IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL NO: AR 114/20

In the matter between:

STHEMBISO BONGANI NDABA FIRST APPELLANT

SIBONGAKONKE PERCIVAL CEBEKHULU SECOND APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

M. Sibisi AJ (Lopes J concurring)

[1] On the 9th October 2018, the appellants pleaded not guilty in the Esikhawini Regional Court on the following counts: robbery with aggravating circumstances (Count 1); kidnapping (Count 2); attempted murder (Count 3); possession of a prohibited firearm (Count 4); the unlawful possession of ammunition (Count 5); possession of a firearm without holding a licence, permit or authorisation issued in terms of the Firearms Control Act 60 of 2000 ('the Act') (Count 6); possession of ammunition without being the holder of a

license in respect of the firearm capable of discharging that ammunition, or a permit to possess the ammunition (Count 7).

[2] On the 26th April 2019, the first appellant was convicted on Counts 4 and 5, possession of a prohibited firearm and possession of ammunition.

[3] The second appellant was convicted in Counts 1, 2, 6 and 7, robbery with aggravating circumstances, kidnapping, possession of a firearm and possession of ammunition.

[4] The first appellant was sentenced to ten years' imprisonment on Count 4 and two years' imprisonment on Count 5, with the sentences imposed to run concurrently.

[5] The second appellant was sentenced to 13 years on Count 1, five years on Count 2 (both to run concurrently), eight years on Count 6 and two years on Count 7 (both to run concurrently). The effective term of imprisonment then, was 21 years.

[6] The appellants applied for leave to appeal against the conviction and sentence from the court *a quo* and leave was granted.

[7] In respect of the conviction, both appellants contend that the chain of evidence was broken, linking them to the firearms and ammunition recovered at the scene because there was no proper description, handling, packaging and examination from seizure to final analysis.

[8] According to the second appellant, the state witnesses could not have been able to identify him because his facial features could not have been visible.

[9] The second appellant contends that his photograph that appeared in the 20th January 2017 Zululand Observer publication, probably came to the attention of the state witnesses prior to the identification parade.

[10] Furthermore, the second appellant wants this court to draw an adverse inference because Ms Ngema made a short statement on the date of the incident, and stated that she was unable to identify any of the suspects. Three months' later Ms Ngema made a detailed statement in which she stated that she would be able to identify the suspect that was guarding her.

[11] According to both appellants, the sentences imposed were grossly inappropriate as to induce a sense of shock. They acknowledge that the court *a quo* found that there were substantial and compelling circumstances justifying a departure from the prescribed statutory norm.

[12] The second appellant contends that the court *a quo* did not adequately consider his personal circumstances; there was an overemphasis on the manner in which the offences were committed, and it was ignored that no injuries were afflicted on the complainant and her witnesses. Further, that the court *a quo* neglected the principle that any sentence should be coupled with mercy and that it should have realised that 21 years' imprisonment was harsh and shocking. Further, that the period already spent in custody should have been taken into consideration, and the personal circumstances of the second appellant constituted strong substantial and compelling circumstances which justified the imposition of a lesser sentence. The court *a quo* should have considered that the second appellant was a first offender, 31 years' old at the time and could be rehabilitated. The court *a quo* placed more emphasis on the offence than the offender, whose personal circumstances needed to be balanced with the surrounding factors to be considered during sentencing. This court should accordingly interfere with the sentences.

[13] According to the appellants, the discrepancy regarding the identification of one of the firearms in the charge sheet as a 'Luger' is material. The firearms that were recovered at the scene were entered into an SAP13 register (exhibit 'D'). On the 19th January 2017, Warrant Officer S E Nkosi found a pistol with 8 rounds of ammunition; a pistol with 5 rounds of ammunition; another pistol with serial number B1894 with 3 rounds of ammunition; a hunting rifle and a shotgun. These were packed in an exhibit bag with reference number PAB000213971 which was delivered to the Forensic Science Laboratory in Amanzimtoti.[1]

[14] On the 23rd February 2017 Warrant Officer Mahesh, the forensic analyst attached to the Forensic Science Laboratory at Amanzimtoti, received a sealed evidence bag with serial number PAB000213971. Mahesh tested the firearms and found that they were all functioning normally without any obvious defects. None of the pistols was described as a Luger.

