**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 835/2021

In the matter between:

**BANELE BAFO NHLAPO** **Appellant**

**and**

**THE STATE** **Respondent**

**Neutral citation:** *Nhlapo v The State* (Case no 835/2021) [2022] ZASCA 125 (26 September 2022)

**Coram:** PETSE DP and MOTHLE and HUGHES JJA and CHETTY and SIWENDU AJJA

**Heard:** 17 August 2022

**Delivered:** 26 September 2022

**Summary:** Criminal law and procedure – sentence in excess of the prescribed minimum for robbery – whether effective sentence of 20 years' imprisonment for robbery and attempted murder was inappropriate – whether the whole of the sentence for attempted murder ought to run concurrently with sentence for robbery.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Mngqibisa-Thusi J and Phahlane AJ, sitting as court of appeal):

The appeal is dismissed.

## JUDGMENT

**Chetty AJA (Petse DP, Mothle and Hughes JJA and Siwendu AJA concurring):**

[1] The appellant, Mr Banele Nhlapo, together with his co-accused Mr Boy Lebyane, were convicted in the regional court, on 8 June 2011, of robbery with aggravating circumstances and attempted murder. They were sentenced to 17 years' imprisonment on the count of robbery and five years' imprisonment on the count of attempted murder. The regional court ordered two years of the sentence for attempted murder to run concurrently with the sentence for robbery. The appellant was therefore sentenced effectively to 20 years' imprisonment. He applied for, and was refused, leave to appeal against his conviction and sentence. On petition to the Gauteng Division of the High Court, Pretoria (the high court), in terms of s 316(1) of the Criminal Procedure Act 51 of 1977 (CPA), leave was granted in respect of sentence only. That court dismissed the appeal on 6 December 2017 finding no misdirection by the trial court in imposing an effective period of 20 years' imprisonment.

[2] The appellant then applied to this Court for special leave to appeal against his sentence, such application being granted on 9 June 2021. The issues for

determination before this Court are whether the high court erred in confirming the sentence for robbery imposed by the trial court in excess of the prescribed minimum in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLA), and in confirming that only a portion of the sentence for attempted murder was to run concurrently with that of the sentence for robbery.

[3] The facts of the matter are relatively uncomplicated. The evidence before the trial court was that the appellant was in the vicinity of a tavern in the area of Etwatwa, Gauteng, on the evening of 3 October 2010 in the company of his co-accused, Mr Lebyane, and other young 'boys'. At the same time, the complainant, Mr Ntuli, and his friend Mr Dlamini, visited the same tavern, where they had a few drinks. On leaving the establishment in the early hours of the morning, the complainant and Mr Dlamini walked through a passage where they were confronted by the appellant and his accomplices. The appellant, without provocation, stabbed the complainant in the head, back and neck. At this stage, Mr Dlamini noticed that Mr Lebyane was pointing a firearm in his direction. Mr Dlamini fled the scene for his own safety, leaving behind the complainant, who was being assaulted by the appellant.

[4] Upon being stabbed by the appellant, the complainant was robbed of his cellular phone, R250 in cash and a ring. These items were never recovered. During the ensuing attack, the complainant fled from his attackers and sought refuge in a nearby yard belonging to Mr Ndala, who was asleep at the time and was awoken by screams for help. Mr Ndala noticed three boys standing outside his yard, with the complainant inside his yard, saying that he had just been robbed. When it appeared that Mr Ndala might intercede on behalf of the complainant, one of the boys broke a bottle and threatened to stab Mr Ndala if he interfered. The complainant, in desperation, ran into Mr Ndala's house, only to be pursued by the appellant and his accomplices who dragged the complainant out of the house and into a nearby street where he was repeatedly stabbed, until he lost consciousness. He only regained consciousness in hospital. The J88 medical report, which was admitted into evidence, is consistent with the evidence of the complainant as to the location and extent of his injuries, revealing wounds to the chest, head, neck and multiple lacerations to the back.

[5] The version of the appellant was that the complainant was assaulted by someone else and that he had mistakenly identified the appellant as the person who attacked and robbed him. This version was rightly rejected by the trial court in light of the evidence by the State witnesses, as well as the fact that the appellant was known to the complainant and Mr Dlamini. There could be no case of mistaken identity.

[6] It bears noting that the trial court observed that the circumstances of this attack were 'different from the normal robberies' it dealt with, in that after the complainant's possessions were taken, he fled the scene to seek help. Not satisfied that they had robbed him, his attackers, including the appellant who by all indications was the leader of the pack, pursued him into the property of Mr Ndala where the complainant had sought refuge, dragged him outside and continued to repeatedly assault him.

