HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A424/2012

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE. **17 September 2014**

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SIGNATURE SIGNATURE

In the matter between:

MQABHI, THULANI SYDNEY Appellant

V

THE STATE Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. The appellant faced two charges. The first was for robbery with aggravating circumstances, read with the minimum sentence provisions of section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997

('*CLAA*'). He was found guilty and, as a first offender, was sentenced to the minimum prescribed period of 15 years imprisonment commencing from the date sentence was delivered.

The appellant was acquitted on the second charge of attempted murder.

2. The court *a quo* granted leave to appeal in respect of sentence only.

THE ISSUES

3. *Ms Cosyn* on behalf of the appellant argued that the learned regional court magistrate misdirected himself in that he should have found substantial and compelling circumstances present under section 51(3) (a)[1] of the CLAA warranting the imposition of a sentence less than the prescribed minimum. It was also submitted that the sentence induced a sense of shock and was inappropriate.

4. It is evident from the record that the magistrate had considered the nature of the crime, the personal circumstances of the appellant and the interests of society, including the impact of the crime on the victim.

5. The court also referred to the fact that the appellant had been held in custody for a period of two years prior to sentencing, but on an overall assessment concluded that there were no substantial and compelling circumstances justifying a custodial less than the fifteen year minimum.

6. Counsel were requested to deal with how courts treat a lengthy period in custody prior to sentencing where the minimum sentencing provisions of section 51 of the CLAA apply. The period in custody prior to sentencing will

[1] Section 51(3)(a):
'If any court …is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed …, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence"

also be referred to as '*pre-sentence detention'* (see *S v Radebe and another* 2013 (2) SACR 165 (SCA) at [13]).

In the heads of argument subsequently filed, Ms Cosyn relied on a number of cases, including S *v Vilakazi* 2009(1) SACR 552(SCA) and S *v Kruger* 2012(1) SACR 369 (SCA), to support the argument that the two year period in custody should be deducted from the 15 years imposed and antedated to 29 July 2011 being the date when the magistrate handed down the sentence. It was submitted that a lengthy period in custody constitutes a substantial mitigating factor warranting a departure from the prescribed minimum sentence.

Mr Mareume for the State also relied on *Vilakazi* and *Kruger*. He submitted that these cases supported the proposition that it was only fair to consider the period in custody particularly if it was lengthy when determining an appropriate sentence. The sting in the tail was that the State relied on the fact that the sentencing court had expressly mentioned the lengthy period the appellant had been in custody awaiting trial and submitted that the court had therefore considered the matter and had properly exercised its discretion.

The State also relied on section 51(4) of the CLAA which provided that a term of imprisonment under the minimum sentencing provisions commences from the date of sentencing and no earlier[2]. Although section 51(4) was repealed the provisions of section 39(1) of the Correctional Services Act 111 of 1998 (*'CSA'*) are to similar effect (see below).

7. In order to consider the issue it is necessary to first set out the main findings of the trial court by reference to the triad of factors relevant to sentencing[3] and to weigh whether substantial and compelling circumstances were present.

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[2] Section 51(4) of the CLAA read;

"Any sentence contemplated in this section shall be calculated from the date of sentence."

[3] See *S v Zinn* 1969(2) SA 537 (A) at 540G-H and *S v Rabie* 1975(4) SA 855(A) at 862G-H. The effect on the victim or victim's family may be conveniently considered within the context of the triad of factors either when dealing with the nature of the crime or the interests of society.

In the absence of such factors, the appellant as a first offender would have been correctly sentenced to 15 years imprisonment.

NATURE OF THE OFFENCE

8. The trial court found that in the early hours of Thursday 26 November 2009, at shortly after 05h00, the appellant in the company of another man entered a taxi which was driven by the complainant. They took their seats behind the complainant ostensibly as fare paying passengers. The complainant was asked to wait for another person who was joining them. The person arrived and as he sat down in the front passenger seat, he pulled up the vehicle's handbrake. The appellant drew a firearm and the driver was then pulled from behind as the assailants attempted to drag him to the back of the vehicle. He tried to resist and the appellant fired a shot which, although not aimed at the driver, was intended to and did compel him to submit. This accounts for the appellant being acquitted on the charge of attempted murder; the court also reasoning that the firing of the shot was already taken into account as part of the aggravating circumstances accompanying the robbery.

