IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A258 / 2021

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

..... 2022-06-01
SIGNATURE DATE

In the matter between:

ABRAM MUZIWAKHE MKONE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

[1] The Appellant was convicted by the Regional Court Magistrate Pretoria on one count of Robbery with aggravating circumstance and he was sentenced to an effective 15 years imprisonment on 17 November 2020. The Appellant was also declared unfit to possess a firearm in terms of Section 103 of the Fire Arm Control Act 60 of 2000.

[2] Aggrieved by the sentence the Appellant now appeals to this court against sentence only and with leave of the court *a quo*.

GROUNDS OF APPEAL

[3] The Appellant lists the following as the grounds for appeal:

3.1 That the learned Magistrate did not give proper regard to the Applicant's personal circumstance.

In this regard reference was made to **S.V Ndlovu 2007 (1) SACR S35 SCA** at 538J paragraph 13 where the following was said:

"It *was necessary to guard againsnt imposing unfair sentence that did not distinguish between the facts of different cases and the personal circumstances of offenders".*

3.2 That the learned Magistrate misdirected himself in finding that there was no substantial and compelling circumstances present to deviate from the prescribed minimum sentence of 15 years imprisonment.

3.3 That the learned Magistrate overemphasised the interests of society and the seriousness of the offences to the Appellant's detriment.

FACTS

[4] It is apposite at this stage to give a brief outline of the circumstances leading to the Appellant's conviction and subsequently sentence, which are briefly as follows:

4.1 In the early hours of 3 February 2019 the Complainant was in the company of her friend at a street corner. They were confronted by the Appellant and another person and the Appellant strangled the complainant.

4.2 The Appellant had a knife in his possession and he threatened to kill the complainant. The Complainant was in the possession of two cell phones, one of which rang and the Appellant instructed the complainant to hand over the cell phone to him. As the Complainant was trying to take out the cell phone from her trousers pocket, it fell on to the ground and a tussle between the complainant and the Appellant over the cell phone.

4.3 According to the Complainant the Appellant kicked the cell phone, picked it up and also took another cell phone that was in the Complainant's pocket. After the cell phones were taken the Complainant notified one Lulekani who followed the appellant and another person. They were first standing aside after the robbery. The Appellant was searched by Lulekani and the complainant after the other person, who was in the company of the appellant, ran away and the Samsung cell phone that was taken from the Complainant earlier was found in the Appellant's possession.

[5] Although the charge sheet alleges that the Appellant threatened the Complainant with a knife the evidence of the Complainant paints a different picture in that she conceded she did not see the knife. The learned Magistrate accepted that at the most the Appellant had a sharp object against the Complainant's neck.

EVALUATION

[6] Once the court convicts a person guilty of an offence that attracts a minimum sentence in terms of legislation, the court is bound to impose a sentence as prescribed by law. In this case the leaned Magistrate convicted the Appellant of an offence that attracts a sentence in terms of Section 51(2) (a); **(CRIMINAL LAW, AMMENDMENT ACT 05 of 1997)** which provides as follows:

"Notwithstanding away other law, but subject to Subsection 3 and 6, a regional Court or a High Court shall sentence a person it has convicted of an offence referred to in –

(a) Part II of Schedule 2, in case of a:-

(i) a first offender, to imprisonment for a period of not less than 15 years

(3)(a) If any Court referred to in subsection 1, or 2 is satisfied that substantial and compelling circumstances exist in which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such a lesser sentence…."

[7] The learned Magistrate found no compelling and substantial circumstances, hence the imposition of the prescribed minimum sentence of 15 (fifteen) years imprisonment.

[8] It is a trite principle of our law that the imposition of sentence is a matter in which falls pre-eminently within the discretion of the trial court. The power of the court of appeal to interfere with such sentence is limited. The appeal court will only interfere with such sentence if the trial court has misdirected itself in any material respects or failed to exercise its discretion judicially or imposed a sentence that the court could reasonably have imposed or that if the sentence was shockingly inappropriate. In **S v Salzwedel**[1] it was held as follows: *"An appeal court is entitled to interfere with the sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or the magnitude of the offence, or sufficiently disparate, or vitiated by*

[1] 1999(2) SACR 586 (SCA)

misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."

