THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 726/12

Reportable

In the matter between:

Sandile Patrick Radebe **FIRST APPELLANT**

Sello Radebe **SECOND APPELLANT**

and

The State **RESPONDENT**

Neutral citation: ***Radebe v S*** (726/12) [2013] ZASCA 31 (27 March 2013)

Coram: Lewis and Leach JJA and Erasmus AJA

Heard: **12 March 2013**

Delivered: **27 March 2013**

Summary: When determining an appropriate sentence of imprisonment, the period spent by an accused in detention while awaiting trial, conviction and sentence should not be assessed mechanically in reducing the period of imprisonment to be imposed. Appeal against sentences for robbery with aggravating circumstances dismissed.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Southwood J and Makgoka AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

LEWIS JA (LEACH JA AND ERASMUS AJA CONCURRING):

[1] The two appellants in this matter were convicted in the Vereeniging Regional Court on three counts of robbery with aggravating circumstances, one count of contravening s 3 of the Firearms Control Act 60 of 2000 (the unlawful possession of four firearms) and one count of contravening s 90 of that Act (the unlawful possession of 43 rounds of ammunition). They were sentenced to 15 years' imprisonment on each count of robbery, the sentences to be served concurrently. The first appellant was sentenced in addition to four years' imprisonment on the charge of unlawful possession of firearms and one year in respect of the unlawful possession of ammunition. The second appellant was sentenced to six years' imprisonment on the charge of unlawful possession of firearms, the additional two years imposed because he had a recent previous conviction for such possession. Like the first appellant he was also sentenced to a year's imprisonment for the unlawful possession of ammunition.

[2] They appealed against both convictions and sentences to the North Gauteng High Court (Southwood J and Makgoka AJ). That court set aside two of the convictions of robbery, but confirmed the sentences on the other counts. The first appellant was thus sentenced to an effective period of 20 years of imprisonment and

the second appellant to an effective 22 years of imprisonment. The high court gave leave to appeal against their sentences to this court on the basis that it had not taken into account the period (some two years and four months) that the appellants had spent in prison while awaiting trial. Southwood J said, in granting the application for leave to appeal:

'It is arguable that a period of two years in detention awaiting trial constitute substantial and compelling circumstances warranting a lighter sentence than the prescribed minimum, but it seems clear that that period of detention should have been taken into account by the court *a quo* when imposing sentence for the other charges.'

[3] Before I turn to this issue I shall describe the robbery and its aftermath briefly. On an evening in May 2004 the three complainants, a husband and wife, Mr and Mrs Henning, and the wife's brother, Mr Bester, were robbed of a Browning 90mm pistol with a wooden grip, cellphones, and jewellery. The Hennings were at home in Vereeninging when the robbers gained entry to their house. The robbers held the Hennings at gunpoint. Mr Henning, having been in the bath when the men entered the house, was naked. He was repeatedly kicked in the kidneys.

[4] While the robbers ransacked the house searching for items to steal, Mr Bester arrived to visit the Hennings. One robber accompanied Mrs Henning to the gate to let Mr Bester in, and then proceeded to steal items from him as well. There is no doubt that the entire experience was frightening and distressing for all three complainants. The robbers accosted a couple in their home, threatened them with death, and one of them kicked Mr Henning. At the time of the trial Mrs Henning in particular was still traumatised, observed the regional magistrate.

[5] A week after the robbery the investigating officer assigned to investigate the robbery, acting on information from an informant, together with two other police officers, found the appellants and a third man (who is not a party to this appeal) at an address given to him. They searched the house and found four firearms, including Mr Henning's Browning pistol. They also found 43 rounds of ammunition, cellphones and a man's watch. The cellphones were those of Mr Henning and Mr Bester. A bangle stolen from Mrs Henning was also in their possession. The three men were arrested.

[6] The suspects made statements about their whereabouts at the time of the robbery, and admitted to having acquired the cellphones about a week prior to their arrest. Their statements were admitted into evidence after a trial within a trial. Two of the robbers were also identified by the complainants at an identification parade shortly after the arrest.

[7] The high court, on appeal, considered that the explanation of the appellants about their possession of the cellphones – that the police had 'planted' the evidence in the house in which they were living – was correctly rejected as improbable. And the high court considered that the appellants had been poor witnesses, their evidence in the trial within the trial also being correctly rejected. As I have said, the high court confirmed the convictions on one count of robbery each, and on the counts of unlawful possession of firearms and ammunition. In that court the State conceded that the three convictions for robbery, on the basis that there were three complainants robbed, were unsustainable.

[8] Hence leave to appeal against their convictions was refused. But leave to appeal against their sentences was granted on the basis referred to earlier. The principal argument against the effective sentences on the charges of robbery and unlawful possession of firearms and ammunition (20 and 22 years' imprisonment respectively), in appeal before this court, was that the trial court, as well as the high court on appeal, did not take into account the two years and four months of detention undergone by the appellants before conviction.

[9] As Southwood J said, in the high court, this argument was not raised before that court on appeal. It was, however, considered by the regional magistrate when he imposed sentence. He said:

'Julle is al 'n hele ruk in hegtenis, hoofsaaklik weens julle eie toedoen. 'n Voorbeeld daarvan is die binneverhoor, wat die saak baie uitgerek het en waar dit toe geblyk het; waar julle aanvanlik gesê het julle het die verklaring gemaak met onbehoorlike beïnvloeding, julle van plan verander het, later gesê het julle het nie so 'n verklaring gemaak het nie. Julle kan dus niemand behalwe julleself blameer vir die lang tydsverloop, wat julle in hegtenis was nie. As gekyk word na die aard en omvang van die vonnisse, dan is dit so dat hierdie kumulatiewe effek, indien julle vonnisse afsonderlik moet uitdien, baie swaar sal wees. Die Hof sal dit dan ook in ag neem, by vonnisoplegging. Ten opsigte van die

besit van vuurwapens en ammunisie, moet die Hof in ag neem dat dit nie net 1 vuurwapen was nie; dit was verskeie vuurwapens, dit was ‘n groot aantal ammunisie wat julle hier besit het en dit op sigself – 43 rondtes, kan julle ‘n oorloggie mee gaan uitvoer het.’

[10] The regional magistrate took into account as well that the second accused (the second appellant in this appeal) had a previous conviction for unlawful possession of a firearm and ammunition and the first accused (the first appellant) a previous conviction for theft.

[11] The appellants now argue that in reconsidering the sentences we should take into account the period of two years and four months awaiting the completion of the trial. They rely on *S v Brophy* 2007 (2) SACR 56 (W) in this regard. There Schwartzman J held that the rule of thumb in determining an appropriate sentence should be to take into account the period in detention awaiting the completion of the trial and double it. That double period should be deducted from the period of imprisonment proposed when sentencing. The learned judge differed in this regard from an earlier decision of the same court in *S v Vilikazi* 2000 (1) SACR 140 (W) at 148*a-e*. In that case Goldstein J said:

‘In this regard I do not overlook the *dictum* of Schutz J (as he then was) in *S v Stephen and Another . . . .* [1994 (2) SACR 163 (W)]. I am not aware of this *dictum* having been universally followed in our courts. It is also not clear to what extent the learned Judge applied the Canadian rule. I think too with respect that it is unsafe to rely on Canadian authority which may well be grounded in the special circumstances of that country. (The report of *Gravino* quoted in *Stephen’s* judgment is not that of a reasoned judgment, but in a few lines records the facts of the case and a comment of Montgomery J that “it is a recognised ‘rule of thumb’ that imprisonment while awaiting trial is the equivalent of a sentence of twice that length”. No reasons are given for the rule.) Imprisonment in our country, whether awaiting trial or after sentence, constitutes, as no doubt it always has done here, a far-reaching and all-encompassing deprivation of liberty and subjects the prisoner in many if not all cases to boredom, indignity, loneliness, danger, lack of privacy and quite profound suffering and loss. . . I would be loathe in the absence of clear evidence to decide that the miseries of the awaiting-trial period are more oppressive than those of the post-sentence ones.’