9. The complainant managed to open the back door of the vehicle and fled. The appellant then jumped into the driver's seat, took control of the vehicle and drove off. He was apprehended by members of the taxi association who spotted the vehicle some time later near a filling station and gave chase. By this stage the hijackers had already managed to strip some of the parts from the vehicle, including the sound system. The damage caused to the vehicle was assessed at approximately R18 000.

PERSONAL CIRCUMSTANCES OF THE APPELLANT AND THE INTERESTS OF SOCIETY

10. The appellant was 35 years old at the time of sentencing. He had a 3 year old son, was in a steady relationship and also supported his parents. The

appellant had been in permanent employment until retrenched after which he managed to obtain work as a taxi driver until the arrest.

11. The trial court referred to the epidemic of violence and the seriousness of crimes which involve firearms. The court also considered the impact of the crime on the complainant, how he was traumatised and the financial loss occasioned as a consequence of the hijackers stripping items from his vehicle. Finally the magistrate took into account that the crime was carefully planned. One can also add that the appellant did not act alone; the attack being executed by a gang which included two others.

12. The magistrate said the following in respect of the pre-sentence period in custody;

> "*The only factor I could find in favour of the accused is that he has been in custody for a very long time awaiting finalisation of the matter. He was arrested in the year 2009, it is now 2011. He is a first offender, however this is an offence that is very serious in nature, a firearm has been used, the offence was carefully planned and carefully executed.*
>
> *In my judgment on an overall assessment of … the accused I have reached the conclusion after much cognizing* (possibly a typing error for '*agonising*') *that there is a need for the protection of society in that a sentence that is prescribed not be destructive. I therefore cannot find any substantial and compelling circumstances justifying the imposition of a lesser sentence …"*

13. In granting leave to appeal against sentence only, the court said;

> "*In respect of sentence. The court had considered a number of factors, particularly the accused's personal circumstances … I could not even be placed with any compelling and substantial circumstances. I had*

also taken into account that the applicant had been in custody for almost two years prior to the finalisation of the matter.

However sentence is a matter of discretion."

14. As stated earlier, the court considered the two year period during which the appellant was in custody prior to sentencing and concluded that overall there were no substantial and compelling circumstances.

THE ISSUES

15. If the period in custody is properly a factor to be considered under section 51(3) (a), then the question arises whether the magistrate was obliged to consider the effect it would have on the actual period that the appellant may be subjected to loss of freedom as a consequence of his crime (ie; seventeen years) and on the period he must wait before being eligible for parole.

16. In the present case the magistrate concluded that the lengthy period in custody prior to sentencing did not constitute a substantial and compelling circumstance either when the mitigating and aggravating factors were viewed in their totality or in isolation (compare the judgment on sentence with that for leave to appeal). Accordingly, at face value, the period in custody was said to have been considered but was not sufficient to bring the appellant within the purview of section 51(3)(a).

CASE LAW

17. The SCA has dealt with the pre-sentence period in custody and the issues it raises in four relatively recent decisions; *S v Vilakazi* 2009(1) SACR 552

(SCA), *S v Kruger* 2012 (1) SACR 369(SCA), *S v Dlamini* 2012 (2) SACR 1 (SCA) and *S v S v Radebe and another* 2013 (2) SACR 165 (SCA).

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18. In *Vilakazi* the SCA said at para [60]:

> "*There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed. In the circumstances I intend ordering that the sentence - which for purposes of considering parole is a sentence of 15 years' imprisonment commencing on the date that the appellant was sentenced - is to expire two years earlier than would ordinarily have been the case.*

The court made the following order;

> "'*The accused is sentenced to fifteen years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire*.'

19. *Vilakazi* concerned the rape of an under-aged girl. The court *a quo* had imposed a sentence of life imprisonment. On appeal the SCA found substantial and compelling circumstances present. These circumstances were not confined to the offender but also had regard to the scheme of the minimum sentence legislation with its lack of gradation in sentencing, and its disproportionality and incongruity when considered against sentences imposed for significantly more serious offences.

The SCA's reference to ante-dating the sentence should not be misconstrued as an application of a power to determine that sentencing can commence from a date prior to its pronouncement. The SCA did no more than apply the provisions of section 282 of the Criminal Procedure Act 51 of 1977 (the '*CPA*') which permit an appeal court on altering the original sentence imposed to direct that it will run from the date on which the trial court handed down sentence.

