REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: CA & R 102/2021
Date heard: 09 February 2022
Date delivered: 22 March 2022

In the matter between

SIPHOMANDLA NQAKA **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

MFENYANA AJ

Introduction

[1] The appellant stood trial in the Regional Court at Humansdorp on a count of housebreaking (Count 1) with intent to rob, and robbery with aggravating circumstances (Count 2). He was found guilty on both counts and sentenced to eight years' imprisonment in respect of the housebreaking, and twenty years' imprisonment for the robbery. The sentences were to run concurrently.

[2] He now appeals against the sentence.

[3] He contends that the court *a quo* erred, particularly in respect of Count 2, in that the court *a quo* imposed a sentence in excess of the prescribed minimum without notifying him of its intention to do so, and without giving reasons for the decision. He argues that the sentence is shockingly inappropriate.

[4] The appellant further contends that the court *a quo* did not place sufficient emphasis on:

(a) the fact that the appellant spent two years in prison awaiting trial;

(b) the fact that he had no previous convictions for violent offences, and

(c) the fact that most of the goods stolen during the robbery were recovered.

[5] Finally, the appellant contends that the court *a quo* did not take into account that the appellant was shot and injured during the robbery and that the injuries sustained by the complainant were not life threatening.

[6] The central question is whether the court *a quo* misdirected itself in sentencing the appellant as it did. From the reading of the notice of appeal, it appears that the appellant takes no issue with the sentence of 8 years' imprisonment imposed in respect of the Count 1. In any case even if that was not the case, the sentences were in any event ordered to run concurrently.

[7] Robbery with aggravating circumstances carries a prescribed minimum sentence of imprisonment of not less than 15 years.

[8] In sentencing the appellant, the court *a quo* found that there were no substantial and compelling circumstances which warranted a deviation from the

prescribed minimum sentence or the imposition of a lesser sentence and sentenced the appellant to 20 years' imprisonment

Facts

[9] The facts leading up to the conviction of the appellant are common cause, as the appellant is not challenging the conviction. On 5 September 2018, in the small hours of the morning, the appellant and his accomplices, armed with knives, a firearm and a crowbar, broke and entered into the home of the complainants with the intention to rob them. While at the premises, the appellant assaulted the complainants, Mr Thornton and his wife, tied Mrs Thornton with cable ties, and robbed them of their belongings, *to wit*, two iPhones, and an iPad. The appellant was shot during the scuffle and subsequently apprehended and stood trial on both charges. He pleaded not guilty, and was found guilty as charged.

Sentence

[10] In sentencing the appellant, the court *a quo* took into account that the offences committed by the appellant involved an element of violence. The court further took into account that Mr Thornton sustained injuries to his lower lip, gums, elbow and ribs. He also sustained defensive wounds on the left forearm, left elbow and on both feet while trying to defend himself during the attack.

[11] In imposing sentence, the court placed reliance on the decision in ***Malgas***[1] and set out the approach to be adopted as follows:

> "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed minimum sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society,

[1] 2001 (1) SACR 469 (SCA)

so that an injustice would be done by imposing it, it is entitled to impose a lesser sentence."[2]

[12] Notably, the court considered the judgement in ***Matyityi***[3] in so far as it stipulates that a victim-centred approach must be followed when considering the appropriate sentence to impose, where a minimum sentence is prescribed. What this means is that while there may be a prescribed minimum sentence to be imposed, the court must consider what would be suitable for that specific offender.

[13] The learned magistrate took into account that the offences committed by the appellant were committed in the early hours of the morning while the complainants were sleeping and that there were also little children in the house. That the offences took place in the sanctity of the complainant's home against women and children was considered to be an aggravating factor by the court *a quo*, and correctly in my view.

[14] The question however is whether having considered all of these factors as the court *a quo* did, it was open to that court to impose a sentence in excess of the prescribed minimum. Linked to that enquiry is whether the court *a quo* could do so without first apprising the appellant of its intention to do so and without providing reasons for doing so. In answering the first leg of this enquiry, there cannot be any suggestion that the court *a quo* did not apply its mind in imposing the sentence that it did. This much has in any event been conceded by the appellant, as it was submitted on his behalf that he does not take any issue with whether the court *a quo* exercised its discretion but that the discretion was not exercised judicially.

[2] At para 25e
[3] 2011 (1) SACR 14 (SCA)

[15] A further question is whether it can be said that the court *a quo* did in fact exceed the prescribed minimum; the prescribed minimum in the case of the appellant is "*imprisonment for a period not less that 15 years*" (own emphasis). The answer has to be in the negative.

[16] In a detailed examination of various judgments[4], the court *a quo* surmised that the sentence must reflect the blameworthiness of an offender and should be proportional to what an offender deserves. Having considered all these factors, carefully and holistically, in my view, the court *a quo* proceeded to impose a sentence of 20 years' imprisonment.

[17] The imposition of a lesser sentence is only called for in circumstances where the court finds that substantial and compelling circumstances exist for such a deviation. In the case of the appellant, the court *a quo* found that "there are no substantial and compelling circumstances justifying the imposition of a lesser sentence."[5]

[18] The record shows that the learned magistrate found that there were no substantial circumstances justifying the imposition of a lesser sentence. On that basis she sentenced the appellant to 20 years' imprisonment. Having pointed out the features which in its opinion made the offences which the appellant had been convicted of, abhorrent, and not justifying a lesser sentence than that prescribed, the court *a quo*, took into account that the manner in which the offences were carried out made them 'one of the most serious' in the country and could have been much worse had it not been for the bravery of the Thorntons.