[7] Against this backdrop, the trial court concluded that despite the appellant being relatively young at 20 years' old, when weighed against the circumstances of the offences and the interests of the community, the latter criteria displaced the personal circumstances of the appellant.

[8] It is well established that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Rabie,*[1] this Court noted that punishment is 'pre-eminently a matter for the discretion of the trial court', and that an appeal court 'should be careful not to erode such discretion'. Consequently, a sentence imposed by the trial court may only be interfered with where it is 'vitiated by irregularity or misdirection or is disturbingly inappropriate'. Even where a sentence is not shockingly inappropriate, an appellate court is entitled to interfere, or at least consider, the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion.[2] Counsel who appeared on behalf of the appellant was unable to point to any misdirection in the high court's confirmation of

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[1] *S v Rabie* 1975 (4) SA 855 (A) at 857; *S v Sadler* 2000 (1) SACR 331 (SCA); *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC) para 66.
[2] *S v Jimenez* [2003] ZASCA 2; [2003] 1 All SA 535 (SCA) para 7.

the sentence. As the high court correctly noted with reference to *S v Kgosimore,*[3] the critical enquiry is whether there was a 'proper and reasonable exercise of the discretion' by the trial court. In the absence of a finding to the contrary, the appeal court has no power to interfere.

[9] Counsel for the appellant contended that the trial court erred in referring only to the appellant's age when it ought to have considered the totality of his personal circumstances in the context of sentencing. This criticism is without merit. The learned magistrate prefaced his judgment by stating that he is required to take into account 'numerous factors' in determining a suitable sentence. He added 'I will take into account everything which was stated by Mr Kathrada [the attorney] on your behalf'. The record indicates that the trial court had earlier been appraised that the appellant was 20 years old at the time, he was a first offender, completed standard 10 at school and was unemployed. This argument therefore must fail.

[10] Insofar as the prevalence of these crimes is concerned, the trial court noted that in its experience, almost every matter involving robbery with aggravating circumstances in its area of jurisdiction is committed by persons of an age similar to the appellant. In *S v Matyityi* [4] this Court stated that an offender 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'.[5] There is nothing on record to suggest that the appellant's relative youth was a factor which contributed to him committing the offences in question or that he was influenced by others to do so.

[11] Having found that there were no substantial and compelling circumstances to deviate 'downwards' from the prescribed penalty of 15 years' imprisonment, the trial court turned its attention to what it considered the aggravating features of the offences, 'where the facts call for it'. Despite the appellant's counsel initially contending that the trial court should have taken the appellant's age and his status as a first offender into account as constituting substantial and compelling circumstances in terms of s 51(3)*(a)* of the CLA, he later conceded that, at best, the

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[3] *S v Kgosimore* [1999] ZASCA 63; 1999 (2) SACR 238 (SCA) para 10.
[4] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).
[5] Ibid para 14.

appellant should have been sentenced to the minimum sentence of 15 years in terms of s 51(2)*(a)*, with the entire sentence of five years for attempted murder being made to run concurrently with the sentence for robbery. Essentially, it was submitted that the appellant should have been sentenced to 15 years' imprisonment.

[12] The trial court misconstrued the provisions of s 51(2) of the CLA in stating that its penal jurisdiction was increased to 20 years' imprisonment. I do not, however, consider this an irregularity justifying an interference as the sentence ultimately imposed was within the range of permissible sentences in s 51(2). That section reads:

'Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.'

[13] As regards the argument based on the concurrency of sentences, the default position in s 280(2) of the CPA is that sentences of imprisonment imposed for two or more offences will run consecutively, unless the court directs that they run concurrently. The purpose is to ensure that the cumulative effect of several sentences imposed in one trial is not too severe in the light of the aggregate sentence[6] or unduly harsh,[7] but at the same time does not underestimate the seriousness of the offence.[8]

[14] I am in agreement with counsel for the respondent that to order the entire sentence for attempted murder to run concurrently with the sentence for robbery would be to negate the seriousness of the attack on the complainant. I am unable to agree with counsel for the appellant that the injuries sustained by the complainant were not the most serious or life threatening, hence the entire sentence for attempted murder should have run concurrently with the sentence for robbery. As counsel for the respondent correctly pointed out, the J88 medical report reveals that the complainant suffered multiple lacerations on the back; two stab wounds on the chest, one on the neck and he had difficulty in breathing to the extent that an

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[6] *S v Cele* 1991 (2) SACR 246 (A) at 248j.
[7] *Moswathupa v S* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA); *S v Dube* 2012 (2) SACR 579 (ECG) para 11.
[8] *S v Maraisana* 1992 (2) SACR 507 (A) at 511g.

intercostal drain was inserted. In the trial court, it was conceded that the complainant was 'very, very severely stabbed'. In any event, it is clear that the trial court, in ordering two years of the sentence for attempted murder to run concurrently with that for robbery, must have applied its mind to the aspect of concurrency as a means to ameliorate the impact of a cumulative lengthy sentence. In doing so, the trial court was exercising its sentencing discretion. The appellant can point to no failing by the trial court in the exercise of its discretion in allowing only a portion of the sentence to run concurrently.[9] This contention must fail.