20. *Vilakazi* is also significant because it reaffirmed the considerations which underlie the need to bring to account, for sentencing purposes, a lengthy period of pre-sentence detention. In that case the SCA took into account the full 2 years of imprisonment as an awaiting trial prisoner by deducting this period from the 15 years imprisonment it considered otherwise appropriate. It was done on the ground that it would be *"most unjust if the period of imprisonment while awaiting trial is not then brought to account..."*(at [60]).

    This echoes the position adopted some two decades earlier in S *v Mgedezi and others* 1989(1) SA 687 (A) *per* Botha JA at 716J-717A where the court, after overturning a death sentence, was not prepared to countenance a situation which precluded it, due to a legislative oversight, from taking into account the time the appellant had already spent in detention.

21. The form of the order in *Vilakazi* might have suggested that once substantial and compelling reasons were found, the appropriate sentence to be imposed was to be further reduced in a separate exercise by deducting the actual time spent in custody. Nonetheless the court had indicated earlier at para [15] that;

    > *'It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'*

In the most recent case of *Radebe* the SCA confirmed that this passage demonstrated that mitigating or aggravating factors should not be taken individually or in isolation when considering substantial and compelling circumstances.

22. The next case was *S v Kruger* 2012 (1) SACR 369(SCA). The appellant had been convicted by a magistrates' court on seven separate counts ranging from one for robbery to others of housebreaking and theft committed over a period of time. The appellant had been in custody awaiting trial for over three and a half years before being sentenced by the trial court.

It is evident that the SCA was not concerned with the application of section 51(3)(a) as the sentencing court had already found the presence of substantial and compelling circumstances. The issue was limited to a consideration of the cumulative effect of the sentences imposed, totaling 26 years imprisonment (at para [11]).

23. The SCA considered the appellant's personal circumstances, both aggravating and mitigating. After finding that the cumulative effect of the sentences induced a sense of shock the court added;

> *"The other consideration is the period spent in prison by the appellant while awaiting trial. It is only fair to consider that period, especially where it is a lengthy period. In the present case the appellant was incarcerated for a period of three years and eight months before he was finally sentenced on 24 February 2000. One way of factoring this period into a sentence is by antedating the sentence to the date on which he was sentenced or an earlier date by simply deducting the three years and eight months from the imposed sentence. (See S v Vilakazi 2009 (1) SACR 552 (SCA) ([2008] 4 All SA 396) para 60.) Punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, prevention, retribution, individual and general deterrence, and rehabilitation."* (para [11])

The court then ordered that all sentences be antedated to when the trial court originally imposed them and then deducted three years from the total effective period of imprisonment. The reference to "*or an earlier date"* would however be inconsistent with the interpretation given to section 32(1) of the old Prisons Act 8 of 1959, and now effectively re-enacted by section 39(1) of the CSA, in *S v Hawthorne en 'n ander* 1980(1) SA 521 (A) at 525E (see below).

24. The third SCA case is *S v Dlamini* 2012 (2) SACR 1 (SCA). Although the five court appeal bench was divided on whether there had been an impermissible splitting of charges, the majority finding that there had not been, the court unanimously upheld the appeal against sentence (the majority holding that the sentences run concurrently). The reasons for altering the sentence to a period of 17 years imprisonment are contained in the decision of Catchalia JA at paras [28] - [42] (which the majority adopted *per* Majiedt JA at para [43]).

25. The significance of *Dlamini* for present purposes appears at paras [41] and [42] of Catchalia JA's judgment;

> *[41] This brings me to the 10 months Mr Dlamini spent in custody before he was sentenced, which, as I have mentioned, neither the magistrate not the high court took into account in deciding the appropriate sentence. It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence. This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been. However, the courts have not spoken clearly on how to calculate this period. One approach has been to do an inexact subtraction; another is to deduct the period actually spent; yet another is to treat the time spent in custody, at the very least, as equivalent to the time served without remission; and a fourth, more adventurous method is to treat the period as equivalent to about twice the length, because of the harsher conditions that awaiting-trial*

prisoners are subjected to in comparison with the conditions of sentenced prisoners.

[42] As we have not had the benefit of argument on what the correct approach should be, I refrain from saying anything further on this question — particularly in the case of prison conditions — as this would depend on the facts. Suffice to say that the courts have spoken clearly that an appellant is entitled to the benefit of the period of his incarceration. In Mr Dlamini's case this was 10 months, which equates roughly to a year in custody. I would deduct this period from the overall sentence of 18 years' imprisonment, which it otherwise would have been, and impose an effective sentence of 17 years' imprisonment.

