



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

CASE NO: A207/2018

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED

19/9/2019 *Deuker Le*

DATE

SIGNATURE

In the matter between:

**THABO WEBSTER NDLOVU**

**APPELLANT**

**v**

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**NEUKIRCHER J**

1. The appellant was charged on 8 separate counts including rape, robbery with aggravating circumstances and housebreaking with the intent to rob, in the Nigel Regional Court. All these offences were allegedly committed between January and December 2013.
2. Leave to appeal was granted, on petition to this Court, in respect of the sentences only on Counts 7, 8 and 9 and therefore that is the sole issue before this Court.

### **The charges and sentence**

3. The charge on count 7 was for robbery with aggravating circumstances and the appellant was sentenced to 15 years' imprisonment.
4. The charge on Count 8 was for housebreaking with the intent to rob and appellant was sentenced to 5 years' imprisonment.
5. The charge on Count 9 was for robbery with aggravating circumstances for which the appellant was sentenced to 15 years' imprisonment.
6. The appellant plead not guilty to all the counts and elected not to give a plea explanation. He was represented.

## The evidence

### 7. Count 7

Alima Hanifa testified:

- 7.1 she and her husband owned a particular shop in Devon. It was +- 21h00 and the shop was closed but she was still serving customers through the locked security gates;
- 7.2 appellant was with accused 1 in order whom she knew from prior business with him at the shop and so she opened the security door slightly because she knew and trusted Accused 1 to hand him the mealie meal he bought. This is when appellant opened his jacket and showed her his gun;
- 7.3 appellant then told her to go back into the shop;
- 7.4 she could see a third person outside but it was too dark to identify him;
- 7.5 they took +- R4 300 from the till, 10 cell phones, the contents of her handbag and left;
- 7.6 everything had a value of more than R11 000.

8. Mrs Hanifa was able to properly identify the appellant and she also could identify his blue two - piece overall jacket.

#### Count 8 and 9

9. Mrs Mokanza and her husband were at home when there was a knock at the door by someone who identified himself as "Thabo". Her husband opened the door and four people entered the home, said they "are about to start with the job" and pointed a firearm at them. They pushed them into the bedroom and made them lie<sup>1</sup> on the bed and tied them both up and proceeded to rob them. After they were done, one of the robbers partially untied her and they left. She then untied herself and her husband. Mrs Mokanza pointed out Accused 1 in the identity parade and in court. Her husband identified the appellant in the identity parade and at court.

#### The appellant

10. He gave evidence. His version is that the reason he was pointed out in the identity parade is because the 3 witnesses had seen him in Devon prior to the identity parade and he denied any knowledge of the events.
11. The Magistrate rejected the appellant's version of Counts 7, 8 and 9 as false and convicted him on the 3 charges.

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<sup>1</sup> Mr Mokanza said he was made to lie on the floor

### Sentence

12. The appellant's circumstances were placed on record by his attorney: he was 23 years old, unmarried and the father of a 2 year old little boy. His mother is 64 years old and he maintains both his son and his mother. Prior to his arrest he was a self-employed brick-layer. He had previous convictions but no pending cases.
13. All of these circumstances were taken into account when the Court imposed sentence. The Court also took into account the fact that appellant had been in custody since 25 February 2013 (i.e. 1 year 7 months) as well the elements of mercy and reform.
14. The court then took into account the interests of the community which appellant and his 2 co-accused had plagued in a spate of robberies and rapes and found

*"that both of you are in dire need to be taught new and civilised values, like respect for your fellow person's right to possess property, and bodily integrity. This Court is of the opinion that you can only be taught these new values if you are removed for a considerable time out of the community and be placed in prison and that you will hopefully after the prison authorities have considered you appropriate to be released on parole emerge a rehabilitated person and it would serve as a deterrent person and will bring home to you the seriousness of the offences you have committed".*

### Appellant's argument

15. Appellant argues that the combined term of 35 years' imprisonment in respect of Counts 7, 8 and 9 is shockingly harsh and inappropriate. It is argued that in light of the comparative case law, the Court misdirected itself by overemphasizing the seriousness of the offence, the effect it had on the complainants and the interests of society. He argues that the Court failed to take into account the appellant's prospects of rehabilitation.
16. He also argues that the aggravating factors taken into consideration by the Magistrate were not presented to the Court by evidence.
17. These aggravating circumstances were stated as follows by the Magistrate:

*"what makes this so more serious is that you know these people, these two business owner, you were a previous customer, but either you are so brazen and arrogant that you do not even attempt to conceal your facial features...because you have left the area now you terrorize the area for robberies and think, ah, the police is not going to catch me.*

*Then accused 1 and accused 2, you are warned, you go take a business to rob a serious lot of money, this is a pre-planned offence. The business owners sometimes are, or most of the time indeed supply a service to the community, they have to open their doors to all possible customers and then you abuse that business concept because now the doors are open there is*

*an opportunity for robbery and the community must be protected against this type of serious crimes (sic)."*

18. I cannot agree that these facts were not placed before the Court by the complainants in each of the charges – they were. Whilst these words were not verbatim stated by the witnesses called for the State, the facts are the logical conclusion (and summary) of the conspectus of the evidence presented.
19. In terms of Part II of Schedule 2 of the Criminal Law Amendment Act, robbery with aggravating circumstances carries a minimum sentence of 15 years' imprisonment in respect of a first offender and 20 years' imprisonment in respect of a second offender. Thus it is clear that the sentences in respect of Counts 7 and 9, the minimum sentence applies as no exceptional circumstances were found.
20. In S v Khumalo<sup>2</sup> & Others the Court stated:

*"...the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. As far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length."*

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<sup>2</sup> 1984 (3) SA 327 (A) at 331; S v Skenjana 1985 (3) SA 51 (A) at 55 C – D Nicholson JA stated "...it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongoers "must not be visited with punishment to the point of being broken." (per Holmes JA in S v Sparks and Another 1972 (3) SA 396 (A) at 410G)." S v Mudau 2012 JDR 2319 (SCA)

21. As stated in S v Swanepoel<sup>3</sup> the main purpose of punishment is “*deterrent, preventative, reformative and retributive.*”
22. It is clear that the Magistrate took all the elements into account when imposing his sentence. He also took into account that appellant had been incarcerated since his arrest and stated “(t)he Court is not going to order that any sentence (sic) run concurrently.”
23. The question is whether any material misdirection occurred and whether the sentences are harsh and disproportionate? I am of the view that they were not: appellant and his 2 co-accused went on a crime spree between January and December 2013 which included robbery, rape and housebreaking with the intent to rob. All-in-all nine charges were filed and appellant identified and convicted on three.
24. The charges are serious, the harm and threat to the community even more so and there are no exigent circumstances warranting the imposition of a lesser sentence.
25. Furthermore, a sentence of 5 years on Count 2 is lenient given the element of the threat of violence in respect of charge 2.
26. I am, however, of the view that the court misdirected itself in not ordering that sentence 2 and 3 were to run concurrently in respect of count 1 and that the time spent incarcerated whilst awaiting trial not be taken into account when considerations of parole arise.

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<sup>3</sup> 1945 AD 444 at 455



27. It is thus for this reason that the order made in the Court *a quo* will be amended to read as set out below.

**Order**

28. Thus I order the following:

1) The sentence imposed by the Court *a quo* is amended as follows:

1.1 the appeal in respect of sentence on Count 7, 8 and 9 is dismissed in part and upheld in part;

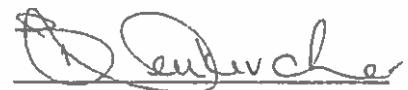
1.2 In respect of Count 7 the appellant is sentenced to 15 years' imprisonment;

1.3 in respect of Count 8 the appellant is sentenced to 5 years' imprisonment

1.4 in respect Count 9 the appellant is sentenced to 15 years' imprisonment;

1.5 the sentences imposed in respect of Counts 8 and 9 are to run concurrently with that imposed in respect of Count 7;

1.6 the time spent in prison awaiting trial is to be taken into account for purposes of consideration of parole.

A handwritten signature in black ink, appearing to read 'Neukircher', written over a horizontal line.

**NEUKIRCHER J**  
**JUDGE OF THE HIGH COURT**

SENYATSI AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for appellant:	Mr Botha Legal aid South Africa, Pretoria
Counsel for respondent:	Mr Van As National Director of Public Prosecutions, Johannesburg
Date of hearing:	9 September 2019
Date of judgment:	12 September 2019