THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

26/10/2016
Case number: A448/2015
REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

MZWAKHE MOAGI Appellant

and

The State Respondent

Heard: 17 October 2016
Delivered: 26 October 2016

Summary: The question which is to be determined is whether the failure by the trial court to forewarn the appellant about the application of the minimum sentencing regime in at the beginning of the hearing constitutes an irregularity that warrants interference on appeal. The minimum sentencing governed by 51 (2) (a) (ii) of the Criminal Procedure Act of 1977. The answer to the question is in the affirmative and accordingly the failure is found to be an irregularity. Principles of resentencing by the Appeal Court restated.

JUDGMENT

Molahlehi J

Introduction

[1]This is an appeal against the decision of the magistrate in terms of which the appellant was found guilty, convicted and sentenced as follows:

1. Count 1-robbery with aggravating circumstances; - 20 years imprisonment;
2. Count 2- kidnapping; - 5 years imprisonment; and
3. Count 3- unlawful possession of the firearm- 3 years imprisonment.

[2] Following the above conviction, the appellant was effectively sentenced to 28 years imprisonment. The appellant was also declared unfit to possess a firearm. The leave to appeal was granted on the petition by the Gauteng Division of the High Court and it only concerns the sentence.

[3] The question which this court has to answer is whether the failure by the trial court to forewarn the appellant about the application of the minimum sentencing regime at the beginning of the hearing constitutes an irregularity that warrants interference on appeal. The answer to the question is in the affirmative and accordingly the failure is found to be an irregularity.

The background facts

[4] The appellant challenges the decision of the trial court in as far as the sentence is concerned and on the ground that it erred in the following respect:

a. In finding that the cumulative mitigating factors did not constitute substantial and compelling circumstances;
b. The sentence is disproportionate to the offence;

c. No weight was put on the period that the appellant spent in custody awaiting trial;

d. Failed to order that the sentence in count one should run concurrently with the sentence on counts two and three.

[5] The brief background to this matter is that the above charges were instituted against the appellant and his co-accused. On the day in question, they approached the complainant whilst he was looking for his GPS in the car he was driving. The registration of the said car is C[…] GP. After asking him what he was selling, the appellant and his co-accused pointed a gun at him and ordered him to get into the back passenger seat of the car.

[6] The appellant drove the car with his co-accused pointing the gun at the complainant during the hi-jacking. The police who had been informed by a driver of another car chased after the high-jacked car of the complainant. On realising that the police were following them the two jumped out of the car and ran away. They were followed up by the police and one of them was arrested during that chase.

[7] In mitigation, it was submitted that the appellant conceded that he had a previous conviction for robbery. He is unmarried, has two children with his fiancé and the third child with another woman. It was also submitted that although a firearm was used in the robbery, no shots were discharged in the course of the robbery. He was self- employed and was earning about R5000, 00 per month. He had been in custody whilst awaiting trial for a period of nine months.

[8] The other points submitted in mitigation are that the complainant was not injured in the course of the commission of the offence and that the entire items taken during the robbery were returned to him.

The legal principles

[9] The approach to be adopted by a court on appeal in criminal matters is well settled. The court will in general not readily interfere with the sentence of the trial court. It will,

however, interfere with the sentence where there is evidence of material misdirection and or where the sentence as stated in *S v Malgas*,[1] is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'.

[10] It is trite that in considering the sentence to impose after conviction, the trial court or the appeal court where it is enjoined to consider the sentence afresh, has to have regard to the purpose of sentencing, the nature of the crime, the circumstances of the offender and the interest of the society.

[11] It is also trite that even in cases involving the prescribed minimum sentence, the court has a discretion whether to impose the prescribed minimum sentence or to deviate therefrom. The court will, of course, deviate from imposing the minimum sentence where there exist substantial and compelling circumstances.

[12] The general and established approach to sentencing is that the court should not adopt a piecemeal approach but should rather have regard to the totality of the facts and circumstances of the case. In *Langeni v S* (2011) JOL 27687 (ECG), the court held that:

> "In determining the appropriate sentence the totality of the appellant's conduct and the consequences thereof must be considered. The concerns of society had to be evaluated against the facts of the appellant's conduct. This would include the number of crimes committed, the nature of the crimes, whether they were planned or premeditated, the degree of violence and attitude of the perpetrator, the period over which they were committed, the nature of the weapons used and injuries and any other harm inflicted, whether the victims posed a threat to the appellant, and what the long term impact on them was, as a result of the crimes. Guidance can certainly be found in other cases but each case has to be decided on its own facts taking into account the overall needs of the society and the circumstances of the accused."

