REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A301/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

21 June 2021 .....

DATE MOKOSE SNI

In the matter between:

HENDRIK MASEKOANE Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who was represented in the court *a quo*, was charged in the Regional Court sitting at Pretoria North with eight counts of robbery with aggravating circumstances, one count of

possession of an unlicensed firearm and one count of possession of ammunition in contravention of Section 90 of the Firearms Control Act of 2000.

[2] The appellant had initially pleaded not guilty to all the charges and the State proceeded to lead evidence. However, several months into the evidence, the appellant made certain admissions in terms of Section 220 of the Criminal Procedure Act 1977 ("the CPA") in respect of all the elements of the offences. The formal admissions were accepted by the State who handed in certain documents including a ballistic report pertaining to count 9 as part of the record.

[3] The appellant was convicted on the ten counts as charged and was sentenced as follows:

(i) Counts 1 to 8: 15 years' imprisonment on each count;

(ii) Count 9: 5 years' imprisonment;

(iii) Count 10: 1 year's imprisonment.

[4] The Magistrate ordered that the sentences in respect of counts 1 to 6 will be served concurrently and that those pertaining to counts 7 and 8 will also be served concurrently in terms of Section 280(2) of the CPA. The sentences pertaining to counts 9 and 10 were also ordered to run concurrently. An effective term of 35 years was imposed on the appellant.

[5] The Magistrate further ordered that in terms of Section 276B of the CPA, a non-parole period of 23 years and 3 months was fixed, that being two-thirds of the effective sentence. The appellant was also declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act 2000.

[6] The appellant sought leave from the Magistrate to appeal his sentences and in particular, the order in terms of Section 276B of the CPA. The application was dismissed. On petition, leave to appeal against sentence was granted.

[7] The appellant submitted that the court *a quo* erred in imposing an effective sentence of 35 years' imprisonment despite the fact that it had ordered that certain sentences are to run concurrently. Furthermore, the appellant submitted that the court erred in not taking into account his personal circumstances and had over emphasised the aggravating circumstances by attaching too much weight to the severity of the offences. Furthermore, the appellant was of the view that the Magistrate failed to take into consideration the fact that the appellant was remorseful which had been seen in his admission to the offences in terms of Section 220 CPA. Accordingly, he was of the view that the sentences imposed were shockingly harsh and induced a sense of shock.

[8] Counsel for the appellant conceded that the court *a quo* was correct in finding that no substantial and compelling circumstances existed to enable the court to deviate from the minimum sentences imposed in respect of counts 1 to 8. He also conceded that the Magistrates' court was correct in its finding that with regards to count 9, the prescribed minimum sentence of 15 years would be disproportionate to the crime and imposed a lesser sentence, being 5 years' imprisonment.

[9] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the court of first instance if such discretion had not been judicially exercised. Marais AJ in the matter of **S v Malgas**[1] observed that:

[1] [2001] 3 All SA 220 (SCA) para 12

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of the first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appropriate court may yet be justified in interfering with the sentence imposed by the court. It may do so only where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate court is large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference I so substantial that it attracts epithets of the kind I have mentioned."

[10] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.

S v Zinn 1969 (2) SA 537 (A)

[11] The approach was followed by the court in the matter of **S v Rabie**[2] where Holmes JA said:

"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."

[12] A cursory reading of the record indicates that the Magistrate had taken note of the appellant's mitigating circumstances which were contained in the pre-sentencing report. The Magistrate noted that in 2011 the appellant had previously been convicted of house breaking and was given a suspended sentence. In 2013 the appellant was again convicted of common robbery and sentenced to a suspended sentence. The Magistrate noted further that the appellant mentioned in the pre-sentencing report that he had committed many previous offences but was never arrested. He further noted that the appellant had dropped out of school in Grade 9 and never had any formal employment. He was unmarried and had no children. These were all mitigating circumstances.

[13] I am satisfied that the Magistrate considered all the victim impact reports as well as the pre-sentencing report of the appellant in exercising his judicial discretion.

[14] Furthermore, it was submitted on behalf of the appellant that the court *a quo* had failed to take into account that he had subsequently pleaded guilty and as such showed remorse. The appellant submits that these are facts that the Magistrate should have taken into account in sentencing.

[15] Poonan JA in the matter of **S v Matyityi**[3] said:

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[2] 1975 (4) SA 855 at 862 G - H

[3] 2011 (1) SA 40 (SCA) at para 19

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not merely feeling sorry for himself at having been caught is a factual question. It is the surrounding actions of the accused rather than what he says in court that one should look at. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined."

