

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A407/2008

DATE:

6 FEBRUARY 2009

5 In the matter between:

1. MXOLISI LUXANDE

First Appellant

2. NTSIKELELO LUFALIGA

Second Appellant

versus

THE STATE

Respondent

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JUDGMENT

P DE B VIVIER, AJ:

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The Appellants in this matter appeared in the Regional court of Wynberg, where they were charged with, and convicted of, robbery with aggravating circumstances. They were charged with two further counts, namely the unlawful possession of a firearm, described in the charge sheet as "an Arinco B00953FN pistol", as well as the unlawful possession of six rounds of 9mm calibre ammunition.

25 The first appellant was convicted on all three counts. The second appellant was convicted on count one only.

In respect of count one, both appellants were sentenced to fifteen (15) years imprisonment, which is the minimum sentence prescribed for first offenders in terms of section

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51(2)(a)(i) of the Criminal Law Amendment Act, No 105 of 1997 ("the Act").

5 In respect of counts two and three, the Magistrate took these counts together for the purpose of sentencing, and sentenced the first appellant to three years imprisonment. Furthermore, in view of the cumulative effect of these sentences, it was ordered that two years of the sentence on counts two and three should run concurrently with the sentence of fifteen (15) 10 years imprisonment, in respect of count one.

As a result thereof, the first appellant was sentenced to an effective term of sixteen (16) years imprisonment. In addition thereto, both appellants were declared unfit to possess a 15 firearm.

This appeal is based on two grounds. The first, is by both appellants against the sentence of fifteen (15) years imprisonment imposed in respect of count one, and, secondly, 20 by the second appellant against the magistrate's ruling that only two years of the sentence in respect of both counts two and three, should run concurrently with the sentence imposed on count one.

25 Mr Stamper, who appeared on behalf of the appellants, submitted with regard to the second leg of the appeal, and I quote from paragraph 7 of his Heads of Argument, as follows:-

30 "In respect of the sentence on count 2 and count 3, it is submitted that the correct approach would be to have the sentence imposed in respect of these counts to wholly run (sic) concurrently with the sentence in court (sic) 1..."

The relevant facts and circumstances pertaining to the commission of the offence, can be summarised as follows: on Monday, 27 August 2007, at approximately 3pm, the complainant, one Nelson Potelwa, was walking back from work to his home in Langa. On his way home, he decided to go to an ATM machine at the Vanguard Shopping Centre in Athlone, to draw money. Having withdrawn R20.00, he continued on his journey home. At some stage thereafter, (it is not clear from the evidence how long after he had made the withdrawal), the complainant noticed two persons following him. Initially, the complainant did not pay much attention to these persons. At some stage, however, when he was about to proceed through an opening in a fence, the complainant was approached by these two persons (being the two appellants herein). The first appellant pointed a firearm at the complainant, and proceeded to rob him of his Sony Eriksson cellphone. The second appellant took the complainant's wallet from him, containing the R20.00, which he had withdrawn a short while before. The complainant's Legal Wise and Nedbank cards were also taken from him. No physical harm was inflicted upon the complainant during the incident.

The complainant testified that he, as well as the appellants, thereafter proceeded to walk in the direction of Langa. The evidence in the court a quo, reflects a measure of confusion as to the exact direction that was followed. Some of the State's witnesses testified that, after the incident, the appellants proceeded to walk down Klipfontein Road in the direction of Guguletu. Be that as it may, this apparent contradiction does not have any significance on the outcome of this appeal.

Shortly after the robbery had occurred (according to the
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complainant, approximately four minutes after the incident), he encountered a vehicle carrying officials of the City Police, to whom he then reported the incident. Soon thereafter, these officials, (still accompanied by the complainant), found the appellants, walking in the direction of Guguletu. The officials confronted the appellants. The appellants were searched and found to be in possession of the complainant's above-mentioned possessions. The appellants were then arrested. The complainant's possessions were subsequently handed in at the Athlone Police Station to be used as exhibits.

In his somewhat brief judgment on sentence, the Magistrate referred to the following personal circumstances of the appellants:-

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The first appellant is currently 31 years old, and lives with his wife and three children at the address recorded on the charge sheet. The first appellant passed standard nine at school. At the time of the trial in the court a quo, he was unemployed (doing only "casual jobs"). He was previously employed as a member of the Defence Force. His wife is also unemployed.

The second appellant is currently 34 years old. Although he is not married, he has two children. He passed standard eight at school and is unemployed. He was previously employed at a garden shop as a general worker. The mother of his children is also unemployed".

As stated above, in terms of Section 51(2)(a)(i) of the Act, the minimum prescribed sentence in the case of first offenders for robbery, when there are aggravating circumstances present, is fifteen (15) years imprisonment, unless, as envisaged in sub-section 3, there are substantial and compelling circumstances
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present that would justify the imposition of a lesser sentence.

5 The Supreme Court of Appeal, in S v Malgas 2001(2) SA 1222 (SCA), at 1236, referred to the "determinative test" to be applied in order to decide whether the prescribed sentence may be departed from. This test was described as follows:-

10 "If the sentencing Court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust in 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."

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The first appellant has no previous convictions. The second appellant has one previous conviction for housebreaking, in respect of which he was sentenced to a period of 12 months imprisonment, during October 1998. The Magistrate, did not, however, take this offence into account for the purpose of sentencing.

