

SOUTH AFRICA / JUDGMENT

Maphumulo v S (A375/2019) [2020] ZAGPPHC 816 (20 December 2020)

[2020] ZAGPPHC 816

COURT

North Gauteng High Court, Pretoria

BEFORE

FMM Snyman, N V Khumalo

CASE / FILE NUMBER

A375/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: A375/2019

REPORTABLE:NO

OF

ONINTEREST TO OTHER JUDGES:NO

REVISED

DATE:21

DECEMBER 2020

In

the matter between:

ALEX

DAN

MAPHUMULO

Appellant

and

THE

STATE

Respondent

JUDGMENT

SNYMAN AJ (N V KHUMALO J concurring)

Background

- [1] The appellant was arraigned and convicted in the Magistrates Court for the District of Merafong held at Oberholzer on one count of housebreaking with the intent to rob and robbery with aggravating circumstances, read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 (CLAA).
- [2] The charge sheet specified that the charges are to be read with section 51(2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The possible penalties mentioned in the charge sheet, should the accused be found guilty, are:
- 15 years imprisonment for a first offence;
 - 20 years imprisonment for a second offence; and
 - 25 years imprisonment for third and subsequent offences.
- [3] The appellant was legally represented for the duration of the trial and pleaded not guilty to the charges.
- [4] The appellant was convicted as charged and sentenced to 20 years imprisonment. Following a partial successful petition, with leave to appeal granted only against sentence, the appellant has approached this court proceeding as per the leave granted.

Evidence led

- [5] During the trial, the complainant testified that on the night of 26 March 2017, she was assaulted at her residence. She was sleeping with her bedroom's light on when she woke up and saw two intruders.

One of the intruders held a cream shoe in his hand and the other was holding a black object which to her looked like a gun. The

complainant identified the appellant as the intruder with the cream shoe who assaulted her by hitting her with the shoe approximately 4 times in the face. The one with the black object was roaming around the room.

- [6] When the intruders left the scene, the appellant left the cream shoe behind at the residence of the complainant. The appellant's fingerprints were later found on this shoe.

[7] The appellant denied the incident and testified that he possibly could have worked at the complainant's house whilst being employed by one Willy Sparing. The appellant apparently did some construction work on a part-time basis (piece-jobs) if and when needed. In addition to this very broad possibility, no evidence served before the Court that can clarify or provide a reason why the appellant's fingerprints would be present in the complainant's residence.

[8] The appellant could not explain the presence of his fingerprints on the cream shoe of the complainant. The state was found to have proven the Appellant's guilt on the charge beyond reasonable doubt and Appellant sentenced in terms of section 51(2) of Act 105 of 1997.

Grounds of appeal

[9] The appellant raises the following grounds of appeal against the sentence of 20 years' imprisonment:

- (a) That the State failed to prove beyond reasonable doubt that aggravating circumstances were present in the robbery which brings the offence within the ambit of the sentencing provisions of section 51(2) of Act 105 of 1997; and
- (b) In the event that section 51(2) is applicable, that the court a quo erred in imposing a sentence of 20 years' imprisonment as the circumstances warranted a lesser harsh sentence.

Presence / absence of aggravating circumstances

[10] On a charge of robbery with aggravating circumstances, the presence of aggravating circumstances is determined during trial on conviction. For the sentencing regime in terms of s 51 (2) to apply the Accused should have been found guilty of robbery with the presence of aggravating circumstances. Facts activating the minimum sentence regime are to be proved by the state beyond reasonable doubt, during the conviction stage; see *S v Taunyane* 2018 (1) SACR 163 (GJ) and *S v Klaas* 2018 (1) SACR 643 (CC). Following the authority of *Minister of Justice and Constitutional Development and Another v Masingili and Another* 2014 (1) SACR 437 (CC).

