IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR561/2015**

In the matter between:

THEMBELIHLE DALINGXOLO **First Appellant**

WELILE BOLILITSHE **Second Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered: 03 July 2018

Mbatha J (Masipa J concurring)

[1] The first appellant, Thembelihle Dalingxolo, was convicted by the Regional Court, Durban on two counts of robbery with aggravating circumstances, one count of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. The first appellant was sentenced to fifteen years' imprisonment in respect of each count of robbery with aggravating circumstances, five years' imprisonment in respect of the attempted murder count, three years' imprisonment in respect of unlawful possession of a firearm and one years' imprisonment in respect of unlawful possession of ammunition. In terms of s 280 of the Criminal Procedure Act 51 of 1977 it was ordered that the sentences on attempted murder, unlawful possession of a firearm, unlawful possession of ammunition and five years on the one count of robbery should run concurrently with

count 1, being the armed robbery count. He was effectively sentenced to twenty five years' imprisonment.

[2] The second appellant, Welile Bolilitshe was convicted of one count of robbery with aggravating circumstances, one count of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. In respect of the count of armed robbery with aggravating circumstances he was sentenced to fifteen years' imprisonment, five years' imprisonment in respect of the attempted murder count, three years' imprisonment in respect of unlawful possession of a firearm and one years' imprisonment in respect of unlawful possession of ammunition. The sentences on unlawful possession of ammunition and firearm were ordered to run concurrently with the sentence on robbery with aggravating circumstances. The second appellant was effectively sentenced to 20 years' imprisonment.

[3] With leave of the court a quo the first appellant appeals against both conviction and sentence. The second appellant's appeal is against sentence only. The provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 applied to the armed robbery and attempted murder counts.

[4] The appeal before us was delayed due to the orders of this court on 14 November 2016 and 6 June 2017, where the court ordered the reconstruction of the record.. Counsel for the appellants and the State have confirmed that the record is adequate for a proper consideration of the appeal.[1] We are also of the view that the adjudication of the appeal will not prejudice the appellants before this court,[2] as the record has been extensively reconstructed. Having overcome this hurdle, I now deal with the merits of the appeal before us.

[5] The incident giving rise to the convictions and sentences of the appellants arose from their arrest after the commission of the robbery on 13 November 2009 at Prospecton, Isipingo, in KwaZulu-Natal. The same arrest led to the conviction of the first appellant in respect of an earlier robbery incident which occurred on 10 November 2009 in KwaDabeka, Durban.

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[1] *S v Chabedi* 2005 (1) SA 415 (SCA).
[2] *Machaba & another v S* 2016 (1) SACR 1 (SCA).

[6] It was initially contended in the heads of argument by counsel for the appellants that the trial court misdirected itself in accepting that the State had proved the case against the first appellant beyond a reasonable doubt. However, at the hearing of the appeal counsel for the appellants conceded that he could not take the matter any further as the conviction was correct. Counsel for the State argued in support of the correctness of the trial court's findings in respect of the convictions of the first appellant and accepted the concession made by counsel for the first appellant. Both counsel argued that the trial court had however misdirected itself in not finding substantial and compelling circumstances when sentencing the appellants. They submitted that there was room for the court to ameliorate the sentences imposed upon the appellants.

[7] For the sake of good order, I will briefly summarise the events that led to the conviction of the first appellant in respect of the incident on 10 November 2009. On 10 November 2009, security officers Ms Gladness Vuyisile Madlala (Madlala) and Mr Mfanafikile Goodman Ndlovu (Ndlovu) were on duty at KwaDabeka Place of Safety in Durban, as a consequence of their employment by Fidelity Security Services. Late that evening Ndlovu left the guardroom to do a routine patrol of the premises. Whilst conducting the patrol, four males with covered faces emerged from the palm trees within the premises. They pointed firearms and knives at him and ordered him to move to the guardroom. As they entered the guardroom, the assailants ordered both Ndlovu and Madlala to keep quiet. The assailants demanded a firearm from Ndlovu, which he could not produce. He was then assaulted and his body searched, but no firearm was found on him. Madlala was then ordered to proceed to the room where the safe was kept to search for the firearm. Whilst en route to that room, she was searched and the firearm was found on her body. The assailants did not proceed to the room with the safe. Instead, they tied up Madlala and left her in the toilet, her face covered with a jacket. After a while Madlala managed to untie herself and proceeded to the main room where Ndlovu was still lying down and she untied him. Thereafter they called their supervisor for assistance and the police were notified.

