THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 148/2019

In the matter between:

MALANGABI MBULELO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mbulelo v The State* (148/2019) [2019] ZASCA 154 (26 November 2019)

Coram: Navsa, Saldulker, Swain and Dlodlo JJA and Eksteen AJA

Heard: 14 November 2019

Delivered: 26 November 2019

Summary: Criminal law – sentence - application for leave to appeal refused by regional court – petition subsequently refused by the high court – whether petition correctly refused.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Khampepe and Tshabalala JJ sitting as court of appeal):

The appeal against the refusal of the application for leave to appeal in respect of the sentence imposed on the appellant is refused.

JUDGMENT

Saldulker JA (Navsa, Swain and Dlodlo JJA and Eksteen AJA concurring):

[1] The appellant, Mr Malangabi Mbulelo, was charged in the Regional Court, Johannesburg with two counts of robbery with aggravating circumstances in relation to two incidents, (count one and count three), kidnapping (count two), attempted murder (count four) and the unlawful possession of a firearm (count five) and ammunition (count six). On 21 November 2007 the regional court magistrate, convicted the appellant on all counts and sentenced him to 15 years' imprisonment on each count of robbery with aggravating circumstances (count one and count three), four years on the kidnapping charge and four years in relation to the attempted murder count. He was sentenced to three years' imprisonment for the unlawful possession of a firearm and two years on the unlawful possession of ammunition. It was ordered that the sentences in relation to the kidnapping, attempted murder and the unlawful possession of a firearm and ammunition counts (counts 2, 4, 5 and 6) run concurrently with count one, the count of robbery with aggravating circumstances, resulting in an effective sentence of 30 years' imprisonment.

[2] On 18 December 2008, the appellant's application for leave to appeal against his conviction and sentence was refused by the regional court. Aggrieved, the

appellant petitioned the Gauteng Local Division, Johannesburg (the high court) for leave to appeal his conviction and sentence. This was also refused on 16 March 2009 (Khampepe and Tshabalala JJ). Subsequently, this court granted the appellant special leave to appeal against the refusal of his petition only in respect of sentence.[1] I now turn to deal with the details of the offences in question.

[3] On 1 September 2005, while an employee of Telkom was fixing Telkom lines in the course of his employment, in the area of Phiri, Soweto, the appellant, accompanied by another person, confronted the technician at gunpoint and robbed him of his Telkom bakkie, a white Mazda. The complainant was roughly manhandled and forced into the bakkie by the appellant and his cohort, and later dropped off a short distance away from where the hijacking took place. Thereafter they drove away with the Telkom bakkie. These were the facts on which the first count was based.

[4] The following day, 2 September 2005, in Jeppe, Johannesburg, and while travelling in the aforesaid stolen Telkom bakkie, armed with unlicenced firearms, the appellant, together with another person, confronted the occupants of a Coin Security van which had stopped behind them. During the incident, the passenger in the van attempted to disarm one of the assailants, and in the process gunshots were fired. The complainant managed to flee, and jumped into the Telkom bakkie and drove off. Upon discovering that there was a firearm in the vehicle, he returned to the scene approximately three minutes later, and found that the van was gone. The complainant subsequently realised that he had sustained an injury to his shoulder as a result of the shots being fired. The van was later found abandoned. The police, upon following a trail of blood from the van, found the appellant lying in a trench amongst refuse bags, near a railway track. The appellant who was injured and in possession of a firearm was apprehended.
These were the facts that led to the conviction on count 3.

[5] Before us, counsel for the appellant submitted that there were substantial and compelling circumstances in relation to count one, which the regional court had failed

[1] *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA); *S v Khoasasa* 2003 (1) SACR 123 (SCA) para 19.

to take into account. These, he submitted, were the relative youthfulness of the appellant, that he was a first offender and that he had spent two years and two months in custody awaiting the finalisation of his trial. With regard to count three, counsel for the appellant was rightly constrained to argue that there were no substantial and compelling circumstances. However, he contended that the regional court had failed to properly take into account the cumulative effect of the sentences imposed, and ought to have taken into account the time spent by the appellant in custody, awaiting the finalisation of the trial, and that, at the very least, a portion of the sentence imposed on count 3 ought to have run concurrently with the sentence imposed on count one, even though they were committed at different places and different times. In this regard, he relied on a judgment of this court in *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) at 372 para 9 where the following was said:

'The trial as well as the high court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and on different times. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence.'

