THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 800/18; 123/18; 346/18

In the matter between:

AUBREY THAMSANQA BHOLA **FIRST APPELLANT**

NKOSINGIPHILE PATRICK MNTHUNGWA **SECOND APPELLANT**

LAZARUS KHOZA **THIRD APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Bhola & others v The State* (800/18; 123/2018; and 346/18) [2018] ZASCA 121 (21 September 2018)

Coram: Shongwe ADP, Majiedt, Van der Merwe, Molemela and Makgoka JJA

Heard: 24 August 2018

Delivered: 21 September 2018

Summary: Criminal Procedure**:** sentence: offence of attempted robbery with aggravating circumstances falls within sentencing regime specified in Criminal Law Amendment Act 105 of 1997: trial court's application of provisions of Criminal Law Amendment Act 105 of 1997 to attempted robbery with aggravating circumstances

constitutes a misdirection: sentence imposed by trial court set aside: sentencing determined afresh.

ORDER

On appeal from: Gauteng Division, Pretoria (De Vos and Basson JJ concurring sitting as court of appeal.)

1 The appeal is upheld.
2 The order of the high court is set aside and substituted with the following:
'(a) The sentences imposed by the trial court on the appellants are set aside and replaced with the following:
Accused no 1 (Mr Bhola): 13 years' imprisonment.
Accused no 2 (Mr Mnthungwa): 8 years' imprisonment.
Accused no 3 (Mr Khoza): 8 years' imprisonment.
(b) The sentences are antedated to 7 April 2014'.

JUDGMENT

Molemela JA (Shongwe ADP, Majiedt, Van der Merwe and Makgoka JJA concurring)

[1] In the late afternoon of 25 February 2013, three male persons entered a jewellery store in Piet Retief. Their attempt at carrying out an armed robbery there was thwarted when the wife of the store owner pressed the panic button of the alarm system, thereby activating the siren. Upon hearing the sound of the alarm, the three perpetrators fled the jewellery store empty-handed. The circulation of the details of their vehicle to the police led to their arrest the next day. The arrested suspects were

later identified as Mr Bhola, Mr Mnthungwa and Mr Khoza, respectively (the appellants). They appeared before the regional court, Piet Retief (the trial court) on one count of attempted robbery with aggravating circumstances. They were all convicted as charged. The trial court found that the offence of attempted robbery with aggravating circumstances attracted a minimum sentence within the ambit of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). Having found no substantial and compelling circumstances justifying deviation from the applicable minimum sentences, it sentenced Mr Mnthungwa and Mr Khoza to 15 years' imprisonment. It found that Mr Bhola's previous convictions warranted a harsher sentence and thus sentenced him to 20 years' imprisonment.

[2] Aggrieved by the decision, the appellants applied to the trial court for leave to appeal against their convictions and sentences, but they were unsuccessful. They subsequently petitioned the Gauteng Division of the High Court, Pretoria (High Court), which granted them leave to appeal against their sentences only. Their appeal against their sentences served before De Vos and Basson JJ (the court a quo) and was dismissed. Upon consideration of their appeal against their sentences, the court a quo, labouring under the same impression as the trial court that attempted robbery with aggravating circumstances attracted mandatory minimum sentences stipulated in the Minimum Sentences Act, dismissed their appeal on the basis that there were no substantial and compelling circumstances warranting deviation from the applicable minimum sentences. Following the court a quo's dismissal of the appeal, Mr Mnthungwa directed an application for special leave to appeal to this Court. On 26 April 2017 this Court granted Mr Mnthungwa special leave to appeal limited to, first, the consideration whether the 15 years' imprisonment sentence which the trial court had purportedly imposed as a prescribed minimum sentence contemplated in s 51(2) of the Minimum Sentences Act was correctly imposed in law for the offence of attempted robbery and, second, to the determination whether the sentences imposed were appropriate.

