IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A784/2004

DATE: 9 MAY 2008

In the matter between:

BONGANI NKOMONDE Appellant

and

THE STATE Respondent

J U D G M E N T

THRING, J:

The appellant in this matter was charged in the regional magistrate's court where he faced two charges. The first was robbery with aggravating circumstances, it being alleged that on the 16th November, 2000, at a place called Pitstop, in Woodstock, he robbed the complainant, a certain Ganiefa Ismail, of R100 000 in cash by pushing her and grabbing the money from her and threatening her with a firearm. Charge 2 was that on the same date and at the same place the appellant contravened section 2(1) of the Dangerous Weapons Act, No. 71 of 1968 by being in possession of a dangerous weapon, being an object so resembling a firearm that in the circumstances in which it was possessed by the appellant it

would probably be mistaken for a real firearm. To these charges the appellant pleaded not guilty. He was represented at his trial by an attorney. He was convicted on both charges, save that aggravating circumstances were not found to be present. The magistrate took both charges together for the purposes of sentence and sentenced the appellant to eight years' imprisonment. With the leave of the regional magistrate the appellant appeals against his sentence only.

This is a sad and difficult case. At the time of the commission of these crimes the appellant was still a young man, being only 24 years of age. He had a clean record. He was born in Ladysmith, KwaZulu-Natal, but he grew up in Malawi with his father. He studied mechanical engineering successfully at the University of Malawi and graduated there as an engineer. In 1997, at the age of about 22 years, he returned to South Africa. He first went back to Ladysmith and later came to Cape Town. Here he obtained employment as a driver with Pitstop. He also assisted sometimes in Pitstop's workshops, but was paid no extra remuneration for this work. He worked for Pitstop for about two years before the incident occurred which is here in question. He seems from all the evidence to have been a law-abiding, hardworking, useful, productive member of society. In his judgment on sentence the magistrate says that the appellant made a very favourable

impression on him as a person. He went on to say that he coul believe that a person like the appellant would commit a crime such as this. The magistrate's impressions are borne out by a reading of the record. The appellant comes across in his evidence as an essentially intelligent, diligent, decent young man, even if somewhat garrulous. He exhibited great contrition in his evidence for what he had done. That remorse appears to be sincere.

However, he was unable to explain satisfactorily why he had acted as he did, save to say that he felt "cheated" by his employer because he was not paid overtime or extra for working in the workshop, and that at the time he felt depressed and helpless. He also made mention in his evidence of the devil. These, of course, are not acceptable explanations for his crimes. Nevertheless, one gets the clear impression that the magistrate had a large measure of sympathy for the appellant and that he was most reluctant to send him to prison. He said in his judgment that he found no pleasure in what he had to do and that he "loathed" imposing a sentence of direct imprisonment on the appellant because of his "very favourable personal circumstances".

To this must be added that the appellant's present employer, a Mr Dylan Johnson, was called in mitigation of sentence. The

appellant worked for him as a driver for about three years whilst his trial was pending. Johnson said that the appellant was a good worker and had never been a problem; that he had frequently been entrusted with large sums of cash, sometimes as much as R30 000, but that he had never misappropriated any of it. He said that the appellant's services were valued by him and that they would be retained, if possible. He clearly has confidence in the appellant. He says that he has always trusted him and that his trust has never been abused by him.

That all said, the offences of which the appellant has made himself guilty here of are undoubtedly very serious ones, especially charge 1, the charge of robbery, even without aggravating circumstances being present as defined in section 1 of the Criminal Procedure Act, No. 51 of 1977. The circumstances in which the crimes were committed are also to some extent aggravating in the usual sense of the word. As the appellant himself frankly admitted in his evidence, he planned the robbery very carefully, down to the last detail. First he took leave of absence from his employer as from the 15th November, 2000. However, instead of going home that evening, he concealed himself in his employer's premises and waited there all night until the next morning. He had with him a bag in which was a realistic-looking toy pistol. He said that this pistol was coincidentally in the bag and that he had no

intention of using it. However, the magistrate correctly rejected this evidence as untrue. The appellant also took with him a pair of surgical gloves so as not to leave any fingerprints and a ski mask or woollen cap which he pulled over his face so as not to be recognised. When a member of his employer's staff, Mrs Ganiefa Ismail, arrived at Pitstop in the morning and opened the safe the appellant, wearing the mask or cap, surprised her, pushed her to the ground and seized some bags which contained about R100 000 in cash which she was clutching to her breast, having just removed them from the safe. He made off with these, but fortunately he was almost immediately apprehended by other members of the Pitstop staff before he could make his getaway.

As the appellant conceded in his evidence, Mrs Ismail is old enough to be his mother. To his credit he did subsequently express concern about her to the police after his arrest and he apologised in his evidence for what he had done to her. Fortunately she sustained no physical injuries in the robbery but she was greatly traumatised by the event. The magistrate accepted, correctly, that on the evidence the appellant did not in fact use the toy pistol in committing the robbery, nor did he threaten anybody with it. All the money in the bags was recovered, but this, of course, was not through any act of remorse or change of heart on the part of the appellant.

A further aggravating factor is that the appellant chose for his victim his employer. He abused his position as an employee and his knowledge of the *modus operandi* which was followed regarding the money in his employer's safe.

It is against this background that the sentence imposed by the magistrate must be considered. I am quite satisfied that the magistrate has not misdirected himself in any way in this matter. Both his judgments on the merits and on sentence are painstakingly careful and thorough. He considered all the possible sentencing options at his disposal. In essence he exercised his discretion, albeit with reluctance, and decided that he had to impose a sentence of direct imprisonment on the appellant.

The question which we now have to ponder on appeal is whether that sentence is heavier than that which we would have imposed and, if so, whether it is so much heavier as to justify our interfering with it.

Normally robbery of this kind could be expected to attract a sentence of unqualified direct imprisonment for a medium to long term, even in the case of a first offender. However, in my view, the appellant's exceptional personal circumstances call

for something of a departure from the normal in this case. I say this mainly for the following reasons.

The appellant, starting from apparently humble beginnings, has been industrious and enterprising enough over a period of some years to obtain a tertiary education and to qualify himself as a graduate in mechanical engineering. Since then he has been gainfully employed almost all the time, earning an income with which he has contributed to the support of his mother and his sister. He has improved his position even during the pendency of his trial to the extent that at the time of his trial, he was earning approximately R3 000 per week working for Johnson, which is considerably more than he was paid at Pitstop, where he received only R350 a week.

Over the last ten years or so, then, both before and after his conviction, and since the appellant reached adulthood, he has shown himself in a number of respects to be basically a useful, hardworking, responsible member of society, and he has not fallen by the wayside, save in this one instance. As a result it would not, in my view, be in the interests of society for him to be incarcerated on a long or medium term basis, unless good reason therefor should be found to exist. Insofar as may be acceptable, other forms of punishment ought to be sought for him. One of these is correctional supervision in some or other

form. The magistrate did, indeed, consider it, but he came to the conclusion that correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act was inappropriate in this case because its duration was restricted to a maximum of only three years. It was therefore not a suitable sentence, he found.

As for imprisonment in terms of section 276(1)(i), the magistrate also found that that would not be an appropriate sentence because it was restricted to a maximum of only five years which, in his view, would not reflect the seriousness of the offence.

In normal circumstances I would agree with all that the magistrate has said in his judgment. However, as I have said, I am of the view that the circumstances of this case are not normal, but are exceptional, especially the appellant's personal circumstances. In S v R, 1993(1) SA 476 (A), Kriegler, AJA said the following at 488G-J about the general policy which Courts ought to adopt in these matters:

> "Die Wetgewer het dus duidelik onderskei tussen twee soorte misdadigers, naamlik dié wat deur gevangesetting van die gemeenskap afgesonder moet word en dié wat stafwaardig is maar nie uit die gemeenskap verwyder hoef

