REPUBLIC OF SOUTH AFRICA

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No:A 179/08

In the matter of

ROMEO THYS **Appellant**

versus

THE STATE **Respondent**

JUDGMENT DELIVERED : 17 OCTOBER 2008

For Appellant : Adv D C Theunissen

Attorneys) : Legal Aid Board

For Respondent : Adv T Berry

Heard on 17 OCTOBER 2008

Bench: Moosa, J et Saner, AJ

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

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CASE NO: A179/08

In the appeal between:

ROMEO THYS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 17 OCTOBER 2008

SANER A.J:

[1] In the Parow Regional Court in Cape Town, the Appellant was charged with one count of robbery with aggravating circumstances as described in Article 1 of Act 51 of 1977 read together with the provisions of Article 51(2)(a) of the Criminal Law Amendment Act, 105 of 1997. He duly stood trial before Regional Magistrate Mr F Botes.

[2] The Appellant's defence at the trial was an alibi. He said he had been at work, with his father, the entire day, only knocking off at a time after the crime with which he was charged had been committed.

[3] Quite correctly, in my view, assessing the evidence in its totality (see **R v Hlongwani** 1959 (3) SA 337 (A) at 341A and **R v Khumalo** 1991 (4) SA 310 (A) at 327H), and not allowing the onus of proof to shift from the state (see **R v Biya** 1952 (4) SA 514 (A) and **Khumalo's** case above at 327G-I), the Magistrate found Appellant guilty as charged.

[4] I say correctly because, not only was the identification evidence in the matter convincing and in line with how such evidence should be approached (see **S v Jochems** 1991 (1) SACR 208 (A); **S v Pretorius** 1991 (2) SACR 601 (A); **S v Zitha** 1993 (1) SACR 718 (A)), but also Appellant's alibi, as the Magistrate pointed out in his judgment, positively bristled with improbabilities, anomalies and blatant untruths. Resting only on Appellant's say-so, thin as that was, without any corroborating evidence which was supposedly available but not produced by Appellant, the alibi was unsustainable.

[5] The Appellant was duly found guilty and sentenced to 15 years' imprisonment on 16 January 2008. The trial court decided that there were no substantial and compelling circumstances persuading it to depart from the obligatory minimum 15 year sentence of imprisonment.

[6] The Appellant initially appealed against both his sentence and conviction. Appellant's counsel, instructed by the Legal Aid Board, received instructions from his client on 14 August 2007 telephonically from

Brandvlei Maximum Security Prison, to proceed only with the appeal against his sentence. This is contained in Mr **Loots**' Heads of Argument. The appeal before us is therefore concerned only with sentence.

[7] In my view, the withdrawal of the appeal against conviction was probably wise in the circumstances as I do not think there would have been much chance of it succeeding in any event.

[8] I have already noted that the sentence imposed was the minimum in terms of the applicable minimum sentencing legislation, and the Regional Magistrate found no substantial and compelling circumstances persuading him not to impose this sentence.

[9] The salient facts regarding the commission of the offence were as follows:

(a) The Appellant and another observed the Complainant and one or more school friends (then school boys) playing with their cellphones in the back garden of a house during the late afternoon.

(b) Later in the same day, the Complainant and his friends were approached on a street corner by the Appellant and another. The other person had a knife. The Appellant demanded the Complainant's cellphone from him in a threatening manner.

(c) The Complainant refused to hand it over and swore at the Appellant. The Appellant then pulled out or showed a gun and the Complainant threw down his cellphone and he and his friend ran away.

(d) The Complainant and his friend were chased for a short distance by the Appellant and his accomplice, the Appellant pointing his firearm at the fleeing Complainant and his friend. The Appellant and his accomplice soon gave up the chase and disappeared.

(e) Attempts to find them immediately after by the Complainant and his friends, assisted by some adults, were unsuccessful.

(f) The Appellant was arrested the next day. He denied all complicity with the crime and said that he had been at work the entire day on which the crime was alleged to have been committed.

(g) The value of the cellphone stolen was approximately R2 000,00.

(h) No one was injured in the robbery and no overt physical violence was used. There was some vague evidence as to some possible "*shirt-grabbing*" at the start of the incident, but that is all.

[10] The personal circumstances of the Appellant were that he was 25 years old at the time of the commission of the crime. He had been in casual

employ more or less continuously as a labourer with one employer for some 5½ years prior to the commission of the crime. He lived at home with his parents and was a joint breadwinner with his father for the family vis-à-vis their joint household. His father is also a labourer. He was described by his mother as a quiet and withdrawn individual.

[11] The Appellant had no relevant previous convictions. In fact he had only one previous conviction, namely a fine of R100,00 for possession of two "*stops*" of dagga. He is therefore, for all intents and purposes, a first offender.

[12] Despite the peremptory wording of Section 51(2)(a) of Act 105 of 1997, as amended, nevertheless the trial court retains a discretion, as it must, with respect to deciding if substantial and compelling circumstances are present in each particular case.