[11] The extent and nature of the aggravating circumstances found to be present (together with other factors applicable) will then during sentencing stage determine whether there are substantial and compelling circumstances that justifies deviation from the prescribed minimum sentence (s51 (2)). Section 12 of the Constitution requiring appropriate proportionality between the offence and its sentence on the one hand and the level of intent on the other. The consideration of the aggravating circumstances during sentencing is therefore not for the purpose of determining if the finding of their presence was correct. As a result, the premise of the Appellant's ground for appealing, arguing that it is entitled to attack the trial court's

conclusion that the Appellant committed the offence of robbery with aggravating circumstances, intending the attack to be on the

applicable regime is misguided. (The deliberation on this issue will follow hereafter, the fact that it was by association is important)

[12] Deviation, in this context can be the imposition of a lesser or a harsher sentence than the prescribed minimum sentence. It is customary for our courts in sentencing proceedings to put more emphasis on the establishment of the existence of substantial and compelling circumstances for the purposes of a likelihood of a lesser sentence being imposed. As it occurs in rare instances that a court would contemplate deviation for the purpose of a likelihood of a harsher sentence being imposed, the courts tend on many occasions to overlook the requirement that a process of deliberation and argument should precede the decision to impose a harsher sentence, with the Accused warned of such a contemplation and likelihood. Failure to do so would result in the miscarriage of justice as such proceedings would infringe the Accused's Constitutional fair-trial right to be subjected to the fair administration of justice.

[13] Furthermore, it is trite that a court that imposes a sentence gives reasons in its judgment for the kind of sentence it imposes. It becomes more so crucial for the Court to furnish cogent reasons in its judgment when imposing a sentence which is higher than the prescribed minimum sentence, mainly to give perspective to the

defence and to the court of appeal of a cause having existed for the court's stricter contemplation. The reasons or circumstances

found to be substantial and compelling to justify a harsher sentence, then listed by the court. Absent such reasons for imposing such higher sentence, the conclusion that is inescapable is that such a decision is arbitrary or that the discretion of the Court was not properly or judicially exercised; see *S v Mathebula* 2012 (1) SACR 374 (SCA). On failure by the court on the two aspects, the sentence ought to be set aside and if the appeal court finds it appropriate and in the interest of justice to do so, remit the matter back to the court a quo for proper administration of justice, consideration and determination of an appropriate sentence.

[14] In casu both parties in the submission of their arguments agreed that the court a quo failed in both aspects however advocated for a different response to the court a quo's shortcoming. Neither were the Appellants warned on the court a quo's contemplation of a harsher sentence, more than the prescribed minimum sentence nor informed of its reasons for deviating and imposing a harsher sentence. The court a quo, had without a doubt misdirected itself in imposing a harsher sentence of 20 years without following the strict procedure as envisaged by the Act in s 51 (2). The sentence of 20 years will then have to be set aside. For the sake of finality this court will deal with the appropriate sentencing of the Appellant.

Substantial and Compelling circumstances

[15] It is argued by the Appellant that:

[15.1] The court a quo agreeing with the state identified the aggravating circumstances to be:

- (a) Firstly, that “an object which resembles a firearm was used during the commission of the offence and the said object is a black object believed by the complainant that it was in fact a firearm”;
- (b) Secondly, that the complainant “was assaulted and sustained grievous bodily harm during the commission of the offence.”; and
- (c) Thirdly, that the appellant was out on parole for a similar offence of robbery when this offence was committed.

Wielding an object that resembles a firearm

[16] In the matter of *S v Hlongwane* 2014 (2) SACR 397 (GP) that the Appellant referred to in support of his contention against the finding of the presence of grievous bodily harm, the Appellant therein was dealing with an appeal against conviction and sentence. The finding of the aggravating circumstances was discussed and challenged in the context of a conviction that will bring the sentencing jurisdiction envisaged by s 51 (2). Accordingly, it was concluded that, it was necessary for the legislature to describe the type of conduct that would justify a greater degree of culpability where dolus (i.e. the intention of the accused), in relation to aggravating circumstances, is not an element (see *Minister of Justice and Constitutional Development v Masingili* 2013 JDR 2680 (CC) at para 21 at para 34). In casu appeal is granted only against sentence.