<u>Evaluation/ analysis</u>

[1] [2001] ZASCA 30; 2001 (1) SACR 469 (SCA)

[13] In my view, this matter turns around the question of whether the sentence of the court is vitiated by the fact that the trial court failed to forewarn the appellant of the possibility that he may at the end of the trial be faced with a sentence regulated by the minimum sentencing regime.

[14] It has been held that the court has a duty to inform an accused person at the beginning of the hearing that the provisions of the minimum sentence would be applicable unless it is clearly stated in the charge sheet. This duty applies irrespective of whether or not an accused is legally represented. The duty to inform an accused person of the applicability of minimum sentence is an aspect of a fair hearing and has its basis in the provisions of section 35(3)(a) of the Constitution.[2]

[15] In dealing with the consequences of the failure by the trial court to forewarn an accused person about the provisions of the minimum sentence, the court in S V Chowe 2010(1) SACR 141 at pages 22 and 23 per Mavundla J, held that:

> "The fact that the accused was legally represented, in my view does not take away the need to inform the accused that such Minimum Sentencing Act dispensation would be relied upon for sentencing."

[16] In *Mthimkhulu v State* the SCA (210/2011) [2011] ZASCA 178(29 September 2016 the SCA per Shongwe JA, referred with approval the decision in *Chowe* and held that:

> "[9] It is also important to note that the appellant was not warned timeously or at all that the state would be relying on the provisions of the minimum sentence legislation. The provisions of the minimum sentence legislation and the applicability thereof were brought to the attention of the appellant, for the very first time, after conviction and only when the sentencing proceedings were underway. This too constituted a material irregularity. In *S v Ndlovu* 2003 (1) SACR 331 (SCA), Mpati JA confirmed that where the state intends to rely on the

[2] 2 Section 35 (3) (a) of the Constitution reads as follows: "Every accused person has a right to a fair trial, which includes the right-

> sentencing regime created by the Act, a fair trial will generally require that its intention be brought pertinently to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge he or she faces as well as its possible consequences. What is at least required is that the accused be given sufficient notice of the state's intention to enable him to conduct his defence properly. (See also *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Makatu* 2006 (2) SACR 582 (SCA)). This certainly did not happen in this case. In *S v Chowe* 2010 (1) SACR 141 (GNP), the court (Mavundla J with Legodi J concurring) went to the extent of saying that the fact that the accused was legally represented did not take away the need to promptly inform him of the applicability of the minimum sentence legislation and its implications

[17] The above approach was confirmed in *Machango v S* (20344) (2014] ZASCA 179 (21 November 2014 where the SCA in dealing with the same issue quoted with approval what was said in *S v Makatu* 2006(2) SACR 582 (SCA) or paragraph 7 where it was said that:

> "[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment - the most serious sentence that can be imposed - must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice."

[18] The SCA then stated the principle succinctly at paragraph 10 of its judgment as follows:

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a. to be informed of the charge with sufficient detail to answer it."

> "[10] It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence."

[19] It is common cause that the trial court in the present matter failed to forewarn the appellant that in case he was found guilty as charged the possibility exist that the court may impose the prescribed minimum sentence. It then follows that the trial court committed an irregularity which warrants interference by this court. The consequence of this finding is that this court is then enjoined to first set aside the sentence and thereafter consider the sentence afresh.

[20] Once the sentence is set aside as a result of the irregularity arising from failure to forewarn the accused about the minimum sentence regime, the court then has to conduct the inquiry regarding the sentence as though the sentence was never imposed by the trial court. The enquiry as the SCA warned in *Machango*, is not that of comparing or considering whether the sentence of the trial court was fair and justified in the circumstances. The SCA, in that case, explained the meaning of considering the sentence afresh as follows:

> "Considering a sentence afresh must ineluctably mean, setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on the sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of sentence - it must interrogate and adjudicate afresh the triad in respect of sentence as stated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court. The full court erred in my view by stating that an appeal court 'will only interfere when the sentence imposed is vitiated by an irregularity ... or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion ...' What the full court did was not considering the sentence afresh but compared what it had in mind with what was imposed."

