** 1987 (3) SA 717.

⁸ **R v Ramanka** 1949 (1) SA 417(A). 419 – 420.

exercised its discretion reasonably regarding the assessment of sentence, a court of appeal can reduce the sentence if there was a striking difference between the sentence imposed by the trial court and a sentence which a court of appeal would have imposed⁹. This court find that it is appropriate to interfere with the court *a quo*'s sentence discretion.

[22] In the circumstances the following order:

22.1 The appeal against sentence is upheld;

22.2 The sentence imposed upon the Appellant is set aside and the following sentence is substituted:

22.2.1 The Accused is sentenced to 8 years of imprisonment.

EM Baloyi-Mere
Acting Judge, High Court
Gauteng Division, Pretoria

I concur

LA Retief
Judge of the High Court

⁹ **S v Manonela** 1997 (2) SACR 690 (O) 693 – 694.

Gauteng Division, Pretoria

Appearances:

For the Appellant: S Moeng
Cell: 082 299 1644
Email: samuelmoo@legal-aid.co.za

For the Respondent: Advocate PW Coetzer
Cell: 082 730 2668
Email: pcoetzer@npa.gov.za

Matter heard: 20 February 2024

Date of judgment: 02 April 2024