[8] Ndlovu was robbed of his mobile phone and transport fare. Madlala was robbed of her service firearm, loaded with five rounds of ammunition. It was described as a revolver .38 special, serial number AA 042710 registered in the name of Fidelity Security Services.

[9] It is common cause that the assailants were not identified as they had covered their faces and switched off the electric light as soon as they entered the guardroom. Madlala alluded a few days later that she recalled the voice of one of the assailants being that of the first appellant. The court a quo correctly rejected that voice identification by Madlala since she could not give any specific peculiarity to it which could positively identify it as being that of the first appellant.

[10] The second robbery occurred two days later on 13 November 2009 at the Home Affairs office, Prospecton, Isipingo. In this incident too, security guards employed by Fidelity Security Services were robbed. In respect of this robbery the State led the evidence of Khulekani Maphumulo (Maphumulo), who was on duty with one Bhekinkosi (Bheki). His evidence was that at about 01h00, having completed a routine patrol, a male person dressed in a black jacket, black pants and a black balaclava type hat entered the guardroom. He pointed a firearm at them and ordered them to lie down. Shortly thereafter another male person wearing three quarter pants and a blue top came in. This man's face was not covered. These men assaulted them. As a result of the attack Maphumulo was robbed of his service firearm, a .38 revolver, serial number AA 706977 registered in the name of Fidelity Security Services. Both men were also robbed of their cellphones, money and personal possessions.

[11] The assailants thereafter ordered the guards to get up and led them towards the outside toilet. As they proceeded towards the toilet, Bheki ran off in an attempt to escape. The second appellant fired a shot at him but missed. This caused Bheki stop running and comply with the assailants' instructions. The assailants finally left, leaving the two guards in the outside toilet. The robbery was reported to their supervisor and the police. The police immediately alerted other officers to be on the lookout for suspects as described by Bheki and Maphumulo. Bheki never returned to work following the robbery, hence Maphumulo's evidence in the trial was that of a single witness.

[12] Maphumulo's evidence was that the police apprehended the second appellant, who was found in possession of his firearm with serial number AA 706977, barely an hour after the incident was reported to them. Maphumulo positively

identified the second appellant as the assailant as his face had not been covered during the robbery and the guardroom had been illuminated by an electric light. His evidence was that the unmasked assailant was identifiable by a scar on his face. The State also led the evidence of the arresting officers of the second appellant.

[13] The first appellant was arrested shortly after the second appellant was arrested. According to Constable Naidoo and Warrant Officer Mvune they arrested a man fitting the description given by the victims at about 03h00 in the CBD in Isipingo near the taxi rank. The man that they arrested was walking, carrying a black bag and wearing a black jacket and black pants. When they stopped their motor vehicle next to him, the man tried to run away but was apprehended by Warrant Officer Mvune. Upon searching him, a firearm, a .38 revolver, serial number AA 042710, was found on his person and five rounds of ammunition were found in his bag, which also contained a balaclava. The person arrested by the two officers was the first appellant.

[14] It is not in dispute that the robberies took place, save that the first appellant denied that he was one of the perpetrators in respect of both incidents. The trial court's conviction of the first appellant was based on the circumstantial evidence before it. The trial court accepted the evidence of the State witnesses as to how the events unfolded and rejected the appellants' denial of involvement in the commission of the crimes. The trial court gave adequate reasons for rejecting the evidence of the first appellant.

[15] The State's case is based on circumstantial evidence. Therefore the all enduring principle of logic as stated in *R v Blom*[3] should be applied. The first appellant was found in possession of a firearm taken from the robbery on 10 November 2009. He was arrested within the vicinity of the second robbery on 13 November 2009, where a firearm was used to commit a similar offence. He fit the exact description of one of the assailants in the second robbery as given by the complainants and was found in possession of a firearm, ammunition and a balaclava. He was arrested immediately after the arrest of the second appellant, who was also found in possession of the firearm that was stolen from the complainants

[3] *R v Blom* 1939 AD 188.

the very same morning of 13 November 2009. They were arrested separately by different officers, within a very short space of time.

