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

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**IN THE NORTH WEST HIGH COURT, MAFIKENG**

**CASE NO: CA 102/2018**

**In the matter between:**

**JONAS MBINGO** **Appellant**

**and**

**THE STATE** **Respondent**

**CORAM: HENDRICKS JP et MMOLAWA AJ**

**DATE OF HEARING : 30 NOVEMBER 2023**

**DATE OF JUDGMENT : 26 MARCH 2024**

## JUDGMENT

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 26 March 2024.

## ORDER

**Consequently, the following order is made:**

**(i) The appeal against both the conviction and sentence is dismissed**.

## JUDGMENT

**MMOLAWA AJ**

**INTRODUCTION**

[1] The appellant, Mr Jonas Bingo, who was accused 1, together with four (4) other accused, stood trial in the Regional Court sitting in Bloemhof on a charge of robbery with aggravating circumstances. They all pleaded not guilty to the charge preferred against them. After tendering their pleas of not guilty, none of them offered any plea explanation.

[2] The charge against them was that on 18 December 2009, they committed the offence of robbery by wrongfully and unlawfully

attacking Leah Johannes and/or Paul Molatlhegi Ndakane and with force took a Silver hand watch, Silver jewellery, Hand bracelet, Puma watch, Earrings, Gold bangles, Puma tekkies, Hi-Tech tekkies, Nike tekkies, Adidas tekkies, T-shirts, Trousers, Two bottle containing R5,00 coins amounting to R6 000,00, Video Camera, Wallet and Cash money, the property of Mr Mohamed Bagalia, or the property in the lawful possession of the said Leah Johannes and/or Paul Ndakane. Aggravating circumstances being present in that a firearm and knives were used in the commission of the robbery.

[3] The other two (2) accused absconded during the trial and were never rearrested. The trial proceeded against the appellant and his two former co-accused. They were convicted of robbery and each sentenced to fifteen (15) years imprisonment. The offence of which they were convicted falls within the ambit of section 51(2), which is robbery referred to in Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, (CLAA). Only the appellant is appealing against both the conviction and sentence.

[4] Section 51(2) of the CLAA imposes a duty upon the court to sentence a person convicted of this offence to imprisonment for a period of not less than fifteen (15) years, unless under section 51(3) thereof, the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence other than the prescribed minimum sentence of fifteen (15) years imprisonment.

**SUMMARY OF FACTS**

[5] Mr Mohamed Essop Bagalia (Mohamed) is a businessman who owns a house situated at […] R[…] Street in Bloemhof in whch he resides with his family. On the day of the incident, being 18 December 2009, he had employed Leah Johannes (Leah) as a helper and Paul Ndakane Molatlhegi (Paul) as a gardener. On that day, at about 08h00, he and his family left for shopping at Hoopstad, leaving his house under the control and care of Leah and Paul.

[6] Leah testified that at about 12h00 (midday), she went out of the house to go and fetch the clothes from the washing line as she was busy ironing some clothes. When she was on the stoep and was about to cross over the lawn, she saw four men standing against the wall of the house. She said the whole house is fenced. The front gate to the house is electronically operated by means of a remote control. The gate leading to the house was not closed because she was busy moving up and down between the house and the washing line.

[7] Two of the men approached her. One of the four men, who was in front of the others, had a knife in his possession. They then

grabbed her as a result of which she called Paul. Paul emerged from the garage. The two men who held her took her to the stoep.

[8] The other two men opened the sliding door and entered the house, whilst the two remained behind with her and Paul at the stoep. The two that entered the house took about an hour before they could emerge therefrom. The faces of these two men who were holding them at the stoep, were not covered in any way. When the prosecutor asked her if any of the two men who were holding them at the stoep were in court, she pointed them out as accused 1 (the appellant) and accused 2. The men then asked them if they had their cellphones with them, to which she replied in the affirmative while Paul told them that he left his at home. Accused 2 took her cellphone, opened it and removed the SIM card, whereafter he gave the cellphone back to her. She did not see what he did with the SIM card, but later on upon the arrival of the police at the house, the police found it on the ironing board.

[9] After having been given her cellphone back, the other two men who had been in the house all the time, came out and were carrying two big bags on their shoulders. They then asked them if there was a place where the door could be locked. When they said there was such a place, they then took them in the toilet and locked them inside it.