26. There are with respect three key considerations mentioned in *Dlamini* and which follow *Vilakazi* and *Kruger* concerning the pre-sentence period of detention, namely;

    a. an offender is entitled to have this period taken into account when deciding on an appropriate sentence (para [41] and repeated in para [42]);

    b. this is done "*by making the period of imprisonment actually imposed shorter than it would otherwise have been."* (at para [41]);

    c. The issue left open was how to factor this in.

27. *Dlamini* referred to three possible ways of taking into account the period of pre-sentence incarceration. The first was by way of an inexact subtraction, the other by treating this period as at least equivalent to the time served without remission and finally to factor in any additional proven or perceived hardships and reduced benefits endured by a non-sentenced detainee when compared to that of a sentenced prisoner (*ibid* at para[41]).

28. The second and third methods of taking the pre-sentence period of detention into account referred to in *Dlamini* have been a vexed issue in matters coming before the High Courts in Gauteng.

    Prior to *Vilakazi* going on further appeal to the SCA, Goldstein J in the High Court (*S v Vilakazi* 2000(1) SACR 140(W) at 148a-e) was not prepared to accept that the earlier decision of S *v Stephen and another* 1994(2) SACR 163 (W) reflected this court's practice. In *Stephen* Schutz J (at the time) at 168f adopted a Quebec Court of Appeal decision which considered that imprisonment awaiting trial was equivalent to a sentence of twice that length.

29. In the subsequent case of *S v Brophy and another* 2007(2) SACR 56 (W) the full bench preferred Schutz J's approach and Schwartzman J said at paras [18] and [19];

> *"[18] There is no evidence before this Court detailing the living conditions of awaiting-trial prisoners, who are presumed to be innocent and who are first offenders. What does not require evidence is that time spent in prison awaiting trial is, at the very least, equivalent to time served without remission. In addition, such prisoners do not get the benefit of any presidential pardon. What cannot be disputed is that the lot of the awaiting-trial prisoner is harsher than that of a sentenced prisoner in that he or she cannot participate in the programmes that a prison may run. What he or she is condemned to is a seemingly endless routine of boredom in the course of which he or she cannot earn any privileges for which serving prisoners can qualify by reason of good conduct. Judicial cognisance can also be taken of the gross overcrowding in prisons housing awaiting-trial prisoners. On a prison visit I have seen such conditions. As appears from the annual reports of Fagan J, the Inspecting Judge of Prisons, these harsh conditions have not been ameliorated.*
>
> *[19] There is no science from which it can be determined that such conditions are equivalent to double or treble or less than double time*

served. Taking all conditions into account - and there are probably others that may be found in some prisons - and notwithstanding the reservations expressed by Goldstein J, I am satisfied that the ratio in the Stephen case ought to be followed.

30. The court in *Brophy* applied *Stephen* and reduced the sentence it intended to impose by deducting from it twice the length of time the appellants had been in custody prior to sentencing.

31. In my respectful view the single court decision of Satchwell J in *S v Mahlangu and others* 2012 (2) SACR 373 (GSJ) at 376c-d might best have expressed the position in this Division:

"There are indeed judgments, particular a full-bench judgment of this division, S v Brophy and Another 2007 (2) SACR 56 (W), which have attempted to do an arithmetical calculation of the equivalent of an awaiting-trial period of time to a convicted period of time. The difficulty with such arithmetical equivalents is that one does not know all the factors peculiar to each awaiting-trial period. I am therefore reluctant to say that accused 2 and 3 have spent approximately two years as awaiting trial prisoners, equal to a four-year period of sentenced imprisonment. What I certainly am prepared to say is that they have suffered great hardship and this is a factor to be taken into account."

32. The most recent SCA case is *S v Radebe and another* 2013 (2) SACR 165 (SCA).

It did not approve of the *Stephen/ Brophy* approach and held at paras [13] and [14] that the pre-sentence period in detention is only one 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".*

The SCA proceeded (at para [14]):

> "*Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. …. (T)he 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"* .

33. In applying the approach that the period of pre-sentence detention could not independently constitute a substantial and compelling circumstance the SCA held at para [18] that the period of two and a quarter years during which the appellants were in detention prior to sentence had to be taken into account, but it did not outweigh the aggravating circumstances. Moreover the court found that the appellants had unnecessarily prolonged the trial by insisting on engaging private defence which they could not afford and by necessitating a trial-within-a-trial. Accordingly they only had themselves to blame for the lengthy delays.

