REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

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

15/04/2014
DATE

SIGNATURE

CASE NO. A185/2013

In the matter between:

ZWANE: THABANG Appellant

and

THE STATE Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The appellant was charged in the Regional Court, held at Johannesburg with robbery with aggravating circumstances as intended in terms of section 1 of Act 51 of 1977 ("**the Criminal**

Procedure Act"), read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 ("**the Act**").

[2] The appellant pleaded not guilty and tendered no plea explanation.

[3] On 21 June 2012 the appellant was convicted as charged and was sentenced to 15 years imprisonment and declared unfit to possess a firearm in terms of section 103(1) and 4 of Act 60 of 2000.

[4] On 22 January 2013, the appellant applied for leave to appeal against both his conviction and sentence. The Court a quo granted the appellant leave to appeal in respect of his sentence only.

[5] The appellant now appeals against sentence.

THE OFFENCE

[6] The appellant was convicted of what is colloquially referred to as "motor hijacking". On 31 March 2010 the complainant testified that he had been travelling with his cousin and his cousin's child in a Volkswagen Golf motor vehicle. He had stopped at a particular house. His cousin had exited the vehicle and he and his cousin's child, were waiting inside the motor vehicle for the cousin's return.

[7] He heard a knock on his window and was ordered to get out. The assailant pointed a firearm at him. He was told to lie on the ground. Another person came, got into the motor vehicle and tried to reverse the motor vehicle. They struggled to get the motor vehicle going and accordingly ordered the complainant to get into the back seat. They still couldn't get the vehicle going and eventually instructed the complainant to drive the motor vehicle. After some distance, the complainant was dropped off on the side of the road. Shortly

thereafter the appellant was apprehended due to excellent policing skills exhibited by constables Thumelo Hlohle and Matsoso Moloi.

PREVIOUS CONVICTIONS

[8] On 20 July 1993 the appellant was convicted of theft and given three cuts.

[9] The appellant also has a previous conviction for rape and several charges of possession of firearms and ammunition for which he was sentenced to 15 years imprisonment on 4 July 2000. On 15 August 2008 he was released on parole to be under supervision until 3 January 2017. Thus, at the time of the commission of the offence under discussion, he was still under parole supervision.

[10] The Court a quo dealt with the appellant as a first offender, this despite the fact that he was still under parole supervision.

APPROACH BY A COURT OF APPEAL AGAINST THE SENTENCE IMPOSED IN TERMS OF THE ACT

[11] In *S v PB*, 2013 (2) SACR 533 (SCA) at 539 Bosielo JA gave direction in respect of the correct approach to be adopted by an appeal court in respect of sentencing imposed by a trial court in terms of the Act. In paragraph 20 he states:

[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."

WHAT FACTS DID THE TRIAL COURT TAKE INTO ACCOUNT?

[12] The trial court considered the nature and seriousness of the offence, the interests of society as well as the appellant's personal circumstances. It was clearly mindful of the fact that it was obliged to attempt to keep a balance between these aspects in considering what an appropriate sentence should be.

[13] It noted quite correctly that "hijacking" is a very serious offence and that the Legislature has deemed it necessary to prescribe a minimum sentence of 15 years imprisonment.

[14] The Court was obviously mindful of the fact that it could only deviate from the minimum prescribed sentence if it could find compelling or substantial circumstances. It considered the following:

14.1. The complainant did not suffer any physical injuries. The learned magistrate quite rightly found that the complainant did probably not injure himself due to the fact that he had kept calm and did not offer any resistance. The learned magistrate thus found that it was none of the appellant's doing that no physical injury was sustained by the complainant.

14.2. The fact that it is almost impossible to take precaution against this type of crime, as in this instance, the

complainant was sitting in a driveway waiting with a child when he was pounced upon.

14.3. That the appellant was 32 years old, that he was single and employed as a security guard earning R2 500 per month.

14.4. The appellant had been in custody awaiting trial for a long period of time. He was arrested on 31 March 2010 and was convicted and sentenced on 21 June 2012;

14.5. The previous convictions, and in particular that the appellant had been released on parole on 15 August 2008, but that he was still under parole supervision until 3 January 2017;

14.6. The trial court disregarded the offence which had been committed in 2000 as it had been committed more than 10 years previously, but frowned upon the appellant having committed this offence whilst on parole.

14.7. The trial court considered the previous convictions aggravating as they showed that the previous sentences did not have the necessary deterrent effect.

14.8. The absence of remorse was a further factor taken into account.

[15] The Court a quo concluded that, having regard to all the factors listed above, there were no substantial and compelling circumstances which warranted a deviation from the minimum sentence.

ARE THE FACTS WHICH WERE CONSIDERED BY THE SENTENCING COURT SUBSTANTIAL AND COMPELLING?

[16] In *S v Vilakazi,* 2009 (1) SACR 552 (SCA), Nugent JA held as follows at paragraph 58:

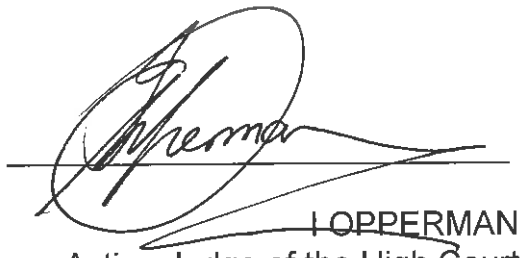
> "*Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided*"... *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. ...* ."

[17] The latter part of the quoted portion is particularly poignant. The appellant has not been deterred by a lengthy period of imprisonment nor did he take the opportunity that was given to him to prove himself fit for reintroduction into society. He was granted parole and turned his back on the lifeline that was thrown to him.

[18] I am unpersuaded that the court a quo erred in its conclusion that substantial and compelling circumstances were absent. I hold the view that to come to a contrary decision in this case would constitute a failure to heed the caution given 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." See S v *Kwanape,* [2012] ZASCA 168 .

[19] In the result the appeal against the sentence is dismissed.



I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

B MASHILE
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 27 March 2014
Judgment delivered: 17 April 2014
Appearances:
For Appellant: Adv.C Van Veenendaal
Instructed by: Johannesburg Justice Centre

For Respondent: Adv LR Surenda
Instructed by: Office of the Director of Public Prosecutions