[10] They stayed for some time in the toilet, whereafter she impressed upon Paul, who was fearful to leave, that they should leave the toilet. She said she managed to open the door of the toilet, from inside and both them went outside. After getting out of the toilet, Paul jumped over the wall and went to the neighbours to ask for assistance, in order for them to call the police and Mohamed. Shortly thereafter the police arrived. Mohamed also arrived after the police.

[11] On their arrival, both of them together with the police and Mohamed, got into the bedroom which had been ransacked as things were scattered on the floor. Mohamed and his wife made a list of the things that had been taken.

[12] She said the one who was carrying the knife was wearing a blue overall and red tekkies. Asked if the person who was having the knife was the one of the two who went into the house or one of the two who were keeping watch over them, she said it was the one who was with them at the stoep and that this person was accused 1 (the appellant). She could not remember whether or not she gave the description of accused 2 to the police. She could also not remember or recognise the other two who went inside the house, but could only remember those who held them at the stoep.

[13] She testified further that she attended an identification parade on 7 January 2020 where she identified accused 1 (appellant) and

accused 2, as she was able to recognise them by their faces and general appearance.

[14] According to her, she was doing the laundry and ironing on the stoep which had burglars, which had a door leading into the yard, where she had to go and fetch the clothes she was busy ironing. Although the sliding door leading inside the house had been locked, she did not know how the robbers managed to open it. She said it was the first time for her to see these four men. She did not sustain any injuries during the robbery.

[15] Under cross-examination she stated that at all times the big and small gates remain locked, as well as the electronic gate. She did not know how the assailants gained entry into the yard, but suspected that they might have jumped over the wall from the neighbours' yard. She reiterated the fact that among these five men, accused 1 (appellant) was the one she was having a knife in his hand. Accused 2 had nothing in his hands but she could not see if the others three had anything in their possession, as they were behind accused 1 (appellant).

[16] She confirmed that it took an hour before the two who were inside the house emerged therefrom. Asked if Paul was attacked by any of the four men, she said she could not testify to that as she was not able to see what the other two who went with Paul did to him. She was steadfast that she was able to identify accused 1

(appellant) and 2 as they were the people who were holding her up. She was steadfast that she was held up next to the washing machine while Paul was made to lie on his back on the floor, and they were about two paces away from each other at that stage.

[17] She testified that she never saw any photos of their assailants before the identification parade was held. When it was put to her that accused 1 (appellant) and 2 would deny being there on the date of the incident, and that she was mistaken about their identity, her response was as follows:

> *"I saw them, I repeat I saw them."*

[18] When it was again put to her that in her statement she said two of them attacked her but did not testify to that effect in court, she elaborated on this by stating that:

> *"INTERPRETER:* *Your worship can I come in on that? As the witness is saying, people who are not coming peacefully to you, taking you forcefully against your will, taking you to the stoep, one can interpret that as attack."*

[19] According to Paul, on the day of the incident at about midday, he was busy in the garage when he heard Leah screaming. He came out of the garage only to meet with a man who was wearing a blue piece of overall. He and Leah were taken to the kitchen and this person pepper-sprayed him.

[20] They were both then led into the area where Leah was doing the ironing. The man who pepper-sprayed him was walking behind him, while the other men were walking in front. These men broke the sliding door by using a screwdriver which they brought along with them. These men were four in number and he and Leah remained with two of them whilst the other two entered the house. When he pleaded with these men not to kill them, they said they would not, as the person they were looking for was Mohamed.

[21] When talking to these two, Paul said he was looking at them though they had made him lie on his back. He said the two who had held them up was accused 1 (appellant) and accused 2. According to him, the appellant was having a knife whilst accused 2 had a pepper-spray. There was also one of the four who was carrying a firearm, which he pointed at him, though he did not see his face.

[22] Two of the four men who had entered the house later came back carrying bags. One of them then suggested that they be locked inside the toilet. Indeed, they were locked inside the toilet and after some time, he managed to open the toilet from inside. During the whole ordeal, he did not sustain any injuries.

[23] Thereafter he jumped over the wall to go and seek help from the neighbours in order for them to call the police. He then went back to the house. Shortly thereafter the police arrived.

[24] On 7th January 2010, Paul attended an identification parade where he pointed out the appellant, accused 2 and 5 as some of their assailants. He said he identified the appellant by the clothes he was wearing, which he said was the same clothes he was wearing on the day of robbery, namely; a blue shirt sleeved with a jean, Reebok tekkies, which were red and white in colour. He said he also recognised him by his facial appearance. He identified accused 2 also by his facial appearance and the Nike tekkies which he was also wearing on the day of the robbery. He identified accused 5 by his face because he was able to see his face at the time of robbery, as he was standing in front of him whilst he was busy trying to open the sliding door, at which stage he was able to see his face for about three (3) minutes.

