Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **CA & R 16/2023**
Heard on: **04/09/2023**
Delivered on: **15/09/2023**

In the matter between:

NTSHEKISANG HENYEKANE **FIRST APPELLANT**

NELSON JASON MOGOTSI **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Mamosebo J et Lever J

JUDGMENT: APPEAL ON SENTENCE

MAMOSEBO J

[1] On 28 November 2022 the appellants appeared before Magistrate Roach in the Regional Court in Galeshewe where they were both convicted of

robbery with aggravating circumstances. They were each sentenced to a term of 15 years imprisonment on 30 November 2022 and now appeal against their sentence with leave of the trial court. The prescribed minimum sentences are applicable.

[2] Their appeal is predicated on the following two grounds:

2.1 Whether the trial court erred in finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years imprisonment in one count of robbery with aggravating circumstances; and

2.2 Whether the sentence of 15 years imprisonment so imposed is shockingly harsh and disproportionate in all the circumstances.

[3] The complainant is a 12-year old pupil who was robbed at knife point of his aunt's speaker box valued at R900.00 and kicked with booted feet by both appellants who were known to him. The incident happened in broad daylight while he was walking home from school. The community of Lerato Park in Galeshewe took it upon themselves to hunt for the appellants and to recover the stolen property. They first effected a civil arrest on the first appellant. The appellants denied their involvement in the offence which resulted in a full trial to establish their complicity. Of significance and aggravating is that the appellants wielded a dangerous weapon (a knife) to subdue a defenceless minor.

[4] Mr Biyela, for the appellants, standing by his written heads, submitted that the sentence is shockingly harsh and disproportionate and stands to be set aside and replaced with a lesser sentence. He correctly conceded

that the minimum sentence legislation is applicable. He further conceded that on the face of it there were no substantial and compelling circumstances, but that the personal circumstances of the appellants, however, ought to attenuate their sentence. Ms Sauls, for the State, submitted that the trial court did not err in its imposition of the minimum sentence and that there was therefore no misdirection. Counsel further contended that the fact that both appellants have previous convictions does not support their claim that the sentence is shockingly disproportionate to their offence. What is aggravating, so the argument went, was that the complainant, who was a minor, was subdued by the appellants wielding a knife at him.

[5] The principles when considering appeals against sentence and the interference by the appeal court are trite. Sentencing lies pre-eminently within the discretion of the sentencing court. Absent any misdirection or where the sentence is not vitiated by any irregularity or is not disturbingly inappropriate, the appeal courts must be loath to interfere with such discretion.[1] This is the test that we follow to determine if there is any misdirection or if the sentence is disturbingly inappropriate.

Do substantial and compelling circumstances exist?

[6] In *S v PB* 2013 (2) SACR 533 (SCA) at para 21 the Supreme Court of Appeal (SCA) remarked:

> *"[21] The most difficult question to answer is always: What are substantial and compelling circumstances? The term is so elastic that it can accommodate even ordinary mitigating circumstances. All I am prepared to say is that* ***it involves a value judgment on the part of the sentencing court.*** *I have,*

[1] See S v Romer 2011 (2) SACR 153 (SCA) at para 22

however, found the following definition in S v Malgas (above) para 22 to be both illuminating and helpful:

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'"

[7] The question to be answered is whether there were substantial and compelling circumstances placed before the trial court justifying a departure from the imposition of the prescribed minimum sentence of 15 years imprisonment and did the trial court err in its finding that they did not exist?

[8] This is what was presented before the trial court for purposes of sentencing. Accused 1 is 29 years old and has no children. His highest academic qualification is Grade 11. He is unemployed and resides with his family. He is not a first offender and has admitted his previous conviction of assault with intent to do grievous bodily harm committed on 2 January 2018. He was sentenced to 30 months imprisonment of which 15 months imprisonment was suspended for a period of three years on specified conditions. The family is dependent on the grandmother's social grant for a living.

[9] Accused 2 is 23 years old and unmarried with no children. His highest academic qualification is Grade 9. He was employed at Riverton Solar

Panels for about two and half years before his incarceration and earned R8,500.00 per month. He used the money to care for his grandparents and nine siblings. He has four admitted previous convictions: housebreaking with intent to steal and theft committed on 11 July 2012 where he was sentenced to 18 months imprisonment and three counts of theft committed on 22 November 2011. The three counts were taken together for purposes of sentence and he was sentenced to 18 months imprisonment wholly suspended on specified conditions. Housebreaking with intent to steal and theft committed on 22 September 2011 and sentenced to one year and six months imprisonment, six months of which were suspended for a period of five years. The SAP 69 reads *"voorwaardes onbekend"*. The last one is robbery committed on 07 August 2012. He was sentenced to five years direct imprisonment. The previous conviction of the first appellant of assault GBH and the robbery committed by the second appellant have not superannuated.

[10] In mitigation of sentence it was submitted that they are both relatively young; they are first time offenders in the crime of robbery with aggravating circumstances where the minimum sentence is applicable; and they can still be rehabilitated outside prison. According to the record these are the factors placed before the trial court as substantial and compelling circumstances: (i) the accused are both very young, 23 and 29 years old; (ii) the robbed item, the value of which value was not so high, was recovered; (iii) the complainant did not suffer any life-threatening injuries and no medical evidence was placed before the court.

[11] The trial court considered the following factors as aggravating. The seriousness of the offence and its impact in the Northern Cape; the

prevalence of the offence within the court's jurisdiction; more minors are victims of the offence of robbery with aggravating circumstances; the complainant was returning from school and still wearing his school uniform; he was robbed by two people who were known to him and he initially thought accused 1 was playing because he smiled at him.

[12] The SCA has made it plain in *S v Malgas* 2001 (1) SACR 469 (SCA) that it is no longer business as usual. The legislature has ordained prescribed minimum sentences and the courts should not deviate from those prescribed minimum sentences for flimsy reasons. Marais JA further sounded the following caution in *Malgas* at para 12:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court."

[13] The submission of the age of the appellants has become settled in our law. The SCA in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 14 Ponnan JA enunciated:

"[14] It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor…. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness."

I am not persuaded that the appellants' circumstances meet the threshold of substantial and compelling circumstances as contemplated in s 51(3)(a) of the Criminal Law Amendment Act, 105 of 1997.

Is the sentence of 15 years shockingly harsh and disproportionate in the circumstances?

[14] In *Malgas at 482 I* Marais JA emphasised the following *dictum*:

> *"I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."*

There is nothing on record that supports the contention that the imposed sentence is shockingly harsh or shockingly disproportionate. The fact that the offence is rife in the area demands from the courts to be mindful that it is not given a clean slate on which to inscribe whatever sentence it thinks fit. The nature of the offence and the circumstances under which it was committed justify a finding that the appellants' personal circumstances recede to the background. See *S v Vilakazi* 2009 (1) SACR 552 (SCA). In the circumstances, there is no reason to interfere with any of the findings made by the Magistrate. It therefore follows that the appellants' appeal against their sentences stands to be dismissed.

[15] In the result, the appeal against the sentences imposed is dismissed.

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MAMOSEBO MC
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

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LEVER L
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the appellants:	Adv K Biyela
Instructed by:	Kimberley Justice Centre
For the respondent:	Adv S Sauls
Instructed by:	Director of Public Prosecutions