THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 045/11

In the matter between:

JOSEPH MATHEBULA **First Appellant**

JOAQI NOVEL **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Mathebula v The State***
(045/11) [2011] ZASCA 165 (29 September 2011)

Coram: Mthiyane, Maya and Bosielo JJA

Heard: **05 September 2011**

Delivered: **29 September 2011**

Summary: Appeals – sentences – appellants convicted of robbery with aggravating circumstances – court sentencing them to imprisonment for 20 years without giving any reasons – s 52(1)(a)(i) of the Criminal Law Amendment

Act 105 of 1997 (as amended) – sentences set aside and replaced with a sentence of 15 years' imprisonment.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Southwood and Legodi JJ sitting as a court of appeal):

1. The appellants' appeal against the sentence of 20 years' imprisonment imposed in respect of robbery with aggravating circumstances is upheld. The sentence is set aside and replaced with a sentence of imprisonment of 15 years.

2. The appeal in respect of the sentence of 3 years' imprisonment imposed on the second appellant for both unlawful possession of a firearm and unlawful possession of ammunition (these were treated as one for purposes of sentence) is varied to an extent that the sentence is ordered to run concurrently with the sentence imposed in respect of the robbery with aggravating circumstances.

3. (a) The effective sentence for first appellant is imprisonment of 15 years;
   (b) The effective sentence for the second appellant is imprisonment of 16 years.

JUDGMENT

BOSIELO JA (Mthiyane and Maya JJA concurring)

[1] The two appellants were convicted in the Regional Court, Brakpan of robbery with aggravating circumstances (count 1), unlawful possession of firearm (count 3) and the unlawful possession of ammunition (count 4) by the Regional Court, Brakpan. In

addition the second appellant was also convicted on negligent discharge of a firearm in contravention of s 39(1) read with s 39(2)(d) of the Arms and Ammunition Act 75 of 1969 (second alternative to count 2). The first appellant was sentenced as follows:

(a) 20 years' imprisonment in respect of the robbery with aggravating circumstances;

(b) 3 years' imprisonment in respect of the unlawful possession of firearm and unlawful possession of ammunition; these were taken together for purposes of sentence. Effectively the first appellant was sentenced to imprisonment of 23 years.

[2] The second appellant was sentenced as follows:

(a) 20 years' imprisonment in respect of robbery with aggravating circumstances;

(b) 1 year imprisonment in respect of the negligent discharge of a firearm and 3 years' imprisonment in respect of the unlawful possession of firearm and ammunition; the two counts were taken together for purposes of sentence. The effective sentence for the second appellant was 24 years' imprisonment.

[3] Both appellants appealed against their convictions and sentences to the North Gauteng High Court. The high court (per Southwood and Legodi JJ) dismissed their appeals against conviction. The appeal in respect of sentences imposed on the first appellant succeeded to the extent that the court below ordered the sentence of 3 years imposed in respect of the unlawful possession of firearm and ammunition to run concurrently with the sentence of 20 years imposed in respect of robbery with aggravating circumstances. Effectively the first appellant was sentenced to imprisonment for 20 years. The second appellant's appeal against his sentences failed. This meant that the second appellant was to serve a sentence of 24 years. Only the first appellant applied for leave to appeal to this court. However, in the interests of justice, the court below granted both appellants leave to appeal to this court against their sentences.

[4] A succinct factual background of the facts of this case will serve to elucidate this judgment. On 11 June 2011 the appellants broke into the home of Ms Shabalala's employer. A firearm was put against her neck and she was frogmarched into the house. Her hands were tied behind her back after she was blindfolded. She was forced into a toilet. However, she succeeded to untie herself and fled to go and seek help from her neighbours. Although she did not suffer physical injuries, she was seriously traumatised. Some items of her employer's belongings were packed in boxes by the robbers although not removed. The only item which was reported stolen was her employer's firearm.

[5] This robbery falls squarely within the purview of s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (the Act). The relevant part of this section provides:

(2) Notwithstanding any other law but subject to subsection (3) and (6), a regional court or high court shall sentence a person who has 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 of not less than 20 years.

[6] A proviso to s 51(2) of the Act provides:

'Provided that the maximum sentence a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose.'

[7] Having convicted the appellants of robbery with aggravating circumstances, the regional magistrate was obliged to impose a minimum sentence of imprisonment of not less than 15 years unless he found substantial and compelling circumstances to justify a lesser sentence. Instead the regional magistrate imposed a sentence of 20 years' imprisonment on each appellant. Regrettably the regional magistrate did not give any reasons for such a material deviation. In terms of the proviso to s 51(2) of the Act, the regional magistrate has the discretion to increase a minimum sentence he or she

decides to impose to a term of imprisonment not exceeding five years. Presumably this can be done where there are seriously aggravating circumstances which render the prescribed minimum sentence inappropriate. Ostensibly this is what the regional magistrate intended to do without clearly saying so.