[15] While it was not disputed that the appellant was aware of the implications of the prescribed minimum sentence being applicable, in the event of his conviction for an offence falling within the ambit of s 51(2), it was submitted on his behalf that the trial court erred in failing to alert the appellant to the possibility of him receiving a sentence in excess of the prescribed minimum of 15 years' imprisonment and for not setting out its reasons for imposing such sentence. A similar argument was rejected by this Court in *Shubane and Another v S*[10] which held:

'In any event, when an accused person is at the commencement of a trial apprised of the sentencing provisions in sections 51 and 52 of the Act, read with Schedule 2, that by necessary implication includes the provisions relating to a Regional Magistrate's power to impose a sentence not exceeding five years more than the prescribed minimum sentence of imprisonment.'[11]

[16] In *Mthembu v S*[12] this Court referred with approval to Swain J's exposition in the court below[13] on the 'starting point' for the imposition of a sentence higher than the minimum. Swain J stated that:

'Although the prescribed minimum sentence should be the starting point, this is solely for the purpose of deciding whether a sentence less than the prescribed minimum sentence should be imposed. The exercise of a discretion by the presiding officer to impose a sentence greater than the prescribed minimum sentence, does not have to be justified by reference to the prescribed minimum sentence.'

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[9] *S v Malgas* 2001 (1) SACR 469 (SCA) 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'.

[10] *Shubane and Another v S* [2014] ZASCA 148.

[11] Ibid para 8.

[12] *Mthembu v S* [2011] ZASCA 179; 2012 (1) SACR 517 (SCA).

[13] *S v Mthembu* 2011 (1) SACR 272 (KZP) para 19.1.

I agree with the above statement by Swain J in *S v Mthembu.*[14]

[17] Moreover, insofar as it is contended that the trial court failed to provide reasons for imposing a sentence in excess of the prescribed minimum, the language used in s 51(2) of the CLA should be contrasted with that in s 51(3)*(a)* of the CLA which states that where a presiding officer is satisfied that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum, 'it shall enter those circumstances on the record of the proceedings'. No corresponding obligation exists when 'deviating upwards' of the minimum prescribed. In this regard, s 51(2) contains repeated reference to the words 'not less than' in relation to the range of sentences which could be imposed by a presiding officer.[15] Properly interpreted, there can be no basis for the contention that the magistrate was required to do anything more than exercise his or her discretion in determining a suitable penalty, even where this results in a sentence greater than 15 years, as in the present case.[16]

[18] Despite not bearing such a burden, the trial court followed the prudent practice of explaining why it imposed a heavier sentence than the prescribed minimum, stating that the violent manner in which the appellant continued his attack on the complainant, even after the robbery was complete, was purely gratuitous. The trial court concluded that the present case was of a 'different category' to those which routinely came before it, in that the circumstances were 'worse than the normal or everyday trial that we indeed hear'. The appellant's contention that the trial court erred in finding that there were aggravating circumstances which justified a 'heavier' sentence than the prescribed minimum in s 51(2) of the CLA is without merit. I can find no misdirection in the trial court's reasoning.

[19] The present case is one in which the personal circumstances of the appellant are overshadowed by the seriousness of the crime and the interests of society.[17] The

[14] Ibid para 19.5.
[15] Footnote 12 para 8.
[16] See fn 13: 'Once the presence or absence of substantial and compelling circumstances is determined, then the exercise of the discretion required of the presiding officer, by the Act, is complete'.
[17] *S v Segole and Another* 1999 (2) SACR 115 (W) at 124-125; *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA).

appellant showed no remorse for his conduct. The sentence is not considered manifestly unjust, justifying interference.

[20] In the result, the following order is made:
The appeal is dismissed.

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M R CHETTY
ACTING JUDGE OF APPEAL

APPEARANCES

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| For appellant: | F F Jacobs |
| Instructed by: | Honey Attorneys, Bloemfontein |
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| For respondent: | M J Makgwatha |
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