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

NORTHWEST DIVISION – MAHIKENG

CASE NO: CA 09/2016

In the matter between:

BAKANG MATLABA **APPELLANT**

AND

THE STATE **RESPONDENT**

CRIMINAL APPEAL

DJAJE DJP & SCHOLTZ AJ

Heard: **27 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **26 JANUARY 2024**

ORDER

1. The appeal against sentence is upheld.

2. The sentence of the court *a quo* is set aside and replaced with the following:

"The appellant is sentenced as follows:

In count 1 – 15 years imprisonment

In count 2 – 15 years imprisonment

In count 4 – 2 years imprisonment

In count 5 – 5 years imprisonment

It is ordered that the sentence in count 2,4 and 5 should run concurrently with the sentence in count 1. Effectively, the appellant is sentenced to 15 years imprisonment."

3. The sentence is antedated to **24 April 2015**.

CRIMINAL APPEAL JUDGMENT

DJAJE DJP

[1] The appellant appeared in the Regional Court sitting in Itsoseng facing five counts. Three counts of robbery with aggravating circumstances, one count of assault with intent to do grievous bodily harm and the last count of pointing of a firearm. He was convicted of two counts of robbery with aggravating circumstances and sentenced to fifteen years imprisonment each. On the count 4 of assault, he was sentenced to two years imprisonment and five years for count 5 of pointing of firearm. He was acquitted on the one count of robbery with aggravating circumstances. It was ordered that the sentence of two years should run concurrently with the sentence in count 1 of fifteen years and seven years of count 2 to also run with the sentence in count 1. Effectively, the

appellant was to serve a term of twenty-eight years imprisonment. This appeal is against sentence only.

[2] It is important to state the facts of this matter briefly before dealing with the issue of sentence. The state led evidence only in respect of robbery in count 1 and 2, assault in count 4 and pointing of firearm in count 5. It was not disputed that the complainants in count 1 and 2 were robbed at a tavern on **12 October 2013**. They were robbed of their shoes and cell phones. A firearm was used during the said incidents. The appellant was positively identified as the person who perpetrated the robbery. In count 4 the complainant testified that he was assaulted by a firearm on his head by the appellant and was injured. Lastly, in count 5 the evidence was that the appellant pointed the complainant with a firearm.

[3] The appellant's defence was that of alibi but it was rejected as being false. The complainants were able to identify the appellant as they knew him before the incidents and had seen him on that day. In convicting the appellant the following was said by the court *a quo*:

> *"There is nothing in their evidence which shows that they were bias towards the accused or that they exaggerated their evidence in order to falsely implicate the accused.*
>
> *There is nothing which shows that any of them had any motive to falsely implicate the accused except Windty and Sergeant Setso. It is very clear that these other witnesses had ample opportunity to identify the accused, they had*

prior knowledge of the accused, there was also light at where this incident took place in order to enable them to identify the accused if the person who was at the scene.

Although Thabo Mahlangu did not stay in Itsoseng area it is clear that prior to the incident he did see the accused and the spot where there was light and he managed to identify the accused as the person well known to him.

Monane attended primary school with the accused, they were at the place when this is incident took place there was ample light from the Apollo and the light from the light which was on the wall of the tavern and they took some time to get there they even talked, the accused even said to him I nearly killed you.

Olebogeng knew the accused very well by sight not by name and it is very clear that the accused also new Olebogeng that is why when he realised that this Olebogeng is the person known to him he ordered Olebogeng to leave.

All these witnesses the court finds that they were credible, honest, reliable and their evidence cannot be faulted even their demeanour in the witness box cannot be faulted in any manner.

These witnesses except Setso and Windty although they had taken liquor there is nothing which shows before this court that the identity of the accused was distructed by the indictment of liquor.

The same cannot be said about the accused. He was not coherent when he was given, when he gave evidence-in-chief and he was worse under cross examination. His demeanour in the witness box leaves much to be desired.

His mannerism when he was answering questions really led to more questions than answers. He was an evasive witness in any case.

It is very clear that the alibi he races that he could not have been at G Town Tavern but he was at the Ditlogo cannot be sustained, that alibi cannot stand.

It is found by this court not to be reasonably, possibly true that is why the court rejects it in its totality."

[4] In sentencing the appellant the court *a quo* found that in respect of count 1and 2 there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences of fifteen years imprisonment. As stated above the effective sentence of the appellant was twenty-eight years imprisonment.

[5] This appeal is being decided on papers as requested by counsel for both the appellant and the respondent. The argument on behalf of the appellant is that the sentence of twenty-eight years imprisonment is shockingly inappropriate when considering the appellant's cumulative facts in mitigation. The appellant seeks an order that the sentences in count 2,4 and 5 should be ordered to run concurrently with the sentence in count 1.

[6] The respondent concedes with the submission made on behalf of the appellant that the sentence of twenty-eight years imprisonment is shockingly inappropriate and should be set aside.

[7] Sentence is a matter for the discretion of the court burdened with the task of imposing it. A Court of Appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence. **See: S v Romer 2011 (2) SACR 153 (SCA) paragraph 22**

[8] In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. **See: S v Banda and Others 1991(2) SA 352 BGD) at page 355.**

[9] Section 280 (2) of the Criminal Procedure Act 51 of 1977 provides that punishment consisting of imprisonment shall commence one after the other unless the court orders that such sentence shall run concurrently. The reason for this is that the sentencing court should always be aware of the cumulative effect of imposing more than one sentence. However, the cumulative effect of the sentence should not underestimate the seriousness of the offence.

[10] In this matter the offences that the appellant was convicted of are very serious. They involve violence and personal properties being taken away from the complainants. However, these offences happened in the same place although at different times.

[11] The appellant's personal circumstances were stated as follows:

- He was 31 years old at the time of the commission of the offence;
- He has one child and is single;
- He was doing odd jobs before arrest;
- He had previous conviction of robbery;
- He was arrested on **12 October 2013** and kept in custody until he was sentenced on **24 April 2015**.

[12] Looking at the facts of this case, the personal circumstances of the appellant, the mitigating and aggravating features, as well as the submissions by both counsel, the sentence imposed by the court *a quo* is severe and excessive. The appellant was charged with two counts of robbery with aggravating circumstances which were committed within a short space of time from each other. Count 1 and 4 took place at the same time. It is so that the offences are serious and the appellant should be punished, but it is important to remember that the purpose of punishment is not to break an offender but to rehabilitate him.

Order

[13] Consequently, the following order is made:

1. The appeal against sentence is upheld.
2. The sentence of the court *a quo* is set aside and replaced with the following:

   "The appellant is sentenced as follows:

   In count 1 – 15 years imprisonment

   In count 2 – 15 years imprisonment

   In count 4 – 2 years imprisonment

   In count 5 – 5 years imprisonment

   It is ordered that the sentence in count 2,4 and 5 should run concurrently with the sentence in count 1. Effectively, the appellant is sentenced to 15 years imprisonment."
3. The sentence is antedated to **24 April 2015**.

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J T DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST PROVINCIAL DIVISION

MAHIKENG

I agree

_____

H. SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

NORTH WEST PROVINCIAL DIVISION

MAHIKENG

APPEARANCES

DATE OF HEARING	**: 27 NOVEMBER 2023**
DATE OF JUDGMENT	**: 26 JANUARY 2024**
COUNSEL FOR THE APPELLANT	**: MR T G GONYANE**
COUNSEL FOR THE RESPONDENT	**: ADV K PHETLHU**