[4] Record, pages 20 - 21
[5] Record, pages 27, para 20

[19] The imposition of sentence is pre-eminently the terrain of the trial court. In the absence of a factual error or a misdirection on the part of the trial court, the findings of the trial court are presumed to be correct. The appeal court will therefore not interfere with the sentence merely on the ground that it would have imposed a lesser sentence. The relevant consideration is whether the sentence is of such a nature that no reasonable court ought to have imposed it, such that it amounts to a misdirection by the sentencing court.

[20] Section 51(2) of the *Criminal Law Amendment Act*[6] states:

> "(2) 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;
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period less than 25 years.

[21] Robbery with aggravating circumstances is an offence listed in Part II of Schedule 2.

[22] From this provision it is clear that the court *a quo* was well within its discretion to sentence the appellant for a period of imprisonment of not less than 15 years. There can thus be no merit to the appellant's contention that the sentence is shockingly inappropriate.

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[6] Act 105 of 1997

[23] The further aspect of the appellant's contention in this regard is that the court *a quo* ought to have given reasons for exceeding the prescribed minimum sentence. I have already stated that the court *a quo* did not exceed the prescribed minimum sentence. It is also not correct that the court *a quo* did not justify its decision. It is clear from the record that the learned magistrate went into great detail in stating what a serious offence robbery with aggravating circumstances is. The court also went further and focused on the specific and identying features of the specific offences committed by the appellant. The court found *inter alia* that the offence was well-planned; that it violated the complainants' constitutional rights; that it went against the Charter on Human and Peoples's Rights to which South Africa is a signatory; that it was a clear invasion of the privacy and dignity of the complainants; that it was perpetuated with an element of violence and that the appellant's conduct showed a flagrant disregard and disrepect of the complainant's rights and did not show any remorse.[7] It further considered the impact of the offences on the economy as more and more people are motivated to leave the country, like the Thorntons were, and that the iPad was never recovered although the cellphones were. That notwithstanding, the court added that the complainants were left out of pocket as they had to incur additional expenses upgrading their security.

[24] Even if that were not the case, it is trite that while it is desirable for the sentencing court to give reasons for a deviation, there is no duty on the court to do so. Counsel for the respondent referred me to the decision of the SCA in *Shubane v The State*[8] which, although not on all fours with the present matter, aptly illustrates the principle there is no requirement in our law that an accused person should be forewarned that a sentence in excess of the prescribed minimum is contemplated. There is therefore no merit on this ground.

[7] Record, pages 22- 26
[8] (073/14) [2014] ZASCA 148 (26 September 2014)

[25] I find the appellant's contention that he was shot and wounded during the robbery, while on the other hand downplaying the injuries sustained by the complainant, to be self-serving. The appellant is the author of his own fate. He cannot be made to benefit from his wrongful action, nor can these be mitigating factors in any way. The same cannot be said for the complainants, who through no fault of their own found themselves having to fight for their lives against the brazen attack hurled by the appellant against them. The appellant cannot benefit from the fact that the complainant put up a fight and escaped with minor injuries. That cannot be equated to the complainants escaping unscathed. The court *a quo* detailed the psychological trauma experienced by the complainants. This ground must also fail.

[26] Regarding the fact that the appellant had been in custody awaiting trial for approximately two years, it appears that the court *a quo* merely paid lip service to this aspect. The appellant was in custody awaiting trial and this ought to have been taken into account by the court *a quo*. It was not. Reference by the court *a quo*, to *S v Vilakazi* in this regard appears to me to not have addressed the issue, in my view, a misdirection sufficient to warrant interference by this court.

[27] The approach adopted in *S v Radebe*[9] seems to me to be the correct approach. In that case the Supreme Court of Appeal per Lewis JA stated:

> "…(t)he 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."[10]

[9] 2013 (2) SACR 165 (SCA)
[10] at 170 para 14b

[28] It is not apparent from the record that these were considered by the court *a quo*. However the learned Judge of Appeal went further to state that:

> "… 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."[11]

[29] Thus it is necessary to consider whether the sentence imposed by the court *a quo* would be impacted in any way, had this been a real consideration by the court *a quo*. In my view, it would be. A period of two years in custody whilst awaiting trial is a substantial amount of time. In my view the court *a quo* ought to have taken it into account in imposing the sentence of 20 years' imprisonment. The court *a quo* should have antedated the sentence, taking into account the pre-sentence detention period of two years.

[30] There is no indication whatsoever that the court *a quo* exercised its discretion arbitrarily so as to warrant interference with the sentence imposed, on appeal. I am therefore not persuaded that there was any misdirection in this regard. While this is so, it is my view that the sentence should have been antedated. To the extent that the sentences were not antedated, the following order is made:

1. *The sentence of 8 years' imprisonment in respect of count 1 (housebreaking with intent to rob) is confirmed.*

2. *The sentence of 20 years' imprisonment (robbery with aggravating circumstances) is hereby confirmed.*

[11] at para 14c

3. *The sentences are to run concurrently.*

4. *The sentences are antedated to 5 September 2018.*

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SM MFENYANA
ACTING JUDGE OF THE HIGH COURT

I agree.

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JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the appellant:	Mr Geldenhuys, instructed by Legal Aid Board, Grahamstown.
Counsel for the respondent:	Mr Zantsi, instructed by the Director of Public Prosecutions, Grahamstown.