[25] Paul said accused 2 was known to him prior to the date of the robbery, because he once came to him at Mohamed's place asking him where he could find a certain Dr Petersen, as he wanted to take his sick brother to him.

[26] When it was pointed out to him under cross-examination that on the day of the identification parade, the appellant was wearing cream white clothes, he conceded that these were not the same clothes that he was wearing on the day of the robbery. Asked why there was such a discrepancy, he said he attributed that to the fact that he was frightened on the day of the incident.

[27] When he was asked if Leah saw the pepper spray, his response was that he did not know if she saw it or not. He confirmed that the appellant had a knife and further that the other assailants' faces were not covered.

[28] Mohamed's evidence was that on the day of the incident, he received a call from his neighbour at about noon. He immediately went back to his house where on arrival he found a lot of police officers and some of his family members. He said their presence was a sequel to the robbery that had just taken place at his home.

[29] He was not allowed to enter the house until the police had dusted for fingerprints. After that, he went inside his house and compiled a list of missing items. He identified the items taken from his house at the police station. Except for a shortfall in the cash that was taken, he recovered all of his items that were taken during the robbery. He did not know any of the accused in court.

[30] Under cross-examination he stated that he went to identify the items at the police station on the Friday night at about 20h00, the same day of the robbery after Captain Dihemo had informed him that the police managed to recover his properties.

[31] The next witness to be called by the State was Tebogo Williams (Tebogo). His evidence was simply that he is a panelbeater and that his place from where he and some of his co-workers worked, was situated a few houses from that of Mohamed, but in the same street. On 18 December 2009 and at about 13h00, he saw Paul come running to them, crying, telling them they had been robbed. They advised him to approach the owner of the house where they were doing their work to call the police.

[32] He said before Paul came seek assistance, he was surprised to see men who were carrying a grey bag, climbing into a car after the hooter had been blown and drove away. According to him, the car had been parked next to Mohamed's gate. The car was sky blue in colour with GP registration number plates. This car looked like a Polo Classic. He said the accused in court were unknown to him. Suffice to state that nothing of importance turned on the cross-examination of Tebogo, as most of the questions were not of any significance.

[33] The State then called William Setsetse (William) as its next witness. He testified that he is Tebogo's co-worker and on 18 December 2009 while busy with their work, he saw four men coming from the direction of Mohamed's house, though he did not see their faces. They were walking downward the street. Whilst walking, a silver grey Polo vehicle emerged and stopped next to them. At that stage they were carrying two bags. The car had GP registration numbers. After climbing in it, it then drove away. After it

had driven off, Paul came running to them and informed them that those men had just robbed them. He said upon arrival of the police, he told them the direction taken by that car.

[34] At some stage of the proceedings, accused 3 and 4 absconded and the trial proceeded against accused 1, 2 and 5.

[35] As the last relevant witness, the State then called Captain Kgosi Dihemo (Dihemo). According to him, he was on duty on 18 December 2009, when one Mr Bennie came running into his office and made a report to him. As a result of this, he got into his official car and drove to the scene of crime. Upon his arrival, he was told that a Polo Vivo with GP registration numbers had just driven off towards Wolmaranstad.

[36] He then followed that vehicle in the direction of Wolmaranstad. When he was about 10 Kilometres from reaching the town, he spotted it. It was then that he called Captain Madito, who said he was actually in town next to the chemist on the N12 road. When he reached the four-way stop next to KFC, he saw Madito stopping the Polo Vivo. He also stopped and the driver of Polo then switched off the engine. The occupants were then ordered to get out of the car. After they got out, he and Modito ordered them to lay on the ground on the left-hand side of the car. Dihemo stood guard over those who were on the ground, whilst Madito ordered the driver to open the boot in order to search the car. On searching

the car, Madito found a container in which there were five rand coins and a bag of clothes in the boot.

[37] It was then that they decided to take the car and the suspects to Wolmaranstad police station. At the police station, Madito continued to search the car, and he also found a Sony camera. Dihemo then informed them that he was arresting them for armed robbery that took place in Bloemhof. He then explained their constitutional rights to them.