[15] The firearms were identified at the scene and there is nothing suggesting that there was any interference with them. We were not shown how the evidential chain was broken, which could have allowed the substitution of another firearm in the chain of evidence leading to the testing of the firearms.

[16] According to Warrant Officer Thabethe, the first appellant was arrested by him. At the time of arrest he had a 'small' firearm on his waist which did not have a serial number and Thabethe took the firearm[2] and put it next to the first appellant.[3]

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[1] Firearms were in protective custody. See pages 136, 142 and 143 of volume 2 of the record and also exhibit 'G'.
[2] Bottom of page 81 of volume 1 of the record.
[3] See pages 81 to 83 of volume 1 of the record. Evidence of handover of the scene was also led.

[17] Even if a firearm was incorrectly described in the charge sheet, the totality of the evidence must be looked at, and the misdescription alone cannot constitute a defence for the appellants. The State led evidence that the firearms recovered matched the description in the evidence.[4]

[18] The firearms were tested, contrary to the contention by the appellants.[5]

[19] We were not directed to anything that suggests that the appellants could have been prejudiced if the charge sheet was amended to reflect the correct description of the firearm.[6]

[20] The contention by the second appellant that, since his photograph was published in the Zululand Observer before the identification parade, an inference should be drawn that the outcome of the identification parade cannot be credible, is without substance. Both Ms Ngema and Mr Zikhali testified that the Zululand Observer publication of the 20th January 2017 and the internet images thereof, did not come to their attention, and there is nothing to gainsay that. Their evidence was accepted by the learned magistrate, and there is no basis upon which this court could interfere with his conclusions.

[21] Ms Ngema testified that when she made the statement on the date of the incident, the 10th August 2016, she was still in shock and was not able to give a detailed statement. On the 25th November 2016 when she made the second statement, she was in a position to give a detailed explanation as to the events that had transpired on the 10th August 2016.

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[4] Firearms and ammunition as per the evidence of Mahesh, pages 176 to 181 of volume 2 of the record.
[5] See examination-in-chief and cross-examination of Warrant Officer Mahesh, pages 176 to 184 of volume 2 of the record.
[6] See *S v Kruger* 1989 (1) 785 (AD) 796A-E; *S v Mdunge* 1962 (2) SA 500 (N); *S v Nel* 1989 (4) SA 845 (AD) 851G-H; *S v Barketts Transport* (*EDMS) BPK En 'N Ander* 1988 (1) SA 157 (AD) and *S v Magwaza* 1972 (2) 781 (N).

[22] It is trite that the circumstances in which a court of appeal may interfere with the sentencing discretion of a lower court are limited.[7] The findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[8] There must be either a material misdirection by the trial court or a marked disparity between the sentence of the trial court and the sentence which the appellate court would have imposed.[9]

[23] In *S v Rabie* 1975 (4) SA 855 (A) at 857D–E, the court stated the following:

'In any appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court" and;

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

[24] In *S v Malgas* 2001 (1) SACR 469 (SCA) para 12, the court stated the following in applying a broadened scope for the interference:

'. . . However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to

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[7] *S v Monyane and Others* 2008 (1) SACR 543 (SCA).
[8] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) and *S v Francis* 1991 (1) SACR 198 (A).
[9] *S v Malgas* 2001 (1) SACR 469 (SCA) at 478D-G.

that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. . . .'

[25] We are satisfied that the court *a quo* properly took into account all the relevant factors that needed to be taken into account when determining whether there were substantial and compelling circumstances present. The trial court deviated and imposed lesser sentences and we find no justification in interfering with the sentences imposed *a quo*.

[26] In the result, the following order is proposed:

(a) The appeal against conviction and sentence is dismissed.

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M. Sibisi AJ

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Lopes J

Date of hearing:	5th May 2023.
Date of hearing:	9th June 2023.
For the appellants:	Ms Z. Fareed (instructed by Legal Aid SA)
For respondent:	Ms N. Moosa (instructed by the Deputy Director of Public Prosecutions).