[16] The trial court found that the firearm found in the first appellant's possession linked him directly to the first robbery. The question before the court was whether the possession was so recent as to employ the doctrine of recent possession. If possession is proved the rest will depend on the nature of the article in question and whether it could easily be passed from hand to hand. It must also be borne in mind that even where possession is relatively recent, it may not necessarily be inferred that the accused is the thief. The basis for the first appellant's conviction in respect of the second robbery, was that he was arrested in the early hours of the morning not very far from the place of the second robbery, walking and dressed as described by the witness, and was found to be in possession of a firearm, ammunition and balaclava.

[17] The question which this court has to consider is whether the finding of the firearm stolen on 10 November 2009 links the first appellant directly to the commission of that robbery irrespective of the falsity of his defence, in the absence of any other corroborative evidence. In *S v Ntsele*[4] the court held that the onus rests upon the State in a criminal matter to prove the guilt of the accused beyond a reasonable doubt – not beyond all shadow of doubt. It held further that the court was not required to consider every fragment of evidence individually. It was the cumulative impression, which all the pieces of evidence made collectively that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt. It was therefore important to the trial court not to focus on one component of evidence and viewing it in isolation from other evidence.

[18] The issue of recent possession is a factual question. In *S v Mavinini,*[5] possession of a motor vehicle less than 24 hours after the robbery taken together with the accused's conduct was accepted as suggesting his involvement in the robbery. The Supreme Court of Appeal in *S v Mothwa*[6] affirmed the principles in *S v Skweyiya*[7] in that the court must be satisfied that:

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[4] *S v Ntsele* 1998 (2) SACR 178 (SCA).
[5] *S v Mavinini* 2009 (1) SACR 523 (SCA).
[6] *S v Mothwa* 2016 (2) SACR 489 (SCA) para 8.
[7] *S v Skweyiya* 1984 (4) SA 712 (A).

'*(a)* the accused was found in possession of the property; and *(b)* the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between possession and the actual offence, the rareness of the property, and the readiness with which the property can or is likely to pass to another person.' (Footnote omitted)

[19] In *Zwane & another v The State*,[8] quoted with approval in *Mothwa* above, the court stated:

'The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see *S v Parrow* 1973 (1) SA 603 (A) at 604B-E; *S v Skweyiya* [1984] ZASCA 96;1984 (4) SA 712 (A) at 715 C-D; *S v Mavinini* 2009 (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see *Skweyiya* at 715E). In my view the items found in the trunk of the car had little or no value to the robbers and are of the type that can be disposed of quite easily. These items were found in the trunk the very next evening after the robbery. It is in my view a sufficiently short time lapse to justify invoking the doctrine of recently stolen property. But that is only one side of the case. The other side is the defence evidence of the first appellant and Ms Mathlaba, set out above.'

[20] In general, objects such as firearms and cellphones exchange hands very quickly. In the present case, the first appellant was found in possession of the firearm two days after the first robbery; he was found in possession of a firearm belonging to his employer Fidelity Security Guards, not just any firearm; he was not on duty and had no reason to be in possession of any firearm from the employer; co-incidentally the posts that were robbed of the firearms were posts manned by his employer Fidelity Security Services; he was arrested within two hours of the commission of the second robbery wearing the apparel as described by his victims and the balaclava used by one of the men who robbed the guards was found in his possession; the second appellant whom he claimed he was travelling with that morning to Umlazi was also found in possession of the stolen firearm from Fidelity Security Services, stolen on the very same morning of 13 November 2009; he ran

[8] *Zwane & another v The State* (426/13) [2013] ZASCA 165 (27 November 2013) para 11.

away when police officers stopped near him; they failed to explain how both of them, travelling together were in possession of the firearms belonging to the first appellant's employer stolen, which had been stolen in two separate robberies. The firearms still had their original serial numbers which proved that Fidelity Security Services was the owner.

[21] It is common cause that the cellphones and other items stolen from the victims were not recovered from the first appellant and his co-perpetrators. This is an indication that the main purpose of the robbery was to rob the employees of Fidelity Security Services of their firearms. The same modus operandi was applied in both robberies. The assailants demanded a firearm in each robbery, which is an indication that they knew how many firearms are issued per station. Such objective facts pointed only to the first appellant.

[22] A further question is whether the identification by clothing was sufficient in the circumstances to link the first appellant to the second robbery. His arrest occurred in the early hours of the morning when there were few people on the streets, unlike in broad daylight where confusion could have easily manifested due to the number of people present on the road. The finding of the firearm on his person, as well as the live rounds of ammunition and the balaclava shortly after the robbery of 13 November 2009 was sufficient corroboration as to the identity of one of the robbers.