[16] No evidence was led by the appellant as proof of the genuineness of the contrition and sincerity of the appellant. It was merely stated that that he was remorseful in the pre-sentencing report. Accordingly, I am satisfied that the Magistrate did not err in sentencing the appellant and that the admissions which were made during the course of the trial were not intended to shorten the course of the trial but made because the evidence which had already been given stacked heavily against him. Furthermore, I am of the view that the sentence imposed does not induce a sense of shock and is not disproportionate to the offences.

[17] The further issue to be decided is whether the Magistrate in the court *a quo* misdirected himself by ordering a non-parole period before the appellant can be considered for parole.

[18] The appellant further contends that although the court *a quo* afforded his legal representative an opportunity to address the court on the intention to order a non-parole period, such an opportunity

was not afforded to the State to indicate whether the appellant was deserving of the imposition of a non-parole period.

[19] Section 276B (1) of the CPA reads as follows:

"276 B Fixing of Non-parole period

(1)(a) If a court sentences a person convicted of an offence to imprisonment of a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole period, and may not exceed two-thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

[20] Section 276B does not confer an automatic right to parole but places a prisoner in a position to be considered for parole by a Parole Board. A court imposing a sentence which provides that a prisoner is not entitled to parole is usurping or encroaching upon the Executive function, to wit, Correctional Services Department, the latter being an entity vested with the right by the legislature to entertain the dynamics of parole.[4]

[21] The court in the matter of **Jimmale and Another v S**[5] held the following:

"Precedent makes it clear that a section 276B non-parole order should not be resorted to lightly. Courts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant

[4] Article by N Mgedeza and D Masuku De Rebus dd 29 August 2016: When is it appropriate for the sentencing court to interfere with parole?
[5] 2016 (2) SACR 691 (CC) at para 20

regulations, to make parole assessments and decisions. Courts should impose a non-parole period when circumstances specifically relevant to parole exist, in addition to any aggravating factors pertaining to the commission of the crime for which there is evidential basis. Additionally, a trial Court should invite and hear oral argument on the specific question before the imposition of a non-parole period."

[22] The appellant submits that although the court *a quo* afforded the legal representative an opportunity to address it on the imposition of a non-parole period and the legal representative chose not to address the court on this aspect without consulting the appellant, that does not absolve the court itself from properly investigating or ordering further evidence to be led before making such a decision.

[23] A cursory ready of the record indicates that the Magistrate in the court *a quo* misdirected herself in failing to afford both parties an opportunity to address the court in respect of the imposition of a non-parole period and properly investigate the exceptional circumstances which exist to enable such a decision to be made. Accordingly, I uphold the appeal in respect of the imposition of the non-parole period.

[24] In the circumstances, I propose that the appeal against sentence be limited to the order relating to the imposition of a non-parole. The entire sentence of the court a quo is substituted as follows:

(i) Count 1 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(ii) Count 2 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(iii) Count 3 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(iv) Count 4 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(v) Count 5 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(vi) Count 6 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(vii) Count 7 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(viii) Count 8 - the appellant is sentenced to 15 years' imprisonment in terms of Section 51(2)(A)(1) of Act 105 of 1997;

(ix) Count 9 - the appellant is sentenced to a period of 5 years' imprisonment; and

(x) Count 10 – the appellant is sentenced to a period of 1 years' imprisonment.

(xi) It is ordered, in terms of Section 280(2) of Act 51 of 1977, that the sentences imposed in counts 1 to 6 be grouped together and will be served concurrently;

(xii) It is ordered, in terms of Section 280(2) of Act 51 of 1977, that the sentences imposed in counts 7 and 8 be grouped together and will be served concurrently;

(xiii) It is ordered, in terms of Section 280(2) of Act 51 of 1977, that the sentences imposed in counts 9 and 10 be grouped together and will be served concurrently;

(xiv) The appellant will serve an effective period of 35 years' imprisonment; and

(xv) The appellant is deemed unfit and accordingly declared unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000.

MOKOSE J

Judge of the High Court of
South Africa, Gauteng
Division, PRETORIA

I agree and is so ordered

MEERSINGH AJ
Acting Judge of the High Court of
South Africa, Gauteng Division,
PRETORIA

For the Appellant:

Mr Emile Viviers instructed by

Emle Viviers Attorneys

For the State:

AdvJP Krause instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 27 May 2021

Date of judgement: 21 June 2021