[3] The granting of special leave to Mr Mnthungwa was subsequently brought to the attention of Mr Bhola and Mr Khoza, which prompted them to also apply for special leave against their sentences. Their application for condonation for the late filing of the application for special leave to appeal was successful. They, too, were

granted leave to appeal against their respective sentences on the same limited basis alluded to above. The three matters were heard simultaneously. At the commencement of the appeal hearing, Mr Mnthungwa's delay in filing the notice of appeal and the record was condoned. For the sake of convenience, Mr Bhola will be referred to as the first appellant, while Mr Mnthungwa and Mr Khoza will be referred to as the second and third appellants, respectively.

[4] The salient common cause background facts are set out hereunder. The evidence adduced by the state witnesses during the trial showed that in attempting to rob the jewellery store, the three appellants seemed to have been acting in concert with a fourth person, an unidentified woman who was never arrested and prosecuted. According to the state witnesses, the woman in question entered the complainant's premises immediately before the attempted robbery occurred and requested a new battery for her wrist watch. After the battery had been inserted, she paid but did not leave the store. The second and third appellants then entered the store. The second appellant loitered around the store while the third appellant requested to be allowed to look at various rings. While the owner's wife was assisting the third appellant with the fitting of different rings, the first appellant entered the shop. Shortly thereafter, the first appellant suddenly took out a firearm, cocked it and pointed it at the complainants. He then instructed everyone in the store to quietly move towards the back section of the store and threatened to shoot those who would not co-operate. The third appellant also pulled out a firearm, brandished it and repeatedly stated that they (the appellants) wanted money. In the intervening period, the second appellant immediately moved towards the door and tried to close it. At some stage, the unidentified woman who had shown interest in watch batteries was seen fiddling behind the counter. As the complainants were moving backwards in compliance with the first appellant's instructions, the wife of the store-owner managed to activate the alarm by pressing the panic button. At the sound of the alarm, the first appellant shouted that he was going to kill the complainants. He, however, hurriedly fled the scene together with his co-perpetrators. The next morning, the three appellants were arrested by the police at a nearby filling station. They subsequently appeared before the trial court and were charged with attempted robbery with aggravating circumstances. They all pleaded not guilty.

[5] The first appellant conducted his own defence, while the second and third appellants were legally represented. Their version amounted to a denial of all the allegations against them. The trial court found that the state witnesses had positively identified the three appellants as the perpetrators of the attempted robbery with aggravating circumstances and thus convicted them.

[6] The key issue is whether the offence of attempted robbery with aggravating circumstances attracts a minimum sentence. The starting point should be the specific provision relied upon by the trial court, namely section 51(2) of the Minimum Sentences Act. Section 51(2) of that Act provides:

'Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence *referred to* in-

(*a*) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.

. . . '. (My emphasis.)

[7] The language used in the section is clear and unambiguous. The ordinary grammatical meaning of the words used in the aforesaid text leaves one with a clear impression that only the offences that are 'referred to' in Part II of Schedule 2 attract the specified mandatory sentences. The plain language used in that provision is not capable of any other interpretation. A perusal of Part II of Schedule 2 reveals that, whereas the offence of robbery with aggravating circumstances is included in the list of the offences specified in that part of Schedule 2, attempted robbery with aggravating circumstances is not. The only reference to attempted robbery with aggravating circumstances in the Minimum Sentences Act is found in Part I of Schedule 2 in relation to a murder that was committed during an attempted robbery, which indicates that it was not intended to include attempted robbery with aggravating circumstances in Part II thereof. The omission of a failed attempt to commit offences from the provisions of the Minimum Sentences Act has been subjected to judicial scrutiny in a number of High Court decisions. This Court in *S v*

Nkosi & another[1] acknowledged that 'there is no specific provision for the offence of attempted robbery' in the Minimum Sentence Act[2]. It follows that the state's concession that the provisions of s 51(2) of the Minimum Sentences Act are not applicable to the offence of attempted robbery with aggravating circumstances was correctly made. Insofar as the trial court approached the sentencing of the appellants on the basis that minimum sentences were statutorily prescribed by the Minimum Sentences Act in respect of the offence of attempted robbery with aggravated circumstances, it materially misdirected itself in relation to the applicable legal prescripts. It follows that the only issue remaining for this court's determination is whether the sentences imposed by the trial court were appropriate.

[8] The State counsel contended that notwithstanding the trial court's misdirection on the applicable legal prescripts, the sentences it had imposed on all the appellants remained appropriate, given the seriousness of the offence they had been convicted of. As authority for this view the State relied on the following remarks made in *Nkosi*:

'Section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years imprisonment, which was imposed here, for the completed offence of robbery but makes no specific provision for attempted robbery - of which the second appellant was convicted on count 2. In my opinion, there is little *in the circumstances of this case* to distinguish between a completed robbery and the heinous foiled robbery by the second appellant, who runs a seemingly decent paving business, and his associates, which involved the use of heavy artillery and gratuitous violence with no regard for the safety of innocent civilians or police. The offence of robbery was all but completed and it is a miracle that Humphries survived and more people were not maimed or killed. The offences committed in this case count among the most violent and, unfortunately prevalent in this country. The harshest form of punishment is undoubtedly warranted.' (My emphasis.)

[9] Counsel for the appellants, in pleading for more lenient sentences, contended that a lesser punishment is usually imposed for an attempt than for the completed

[1] *S v Nkosi & another* [2011] ZASCA 83; 2011 (2) SACR 482 (SCA) at para 36.
[2] This acknowledgment is obviously in line with the approach of those judgments that found that the application of the minimum sentencing regime to offences not included in Schedule 2 to the Minimum Sentences Act was simply incorrect. *See S v Louw* 2007 (1) SACR 539 (NC) at para 7; *S v Qwabe* 2012 (1) SACR 347 (WCC).

offence.[3] I do not regard the aforesaid *dictum* in *Nkosi* to constitute a departure from that trite principle. Rather, that *dictum* makes it plain that in circumstances where an attempt to commit a particular offence is not specified in the Minimum Sentences Act but the completed offence is, nothing precludes a court convicting an offender of the failed attempt from, within its sentencing discretion and in appropriate circumstances, imposing the same sentence such court would have been entitled to impose in respect of the specified completed offence.

[10] With specific reference to the first appellant, on whom the trial court imposed a sentence of 20 years' imprisonment, the state counsel initially contended that the aforesaid sentence ought not to be tampered with, as a harsher sentence was justified by his previous convictions. Following debate with members of the bench, the state counsel ultimately conceded that the basis for the trial court's imposition of a sentence in excess of the Regional Court's penal jurisdiction of 15 years' imprisonment[4] was an erroneous belief that the provisions of the Minimum Sentences Act gave it an increased penal jurisdiction. It follows *a fortiori* that such a sentence can no longer be sustainable once it is found that the provisions of the Minimum Sentences Act are not applicable. Given my earlier finding that the provisions of the Minimum Sentences Act are indeed not applicable to the offence of attempted robbery with aggravating circumstances, it follows that the 20 years' imprisonment sentence imposed on the first appellant does not pass muster as it is in excess of the Regional Court's penal jurisdiction.

[11] Turning to the circumstances of this matter, although the brazen wielding of firearms was accompanied by threats of violence, none of the persons inside the jewellery store and the onlookers were physically harmed during the attempted robbery or during the appellants' escape. I am of the view that the circumstances of this case vary markedly from those delineated in *Nkosi*, where the offence committed was a heist and, despite being a failed attempt, was coupled with extreme aggravation, including commission of further offences involving gratuitous violence brazenly aimed at the police. Consequently, I am of the view that the sentence imposed by the trial court on the appellants is totally disproportionate to the gravity of

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[3] C R Snyman *Criminal Law* 6 ed (2014) at 294.
[4] Section 92(1) *(a)* of the Magistrates Court Act, Act 32 of 1944.

the offence they have been convicted of. It is clear that the trial court's sentencing discretion was not judicially exercised.[5] Where a material misdirection by the trial court has vitiated its exercise of the sentencing discretion, an appellate court is at large to consider the question of sentence afresh. I turn now to consider the appropriate sentence.

