OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A235/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

11/12/2014
DATE

SIGNATURE

In the matter between:

BEN CHUMKUMBERA Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] This appeal is directed against sentence only on a charge of robbery with aggravating circumstances. This case comes before this court with the

permission of the Regional Court for the Regional Division of South Gauteng held at Johannesburg from which it emanates.

[2] The Appellant who was thirty-one years old at the time of the commission of the crime pleaded not guilty and chose to furnish the court with no plea explanation. He was represented throughout the proceedings before the court a quo. On 27 July 2012, he was convicted as charged and sentenced to 8 years imprisonment. The Appellant was also declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act No. 60 of 2000.

[3] It will be useful to set out a brief background of the facts prior to embarking on the appropriateness of the sentence. The Appellant was one of two accused persons who on 19 May 2012 at Brixton assaulted Mohammed Hussein and Hassim Musseh. They then attempted to rob them of their mobile phones and money.

[4] The Complainants, father and son, were travelling on foot from church at approximately 19H00 in the evening of the 19th of May 2012 when they were suddenly surprised by two unknown men. One of them pointed a firearm at one of them,the son, and demanded that they hand over their mobile phones and money. Aberrant, as it may sound, the father took out his firearm and fired a warning shot.

[5] The two assailants fled. However, before they could run far, the one with a firearm turned around and once more pointed the firearm at them. Again, the father fired a warning shot. They fled into the direction of the bushes.

[6] While the police were on patrol in a police vehicle, they were stopped and informed that two men attempted to rob the Complainants and showed the police the direction into which the robbers ran. Subsequently, the police assisted by security guards from the neighbourhood, cordoned off the area and began searching. They found the accused hidden among the bushes.

[7] They apprehended them and took them to the Complainants who identified them as those who had just attempted to rob them. They were arrested and locked up.

[8] It is trite law that in an appeal against sentence, a court of appeal is guided by the principle that punishment is pre-eminently a matter for discretion of the court a quo and should only be interfered with if the court a quo failed to exercise its discretion on sentence judiciously and properly. See *S v Rabie* 1975 (4) SA 855 (A). A sentence imposed by a lower court should only be altered if:

8.1 An irregularity took place during the trial or sentencing stage;

8.2 The court a quo misdirected itself in respect of the imposition of sentence; and

8.3 The sentence imposed by the court a quo could be described as disturbingly or shockingly inappropriate. See *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) at 591 [10] and *S v Malgas* 2001 (1) SACR 469 (SCA) at 857 D-E.

[9] Establishing whether the sentence imposed is shockingly inappropriate or is violated by misdirections and irregularities is the test used to determine how the trial court exercised its discretion. See *S v Anderson* 1964 (3) SA 49 and *S v Rabie* 1975 (2) SA 537 (A).

[10] Accordingly, the issue to be decided by this court is whether or not the eight years direct imprisonment term imposed by the court a quo is shockingly inappropriate or breached by misdirections and indiscretions. If it did, this court will have the right to interfere by setting aside such sentence and substituting therefor with what it considers an appropriate sentence.

[11] When engaging in this endeavour, this court must have regard to the interest of the society, the seriousness and the prevalence of the crime, on the one hand, and the personal circumstances of the Appellant on the other. There is evidence from the judgment of the court a quo that it was alive to the aforegoing when it sentenced the Appellant.

[12] The court a quo considered the personal circumstances of the Appellant and the factors in aggravation of his sentence. To begin then with the Appellant's personal circumstances. It contemplated the Appellant's age, thirty-one, his marital status and that he has an eight year old child. Although not specifically mentioned, this court assumes that his wife and child are financially dependent on him. A further factor that featured in the judgment of the court *a quo* is that the Appellant had already spent slightly over a year in jail while awaiting trial. No further personal circumstances of the Appellant were brought forth and it seems that the court a quo only had the above to consider for sentencing purposes.

[13] The court *a quo* then turned to the aggravating factors and made an observation that the Appellant was not a first offender in that he was convicted of theft previously for which he was sentenced to three years.

[14] It proceeded to note that the offence of which the Appellant was found guilty is extremely serious and prevalent in the area of jurisdiction of the court. They threatened to shoot the Complainants with a toy gun, which was perceived to be a real gun by the Complainants. The court a quo also mentioned that it was the Appellant who pointed the toy gun at the Complainants and that it was subsequently found in his possession. These two factors possibly explain why an eight year imprisonment term was imposed on him.

[15] It also noted how rampant these kinds of offences are in the streets of Johannesburg and that ordinary law-abiding citizens can hardly have the liberty of walking anywhere any time without fear of being attacked.

[16] The manner in which the commission of the crime was executed appeared to have been well planned. Furthermore, the Appellant failed to demonstrate that he was contrite as he pleaded not guilty and persisted in endeavouring to portray the police, security guards and the Complainants as perfidious and unreliable.

[17] With regard to the previous conviction of theft and subsequent sentence of three years that was imposed on the Appellant, the court subtly remarked that the imprisonment sentence did not deter the Appellant from committing the current crime for which he is being tried. I surmise and I must be correct that the court *a quo's* mere reference to the Appellant's previous conviction has had a significant bearing on the outcome of the eight year imprisonment term that it imposed on the Appellant otherwise it would not have alluded to it.

[18] I note that theft and attempted robbery with aggravating circumstances are two distinct offences. The imposition of sentence on a charge of attempted robbery with aggravating circumstances should not be influenced by a previous conviction of theft. I therefore consider this to have been a misdirection by the court *a quo*.

[19] The court *a quo* over emphasized the seriousness of the offence. In this regard it is useful to refer to the introductory paragraph to Part 4 of Schedule 2 of Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997. I am mindful that the paragraph refers to those offences for which minimum sentences are prescribed. It provides:

> "*Any of the following offences, if the accused had with him or her at firearm, which was intended for use as such, in the commission of such offence.*"

[20] While the Appellant was in possession of what, in the eyes of the Complainants, was a firearm, he could not have utilized it as such because it was a toy gun. In the circumstances, it is legally indefensible to elevate a person who uses a toy gun to carry out an attempted robbery to one who uses a real gun.

[21] That must be so because the latter foresees a possibility of discharging his firearm with potential fatal repercussions in the event that he encounters resistance. I must be quick to add that the desired result in both scenarios is similar but the moral culpability is distinguishable.

[22] I have so far treated the Appellant as though he was alone when he committed this offence. Perhaps I should mention that this is a crime that was executed with common purpose by two suspects, the Appellant and his co-perpetrator. The Appellant was sentenced to eight years while his partner in this crime received five years. I cannot fault the court a quo for the

differentiation because it was warranted.

[23] In view of the fact that the offence was committed with common purpose, I am somewhat startled why it would matter that the Appellant is the one who pointed the firearm at the Complainants and that the toy gun was found in his possession when they were apprehended. Reference to that fact, as I have already stated earlier intimates that it played a part in the imposition of the sentence of eight years. That being so, it must constitute misdirection.

[24] The court *a quo* stated that it had taken into account the period spent by the Appellant in jail whilst awaiting trial. A sentence of eight years under the circumstances described above does not suggest that it did. In the circumstances I hold that the court a quo misdirected itself and that the resultant sentence is disturbingly inappropriate.

[25] In the result, I uphold the appeal and make the following order:

1. The judgment and order of the court *a quo* is set aside and replaced with the following:

> "*The Appellant is sentenced to five years direct imprisonment;*
>
> *The sentence is antedated to the date of sentence of the Appellant by the court a quo.*"

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree:

S STEIN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE HEARD: 02 December 2014

DATE OF JUDGMENT: 11 December 2014

COUNSEL FOR THE APPELLANT: J PENTON
INSTRUCTED BY: JOHANNESBURG JUSTICE CENTRE

COUNSEL FOR THE RESPONDENT: V H MONGWANE
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