[12] Schwartzman J in *Brophy* considered otherwise. He said (para 18):

‘There is no evidence before this Court detailing the living conditions of awaiting-trial prisoners, who are presumed to be innocent and who are first offenders. What does not require evidence is that time spent in prison awaiting trial is, at the very least, equivalent to time served without remission. In addition, such prisoners do not get the benefit of any presidential pardon. What cannot be disputed is

that the lot of the awaiting-trial prisoner is harsher than that of a sentenced prisoner in that he or she cannot participate in the programmes that a prison may run. What he or she is condemned to is a seemingly endless routine of boredom in the course of which he or she cannot earn any privileges for which serving prisoners can qualify by reason of good conduct. Judicial cognisance can also be taken of the gross overcrowding in prisons housing awaiting-trial prisoners.'

The learned judge continued (para 19):

'There is no science from which it can be determined that such conditions are equivalent to double or treble or less than double time served. Taking all conditions into account – and there are probably others that may be found in some prisons – and notwithstanding the reservations expressed by Goldstein J, I am satisfied that the *ratio* in the *Stephen* case ought to be followed.'

[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (It should be noted that this court left open the question of how to approach the matter in *S v Dlamini* 2012 (2) SACR 1 (SCA) para 41.)

[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.

[15] That general principle was expressed, first, in relation to the way to assess whether substantial and compelling circumstances exist where a minimum sentence has been prescribed by the Criminal Law Amendment Act, in *S v Malgas* 2001 (2) SA 1222; 2001 (1) SACR 469 (SCA) where Marais JA said (para 25):

'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.'

That approach was endorsed by the Constitutional Court in *S v Dodo* 2001 (3) SA 382; 2001 (1) SACR 594 (CC). More recently, in *S v Vilakazi* 2012 (6) SA 353; 2009 (1) SACR 552 (SCA) this court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Nugent JA said (para 15):

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'

[16] I am satisfied that the prescribed sentence of 15 years' imprisonment is fully justified in respect of the robbery committed by both appellants. The robbery was planned; firearms were used; Mr Henning was assaulted, and held naked at gunpoint; all three complainants were held at gunpoint during the course of the robbery; the complainants were deeply distressed during and after the robbery; and a firearm was stolen, as were jewellery and cellphones. The first appellant had a previous conviction for theft (a competent verdict on a charge of robbery) and the second appellant was convicted only three months before the commission of the offences in issue on charges of unlawful possession of a firearm and ammunition.

[17] In so far as the sentences in respect of the charges of unlawful possession of firearms and ammunition are concerned, I consider that these too are fully justified. The appellants were in unlawful possession of four firearms, one of them stolen from the Hennings, and 43 rounds of ammunition, a considerable armoury, as pointed out by the regional magistrate. And, as I have said, both appellants had previous convictions, the first for theft and the second for unlawful possession of a firearm and ammunition.

[18] The additional five and seven years' imposed on them respectively do not induce a sense of shock. It is so that the appellants spent two years and four months in detention before they were convicted. That must of course be taken into account. But in my view this factor does not outweigh the aggravating circumstances attendant on the crimes committed. As pointed out by counsel for the State, detention for some of that period was the result of the appellants insisting on private legal representation although they did not have the ability to pay for it; and by the changing of their versions during the course of the trial such that a trial within a trial had to be held. As the regional magistrate said, they had only themselves to blame for the lengthy period over which the trial was conducted.

[19] The appellants also argued that the regional magistrate did not take the lead in enquiring about the personal circumstances of the appellants before imposing sentence. This argument is not convincing. The appellants were represented by counsel, who described their personal circumstances and did not draw anything of consequence to the attention of the court other than their age and the number of dependants each had. In the circumstances of this case none was mitigating and the regional court considered all the factors relevant to sentence.

[20] There is no reason to interfere with the sentences imposed by the regional magistrate and confirmed by the high court. The appeal is dismissed.

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	H H Moeng Instructed by: Johannesburg Justice Centre, Marshalltown. Bloemfontein Justice Centre, Bloemfontein
For Respondent:	MNC Menigo Instructed by: Director of Public Prosecutions, Johannesburg. Director of Public Prosecutions, Bloemfontein