[38] As there was no one to drive the Polo to Bloemhof, they left it at Wolmaranstad for it to be registered in the SAPS 13. On his way to Bloemhof, he phoned Warrant Officer Marumo (Marumo) to obtain a list of stolen properties in the meantime. On their arrival at Bloemhof, indeed they found Marumo having compiled the said list. They then called Mohamed to their office who on arrival positively identified some of the property as his, but said others like overalls and T-shirts were not his.

[39] During cross-examination he confirmed that most of the items were in the boot and that money was found on the driver’s side. He confirmed further that he found the wristwatch in accused 5’s right trouser pocket.

[40] The appellant's version was that on 18 December 2009, he and his former four accused were coming from Kimberley where they had attended a funeral, and on reaching Wolmaranstad, they were arrested on allegations of having committed robbery at a house in Bloemhof. He said he knew nothing about that robbery as they were never in Bloemhof. He further testified that he knew nothing about the items that were found in the boot of their car as he did not see them. Suffice to state that this was the evidence similarly given by his co-accused, namely, accused 2 and 5. Their evidence was simply bare deniels insofar as it related to the robbery.

[41] In evaluating the totality of the evidence, the learned magistrate, in my view, correctly accepted the version of the State and rejected that of the defence. I can find no fault with his finding on this score.

[42] Shortly after the robbery, Mohamed's articles were found in the boot of the get-away vehicle in which the appellant was a passenger. On the whole of the evidence, I am satisfied that the appellant was correctly convicted of the offence of robbery. The appellant and accused 2 were positively identified by Leah and Paul at the identification parade as some of the four assailants that committed the robbery at Mohamed's house. Both Leah and Paul had ample time to observe the appellant and accused 2, as they remained with them at the stoep for about an hour while the other two suspects were busy ransacking the house.

[43] Contrary to the submissions raised by the appellant's counsel in his heads of argument, I am of the view that the State succeeded in proving the guilt of the appellant beyond reasonable doubt. On this basis, the appeal against the conviction should therefore fail.

**SENTENCE**

[44] The sentence imposed is assailed on the basis that it is strikingly inappropriate and that it induces a sense of shock, when viewed against the personal circumstances of the appellant and the mitigating factors in his favour. On the other hand, the State submitted that in imposing the sentence, the trial court did not commit any irregularity or misdirection that justifies this Court to interfere with the sentence.

[45] It is settled law that sentencing falls within the preserve of the trial court. In **S v Rabie 1975 (4) SA 855 (A) at 857 D – E,** it was stated that:

> *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –*
>
> (a) *should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";*
>
> *and*
>
> (b) *should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".*

*2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."*

[46] In **S v Bailey 2013 (2) SACR 533 (SCA)** the Court stated the following:

> **"***[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.***"**

[47] As to the nature of a misdirection which entitles a court of appeal to interfere, the following was stated in **S v Pillay** 1977 (4) SA 531 (A):

> **"***Now the word "misdirection" in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its*

*discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."*

[48] The personal circumstances of the appellant that were raised in mitigation were the following, viz: that he was 37 years of age at the time he was sentenced; that he was married with two children he had been maintaining; that he attended school until at Matric level; and that he was self-employed before his arrest.

[49] On the other hand, the appellant was convicted of a serious offence. He was one of the group of five men that were involved in the commission of this offence, with the driver of the Polo waiting for them to beat a hasty retreat once the robbery had been accomplished. This clearly shows that this was a well thought out and pre-planned offence. A knife and firearm were used in the commission of the robbery. The appellant has a string of previous convictions. No tittle of remorse was exhibited by the appellant for his heinous deeds.

[50] This is a type of crime that members of the community in which it was committed and of the society as a whole, view with

abhorrence and which they expect the Courts to punish in such a way that their understandable desire for retribution will be satisfied.

[51] In my view, the aggravating features far outweigh the mitigating circumstances. I can find no circumstances which are substantial and compelling to justify the imposition of a lesser sentence other than that ordained by the legislature. I am therefore of the view that in imposing the sentence it did, the trial court did not misdirect itself. On this score, the appeal against the sentence must also fail.

**ORDER**

[52] Consequently, the following order is made:

(i) The appeal against both the conviction and sentence is dismissed.

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**M. E. MMOLAWA**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**NORTH WEST DIVISION, MAHIKENG**

I agree

_____

**R. D. HENDRICKS**

**JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST DIVISION, MAHIKENG**

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