[17] The court at [18] in *S v Hlongwane* stated that:

‘Accordingly even if the term ‘wielding’ excludes ‘holding’ or ‘pointing’ a dangerous weapon for the purposes of subsection (i), it does not preclude the same action from constituting a non-verbal threat for the purposes of subsection (iii).

[18] At [19] it stated that:

“In my view it would result in an absurdity or inconsistency of application if, during a robbery, the ‘mere’ holding of an AK47 assault rifle could be regarded in a less serious light for sentencing purposes than wielding a knife.”

[19] Consideration of the fact that the holding of an object that resembles a firearm reflected to the Complainant a threat to inflict grievous bodily harm whilst the actual infliction was done by a shoe was not without merit, even though in the *Hlongwane* matter it was determined that, in order to comply with the definition of “wielding of a firearm” something more than the mere possession or holding of a firearm is required. I do agree that on application of the law on the facts in casu it cannot be said that the accused was wielding a fire-arm, however, the threat of inflicting grievous bodily harm existed. It therefore does not have the connotation of a less moral blameworthiness.

[20] Furthermore the fact, that the Appellant attacked the complainant with a shoe does not assist. The complainant specified the attack as such and was at all relevant times aware that the assault was committed with a shoe. It is so that the accomplice of the Appellant was holding an item that, to the complainant, appeared to be a fire-arm, and as indicated that would be relevant to s 1 (b) (iii).

[21] I therefore do not agree that the court a quo erred in finding that the application of section 51(2) would be applicable to the offences that the accused has been found guilty of.

Similar previous offence

[22] We cannot find that the accused has committed a similar previous offence as in the context of being a second offender in terms of s 51 (2), however take cognisance in establishing if substantial and compelling circumstances exist that he is not a first offender having been previously convicted of an offence that involves robbing of people of their possessions. In this instance, it is worse and sickening that the Complainant was robbed with violence used, in the sanctity of her home where she is supposed to be very much secured and protected.

[23] The State has also emphasised that the appellant's previous conviction which was for robbery, dates back to 11 March 2008, for which the appellant was sentenced to 15 years' imprisonment. On appeal the sentence was reduced to 14 years' imprisonment. At the time this current offence took place on 26 March 2017, the appellant was out of prison and released on parole as from 6 February

2015. A fact that nevertheless failed to deter the Appellant from again committing another robbery before the expiry of his parole on 10 September 2021, this time with aggravating circumstances.

Such systematic contempt should be stamped out and does not justify the imposition of a lesser sentence.

[24] This is a factor that cannot be ignored by the court since it points to Appellant's propensity to commit robberies with an underlying factor of violence.

[25] As a result we could not find any substantial and compelling circumstances that justifies the imposition of a lesser sentence than the prescribed minimum sentence ordained by the legislature.

[26] It follows that the imposed sentence of 20 years imprisonment has to be set aside. Having regard to the stated circumstances, an appropriate sentence would be 15 years imprisonment.

[27] Under the circumstances the following order is proposed:

1. The appeal against sentence is granted.

2. The sentence on one count of housebreaking with the intent to rob, and robbery with aggravating circumstances, that of 20 years imprisonment imposed in terms of s 51(2)(a)(ii) of the Criminal Law Amendment Act 105 of 1997, be set aside and replaced with a sentence of 15 years imprisonment.
3. The sentence be antedated to the date of sentence in the court a quo, in terms of Section 282 of the Criminal Procedure Act, Act 51 of 1977.

FMM SNYMAN

ACTING JUDGE OF THE HIGH COURT

N V KHUMALO

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

DATE OF APPEAL: 13 AUGUST 2020

DATE OF JUDGMENT: 21 DECEMBER 2020

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