See: The unreported judgment of **Griesel J** in **S v Frans** Case No A564/07 CPD para 14, where he said the following:

> "*Al die oorwegings waarom 'n Hof van Appèl tradisioneel traag is met die uitoefening van 'n verhoorhof se diskresie ten opsigte van vonnisoplegging in te meng is ook aanwesig by die beoordeel of die vraag of wesenlike en dwingende omstandighede in 'n spesifieke geval aan of afwesig is. Die verhoorhof het normaalweg*

– soos in die huidige geval – die voordeel om eerstehands die onderskeie persoonlikhede van die beskuldigde sowel as die slagoffer(s) waar te neem, asook die effek wat die betrokke misdade gehad het – nie alleen op die individuele slagoffers daarvan nie, maar ook op die plaaslike gemeenskap. ... In hierdie omstandighede is ek van oordeel dat dit meer korrek en ook meer sinvol sou wees om die beslissing ten opsigte van wesenlike en dwingende omstandighede aan die diskresie van die verhoorhof oor te laat en om op appèl slegs weens beperkte gronde met daardie beslissing in te meng".

[13] It is settled law that a court of appeal will only interfere with the exercise of the discretion by a trial court if the exercise of such a discretion is vitiated by a misdirection. (See: **S v Oosthuizen** 2007 (1) SACR 321 (SCA) at 324h – 325b; **S v Kibido** 1998 (2) SACR 213 (SCA) 216g – j). When weighing the facts of this matter against the 15 year sentence imposed, I find the latter startlingly inappropriate (see **S v Ivanisevic** 1967 (4) SA 572 (A) at 575H) and that the Magistrate misdirected himself in not finding substantial and compelling circumstances.

[14] In deciding to interfere with the sentence in this matter, I do not lose sight of the fact that, as was said in **S v Valley** 1998 (1) SACR 417 at 420C–D by **Hoffmann AJ**:

"*The crimes which the Appellant committed are extremely serious. We live in a society which is becoming increasingly lawless; firearms are frequently used in robberies and victims are not uncommonly shot to death or badly wounded. Persons who perpetrate such crimes must be punished severely. Society demands this and it is absolutely necessary that the message go out to the world that people who commit these sorts of crimes will be dealt with severely*".

[15] I have also borne in mind, and taken note of, the judgment in the leading case in this regard of **S v Malgas** 2001 (1) SACR 469 (SCA) at para 25 concerning the reasons why the Legislature saw fit to pass the minimum sentencing legislation. In this regard, I refer particularly to the words of **Marais JA** where he said:

"*While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored … the ultimate impact of all circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') …*

If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence

unjust and that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided".

[16] Nevertheless, I believe that imposing a 15 year jail sentence on a relatively youthful accused, essentially a first offender, for a robbery where no shots were fired, no physical violence was used, no physical harm was caused and where a single cellphone worth approximately R2 000,00 was stolen, would work an injustice. I find in those circumstances substantial and compelling reasons not to impose the minimum sentence, as the Magistrate should have done. In this regard I am guided by the majority judgment in the case of **S v Nkomo** 2007 (2) SACR 198 (SCA), and particularly at paras 13 and 14, where **Lewis JA** said that:

"*The factors that weigh in the Appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No*

evidence was led to that effect, however … nonetheless these are substantial and compelling circumstances … A sentence of life imprisonment – the gravest of sentences that can be passed even for the crime of murder – is in the circumstance unjust and this court is entitled to interfere and to impose a different sentence, one that it considers appropriate".

[17] I mention also that, at para 24, the majority of the Court in the **Nkomo** case noted that, even though "*it may be difficult to imagine a rape under much worse conditions … the prospect of rehabilitation and the fact that the Appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence*". I am of the view that similar considerations apply here.

[18] In the **Nkomo** case, the majority therefore reduced the life sentence to one of 16 years' imprisonment.

[19] I am therefore of the opinion that the 15 year sentence should be set aside and that a suitable sentence should be imposed in its place. In doing so, I must of course consider the triad of the crime, the interests of society and the personal circumstances of the criminal. (See **S v Zinn** 1969 (2) SA 537 (A)). In the assessment of an appropriate sentence I must have regard, *inter alia*, to the main purposes of punishment, namely deterrence, prevention, reformation and retribution. These considerations have been

followed and laid down as the bedrock of all sentencing in our courts for many years, and are set out in:

R v Swanepoel 1945 AD 444 at 455

S v Whitehead 1970 (4) SA 424 (A) at 436E – F

S v Rabie 1975 (4) SA 855 (A) at 862

[20] As was pointed out in **S v Khumalo** 1984 (3) SA 327 (A) the possibility of reformation and rehabilitation should not be sacrificed at the altars of retribution and deterrence. As Nicholas JA observed in **Khumalo's** case:

> "*It is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the prisoner*".

I am respectfully of the view that, in the present case, these remarks are particularly applicable. The few facts we have to hand indicate that the Appellant is not yet a hardened criminal and I would hesitate to risk making him so by imposing an unduly lengthy sentence in the circumstances. In my judgment, a 15 year sentence will over-emphasise the deterrent and retributive aspects of punishment and will leave little scope for rehabilitation.

[21] Taking all of the above into consideration, I think an appropriate sentence, which would send a correct message to society that the crime of robbery is considered very seriously by the courts, would be 8 years imprisonment with 3 years thereof suspended for 5 years, on condition that the Appellant is not convicted of a crime during the time of suspension, of which theft, assault or robbery are elements.

[22] The sentence of 15 years imprisonment is accordingly set aside. It is replaced with a sentence of 8 years imprisonment with 3 years thereof suspended for 5 years on condition that the Appellant is not convicted of a crime of which robbery, assault or theft are elements, within the time of the suspension, and is sentenced to imprisonment without the option of a fine.

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J SANER

MOOSA, J: I agree and it is so ordered.

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