34. The effect of *Radebe* is to preclude a court from considering the period of pre-sentence detention independently of all the other mitigating and aggravating circumstances. It becomes a part of the totality of factors that must be weighed in order to determine whether substantial and compelling circumstances exist to reduce the sentence from the prescribed minimum.

35. The approach in *Radebe* appears to reflect a departure from the earlier cases of *Kruger* and *Dlamini*. Although all the cases confirm that a court is obliged to take the period of pre-sentence detention into account, the latter two cases appeared to consider that the pre-sentence detention period constituted a distinct ground for finding substantial and compelling circumstances based on

the consideration that it was *"unjust*" not to (this term was used in *Vilakazi* at para [60]. See also *S v Malgas* 2001 (1) SACR 469 (SCA) at para [25] [4])

However, none of the earlier cases were confronted with the features presented in *Radebe.*

An illustration of the application of the pre-*Radebe* approach is found in *S v Bhengu* 2011(1) SACR 224 (KZP) where the court, after agreeing with the magistrate's finding that no substantial and compelling reasons were present, held that the pre-sentence period in custody was be deducted when calculating the date on which the sentence would expire (at para [38]).

36. The first unique aspect which required consideration in *Radebe* was the extent to which the appellant's own dilatory actions contributed to the lengthy delay in finalising the case. This had not been raised in the previous cases and *Radebe* considered it a factor that required to be brought into account, without indicating the weight it was to be given in any particular case.

37. The second significant feature is that *Radebe* dealt with the situation where the appellants had been found guilty of three separate robbery convictions, all subject to the minimum sentence provisions, but which the SCA had already decided to discount for sentencing purposes by treating as one. It will be recalled that in *Dlamini* there was no decision to reduce the minimum prescribed sentences before engaging in the enquiry since the merits of the case turned on whether there was indeed only one offence or not. Both *Vilakazi* and *Kruger* were concerned either with a single offence that was subject to the provisions of section 51 or where the trial court had already found the presence of substantial and compelling circumstances.

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[4] S v Malgas *per* Marais JA at para [25]:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

Accordingly if the pre-sentence incarceration period in *Radebe* was considered in isolation, after already treating the three robberies as one for the purposes of sentencing, then the overall result might have been too lenient.

38. In my respectful view the following appears to be evident from the four SCA cases mentioned;

a. pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of section 51 of the CLAA (*Radebe, Dlamini et al*);

b. such period of detention is not to be isolated as a substantial and compelling circumstance. It must be weighed as a mitigating factor together with all the other mitigating and aggravating factors in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. If it is not then the want of proportionality constitutes the substantial and compelling circumstance required under section 51(3) (*Radebe* at para [14]);

c. the reason for the prolonged period of pre-sentence detention is a factor. If the offender was responsible for unnecessary delays then that may rebound to his detriment (*Radebe)* ;

d. there is no mechanical formula or rule of thumb to determine the period by which a sentence is to be reduced. The specific circumstances of the offender, which may include the conditions of his detention, are to be assessed in each case when determining the extent to which the proposed sentence should be reduced. *(Radebe* at para [13]);

e. where only one serious offence is committed, and assuming that the offender has not been responsible for unduly delaying the trial (*Radebe* at para [14]*)*, then a court may more readily reduce the sentence by the actual period in detention prior to sentencing. (*Dlamini and Vilakazi*);

39. The question that appears to have been left open by *Radebe* is the weight to be attached to the pre-sentence period in detention. In this regard:

a. The high store placed by *Vilakazi* on a lengthy period of pre-sentence detention amounting to unfairness if not taken into account remains a vital consideration.

b. A further consideration is the difference in conditions of detention between an inmate detained in custody ('*remand detainee*'[5]) and a sentenced offender. This is clear from a comparison between Chapters IV and V respectively of the Correctional Services Act 111 of 1998 ('*CSA*').

Moreover parole can only be considered after a particular portion of a sentence has been served, calculated from the date of sentencing and not before (see sections 39 (1) read with 73(6) and (7) of the CSA).

c. There is also the issue of inequality of treatment. This can be illustrated by postulating the position of accomplices who are brothers involved in a robbery where aggravating circumstances are present and they both are first offenders. The brothers present the same mitigating and aggravating factors which otherwise would not result in a court finding grounds for reducing the minimum sentence of fifteen years under section 51(3) of the CLAA. Postulate further that one was able to afford bail and the other not which resulted in him spending three years as a remand detainee while delays in proceeding with the trial were attributed to the other who was on bail. Based on the express provisions of section 73(6)(a) the brother in detention would have been

[5] See section 1 definition in the Correctional Services Act 111 of 1998

imprisoned for ten and a half years before being eligible for parole whereas the other would only have to serve seven and a half years.

