Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 37/2020

In the matter between:

OFENTSE JUNIOR RADEBE 1st Appellant

THEBEETSILE HERMAN MATENGE 2nd Appellant

and

THE STATE Respondent

CORUM: HENDRICKS DJP et PETERSEN J

DATE OF HEARING : 04 MARCH 2022

DATE OF JUDGMENT : 17 MARCH 2022

FOR THE APPELLANT : ADV. MOKAA

FOR THE RESPONDENT : ADV. B.T CHULU

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00 on 17 MARCH 2022.

ORDER

Consequently the following order is made:

(i) The appeal against sentence by both appellants fail.

(ii) The sentences imposed on both appellants are confirmed.

JUDGMENT

HENDRICKS DJP

[1] The appellants stood trial in the Regional Court on a charge of robbery with aggravating circumstances. They were convicted and sentenced to an effective term of ten (10) years imprisonment each. They appeal the sentence imposed on the basis that it is excessive and totally out of proportion with the crime committed.

[2] Sentence is primarily within the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of that discretion, unless it was exercised capriciously and not judiciously **or** unless the proceedings are vitiated by a gross irregularity. This much is trite.

[3] In **S v Malgas** 2001 SACR 469 (SCA) at page 478d-h the following is stated:

> *"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be, a just and appropriate sentence.* ***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."

[4] The background facts of this matter are as follows from their pleas of guilty.

"In the Regional Court for the Regional Division of North West held at Mmabatho, Case RCB0412015, the matter between the State v Ofentse Radebe. Statement in terms of Section 112 (b) of the Criminal Procedure Act 51 of 1977.

'I, the undersigned, Ofentse Radebe do hereby make a statement under oath and say that I'm a major male person and the accused herein.

The facts set out herein are to the best of my knowledge and belief both true and correct save where the contrary is proven. I wish to make the statement freely and voluntarily without any undue influence and/or coercion.

I make the statement in my sound and sober senses in order to demonstrate my admissions against the charges proffered against me. I submit that I understand the charges and allegations levelled against me by the State and accordingly plead guilty thereto.

I wish to further confirm the correctness of the allegations as appears in the charge sheet.

I confirm that on or about the 12th day of October 2014 at or near Mahikeng in the division of North West I did unlawfully and intentionally assault Chris de Sousa Gomes, and did there and then

and took with force an amount of R64 900 in cash, which money was the property of Mr de Sousa Gomes. Alternatively, which money was at the time of the incident in his lawful possession.

I wish to submit further that in the process of the commission of the offence in question a firearm was used in order to subdue the complainant and motivate him to surrender the money as aforesaid. I submit that at all material times during the commission of this offence I was aware that it constituted a criminal offence punishable by law.

I submit that on the day in question I was in the company of my co-accused, Mr Matenge, in Mahikeng town. We were broke and hungry. My co-accused had a financial problem, an ill mother who needed medical attention immediately.

I submit that during this period I was unemployed, my son was admitted to [indistinct] private hospital His mother's medical aid was about to be exhausted and as a result the hospital was about to [indistinct] to move my son to a public hospital, which I felt that he would not receive the kind of treatment he had been receiving in the private hospital, and as such I needed to raise between R20 - R35 000 in order to secure the hospital bill for my son to be taken care of or to receive the best kind of treatment.

[Indistinct] led to me and co-accused to rob the complainant of the amount [indistinct].

I respect [indistinct] that subsequent to my arrest I [indistinct] rehabilitated and I have stopped committing offences and wish for the court to find [indistinct] in my favour.

I wish to also submit that I am remorseful of my conduct and confirm that I will never act contrary to the law ever again. I wish for the court to grant me a second chance in life'."

Your Worship, this plea is dated 15 January 2020, signed here in Mmabatho.