te word nie. Wat meer is, die Wetgewer het ondubbelsinnig deur die klemverskuiwing, wat uit die Wysigingswet as geheel spreek, aangedui dat straf, hervormend maar desnoods hoog bestraffend, nie noodwendig of selfs primêr deur opsluiting in 'n gevangenis haalbaar is nie. Waar die wetgewende gesag so duidelik sy wens uitgespreek het en waar die uitvoerende gesag (blykens die wetsinwerkingstellende proklamasies) paraat is om die nodige administratiewe rugsteuning te verskaf, is dit die plig van regsprekers om die middele wat so vrylik tot hulle beskikking is as daadwerklik op te neem. In die besonder moet daar ingesien word dat daar nou gevoelige straf toegemeet kan word sonder gevangesetting, met al die bekende nadele aan laasgenoemde verbonde vir beide die prisonier en die breë gemeenskap. 'n Vonnis van korrektiewe toesig kan tewens so saamgestel word dat dit vir die veroordeelde meer beswaar as korttermyn gevangenisstraf..."

In subsequent decisions in our Superior Courts it has repeatedly been held that even in the case of serious offences, correctional supervision may sometimes be an appropriate sentence. Of course, the facts of each case differ, and each case must be decided on its own merits. There can be no rigidity in these matters, but correctional supervision has been found suitable, for example, in cases of robbery with aggravating circumstances (S v Booysen, 1993(1) SACR 698 (A)); murder (S v Potgieter, 1994(1) SACR 61 (A)) and rape (S v A en 'n Ander) 1994(1) SACR 602 (A)).

Whilst I agree with the magistrate that correctional supervision under section 276(1)(h) would not be appropriate in the present case because of its restriction to a maximum period of three years, I am unable to agree with him that the maximum period of five years attached to a sentence in terms of section 276(1)(i) renders it inadequate in the special and exceptional circumstances of this case. The latter sentence entails a period of direct imprisonment, which I think is inevitable for the appellant. However, it need not be a long period, provided that he is a suitable candidate for correctional supervision. The Commissioner of Correctional Services may release him quite soon to serve the balance of his term of imprisonment in society, where he can continue to perform a useful function and advance himself. Such a sentence, it seems to me, is

called for in this case, not only because it would best serve the interests of the appellant (such a reason is seldom sufficient by itself in a serious case such as this), but also because society in general would, in my view, probably benefit from it. The corrupting influence of imprisonment is well known. Society probably has more to gain in this matter, in my judgment, from the appellant being kept out of prison than it has from him being incarcerated for a medium to long term.

In addition, provided that the period of imprisonment imposed under section 276(1)(i) of the Criminal Procedure Act is less than the maximum period of five years, the balance can be imposed in the form of imprisonment which is conditionally suspended. Such suspended imprisonment can then hang over the appellant's head, as it were, and act as a further deterrent to any repetition of his crimes which he may be tempted to commit in the future.

For these reasons, had I been sitting as the Court of first instance in this matter, I would have imposed a period of imprisonment of substantially less than eight years under section 276(1)(i), together with a further period of imprisonment, conditionally suspended. The difference between that sentence and the eight years' direct imprisonment imposed by the magistrate is very substantial. I

think that it is more than substantial enough to justify interference with the sentence by us on appeal.

The appellant has already served some seven months of his sentence. He was sentenced on the 5th February, 2004, and we are informed that he was released on bail by order of this Court on the 8th September, 2004. In addition, he spent about six weeks in custody after his conviction, awaiting sentence. The Court expresses the strong hope that, in terms of section 276(1)(i) of the Criminal Procedure Act, the Commissioner of Correctional Services will see fit to place the appellant under correctional supervision within a very short time after this judgment has been handed down, subject, of course, to him being found to be a suitable candidate therefor, which he appears to be.

In the result, the appeal will be upheld. The sentence imposed on the appellant by the regional magistrate is set aside and is substituted with the following:

> "The charges are taken together for the purposes of sentence.
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> The accused is sentenced to 42 months' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, No. 51 of 1977.

In addition, he is sentenced to imprisonment for a further period of 18 months, which latter imprisonment is suspended for five years on condition that he is not convicted of any offence of which an element is violence against the person of another, or of contravening section 2(1) of the Dangerous Weapons Act, No. 71 of 1968, committed during the period of suspension.

In terms of section 12 of the Arms & Ammunition Act, No. 75 of 1969, the accused is declared to be unfit to possess a firearm".

THRING, J

MATOJANE, AJ: I agree.

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MATOJANE, AJ

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