[9] In considering whether compelling and substantial circumstance exist the learned Magistrate started by correctly referring to **S.V Malgas**[2] paragraph 25 *"If the sentencing court, on consideration of the circumstances of a particular case is satisfied that they render the presented sentence unjust that it would be disproportionate to the crime, the criminal and the injustice would be done by imposing that sentence, is entitled to impose a lesser sentence".*

[10] The learned Magistrate further correctly asserts that[3] *"it is now well known in our law that whenever factors which may be taken into consideration to establish whether there are compelling and substantial circumstances, must be cumulatively considered not in isolation;-*

[11] The Appellant was 29 years of age at the time sentence was imposed. He was not married but had two minor children aged 11 years and 3 years old respectively. The mother of the children stays with the Appellant. The mother of the children was employed but received social grant on behalf of the children. The Appellant's highest scholastic education is grade 12 and he was busy with a certificate in health and safety in relation to the construction business and he was receiving a stipend of R2500 per month, as part of the program he was undergoing at an academy in Eersterus. The Appellant has a previous conviction of theft of 2010, which at the time of the conviction in this case was over 10 years old. The Appellant, also has a previous conviction of unlawful possession of drugs where he paid an admission of guilt fine in 2016.

[12] The learned Magistrate remarked that the previous conviction of theft is relevant[4] *"because it also makes the current offence consist of an element of dishonesty".*

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[2] 2001(1) SACR 469 SCA
[3] See record page 27 lines 17-20
[4] See record page 24 lines 23-25

[13] In my view the learned Magistrate overemphasised the fact that the Appellant pleaded not guilty and that according to the learned Magistrate is a sign of lack of remorse. I have to caution that the courts should be wary of unfairly punishing the accused persons so for exercising their rights to plead not guilty.

[14] This is a matter where the court a quo should at least have asked for a pre-sentence report, before imposing the sentence. There was nothing preventing the learned magistrate from asking for a pre-sentence report if the state and the defence had not asked for it.

[15] The record shows that the Complainant was pointed with a knife or sharp object but she was wrestling for a phone that fell on the ground with the Appellant. It was not canvased with the Complainant where was the knife at the time she was wrestling for the cell phone with the Appellant. The violence, if any, that was used by the Appellant in the commission of the offence was therefore, in my view, minimal.

[16] According to the Complainant one of the cell phones was recovered. The Appellant did not run away after the commission of the offences. He was apprehended there and then he was even taken into a car.

[17] The learned Magistrate did not give reasons why he was of the view that compelling and substantial circumstances do not exist.

[18] Marias JA in **Malgas**[5] (*supra*) at paragraph 251said the following: "*prescribed sentence would be unjust in that it would be disproportionate to the crime, the criminal and the needs of the society*". The sentencing court ought to therefore have considered the as they were outlined in **S v Zinn**[6], namely, the gravity of the offence, the personal circumstances of the offender and the interests of the society in order to come to a determination whether there exist compelling and substantial circumstances or not. The Act does not define what compelling and substantial circumstances and these will depend on case to case basis. This

[5] 2001(1) SACR 469 SCA
[6] 1969(2) SA 537

aspect was over time given consideration by the courts and in a number of judgments the courts have endeavoured to explain what constitute compelling and substantial circumstances.

[19] In the ureported case of **The State v Dhayalan Pillay(caseno. CCD48/2017; 7 May 2017-Kwazulu-Natal Local Division)** Hendriques J said the following on paragraph 12 "*In **S v Vilakazi**[1] the court explained particular factors, whether aggravating or mitigating, should not be taken individually in isolation as substantial and compelling circumstances. Ultimately in deciding whether substantial and compelling circumstances exist, one must look at the traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated.*"

[20] I am of the view that the learned Magistrate erred in imposing the sentence of 15 years imprisonment as it is shockingly inappropriate. Furthermore, the learned magistrate did not request a pre-sentence report. In my view the appeal should therefore succeed.

[21] In the result I propose the following order:

(a) The appeal succeeds.

(b) The sentence of the court a quo is set aside and replaced with the following:

"The accused is sentenced to 6(six) years imprisonment."

(c)The sentence is antedated to 17 November 2020.

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[1] 2009 (1) SACR 552 (SCA)

KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA.

I agree.
It is so ordered

D MAKHOBA
JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA.

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 1 June 2022.

FOR THE APPELLANT	: Mss MMP MASETE
INSTRUCTED BY	: PRETORIA JUSTICE CENTRE
FOR THE RESPONDEMT	: ADV S LALANE DIRECTOR OF PUBLIC PROSECTIONS
DATE OF JUDGMENT	: 01 June 2022