[8] This appeal raises two questions for consideration. Firstly whether the regional magistrate and the court below acted properly in sentencing the appellants to imprisonment for a sentence exceeding 15 years which is the minimum sentence prescribed by s 51(2)(a)(i) for robbery with aggravating circumstances without giving any reasons. Secondly, whether, given the circumstances under which the robbery was committed, and the personal circumstances of the appellants, a sentence of imprisonment for 20 years can be described as shockingly or startlingly inappropriate. On appeal the high court found that it could not be said that a sentence of imprisonment of 20 years in the circumstances of this case is inappropriate and confirmed the sentence.

[9] There is no doubt that the robbery herein was accompanied by serious aggravating factors. The robbery was pre-planned and premeditated. The two accused acted in concert which makes it a gang robbery. The complainant was ambushed in the sanctity and comfort of her employer's home. She was terrorised repeatedly with a firearm which was pressed against her neck. Her hands were tied and she was blindfolded.

[10] A regional magistrate has the discretion to impose a sentence exceeding the minimum sentence prescribed by the Act with an additional 5 years as provided for in the proviso to s 51(2). Such a discretion must however be exercised judicially and on reasonable grounds. Where a regional magistrate intends to depart from the prescribed minimum sentence, it is proper and fair that the regional magistrate gives reasons for such a departure. Absent any such reasons, the conclusion becomes inescapable that

such a decision is arbitrary or that the sentencing discretion was not exercised judicially. It is not proper for an appeal court to have to speculate about the reasons which motivated the regional magistrate to impose a sentence higher than the minimum sentence prescribed. Such an approach cannot be countenanced as it is subversive to the principles of openness, transparency, accountability and fairness. It is trite that judicial officers can only account for their decisions in court through their judgments. It is through judgments which contain reasons that judicial officers speak to the public. Their reasons are therefore the substance of their judicial actions. Dealing with a similar matter this court enunciated the principle as follows in *S v Maake* 2011 (1) SACR 263 (SCA) para 19:

'It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions.'

The court went to state the following at para 20:

'When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.'

See *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) para 15.

[11] The proper approach to be adopted by a sentencing court which contemplates to impose higher than the prescribed minimum sentence seems to me to be the one adumbrated by Wallis J in *S v Mbatha* 2009 (2) SACR 623 (KZP) para 20 where he stated:

'On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where

a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated.'
This salutary approach was endorsed in *S v Maake* (above) para 28.

[12] In conclusion, I find that the robbery herein fell within the provisions of s 51(2)(a)(i) of the Act. Both the regional magistrate and the court below failed to identify and record any facts or circumstances which made the robbery so serious or exceptional that it merited a sentence of imprisonment exceeding the prescribed minimum sentence of 15 years. I have not been able to find any such facts or circumstances from the record to justify the imposition of an additional 5 years provided for in the proviso to s 51(2). Absent such facts the sentence of imprisonment for 20 years appears to me to be not only arbitrary but disturbingly inappropriate as well. The appellants should have been sentenced to imprisonment of not less than 15 years and not 20 years.

[13] Concerning counts 3 and 4 the high court had found that the regional magistrate had erred in failing to take into account the fact that the first appellant was in unlawful possession of the firearm (count 3) and ammunition (count 4) for a limited period whereas the second appellant unlawfully possessed them until his arrest on 17 July 2001. Based on this reasoning, the high court ordered the sentence of 3 years' imprisonment imposed on the first appellant for unlawful possession of firearms and ammunition to run concurrently with the sentence imposed in respect of the count of robbery with aggravating circumstances (count 1). The high court dismissed the appeal by second appellant against his sentences. Effectively the second appellant was to serve imprisonment of 24 years whilst the first appellant would serve imprisonment of 20 years only.

[14] It is trite that, unless there are exceptional circumstances, accused persons convicted of the same offences must receive the same sentence. This principle accords with the fundamental principles of uniformity of sentence, equality and fairness.

Fairness in particular is a foundational value which should suffuse the entire criminal proceedings. The two appellants were convicted of the same offences except that the second appellant was also convicted of the negligent discharge of a firearm. There is no significant difference in their personal circumstances to justify a disparity of 4 years. This unexplained disparity is so shocking that it warrants interference. Save for the count of negligent discharge of a firearm for which second appellant received a sentence of imprisonment for 1 year, I see no reason for treating the two appellants differently. The second appellant deserves to have the sentence imposed on him in respect of the counts of unlawful possession of firearm and the unlawful possession of ammunition run concurrently with the sentence imposed in respect of the count of robbery with aggravating circumstances as is the case with the first appellant.

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

1. The appellants' appeal against their sentences of 20 years' imprisonment imposed in respect of robbery with aggravating circumstances is upheld. The sentence is set aside and replaced with a sentence of imprisonment of 15 years.

2. The appeal in respect of the sentence of 3 years' imprisonment imposed on the second appellant for both unlawful possession of a firearm and unlawful possession of ammunition (these were treated as one for purposes of sentence) is varied to an extent that the sentence is ordered to run concurrently with the sentence imposed in respect of the robbery with aggravating circumstances.

3. (a) The effective sentence for first appellant is imprisonment of 15 years;
   (b) The effective sentence for the second appellant is imprisonment of 16 years.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellants:	LA van Wyk SC Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	E Leonard SC Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein