

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A76/2008

DATE:

27 FEBRUARY 2009

5 In the matter between:

1. FAREEZ PATTON

1st APPLICANT

2. DOMINIC ADAMS

2nd APPLICANT

and

THE STATE

RESPONDENT

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JUDGMENT

(Application for Leave to Appeal)

MAQUBELA, A J:

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The appellants were charged on 15 August 2007 with robbery with aggravating circumstances in the Cape Town Regional Court. They pleaded not guilty, but were convicted as charged. The 1st appellant was sentenced to 12 years imprisonment and the 2nd appellant to 14 years imprisonment. They have now approached this Court to appeal against their sentences.

When sentencing the appellants, the trial court said that because of the nature of the offence of which they had been

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convicted, namely robbery with aggravating circumstances, the court was obliged in terms of the Criminal Law Amendment Act 1997, to impose the minimum sentence of 15 years imprisonment. The Court went further to state that it could only deviate from the sentence if the court finds that there are substantial and compelling circumstances which warrant a lesser sentence. Also it has been stated in numerous High Court cases that these sentences should not be lightly deviated from, because they should be the benchmark when considering sentences.

Pertaining to 1st appellant, the Court took into account that he was still fairly young, he was only 23 years old and had one previous conviction against him, one of theft which was committed in June 2004. The Court also felt that he had shown remorse to a certain extent. For his previous conviction he had not been given a sentence of direct imprisonment.

As the 2nd appellant's circumstances differed remarkably, the Court felt that there should be differentiation also in sentencing them. The personal circumstances of the 2nd appellant were found to be an aggravating factor. He was 30 years old at the time and according to the trial court had, I quote:

"A very impressive career with regard to his criminal activities."

All his previous convictions related to the offence in question and they are theft, assault, robbery, possession of firearms and ammunitions. According to the Court it seemed as if his previous sentences had not taught him any lesson at all and did not have a deterrent effect. Regarding the 2nd appellant, the Court found that there were no substantial and compelling reasons which warrant a lesser sentence. However the Court still found that because he had been in custody for about five months awaiting trial, that could be counted in this favour. Therefore, the sentence of 14 years instead of 15 years imprisonment was passed on him. Effectively obviously this means that the trial court, although it said it didn't find any substantial and compelling reasons to deviate from the sentence, in effect it did.

The grounds of appeal are as follows:

1. The appellant's financial status and their social circumstances should be regarded as mitigating factors rather than aggravating ones.
2. The trial court put undue emphasis on the seriousness of the crime and the deterrent attributes of the sentence.

3. The trial court erred in accepting the alleged trauma of 3rd parties not involved in this incident as aggravating factors.

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4. The trial court should have taken into consideration the following:

(a) The complainant suffered minimal economic loss.

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(b) A toy gun was used in the crime.

(c) Punitive effect of a long term prison sentence would have a multiple adverse effect as both the appellants have dependants and were employed at the time of the commission of the crime.

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(d) The special circumstances of the case require that the sentences should be tampered with mercy.

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Now, in addition, the trial court over-emphasised the interest of society above the personal circumstances of the appellants and the special circumstances of the case. It is then submitted that this Court should set aside the sentence and substitute same with a more appropriate one. This Court is,

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however, asked by the respondent to confirm the conviction and dismiss the appeal.

First of all the Court condones the late lodgement of the appeal and having listened to argument and having regard to the general principles of sentencing, this Court approaches this case as follows. The Court takes the view that the circumstances of this case are such that, indeed pertaining to the 1st appellant, there are substantial and compelling reasons to deviate from the minimum sentence provided for by legislation in cases of this nature as the court *a quo* found. However, taking into account his personal circumstances such as relative youthfulness and the almost clean record as an offender, I still have to balance that against the seriousness of the offence, the interests of society in maintaining confidence in the Criminal Justice System, where offenders are seen to be getting their just desserts.

Turning to the 2nd appellant, it becomes more difficult indeed to be persuaded that there are substantial and compelling reasons to deviate from the injunction of the relevant legislation, given the litany of previous convictions in similar offences and in line with what the law prescribes, I find the 2nd appellant's position, should be individualised, this should be so because of his personal circumstances which are markedly

different from those of the first appellant. Although still relative young when they committed the crime, he was plus minus 30 years old. He was the older one of the two. His previous convictions of similar offences and even more serious in the extent. The urge to treat him more severely is almost irresistible. However, as was said in the leading case in sentencing, that is S v Malgas 2001(1) SACR 469 (SCA), it was said at page 471, paragraph i to j:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they rendered the prescribed sentence unjust and that it would be disproportionate of the crime, the criminal and the needs of society so that any justice would be done by imposing that sentence, the court 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.”

The relevant Section 51(2)(a) of the Criminal Law Amendment Act, 105 of 1997, provides that a third or subsequent offender

of any such offence should be sentenced to imprisonment for a period not less than 25 (twenty five) years. This is obviously applicable to second appellant, but would be grossly disproportionate to the offence in question.

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The balance which has to be struck in a case like this present one takes into account the crime itself, the degree of its specific seriousness as opposed to the general regard to its nature.

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In the case of S v Maomotsa 2002(2) SACR 435 (SCA), the Court made the following remarks in this regard:

“Even in cases falling within the categories delineated in the act, there are bound to be differences in the degrees of their seriousness. There should be no misunderstanding about this, they will all be serious, but some will be more serious than others. But subject to the caveat that follows, it is only right that the differences and seriousness should receive recognition when it comes to the meting out of sentence.”

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I find that in the case of the 2nd appellant as well, there are substantial and compelling circumstances which makes it

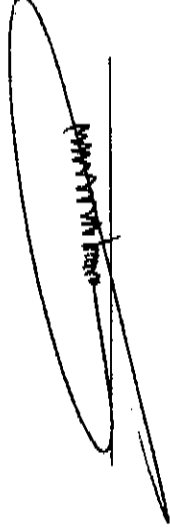
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possible to deviate from the prescribed sentence in the sense that his sentence is also disproportionate to the nature of the offence of which he was convicted. I come to the conclusion that the sentences imposed by the trial court have to be
5 interfered with as follows:

1. The sentence of 12 years imposed on 1st appellant should be set aside and replaced with one of 8 (EIGHT) YEARS IMPRISONMENT, of which 4 (FOUR) are
10 SUSPENDED for 5 (FIVE) YEARS on condition that he is not found guilty of theft or robbery committed during the period of suspension.

2. The sentence of 14 years imprisonment imposed on 2nd appellant is hereby set aside and replaced by one of 10 (TEN) YEARS IMPRISONMENT, of which 4 (FOUR) YEARS are SUSPENDED for 5 (FIVE) YEARS on condition that he is not found guilty of theft or robbery committed during the period of suspension.

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MAQUBELA, A J

Save for stating that in relation to 1st appellant it is 8 (EIGHT)

10 YEARS IMPRISONMENT of which 4 (FOUR) YEARS and not