[21] I now turn to consider the appropriate sentence to impose in this matter and I do so by applying the principles governing sentencing which is set out above. In this respect, the personal circumstances of the appellant are set out above and in summary, the following are important:

[22] The appellant was at the time of the commission of the crime relatively young men 35 years of age. He has three children. He was arrested at the scene of the crime before she could even benefit from the proceeds of his crime. The complainant was not physically harmed and all his property was returned to him by the police. The appellant is a second offender and thus in terms s 51 (2) (a) (ii) of the Criminal Procedure Act, one of five of 1997, the minimum sentence to be imposed is 20 years.

[23] In my view, the most important factor in considering the sentence for the offence committed by the appellant is that he was denied a fair trial by the failure of the trial court to forewarn him of the prescribed minimum sentence that could be imposed if he was to be found guilty as charged.

[24] The above needs to be weighed and balanced against the seriousness of the offence. The hijacking took place in the context where a gun was used. There is no evidence that the complainant resisted when the appellant and his co-accused instructed the complainant to hand over his car to them including the instruction that he should be out of the driver's seat and get into the passenger seat. There is no evidence as to why the appellant and his co-accused kidnapped the complainant including why the gun was continuously pointed to the complainant as they were driving away with him. There is no explanation why the complainant was subjected to such humiliation, trauma and degradation. The only reason I can find is that the treatment was intended to induce fear, anguish and inferiority directed at humiliating and debasing him.

[25] There can be no dispute that hijacking of someone's car is a serious offence. In *S v Somyalo* 1996 (1) SACR 566 (CK) in dealing with this issue had the following to say:

> "The crime of armed hijacking of motor vehicles has spread through our society

> like malignant cancer. Although the courts cannot hope to eradicate this crime, it is their duty not only to punish such offenders severely, but also to send out a clear message to other would-be hijackers that they can expect very little, if any, mercy from the courts. This offence must rank near the top of the ladder of serious crimes. What makes it so heinous is that any resistance often leads to the fatal shooting of the totally innocent victim, as is borne out by the numerous media reports of such fatalities. It is indeed a sorry state of affairs that law-abiding citizens no longer feel safe when using their motor vehicles, and I have no doubt that the public requires the courts to impose robust sentences in cases of this nature. What exacerbates the blameworthiness of the appellant is that he is a policeman of seven years standing. Instead of protecting members of the public, he has persecuted them."

[26] The argument by counsel for the appellant that the complainant was not injured was dealt with by the court in Somyalo as follows:

> "Counsel for the appellant, Mr Bulube, has submitted that the fact that no one was injured in the hijacking is a mitigating factor, we do not, with respect, agree with this submission, and in our opinion, it was simply fortuitous that no one was injured. If Stuurman had resisted he would in all probability have been shot. The only mitigating factor in our opinion is that the appellant has no previous convictions."

[27] The same view was expressed in the unpublished judgment of *Loti Makhele and Another* case number A42/2015 where the court said:

> "[24] In relation to the contention that the complainant did not suffer any injury, the appellant's counsel conceded that he however in all probabilities suffered psychological trauma. In any case, the fact that the complainant suffered no physical injury in the process is irrelevant in the present matter as what is important is that the method used by the appellant and his co- perpetrator was potentially injurious to the complainant's life and limp."

[28] In *Ncube and Others v S* 2011 (2) SACR 471 (GSJ) Lamonmt J in dealing with the same issue of the complainant not being injured during the robbery said:

> "While no shots were fired there was the potential for shots to have been fired. These shots would have been fired with a view to injuring people in return for the opportunity to obtain money."

[29] The other point raised on behalf of the appellant was that the period he spent awaiting trial need to be taken into account when considering the sentence.

