REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

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

7/8/15

CASE NO: A 416/2014

In the matter between:

BUTI JACOBS MONARE APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

MAKUME J

[1] The Appellant was convicted on one count of robbery with aggravating circumstances and sentenced to 15 years imprisonment on the 8th March

2013 by the Regional Court in Pretoria. He was granted leave to appeal against sentence by that Court.

[2] The facts leading to the conviction and sentence are that on or about the 18th September 2006 the complainants were attacked at their small holding outside Pretoria by four (4) men carrying firearms and robbed of their belongings namely jewellery, a revolver an Isuzu bakkie; cellular phones; and a hunting knife.

[3] During the ordeal the Appellant who appeared to be the leader of the group ordered the complainant Ms Christina Myburgh as well as Lizzy Blau to undress much to their humiliation. The two ladies were assaulted and ordered to lie under the bed and remain there until the Isuzu bakkie had driven off. It is not disputed that they were traumatised and humiliated by being left naked in full view of other people in the house.

[4] The state proved three previous convictions against the Appellant two of which were for theft committed during 1989 and 1990 and one for assault committed in the year 2004 for which the Appellant was cautioned and discharged.

[5] The Appellant's personal circumstances were placed before court these appear from the Magistrate's summary on sentence. The Appellant was at that stage 41 years old and had one previous conviction which the court deemed insignificant for purposes of sentence. It appears that prior to this

conviction the Appellant had stood trial on the same facts and had been convicted and sentenced to 18 years imprisonment. On the 31st January 2009 that conviction and sentence was set aside on appeal by this court. The appeal court ordered that if the state deems it fit it could recharge the Appellant on the same facts but that the trial should proceed before a different Magistrate.

[6] The Appellant was rearrested and stood trial from the year 2010 until he was convicted in the year 2013. It is not disputed that in respect of the first conviction he had spent a period of over two years in custody and in respect of this conviction he spent some 18 months awaiting trial.

[7] The further personal circumstances of the Appellant are that he has three children, whose ages are not indicated in the court record.

[8] The court *aquo* in arriving at the sentence of 15 years found that the fact that the Appellant had spent time in custody for this matter as well as another matter should not be taken as substantial and compelling circumstances. The Magistrate said that it would be speculating as to whether the Appellant would have been granted bail because application for bail was never made. The court concluded that because of the seriousness of the crime for which the Appellant had been convicted that the minimum sentence of 15 years imprisonment was appropriate.

[9] It is trite law that an appeal court will not interfere with the sentence imposed by the trial court unless the appeal court is satisfied that the

court below made a material misdirection or the sentence is disturbingly inappropriate.

[10] In the present matter it is not argued by the Appellant that the sentence is disturbingly inappropriate and correctly so. What is in issue in this appeal is that the court *aquo* failed to take into consideration the period that the Appellant spent in custody prior to being sentenced as well as the period he served in the same matter before the Appeal court set aside the conviction and sentence and ordered a retrial.

[11] The court *aquo* having referred to the matter **S v Brophy** as well as **S v Malgas,** concluded that the time spent awaiting trial for pre- sentence was over shadowed by the seriousness as well the prevalence of the offence in the Pretoria district. The learned Magistrate accepted the fact that the Appellant was a first offender and concluded that despite that the crime was serious and that it will be in the best interest of society to impose the minimum sentence of 15 years.

[12] In my view the court a *quo* over emphasised the seriousness of the crime and its prevalence and under emphasised the personal circumstances of the Appellant and in the process misdirected itself.

[13] Counsel for the Respondent argues that **S v Vilakazi 2009 (1) SACR 552 (SCA)** should be read against the later decision also of the supreme Court of Appeal in **S v Radebe 2013 (2) SACR 165 (SCA)**. Firstly the

two cases cannot be compared when dealing with the reasonableness or not of a minimum sentence because the Vilakazi matter was a rape matter involving a 16 year old child. The matter of Radebe was for robbery. Secondly the accused in the Radebe matter had previous convictions involving theft.

[14] Nuget J A in **S v Vilakazi** said the following at paragraph 15:

> *(15) 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*"

[15] It cannot be denied that the Appellant spent in excess of 2years in custody as a sentenced prisoner on the same case. I therefore could not find any reason in the judgment of the Magistrate dealing especially with that period when he was sentenced. That period should have been deducted.

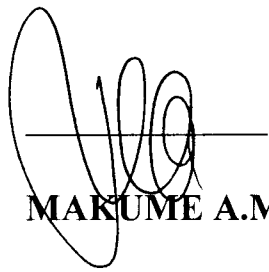
ORDER

[16] (i) The Appeal against sentence is upheld.

(ii) The sentence of 15 years imposed upon the Appellant is set aside and substituted by the following:

(a) The accused is sentence to 13 years (Thirteen years) imprisonment.

(b) The sentence of 13 years is antedated to the 8th March 2013 in terms of Section 282 of the Criminal Procedure Act 51 of 1997.



MAKUME A.M.

(JUDGE OF THE HIGH COURT)

I agree

MALULEKE J.

(ACTING JUDGE OF THE HIGH COURT)

Date of Hearing: 28 July 2015

Dated of Judgment: 7th August 2015

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