NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: CA 197/2004

In the matter between:-

KGWANKGWA JOHANNES MASHIANE Appellant

and

THE STATE Respondent

CRIMINAL APPEAL

GURA J & KGOELE J

DATE OF HEARING: 04 MAY 2012
DATE OF JUDGMENT: 19 JULY 2012

FOR THE APPELLANT: ADV SKIBI
FOR THE RESPONDENT: ADV VAN NIEKERK

JUDGMENT

GURA J

Introduction

[1] The appellant was convicted of three counts of robbery with aggravating circumstances and sentenced to fifteen years imprisonment on each. The Regional Court directed that the sentences on the second and the third count should run concurrently, hence, an effective imprisonment term of thirty years.

His appeal, with leave of this Court, is directed against sentence only.

Factual Background

[2] On 7 May 2003, around 12H00, the complainant in count 1 (Bafana) was driving a taxi, a ford spectrum, conveying six passengers. Little did he know that three of his passengers, who were males, were robbers. Some of his passengers were Andronika and Emily.

[3] Whilst driving, he got a firearm blow on the back part of his head. Undoubtedly, his assailant was on the seat behind him. He stopped the vehicle immediately. At that stage, Bafana was made to lie on the combi floor, just behind the driver's seat. He was searched and dispossessed of a cellphone, driver's licence, bank cards, hat, jersey and an unspecified amount of money. He estimated that it could have been R390-00 cash. In the meantime, the appellant, who was seated next to the passenger's door, jumped onto the driver's seat and set the motor vehicle in motion.

[4] Whilst the appellant was still driving, his two companions robbed the two ladies; Andronika and Emily of R500-00 and R209-00 cash respectively. Andronika's pair of earrings were also taken. The two then threatened to rape the latter but the appellant warned them against the idea.

[5] The appellant then drove to the bush where they were dumped. After the robbers had disappeared with the vehicle, the victims embarked on a long walk to a place where they eventually telephoned the police. Fortunately, the vehicle was recovered through a tracking device.

The trial court's approach

[6] In meting out punishment, the trial court took into account the appellant's age, 27 years, the role played by his companions, the robbery was pre-planned, none of the victims was injured, the appellant and his companions were not remorseful, Emily was an old age pensioner and the stolen money was part of her pension because she had just received it from a pay point. The fact that appellant discouraged his companions from raping Andronika served to mitigate his sentence, concluded the trial court.

Submissions

[7] Mr Skibi, for the appellant, submitted as follows: the trial court over emphasized the seriousness of the offences and hardly dealt with the mitigating or personal profile of the appellant; it overlooked the minor role played by the appellant; "the offences were a result of a single criminal enterprise and closely connected in terms of time, space, and deed . . ."; the court did not make a finding (as it should have done) whether or not there were substantial and compelling factors which militated against the mandatory minimum sentence of fifteen years on each count. Mrs Van Niekerk, for the respondent, whilst maintaining that there were no substantial and compelling factors which called for a lesser sentence, conceded that the effective sentence of thirty years imprisonment induced a sense of shock.

The Law

[8] The duty to impose what it considers to be an appropriate sentence is that of the trial court and a court of appeal should never allow itself to be unaware about this. The trial court has an advantage, which this Court does not enjoy, it was imbued with the atmosphere of the trial. In ***S v Malgas*** 2001 (1) SACR 469 at

478d-h, Marais JA, stated the law in the following significant passage:

> "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'. It must be emphasised that in the latter situation the appellate 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."

[9] The effect of the minimum sentence legislation was recently aptly restated in ***S v Matyityi*** 2011 (1) SACR 40 (SCA) at 53c-g as follows:

> "Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from ***Malgas***, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As ***Malgas*** makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or

> personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

Summary and Conclusion

[10] The appellant is 27 years old, unmarried and has one four year old child. The mother of the child is unemployed. The appellant is a taxi driver with a salary of R450-00 per week and is the sole breadwinner of his unemployed brother and the four year old child. He is a first offender. All the victims were robbed almost at the same place and time. The motor vehicle valued at R80 000-00, was recovered.

[11] When dealing with sentence, the trial court remarked that the appellant might not have foreseen that the two ladies would be robbed. I am unable to understand what the court intended to convey because it had already convicted the appellant of the robbery on the two passengers. The trial court was convinced beyond reasonable doubt, and so am I, that the appellant was guilty on all three counts. The fact that he physically played no role in the robbery of the second and third complainant does not render his conduct anything less reprehensible. Andronika (the third victim) was a pensioner. She is therefore

in the afternoon of her age. Robbers who prey on senior citizens, who are weak and harmless, who are soft targets of crime, should not be treated with velvet gloves.

[12] As the trial court found, correctly in my view, she lost all her earnings in this robbery. To add salt to a sore thumb, she (together with the two victims) had to foot for a considerable distance from the bush to their sanctuary. The greatest insult of all, was when one of the robbers, a young man in his late twenties, inserted his hand in this granny's breast to take her money. That itself violated her privacy.

[13] Violent crime, especially on public transport like a taxi should be discouraged at all costs. Such public transport is predominantly the way of survival of mostly poor and vulnerable people. If they are scarred to use public transport because of the marauding army of robbers, they have no alternative means of transport.

[14] For the purpose of sentence, the trial court took into account in favour of the appellant only one personal factor – his age. Nowhere in the whole judgment does the court mention his personal circumstances. A conclusion is justified therefore that the trial court sacrificed the accused's personal circumstances on the altar of aggravating factors.

[15] When I take into account the cumulative effect of mitigatory factors against the totality of the aggravating features, I cannot find anything which justifies a finding that there are substantial and compelling reasons which can ward off the mandatory minimum sentence of fifteen years. The court is accordingly of the view that the finding by the trial court in this regard was correct. The trial court imposed a total of 45 years imprisonment but it directed that the appellant should serve only 30 years. Whilst one appreciates the attempt by the court to

mitigate the stiffness of this effective sentence, but I am inclined to believe that a sledgehammer was used. In my view, a lesser term of imprisonment would have served the same purpose as the 30 year sentence.

[16] Consequently, the appeal is upheld, the sentence is set aside and substituted with the following:

1. The three counts are taken together for the purpose of sentence:

   "Twenty-two years imprisonment"

2. The sentence is antedated to 15 April 2004.

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SAMKELO GURA
JUDGE OF THE HIGH COURT

I concur

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A. M. KGOELE
JUDGE OF THE HIGH COURT