[23] As to the conviction in respect of attempted murder, the evidence of Maphumulo is apposite here. The trial court convicted the first appellant on the basis of common purpose as it was the second appellant who fired a shot at Bheki. The facts of the case show that the mandate had been completed. The complainants were taken to the outside toilet after the robbery had been completed. The shooting occurred unexpectedly when Bheki bolted. The question is whether the actions of the second appellant were foreseeable by the first appellant when he fired a shot at Bheki and missed? I do not agree with the findings of the trial court in this regard. As conceded by counsel for the State the second appellant acted on his own. In *Toya-Lee van Wyk v The State*[9] the SCA stated at para 16 that 'care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person'. The question is therefore whether the agreement to rob the guards by

[9] *Toya-Lee van Wyk v The State* (575/11) [2012] ZASCA 47 (28 March 2013).

force, extended to any act committed after the completion of the mandate? The first appellant should have been acquitted of the attempted murder count. His mere presence did not attract liability at that stage of the attempted murder of Bheki.

[24] The court correctly found that the first appellant's denial of being found in possession of the incriminating evidence to be false. It also found that the first appellant's version of being incriminated was false as the firearm had not been recovered before his arrest. The trial court correctly accepted that the appellants were arrested separately from each other as they were arrested by different police officers and at different places, though not far from each other. The first appellant's version that he was in the company of the second appellant at all times was correctly rejected as he failed to explain why two sets of officers assigned to different duties arrested them. The first appellant gave a number of versions, including that he was arrested in the absence of the second appellant who had gone to buy airtime or to speak to certain ladies. His evidence that he and the second appellant were en route to Umlazi in the early hours of the morning was false.

[25] In conclusion I am satisfied that the trial court's approach to the evaluation of evidence was correct. It considered the totality of the evidence and weighed the evidence of the State witnesses as against that of the first appellant. The trial court correctly concluded that the first appellant's version was a fabrication, and false.

Sentence

[26] I will jointly consider the appeals on sentence by the first and second appellants. The appellants' counsel submits that this court is at liberty to ameliorate the sentences as these are sentences that this court would not ordinarily impose for such convictions. Though the crimes committed were serious and prevalent, the sentences imposed were harsh in the light that there were no injuries or fatalities which occurred when these crimes were committed. Furthermore, the appellants spent two years and four months in custody before their conviction and given that they are young and first offenders, they are capable of rehabilitation.

[27] On the other hand the State submits that the robberies in counts 1 and 7 fall within the purview of the minimum sentence legislation and attract the prescribed minimum sentence of fifteen years for first offenders. However, it concedes that the effective sentences of twenty five years' and twenty years' imprisonment respectively, appears to be too harsh in the circumstances, irrespective of the seriousness of the offences, as both of the appellants are first offenders.

[28] It is trite that a court will only interfere with sentence if the trial court misdirected itself in passing sentence. Moreover, a misdirection alone does not suffice for a court of appeal to interfere. A misdirection should be material, as expressed by Trollip JA in *S v Pillay.*[10] In *S v Malgas*[11] the court stated that:

'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 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 doing so, it assesses sentence as if it were a court of 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 appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when 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". . .in the latter situation the appellant court is not at 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 is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[29] I now turn to the judgment on sentence as given by the learned magistrate when he sentenced the appellants. He took into account the following factors: the seriousness of the offences; that the first appellant perpetrated these offences against his employer; that one incident of robbery was not enough for the first appellant who returned with an accomplice, the second appellant to rob his

[10] *S v Pillay* 1977 (4) SA 531 (A) at 535E-H.
[11] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

colleagues; in the execution of the second robbery, there was an attempted murder of a security guard who tried to flee the scene and that the crimes were premeditated. He also took into account the prevalence of such dangerous crimes within the community.

[30] The learned magistrate was apprised of the personal circumstances of the appellants: that they were 25 and 30 years old respectively; that they both have minor children; they were breadwinners; that they were remorseful and capable of being rehabilitated back into the community being that they were first offenders. The learned magistrate did not find that the aforementioned personal circumstances of the appellants amounted to substantial and compelling circumstances.