40. In essence the following legal principles, interests and values have a bearing on the weight to be accorded to a lengthy period of pre-sentence incarceration and assuming that the offender was not deliberately delaying the trial;

    a. The store placed on the right to freedom under section 12 (1) of the Constitution which, although recognising detention awaiting trial (under subparagraph (1)(b)), may be read with section 35(3)(d) which accords the right of every accused person to have the trial " *begin and conclude without unreasonable delay"*;

    b. The equality provisions of section 9 of the Constitution, and in particular sub-sections (1) and (2) which provide;

        (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

        (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

    Offenders who have spent a substantial period of time in pre-sentence detention might be discriminated against, and therefore treated unequally, because they would not only be deprived of their freedom for a much longer period but would only be eligible for parole at a much later stage. In this regard it should be born in mind that their entire period of incarceration was as a sole consequence of the crime (albeit that it was not proven at the time of the detention). The grant of bail may also be influenced by other discriminatory factors such as financial and social status.

Moreover the stricter requirements in granting bail under section 60(11) of the CPA means that most accused charged with serious crimes will be detained from the time of their arrest until sentenced, although there is nothing in section 51 to suggest that this was considered when introducing the minimum sentence provisions. The effect is that while pre-trial incarceration is accepted, no distinction is drawn between the consequences of being deprived of freedom pre-or post- sentence or conviction.

Furthermore there is a significant distinction in the quality of a remand detainees' incarceration. If the provisions of Chapter IV are compared with Chapter V of the CSA such a person is ineligible to participate in the programs provided to sentenced offenders, including assessment and case management. Accordingly a lengthy period of pre-sentence detention is a period languishing in captivity with no credits being accumulated and no effective direction.

41. The potential for inequality of treatment unless justified under the limitation provisions of section 36 of the Constitution is therefore apparent.

In this regard cases such as *S v Hawthorne en 'n Ander* 1980 (1) SA 521 (A) at 525B-D may no longer be good law because they did not characterise the issue as one concerning the deprivation of freedom but adopted a technical approach to the distinction between implementing a sentence prior to actual conviction[6].

42. Since each of these considerations involves the possible limitation of a constitutional right, the factors which discounted against taking the pre-sentence period of detention into account should be identified. While a failure

[6] The justification for a trial court being precluded from antedating the commencement of its sentence to before it was delivered appears to have been twofold; a person cannot begin to serve a sentence before being convicted for it and an awaiting trial prisoner cannot be regarded as, nor is that person treated in the same manner under the prison regulations as, a convicted prisoner – *Hawthorne* at 525B-D).

to do so may be cured if the factors are readily apparent from the record as a whole, in my view, and precisely because constitutionally protected rights may be affected, it appears preferable to adopt a position similar to that applied in *S v Mathebula* 2012(1) SACR 374 (SCA) at paras [10] and [11]. There the SCA indicated that if a sentencing court intends imposing a sentence greater than the prescribed minimum it should identify the circumstances that led it to do so and explain why such circumstances justify a departure from the prescribed sentence.

43. In passing, a number of cases expressed concern about courts intruding on the domain of the executive if a judicial officer has regard to the date from which an offender may first be eligible for parole when considering an appropriate sentence. Whatever the position under previous legislation, the CSA stipulates the earliest date of eligibility for parole. See Chapter VII and sections 73(6) and (7) in particular. Accordingly the date when the Correctional Supervision and Parole Board may first consider exercising its discretion is statutorily defined.

44. There appears to be no reason why a court cannot have regard to this when determining an appropriate sentence if substantial and compelling circumstances are found. The period of the sentence and the considerations that should be taken into account as to when the offender may first be eligible to secure his or her freedom are the exclusive province of the judiciary. Moreover this does not interfere with any discretionary power, for there is none conferred since the date when the offender may first be eligible for parole is fixed by statute. The exercise by the Board of its power to either grant or refuse parole on that date remains undisturbed.

