

SOUTH AFRICA / JUDGMENT

Mthombeni v S (A210/2023) [2025] ZAGPPHC 521 (22 May 2025)

[2025] ZAGPPHC 521

COURT

North Gauteng High Court, Pretoria

BEFORE

SK Hassim, FS Nmutandani

CASE / FILE NUMBER

A210/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A210/2023

In

the matter between:

MTHOMBENI

NTANDO

Appellant

and

THE

STATE

Respondent

This

judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the

parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines.

The date for

hand-down is deemed to be 22 May 2025

JUDGMENT

SK HASSIM J et NEMUTANDANI AJ

[1] In terms of section 51(2)(a)(ii) of the Criminal Law Amendment Act, Act No 105 of 1997 (“the Minimum Sentences Act”) read with paragraph

(a) of Part II of Schedule 2 thereto, a court convicting a person for robbery when there are aggravating circumstances shall impose a sentence of 20 years’ imprisonment if the conviction for robbery is a second one with aggravating circumstances, or it involves the taking of a motor vehicle.

[2] Robbery, when there are aggravating circumstances or involving the taking of a motor vehicle is listed in Part II of Schedule 2 to the Minimum Sentences Act. A conviction carries with it a minimum sentence of either 15 years or 20 years imprisonment.

[3] Section 51(2) provides as follows:

“...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) ...”

[our underlining]

[4] The Appellant was charged in the Regional Court, Benoni with, and convicted of robbery with aggravating circumstances. On 24 February 2022, he was sentenced to 20 years’ direct imprisonment. The trial court refused the Appellant’s application for leave to appeal. The Appellant successfully petitioned the Judge President to appeal the sentence.

[5] The facts are briefly: On or about 25 April 2020, the Appellant and another person robbed the Complainant of a Volkswagen Polo Vivo (“the motor vehicle”). They tied up the Complainant and put him into the boot of the motor vehicle. They then drove the motor vehicle to Rand Swart, Cemetery where they tried to locate the tracking device on the motor vehicle in order to remove it.

[6] It is common cause that the Appellant had the following two previous convictions:

(i) Housebreaking with intent to steal, and theft for which he was sentenced on 24 January 2005 to 4 years’ imprisonment wholly suspended for a period of four years.

(ii) Robbery for which he was sentenced to 8 years’ imprisonment on 8 November 2008.

- [7] Based on the previous conviction for robbery, the trial court found that the Appellant was a second offender as contemplated in section 51(2) (a)(ii) of the Minimum Sentences Act. He was thus sentenced to 20 years' imprisonment.
- [8] The State and the Appellant's counsel agreed that the appeal is limited to one issue: Did the court a quo commit a misdirection in finding that the Appellant is a second offender for purposes of section 51(2)(a)(ii) of the Act thereby attracting a minimum sentence of 20 years' imprisonment? The Appellant's counsel submitted that the sentence of 20 years' imprisonment should be set aside and replaced with a sentence of 15 years' imprisonment. He did not contend for a departure from the minimum sentence of 15 years' imprisonment.
- [9] The central question in this appeal is whether the Appellant's previous conviction for "robbery" amounts to robbery with aggravating circumstances for purposes of section 51(2)(a)(ii).
- [10] In *Qwabe v State*[1] the trial court had found that a previous conviction for "robbery" fell within the definition of "robbery" in section 51(2)(a)(ii) read with Part II of Schedule 2 [2]. The Full Bench of the Western Cape High Court disagreed. It upheld the appeal against the sentence and found –
- "[26] [I]n order for the appellant to fall within the provisions of s 51(2)(a)(ii) his previous conviction would have to have been of 'any such offence', namely robbery when there (were) aggravating circumstances.*
- ...
- [30] It would seem to me that the word 'such', ..., imports the concept of similarity of 'kind or degree' or 'of the kind or degree already described or implied in context', or 'of the aforesaid kind', into the offence under consideration. It would follow from that, that not any robbery," but only a robbery of such kind or degree, would qualify."
- [11] We agree with this interpretation of section 51(2)(a)(ii) of the Minimum Sentences Act read with Part II of Schedule 2. There is nothing in the record to support a finding that the Appellant had previously been convicted of robbery with aggravating circumstances or involving the taking of a motor vehicle. The Constitutional Court in *S v Bogaards*[3], succinctly sets out the boundaries of an appellate court's power to interfere with a sentence imposed by a trial court.

Kampepe J reiterated that a court of appeal can interfere with a sentence on appeal only "where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

- [12] In our view, the court a quo misdirected itself when it sentenced the Appellant as a second offender for the offence of robbery with aggravating circumstances. The Appellant does not have a previous conviction for “robbery when there are aggravating circumstances”. He is thus a first offender for robbery when there are aggravating circumstances. The misdirection vitiated the trial court’s decision on sentence. We are therefore at large to interfere with the sentence.
- [13] The minimum prescribed sentence for robbery when there are aggravating circumstances is 15 years’ imprisonment. Counsel for the Appellant, did not argue, correctly so too, that there are substantial and compelling circumstances to warrant a departure from the minimum sentence.
- [14] In the result, the sentence of 20 years imprisonment is set aside and is substituted with a sentence of 15 years’ imprisonment.

SK HASSIM

JUDGE OF THE HIGH COURT

FS NEMUTANDANI

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant: Adv J.L Kgokane Instructed by: Pretoria Justice Centre Counsel for the Respondent: Adv M Shivuri

[1] 2012

(1) SACR 347

[2] Para [25]

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