[31] The views expressed by Nugent JA in *S v Vilakazi*[12] are apposite here in the determination of a sentence falling within the ambit of the prescribed minimum sentence legislation:

'It is plain from the determinative test laid down by *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentenced is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.'

[32] It is also my view that all factors need to be considered to come to an appropriate sentence. The appellants were both first time offenders. This is an indication that there is scope for their rehabilitation though they are not very youthful offenders. Furthermore, they spent two years and four months in custody and expressed their remorse to the court.

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[12] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 18.

[33] Without appearing to overemphasise the personal circumstances of the appellants, I acknowledge that the crimes committed by the appellants were serious and motivated by greed. The gravity of these crimes is that they were committed against the unsuspecting colleagues of the first appellant and his employer. The reckless use of the firearm by the second appellant almost cost the life of one of the colleagues of the first appellant.

[34] There is no doubt that the nature of the offences are serious and that the interests of society need to be protected. The courts must send out a clear message to likeminded offenders, that such crimes will always attract harsh sentences. Be that as it may, courts also treat where appropriate, first offenders with mercy, which encourages rehabilitation of such offenders. Sentences imposed by the courts should not overemphasise the elements of retribution and general deterrence only, but should also consider the elements of personal deterrence and rehabilitation of the offenders.

[35] Though these were premeditated and serious offences, this court is persuaded that there are substantial and compelling circumstances which allow this court to ameliorate the sentences imposed by the trial court.

[36] The sentences of twenty five and twenty years' imprisonment imposed on the appellants are sentences often considered for serious murder convictions and second offenders in convictions of robbery with aggravating circumstances. Such sentences are considered for hardened criminals not first offenders. A long sentence of imprisonment is also considered for repeat offenders in armed robbery convictions, who have already been given an opportunity to rehabilitate themselves. In *R v Mzwakala*[13] and *S v Sibiya*[14] the court held that such term of imprisonment should be imposed only in exceptional circumstances. The person who serves such a lengthy period of time may at the end of serving such a long sentence, be unable to be integrated into the society. This effect negates the principles of personal deterrence and rehabilitation. A long term imprisonment sentence would defeat that very same purpose. A holistic approach would be to show leniency to such offenders, which will encourage rehabilitation.

[13] *R v Mzwakala* 1957 (4) SA 273 (A) at 278E-F.
[14] *S v Sibiya* 1973 (2) SA 51 (A).

[37] Accordingly, I make the following order:

(1) The appeal against conviction and sentence in respect of count 2 (attempted murder) against the first appellant is upheld.

(2) The convictions in respect of counts 1, 3, 4 and 7 are confirmed against the first appellant.

That the sentences imposed by the trial court be set aside and replaced with the following:

(3) '(a) Accused 1 is sentenced in respect of count 1 (robbery with aggravating circumstances) to fifteen (15) years' imprisonment.

(b) Accused 1 is sentenced in respect of count 3 (possession of firearm without a licence) to three (3) years' imprisonment.

(c) Accused 1 is sentenced in respect of count 4 (possession of ammunition without a licence) to one (1) years' imprisonment.

(d) Accused 1 is sentenced in respect of count 7 (robbery with aggravating circumstances) to fifteen (15) years' imprisonment.

(e) The sentences imposed on counts 3, 4 and 7 are to run concurrently with the sentence on count 1.

(4) (a) Accused 2 is sentenced in respect of count 1 (robbery with aggravating circumstances) to fifteen (15) years' imprisonment.

(b) Accused 2 is sentenced in respect of count 2 (attempted murder) to five (5) years' imprisonment.

(c) Accused 2 is sentenced in respect of count 5 (possession of firearm without a licence) to three (3) years' imprisonment.

(d) Accused 2 is sentenced in respect of count 6 (possession of ammunition without a licence) to one (1) years' imprisonment.

(e) The sentences imposed on counts 2, 4 and 6 are to run concurrently with the sentence on count 1.

(f) Accused 1 and 2 are each sentenced to an effective term of fifteen (15) years' imprisonment. The sentences are antedated to 12 March 2012.'

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Mbatha J

Date of hearing	:	22 June 2018
Date delivered	:	03 July 2018

Appearances

For the Appellants	:	Adv P Marimuthu
Instructed by	:	Justice Centre Durban
For the Respondent	:	Adv A.S.H. Walters
Instructed by	:	The Director of Public Prosecutions Durban