REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A64/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

BLESSING VILAZI Appellant

~~and~~And

THE STATE Respondent

J U D G M E N T

MASHILE, J:

The Appellant, a 33 year old man, appeared before the Regional Court for the Region of South Gauteng held at Alexandra on 15 April 2013 subsequent to a charge of robbery of a 31 year-old Mr Samuel Ramia.

[2] The robbery happened in Midrand and was with aggravating circumstances as envisaged in Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997 (hereinafter "*the Act*"). The appellant was legally represented throughout the duration of his trial and was warned that the provisions of Section 51 of the Act could be invoked for purposes of the imposition of sentence should he be found guilty as charged.

[3] He pleaded not guilty to the charge preferred against him and tendered no plea explanation. On 15 April 2013 the trial court nonetheless found him guilty and simultaneously imposed a minimum sentence of 15 years as provided in the Act. The trial court made no pronouncement regarding whether or not the Appellant was fit to possess a firearm in terms of Section 103 of the Firearm Controls Act No. 60 of 2000.

[4] The Appellant applied for leave to appeal against both conviction and sentence on the same day. The magistrate considered his application and refused him leave on both. Leave to appeal having been denied, the Appellant approached this court by way of a petition. Masipa J and Khanyago AJ considered it and granted leave to appeal against sentence only. For that reason the Appellant's appeal is only against sentence.

[5] I do not intend to set out the facts that led to the Appellant's conviction since his petition in that respect was not successful. That being so, I may make reference to portions of the facts that led the trial court to conclude that

the appropriate sentence in the circumstances was 15 years direct imprisonment.

[6] Prior to the introduction of the minimum sentence legislation, it was a tradition that a trial court had an unfettered discretion when imposing a sentence. However, a court of appeal could interfere with the trial court's sentencing discretion if it deemed that the trial court failed to exercise its discretion astutely and correctly.

[7] The minimum sentence legislation has changed the general approach as I have described it in the preceding paragraph. This shift in approach is palpable from *S v PB* 2013 (2) SACR 533 (SCA) at 539 where Bosielo JA said:

> "*[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.*"

[8] Robbery with aggravating circumstances falls squarely under Section 51(2) of the Act, which meant of course that unless the trial court found the existence of compelling and substantial circumstances as envisaged in Section 51(3) of the Act, it would have been obliged to impose the

preordained sentence. It is therefore necessary to establish whether or not the trial court found any compelling and substantial circumstances in this case.

[9] It was argued by Counsel for the Appellant that the trial court paid no attention to the personal circumstances of the Appellant when imposing the minimum sentence. He asserted further that it could be inferred from the trial court's lack of reference to those personal circumstances that he did not give it any weight whatsoever when imposing the sentence. The trial court might not have referred to all the personal circumstances mentioned by the legal representative of the Appellant but it is plain that he had them in mind when he said:

> "*I take into account your personal circumstances, the fact that you are a first offender in custody although not for a very long period you are still in custody as pointed out …*"

[10] Counsel for the Appellant then went ahead to list the following, which he said should have led the trial court to conclude that cumulatively they constituted compelling and substantial circumstances as intended in Section 51(3) of the Act:

10.1 The Appellant was 33 years old and was a first offender;

10.2 The offence did not appear to have been planned at all;

10.3 The complainant did not suffer any injuries;

10.4 The complainant recovered all the money taken from him.

[11] The trial court correctly in my view found that all the circumstances listed above could not be regarded as compelling and substantial especially when contrasted with the aggravating circumstances of the Appellant. The Appellants and his co-perpetrators could have used force, it would appear, had the complainant resisted. Furthermore, one cannot regard the fact that the money was recovered as extenuating because had the police not arrested them, the money would not have been regained. Lastly, Counsel for the Appellant contended that the offence was opportunistic and not organised.

[12] That contention cannot find favour with me for it appears obvious that the Appellant and his co-perpetrators searched the area until they spotted a lonely vulnerable figure that could be attacked. What is even more disquieting is that the robbery took place broad daylight, which to a degree demonstrates how brazen they were. I may even venture and state that what they did is not consistent with people committing such a crime for the first time.

[13] The mere fact that the trial court alluded to the personal circumstances of the Appellant albeit without listing all of them as the legal representative for the Appellant has done is an indication that he was mindful of them. The trial court was aware that it was under an obligation to impose the minimum sentence unless there were compelling and substantial circumstances justifying a departure from it. Thus, after mentioning the personal

circumstances of the Appellant, it immediately makes reference to the aggravating circumstances thereby weighing them. It considered the following as aggravating circumstances:

13.1 The Appellant and his accomplices executed this crime in a planned manner;

13.2 They were a gang;

13.3 They had a get-away vehicle;

13.4 They utilised a dangerous weapon;

13.5 It was by sheer luck that a police officer happened to be driving in the area and quickly responded to the complainant's cry for assistance;

13.6 They were caught virtually red handed;

13.7 The crime was prevalent in the area of jurisdiction of his court;

13.8 It was a violent crime even though no one was hurt.

[14] The trial court certainly considered the interests of the society, the prevalence, nature and seriousness of the offence and correctly sought to

strike a balance with the personal circumstances of the Appellant when determining the sentence to impose.

[15] The trial court concluded that the aggravating circumstances far out-weighed the personal circumstances such that it was compelled to impose the prescribed minimum sentence. Having said that, it is instructive to refer to *S v Vilakazi* 2009 (1) SACR 552 (SCA), where Nugent JA said at paragraph 58:

> "*Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again …*"

[16] I am swayed that the trial court was correct in its invocation of the minimum sentence legislation for to hold otherwise will be betraying what was stated in S *v Malgas,* 2001 (1) SACR 469 (SCA) that "*the specified sentences are not to be departed from lightly or for flimsy reasons*" and that "*speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders … are to be excluded*".

[17] In the premises I make the following order:

1. The appeal against sentence is dismissed.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

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R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 06 October 2014

Date of Judgment: 16 October 2014

Counsel for the Appellants: Adv. E Tlake

Instructed by: Johannesburg Justice Centre

Counsel for the Respondent: Adv. Adeoraj

Instructed by: The Office of the DPP