MISDIRECTION

45. It is evident that the magistrate in the present case did not take into consideration the legal rights, values or interests that may be affected if the

appellant was to be incarcerated for an effective period of 17 years or that he would only be eligible for parole from a time commencing when sentence was imposed and not from the time he was actually detained in custody. Nor is it evident from the judgment on sentence or conviction, or even from the record as a whole, what circumstances were sufficiently egregious to justify ignoring the two extra years of incarceration that the appellant would be subjected to and that this same period would be ignored when determining the earliest date of eligibility for parole under the CSA. The failure to appreciate why the courts in cases such as *Vilakazi* and *Dlamini* consider a lengthy period of pre-sentence detention to be relevant when considering an appropriate punishment is equally apparent.

46. In particular there is no one or more aggravating feature mentioned by the magistrate, or to be discerned from the record (see above), which outweighs the considerations that arise from the appellant being incarcerated for two years until sentenced when taken together with the other mitigating factors.

47. Without first considering these factors it was not possible for the trial court to determine whether the two year pre-sentence detention period is outweighed by the aggravating factors. As indicated earlier I do not wish to suggest that a failure to expressly identify the factors that bear upon the issue will not be saved if is apparent from the judgment as a whole that they were appreciated. In the present case there was only one conviction subject to the minimum sentence provisions.

However the effect of weighing up both aggravating and mitigating factors, including a significant period of pre-sentence detention, and finding no substantial and compelling circumstances, effectively means that there are features which render the accused more morally blameworthy. In the context of imposing a harsher sentence than the prescribed minimum Wallis J (at the time) in S *v Mbatha* 2009 (2) SACR 623 (KZP) at para [20] said: "*The factors that render the accused more morally blameworthy must be clearly articulated*". This passage was cited with approval in *Mathebula*.

48. In my view it was equally necessary, having regard to the constitutional rights potentially affected, for the trial court to have indicated the motivation for requiring the appellant to be incarcerated for effectively 17 years instead of the prescribed 15 year minimum if he had been granted bail. It should not be left for an appeal court to speculate where there is nothing otherwise apparent from the record to explain it (see *Mathebula* at para [10]).

49. The failure to apply correct principles when considering the weight to be attached to the period of the appellant's pre-sentence detention when taken together with the other mitigating and aggravating factors constitutes a material misdirection vitiating the exercise of the sentencing court's discretion. In such a case the appeal court is required to reconsider sentencing afresh. See generally *S v Malgas* 2001(1) SACR 469 (SCA) at para 12. I proceed to do so.

50. In the present case the trial court rightly regarded the discharge of the firearm in the confines of a vehicle in which the complainant was seated as an aggravating factor. Although not stated in the judgment, no doubt the fact that the appellant was part of a gang and had lured the complainant into opening the vehicle's doors under false pretense were also aggravating factors. Against this the court itself did not perceive the discharge of the firearm as life threatening. On the contrary the court held that the shot was deliberately fired away from the accused to render him compliant. What remained was the fear that the appellant or his accomplices would not hesitate to use the firearm to maim or kill. I do not believe that these features are so removed from the fear engendered when a gang invades a family home and threatens to use a firearm as the family remains captive for a lengthy period and under constant fear while their home is being ransacked.

51. In my view the aggravating features are outweighed by the totality of the other mitigating factors that were taken into account by the magistrate and mentioned earlier as well as the deprivation of liberty for effectively two years beyond the maximum that would have prevailed if the appellant had been afforded bail considered together with the impact of not being eligible for

parole sooner if the period of effective imprisonment is not reduced. In the circumstances of this case these additional factors also impinge on the appellant's right to equality of treatment.

52. I am therefore satisfied that overall, if regard is had to the totality of aggravating and mitigating circumstances including the lengthy period of pre-sentence incarceration of two years, substantial and compelling reasons are present which justify reducing the minimum sentence of 15 years. The considerations in this case approximate those of *Dlamini* and the earlier case of *Vilakazi* in that there is effectively a single serious offence which is subject to the minimum sentence provisions while there is nothing to suggest that the appellant deliberately delayed the finalisation of the case.

***OBITER*- DATE FROM WHEN SENTENCE COMMENCES**

53. Lopes J in *Bhengu* at para [36] noted that section 51(4) of the CPA had been effectively repealed by the Criminal Law (Sentencing) Amendment Act of 2007 with effect from 31 December 2007 (*per Government Gazette no 30638*) thereby allowing the period spent in custody to be taken into account in determining an appropriate sentence.

54. However section 39 of the CSA precludes a court from directing, in an appropriate case, that a sentence may commence from the date when the accused was detained in custody. It provides;

> ***39 Commencement, computation and termination of sentences***
>
> *(1) Subject to the provisions of subsection (2) a sentence of incarceration takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the sentenced person is released on bail pending a decision of a higher court, in which case the sentence takes effect from the day on which he or she submits to or is taken into custody.*

55. The current provisions of section 39(1) of the CSA came into effect on 1 October 2004[7] through section 5 of the Parole and Correctional Supervision Amendment Act 87 of 1997. It effectively re-enacted the provisions of section 32(1) of the old Prisons Act 8 of 1959 which had been authoritatively interpreted in *S v Hawthorne en 'n ander* 1980(1) SA 521 (AD) at 525E. It therefore remains binding authority.

56. The courts have been confronted with the inability to direct that a custodial sentence commences prior to the date on which it is passed. Until the advent of the minimum sentence regime under section 51 of the CLAA for the majority of serious offences, a court could readily take into account the period an offender was held in custody awaiting trial by reducing the overall sentence imposed (*Hawthorne* at 525E). The case of *Radebe* demonstrates that it is not possible to do so as all aggravating and mitigating features, including the period of pre-sentence detention, must be considered in weighing whether there are substantial and compelling reasons to deviate from the prescribed minimum sentence.

57. *Radebe* was most recently applied in *S v Dlamini* 2014 (1) SACR 530 (GP). The full court considered that it was unnecessary to take into account the period of two and a half years that the appellant spent in custody prior to sentencing. It considered life imprisonment to be an appropriate sentence having regard to the appellant's personal circumstances and the nature of the offence. Lamprecht AJ on behalf of the court said at para [18] that;

> *"For a trial court (or a Court of Appeal) to be able to properly compute a lesser sentence than life imprisonment it will have to take parole legislation and policies into account to determine how long a sentence of life imprisonment would effectively be, before it can be adjusted downward. That is, however, the domain of the executive, and courts should be wary to tread on the terrain of other arms of government, in order to preserve the separation of powers doctrine. In any event —*

[7] Proclamation No. R.38 of 2004

> *'the test is not whether on its own that period of [awaiting-trial] 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'.* (citing *Radebe* at [14])

58. Goldstein J in *Vilakazi* (2000(1) SACR 140(W) at 142f - i) raised a concern about the court's inability to ante-date its sentence in appropriate cases to when the offender was first detained and considered that the legislature ought to specifically allow sentences to be antedated so as to take into account the actual time spent in custody awaiting trial[8].

    Hardships in relation to the limitations of section 282 of the CPA were exposed in *Mgedezi* and led the court to call for remedial legislation which subsequently occurred through an amendment to the section.

59. It is evident that the inability to determine that a sentence under the minimum sentence provisions should commence on a date earlier than when it is delivered does work hardship on an accused who, after being detained in custody for two or three years, is sentenced to life imprisonment and who, in terms of section 73(6)(b)(iv) of the CSA, only becomes eligible for parole after serving a minimum sentence of 25 years. It may also affect constitutionally safeguarded rights.

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[8] At 142g-i:

> "And so in my view the courts are driven to eschew simple subtraction and fudge the period of awaiting trial, thereby doing substantial but perhaps less than perfect justice.
>
> The reason for this unsatisfactory situation lies in the wording of s 32(1) of the Correctional Services Act 8 of 1959 which provides for a sentence of imprisonment to take effect on the day it is passed, and which prevents the sentence being ante-dated in any way. See S v Hawthorne en 'n Ander 1980 (1) SA 521 (A); cf, section 282 of Act 51 of 1977 (as amended).
>
> In my view the legislation concerned ought to be amended to provide for the ante-dating of a sentence to occur to the extent of any time spent in custody awaiting trial. If this were done all the problems I have referred to would, it seems, be resolved."

ORDER

60. The method adopted in *Vilakazi* and *Dlamini* of taking the period of pre-sentence detention into account appears appropriate to the circumstances of this case. Accordingly the two year period of pre-sentence incarceration will be deducted from the fifteen years minimum and the court orders that;

    a. The appeal on sentence is upheld;

    b. The court *a quo's* order is set aside and replaced with the following order in accordance with the provisions of section 279 of the CPA;

        The appellant is sentenced to thirteen years imprisonment in respect of count 1 such sentence to commence from 29 July 2011being the date he was sentenced by the trial court.

VALLY, J:

I agree

_____ _____

SPILG, J **VALLY, J**

DATE OF JUDGMENT: 17 September 2014

COUNSEL FOR THE APPELLANT: Adv K. Cosyn

COUNSEL FOR THE RESPONDENT: Adv R.T Mareume