[12] It is a trite principle of our law that punishment must fit the criminal, the crime and the interests of society. Although the appellants were in essence convicted of a failed attempt, aggravating factors are extant. The appellants attempted to rob a jewellery store in broad daylight. Not only were firearms brandished during the attempted robbery, it was made clear that the complainants would actually be shot if they did not co-operate. The store-owner suffered psychological trauma as a result of the incident and had to undergo therapy. All these aspects highlight the gravity of the offence the appellants were convicted of. The prevalence of offences involving the use of firearms has caused a lot of consternation in our communities countrywide. Courts must take the interests of society into account and, through the sentences they impose, assure the communities that even a mere attempt to commit a robbery with aggravating circumstances will not be tolerated.

[13] The next consideration in the triad of sentence is the appellants' personal circumstances. The mitigating factors presented on behalf of the appellants are as follows. The first appellant is married. As at the time of his arrest, he had three adult children who were financially dependent on him. He used to work as a builder, earning R250-00 per day. He spent just over a year in custody pending finalisation of his trial, as did the second appellant who is a first offender. He was 27 years old at the time of the commission of the offence. He passed grade 12 at school and worked as a builder for R150-00 per day. He is married, with three minor children aged 8, 5 and 1 years, respectively. He was the sole breadwinner in the family. His motor vehicle was sold in order to pay for his legal fees at the trial. It was submitted that he had, therefore, already suffered some consequences from his actions. The third appellant is a first offender. He was 47 years old at the time of commission of the offence. He is not married but lived with the mother of his three children, the

[5] *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G.

youngest of whom was approximately 4 years of age at the time of sentencing. He used to work as a builder and earned R300-00 per day. He, too, spent just over a year in custody pending finalisation of his trial.

[14] The appellants' criminal record is another important consideration when determining an appropriate sentence, for it serves as a good indicator of an offender's ability to be rehabilitated. Whereas the second and third appellants are first offenders, the first appellant has four relevant previous convictions, namely two counts of murder, robbery, attempted murder and the possession of a firearm and ammunition. The trial court also pointed out that one of the offences reflected in the first appellant's record of offences was committed while he was on parole. His criminal record is a serious aggravating factor which, as correctly pointed out by the court a quo, puts the first appellant on a different footing than that of his co-perpetrators. His previous incarceration for serious offences has clearly failed to rehabilitate him. This calls for a harsher sentence to be imposed on him.

[15] Although the appellants' counsel contended that a more lenient sentence ought to be imposed on the second appellant as he was not armed during the incident, was significantly younger than the other two appellants and played a lesser role in the commission of the offence, the evidence paints a different picture. The conspectus of the evidence depicts three persons acting with a common purpose and playing different but equally important, carefully planned roles. The second appellant strategically loitered around the shop while the third appellant was pretending to be interested in buying a ring. As soon as the first appellant started brandishing the firearm, the second appellant immediately attempted to close the door. Indeed, as correctly argued by the state counsel, the ineluctable inference from all the evidence is that the large backpack that the second appellant was carrying was intended for the loot in the event of a successful robbery which, unfortunately for the appellants, did not materialise. It was also not disputed that he is the one who conveyed the two other appellants to the complex where the jewellery store was situated in his vehicle. The same car was later used as a getaway vehicle. On the whole, the second appellant played a crucial role in the foiled attempt to commit robbery with aggravating circumstances. His counsel's contention that his actions were influenced by his older co-perpetrators is not borne out by the record. The age difference

between him and his co-perpetrators is therefore a neutral factor. I can find no reason why his sentence must be more lenient. As for the first appellant, he is a recidivist and deserves a harsher sentence than the second and third appellants. In arriving at the appropriate sentence, it has been taken into account that all the appellants spent one year in custody while awaiting finalisation of their trial.

[16] For all the reasons outlined above, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

‘(a) The sentences imposed by the trial court on the appellants are set aside and replaced with the following:

Accused no 1 (Mr Bhola): 13 years’ imprisonment.

Accused no 2 (Mr Mnthungwa): 8 years’ imprisonment.

Accused no 3 (Mr Khoza): 8 years’ imprisonment.

(b) The sentences are antedated to 7 April 2014’.

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M B Molemela
Judge of Appeal

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