[6] In my view, whilst I agree with the principles laid down in *S v Kruger*, and endorse the sentiments expressed by this court therein, it is not particularly helpful in this matter. In *Kruger*, the appellant was convicted of four counts of housebreaking with intent to steal and theft, robbery, theft and contravening s 36 of the General Law Amendment Act 62 of 1955.[2] He was effectively sentenced to 26 years' imprisonment. The robbery was essentially the snatching of a handbag, with minimal violence, and not the kind of violence involved in the present case. This court held that there was no doubt that all of the offences forming the subject matter of *Kruger*'s appeal were not of a violent or heinous character. This court took into account that the appellant had spent more than three years awaiting the finalisation of his trial, and considered it appropriate

[2] **'Failure to give a satisfactory account of possession of goods**
Any person who is found in possession of any goods, other than stock or produce as defined in section *one* of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'

to factor in this period in mitigation of the cumulative effect of the sentences. He was eventually sentenced to a term of 13 years' imprisonment.

[7] In contrast, the aggravating features of the offences committed by the appellant in this matter in broad daylight were serious, violent and heinous. Armed with a firearm in two major busy urban areas, Soweto and Jeppe, the appellant and his cohort brazenly attacked unsuspecting people and robbed them of their vehicles at gunpoint. The day after the first hijacking, they targeted a security van, armed yet again with lethal weapons in Jeppe, a busy hub near the train station, using the Telkom bakkie they had hijacked on the previous day. Both robberies were executed with firearms, clearly indicating that the appellant foresaw the potential of encountering resistance. The attack on a Telkom employee going about his business as well as on the Coin security van were both cowardly and brazen, and displayed a blatant disregard for the law. In the latter attack, count 3, both the appellant and the complainant were shot and injured. This is a far cry from just snatching a handbag. The reliance on *Kruger* is therefore misplaced.

[8] Both the hijacking incidents on counts one and three attracted a prescribed minimum sentence of 15 years' imprisonment in terms of the Criminal Law Amendment Act 107 of 1997 (as amended), unless there were substantial and compelling circumstances justifying a deviation therefrom. The regional court in its judgment on sentence took into account, the age of the appellant, that he was a first offender and the time he had spent in custody awaiting the finalisation of his trial. It also took into account the seriousness and the prevalence of these violent crimes in urban areas, and that society demanded that offenders of such crimes be severely punished. The regional court had regard to both the aggravating and mitigating factors, taking into account the period awaiting trial and ordered that the sentences that were imposed on the kidnapping, attempted murder and the unlawful possession of a firearm and ammunition counts run concurrently with the sentence on count one. Even though count five, which was for the unlawful possession of a semi-automatic firearm, and ought to have attracted the minimum prescribed sentence of 15 years' imprisonment, the regional court sentenced the appellant on that count to three years' imprisonment.

[9] The aggravating features of the offences committed by the appellant cannot be ignored. The legislature prompted by its electorate, ordained minimum sentences as set out in *S v Malgas*,[3] unless there were substantial and compelling circumstances so as to justify a deviation from the prescribed minimum sentence. Both counts one and three carried the prescribed minimum sentence, and the regional court correctly concluded that there were no substantial and compelling circumstances present justifying a departure. The criminal matters that come before this court almost every term as well as the applications for leave to appeal that are received reflect the prevalence of violent crimes that this country is besieged with. Robberies accompanied by violence are rife in the major metropoles as is evident from the matters that come before this court. The prevalence is real.

[10] As alluded to above, the minimum sentences legislation was introduced by the legislature to address the rising levels of criminality in this country. Furthermore, in *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) para 23, Ponnan JA decried the escalation in crime and stated:

`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. . . 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. . . . '

[3] *S v Malgas* 2001 (2) SA 1222 (SCA) paras 8 and 34.

[11] It is clear from the judgment on sentence that the regional court took into account that the appellant had spent over two years in custody awaiting his trial. In the circumstances of this case, the effective sentence of 30 years' imprisonment does not appear to be shockingly inappropriate, nor is the cumulative effect of the sentence on counts one and three unduly harsh. There are no reasonable prospects that another court will come to a different conclusion. Accordingly the special leave to appeal against the refusal of the petition must fail.

[12] In the result, the following order is made:

The appeal against the refusal of the application for leave to appeal in respect of the sentence imposed on the appellant is refused.

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H K Saldulker
Judge of Appeal

APPEARANCES

For Appellant:	W A Karam
Instructed by:	Legal Aid South Africa, Johannesburg
	Legal Aid South Africa, Bloemfontein
For Respondent:	F Mohamed
Instructed by:	Director of Public Prosecutions, Johannesburg
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