25 The Magistrate rejected the submissions, in the court *a quo*, by the appellants' then legal representative, that there were in fact substantial and compelling circumstances that warranted a lesser sentence. His conclusions appeared to be primarily based on the following statement:-

30 "This Court on a very regular basis deviates from the prescribed minimum sentence for obvious reasons. In many cases, if not the majority of cases, the cumulative effect of all the mitigating factors are such that the prescribed minimum /...

sentence could not be regarded as suitable. In this case, however, I think that the minimum sentence is indeed suitable regarding both accused. I think that this kind of robbery is indeed the kind of robbery that the legislator had in mind when this legislation was enacted. Two men in broad daylight, one armed with a working firearm, approaches a complainant who clearly had no chance against them."

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It is true, as pointed out by the Magistrate in a statement immediately following the above quoted passage, that the appellants' conduct showed a total disregard for the complainant's rights to his property and person. Moreover, the appellants did not show any remorse for their actions, by failing to admit guilt in respect of the offence. The Magistrate also referred to the complainant's evidence that, as a consequence of the incident, he had lost his employment.

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20 Mr Stamper, however, argued that this aspect had not been properly investigated in the court *a quo*, and that the appellants should be given the benefit of the doubt, in other words, it should not be taken into account as an aggravating fact. In my view, this contention is unfounded, in view thereof that the complainant's evidence in that regard, was not disputed in the court *a quo*.

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However, the Magistrate erred by concluding, *a priori* and before he gave consideration to the relevant facts and circumstances, that the minimum sentence was in fact the appropriate sentence. This is evident from the following remark by the Magistrate:

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"I think that this kind of robbery is indeed the kind of robbery that the legislator had in mind when this legislation was enacted."

5 In the unreported judgment of the Supreme Court of Appeal in S v Vilakazi, reported under case number 576/2007, on 3 September 2008, the Court stated the following:-

10 "It is plain from the determinative test laid down by Malgas, consistent with what was said throughout the judgment and consistent with what was said by the constitutional court in Dlodlo that a prescribed sentence cannot be assumed *a priori* to be proportionate in any particular case."

15 It is clear from this *dictum* in the above judgment, that it is incumbent upon a Court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.

20 This, the Magistrate, in my view, failed to do. Having stated that, in his view, the kind of robbery that occurred in the instant matter, is indeed the kind of robbery that the legislator had in mind when this legislation was enacted, the Magistrate proceeded to emphasise the aggravating circumstances, namely the fact that the appellants' conduct showed a complete disrespect for other peoples' rights, and that they were found in possession of the stolen items less than an hour after the robbery, yet they refused to admit their guilt. The Magistrate emphasized that this conduct manifested a complete lack of remorse. Lastly, the Magistrate emphasized the fact that the complainant had lost his job as a result of the
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robbery. He then concluded as follows:-

5 “The Court is of the opinion that regarding both the accused the minimum sentence is the most appropriate sentence today.”

10 In my view the Magistrate erred by failing to give sufficient consideration to the personal circumstances of the appellants. They both are first offenders and were unemployed at the time of the offence. Only the first appellant is married. Both have young children (their ages are not apparent from the proceedings in the trial court).

15 Apart from these personal circumstances of the appellants, due consideration should also be given to the fact that the appellants did not inflict any physical injuries upon the complainant during the incident. Apart from being threatened with a firearm, which is by no means an insignificant event, the complainant was not subjected to any physical harm. I am mindful of the fact that the complainant lost his employment as a consequence of the incident, and that he must have been severely traumatised by this extremely unpleasant experience. The fact remains, however, that the complainant did not suffer any physical injury or financial loss. His possessions would eventually have been returned to him and there is nothing to suggest that this will not be the case.

25 Ms Van Rooyen, who represented the Respondent, submitted that the Magistrate in the court *a quo* considered and weighed the mitigating factors against the seriousness of the offence, and found the imposition of the minimum sentence to be appropriate. She also submitted that the Magistrate did in fact weigh all the factors before him before imposing sentence.

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In my view, the Magistrate did not afford the mitigating factors, as well as the personal circumstances of the appellants, appropriate recognition. Furthermore, he gave no consideration to the traditional aims of sentencing, such as personal deterrence, rehabilitation and reformation.

I am of the view that the combined effect of his failure in this regard, constitutes a further material misdirection, that warrants intervention by this Court.

Having reconsidered the matter and having regard to all the relevant circumstances, I am of the view that, in respect of count one, a sentence of ten (10) years imprisonment would be a proportionate sentence. This would have an effect on the order of the Magistrate, that, in respect of counts two and three, two (2) years of the sentence should run concurrently with the sentence on count one. I intend to order that only one (1) year should run concurrently with the sentence on count one.

In conclusion, I would uphold the appeal against the sentence in respect of count one, and I intend to order that the sentence imposed upon the appellants should be set aside and substituted with the following sentence:

The appellants are sentenced in terms of the provisions of Sections 51(2)(a)(i) and 51(3) of the Act, to ten (10) years imprisonment on count one. In the case of the first appellant, counts two and three will be taken together for the purpose of sentence.

Having regard to the cumulative effect of the respective periods of imprisonment, I would order that one (1) year of the sentence of three (3) years in respect of counts two and three should run concurrently with the sentence in respect of count

5 one.



P DE B VIVIER, AJ

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I agree. Both the appeals against sentence succeed. The convictions are confirmed but the sentences are replaced by the sentences read out by my brother, and it is so ordered.

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LOUW, J