[30] It is now accepted that the period that an accused person spent awaiting trial is a factor to be taken into account when imposing a sentence. It is no longer regarded as a 'mathematical calculation' that requires it to be deducted from the period of the sentence. It was in this respect stated in *S v Radebe,* 2013 (2) SACR 165 (SCA) at [14] by the SCA that the period spent detention whilst awaiting trial is a factor to be taken into account when determining an effective sentence. In this respect the SCA stated the approach to adopt as follows:

> "[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the 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. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the 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."[3]

[31] As concerning the calculation of the weight to be given to the period spent by an accused awaiting trial the court in *Radebe* held that a mechanical approach should be avoided but that rather the circumstances of the individual accused must be used in determining the extent to which the sentence should be reduced by the period of detention whilst awaiting trial.[4]

[32] In my view, regard being had to the weapon used in the hijacking and the potential to cause serious and or fatal harm with it to the complaint, and the impact that the offence has on the society, the period of the detention in the present case has very little weight. The failure to take responsibility for his conduct takes away any sympathy that the court may have had for the appellant regarding the period of the detention whilst awaiting trial.

[33] Having regard to the above discussion, I make the following findings:

i. The silence of the charge sheet concerning minimum sentence and the failure by the trial court to forewarn the appellant about reliance on the provisions of s 51 (2) of the CPA at the beginning of the trial constitutes substantial and compelling circumstances.
ii. The period of detention of the appellant whilst awaiting trial does not serve as

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[3] 'The previous approach which seems to have been informed by the Canadian approach was based on 'rule of thumb' that imprisonment while awaiting trial is the equivalent of a sentence of twice that length." This approach was rejected Goldstein J in *S v Vilakazi* 2000 (1) SACR 140 (W). In that case, the court held that: 'In this regard, I do not overlook the *dictum* of Schutz J (as he then was) in *S v Stephen* and Another
[1994 (2) SACR 163 (W)]. I am not aware of this *dictum* having been universally followed in our courts. It is also not clear to what extent the learned Judge applied the Canadian rule. I think too with respect that it is unsafe to rely on Canadian authority which may well be grounded in the special circumstances of that country. (The report of *Gravino* quoted in *Stephen*'s judgment is not that of a reasoned judgment, but in a few lines records the facts of the case and a comment of Montgomery J that "it is a recognised 'rule of thumb' that imprisonment while awaiting trial is the equivalent of a sentence of twice that length". No reasons are given for the rule.) Imprisonment in our country, whether awaiting trial or after sentence, constitutes, as no doubt it always has done here, a far-reaching and all-encompassing deprivation of liberty and subjects the prisoner in many if not all cases to boredom, indignity, loneliness, danger, lack of privacy and quite profound suffering and loss... I would be loathe in the absence of clear evidence to decide that the miseries of the awaiting-trial period are more oppressive than those of the post-sentence ones.'

[4] See paragraph [13] *Radebe*'s judgment supra

substantial and compelling circumstances.

iii. The seriousness of offence, public interest, the failure of the appellant to take responsibility for his conduct and the deprivation of the complaint of his constitutional rights weighs heavily weighs in favour of imposing a prison sentence against the appellant

iv. A fair and just sentence for the appellant has to be imprisonment.

v. The sentence to be imposed is that which less than the prescribed minimum.

Order

[34] In the circumstances the following order is made:

1. The appeal against the sentence imposed on the appellant by the court a quo is upheld.

2. The order of the trial court is set aside and the following order relating to the sentence of the appellant, Mr Mzwakhe Moagi, is made:

i. For count 1, relating to robbery with aggravating circumstances, the appellant is sentenced to 14 years imprisonment.

ii. For count 2, relating to kidnapping of the complainant, the appellant is sentenced to 5 years imprisonment.

iii. For count 3, relating to possession of a firearm, the appellant is sentenced to 3 years imprisonment.

iv. The appellant will effectively serve 12 years imprisonment.

3. The sentence is antedated to 14 October 2014, the date on which the trial court imposed its sentence.

4. The appellant is in terms of s 103 (1) of the Firearm Control Act 60 of 2000, declared to be unfit to possess a firearm.

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E Molahleni

Acting Judge of the High Court, Pretoria

I agree and it is so ordered

A J Senyatsi
Acting Judge of the High Court, Pretoria

Appearances

For the Appellant:	MR MB KGAGARA
Instructed by:	
For the Respondent:	ADV K VAN RENSBURG