In respect of Accused 2 I have also prepared a statement, Your Worship, in terms of Section 112 of Act 51 of 1977. It reads as follows:

> *"'I, the undersigned, Thebetsile Herman Matenge do hereby make a statement under oath and say that I'm a major male person and the accused in this matter.*
>
> *The fact set out herein are to the best of my knowledge and belief both true and correct save where the contrary is proven.*
>
> *I make the statement freely and voluntarily in my sound and sober senses, without any coercion or undue influence, in order to demonstrate my admissions to the allegations against me.*
>
> *I wish to submit that I plead guilty to the offence charged with, which allegations I understand to the best of my knowledge and confirm the correctness thereof.*
>
> *I submit that on or about the 12th day of October 2014 at or near Mahikeng in the regional division of the North West, I did unlawfully and intentionally assault Chris de Sousa Gomes, and in the course thereof did and with force take the following items from him, to wit R64 900 cash being his property, or which property was at the time in his lawful possession.*
>
> *I further wish to submit that in the process thereof, alternatively in the process of the furtherance of the above motivated the complainant, Mr de Sousa Gomes with a firearm, which I confirm to have aggravated circumstances leading to him surrendering the moneys as aforesaid.*

I wish to submit further that during the commission of this offence I was at all times aware that same constituted a criminal offence which is punishable by law.

I submit that on the day in question I was around Mahikeng town with my co-accused, Mr Radebe. We were both broke, hungry and I had family problems in that my grandmother was critically ill and I had to raise sufficient moneys to take her to a traditional doctor in Botswana for help.

The total amount needed in order to nurse her back to health was approximately R40 000, and since I was at the time of the commission of the offence unemployed, I deemed robbing the complainant of his moneys was the suitable and efficient way to raise the amount, failing which I would have had problems or probably lost my family.

Subsequent to my arrest and release on bail I turned a new leaf on life in that I stopped committing any further offences to date, enjoy/and joined[?] politics[?] which help me financially to nurse my grandmother back to health. After numerous occasions of thought I now realise that I acted without due regard to the law and impulsive.

I am remorseful and regret having conducted myself in that manner, as I now have a better life, am a changed man, and responsible for that matter. And as a result wish for the court to have mercy on me and grant me a second chance in life, as I have demonstrated to the court that I am capable of being rehabilitated and duly rehabilitated myself without any intervention from the authorities'."

[5] Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (read with Part II of Schedule 2) finds application in this matter, which reads thus:

> *"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who had been convicted of an offence referred to in –*
>
> *(a) Part II of Schedule 2, in the case of -*
>
> *(i) a first offender, to imprisonment for a period not less than 15 years;*
> *(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and*
> *(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;*
> *…"*

[6] The minimum sentence prescribed by the legislature is that of fifteen (15) years unless there are substantial and compelling circumstances present in this case which warrants a deviation from imposing the prescribed sentence. The learned Regional Magistrate in his well-reasoned judgment concluded that there are substantial and compelling circumstances present in this case. Therefore, the prescribed minimum sentence was not imposed. The learned Regional Magistrates' findings in this regard cannot be faulted.

[7] In **S v Malgas**, *supra* it was held that:-

> *"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -*
>
> *A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*
> *B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*
> *C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*
> *D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in*

personal circumstances or degrees of participation between co-offenders are to be excluded.

E. *The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.*

F. *All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*

G. *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.*

H. *In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.*

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu

<u>of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."</u>

[8] In **S v Matyityi** 2011 (1) SACR 40 (SCA), the following is stated:

> *"[23] 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 hypotheses 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."

[9] I find the dicta in **Malgas** and **Matyityi** quite apposite in this case. The exercise of the judicial discretion by a Magistrate (District or Regional) should not be interfered with lightly. This will erode confidence in the criminal justice system. Much as every convicted person has the right to appeal, which right is constitutionally entrenched, sentence imposed by the lower courts should not be lightly interfered with.

[10] Having considered all the facts and circumstances of this case, I am of the view that no misdirection was committed by the learned Regional Magistrate. The sentence imposed is just and appropriate under the circumstances of this case. The appeal against sentence should accordingly fail.

Order

[11] Consequently, the following order is made:

(i) The appeal against sentence by both appellants fail.

(ii) The sentences imposed on both appellants are confirmed.

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R D HENDRICKS
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

_____

A H PETERSEN
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG