IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

CASE NO: A143/2010

In the appeal of:

LORENZO DOTY Appellant

vs

THE STATE Respondent

JUDGMENT: 19 AUGUST 2010

NGEWU, AJ:

[1] The appellant was convicted of one count of robbery with aggravating circumstances in the regional court, Vredenburg, and was sentenced to 15 years' imprisonment. With the leave of the court *a quo* he now appeals against the sentence only.

[2] The charge had been read with the provisions of section 51 of the Criminal Law Amendment Act, ("the Act"), which prescribes a minimum sentence of 15 years to be imposed on first offenders for such robbery upon conviction. The trial court found that there were no substantial and compelling circumstances warranting deviation from the prescribed sentence and proceeded to impose a sentence of 15 years direct imprisonment.

[3] The state's evidence was briefly that on 9 January 2006 the complainant was working at Fred's Discount Store as a cashier. At about 2 o'clock in the afternoon the appellant entered the shop and asked for the price of cinnamon. He said he wanted to buy it but did not have money and stepped outside to wait for the child to give him money. It was quiet in the shop. Complainant was restless as the manner in which the appellant carried himself and addressed her was domineering. Appellant came in again asking for water. Complainant told him she could not leave the shop. He went out again. He came back again with his hands in the pocket. He then took out a firearm and loaded it and pointed it at the complainant and demanded money or complainant's life. He demanded only bank notes. Complainant put the money on the till. Appellant took it and ran away. Complainant then got a chance to press the panic button. The amount stolen was R400.00. As a result of the incident complainant suffered nightmares and was traumatized by the incident.

[4] The following grounds of appeal were raised on behalf of the appellant:

(i) The court *a quo* misdirected itself by not finding that the personal circumstances of the appellant amounted to substantial and compelling circumstances.

(ii) The court *a quo* misdirected itself by over-emphasizing the seriousness of the offence.

(iii) The court *a quo* misdirected itself by over-emphasizing the appellant's previous convictions.

(iv) The court *a quo* failed to consider alternative forms of sentencing of which correctional supervision would have been the most appropriate.

(v) Appellant has two minor children. Their interest is paramount and being deprived of their father will have a serious psychological impact on them.

[5] It is trite that the Act demands the imposition of the prescribed minimum sentence unless the Court is satisfied in a particular case that there are substantial and compelling circumstances that justify the imposition of a lesser sentence. It is the duty of the sentencing Courts to determine whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not only pay lip-service to, the Legislatures' view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of a specific kind are committed. (See **S v Vilakazi 2009(1) SACR 552 SCA**).

[6] In S v **Malgas 2001 (1) SACR 469 (SCA) Marais JA** interpreted the concept substantial and compelling circumstances as follows:

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the

absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. *Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*

D. *The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. 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.*

E. *All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*

F. *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.*

G. *In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.*

H. *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.*

I. ***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 bench mark which the legislature has provided.***

[7] It is not for the courts to simply impose the prescribed minimum sentence without probing into circumstances relevant to the offence at hand. Judicial officers are required to reflect on the sentences they should impose. It is incumbent upon a court in every case, before it imposes the prescribed sentence, to assess upon a consideration of all the circumstances of a particular case, whether it is indeed proportionate to the particular offence. Robberies vary widely in terms of their nature, their consequences, the items stolen, the mode of commission, the degree of violence used, the nature and extent of injuries inflicted on the victims and the impact they have on the victims and their families.

[8] A prescribed sentence cannot be assumed ***a priori*** to be proportionate in a particular case. It cannot be assumed ***a priori*** that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate and capable of being imposed, is a matter to be determined upon a consideration of the circumstances of a particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of **Malgas** and **Dodo** is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.
(See **S v Vilakazi** above.)

[9] In the words of Ackerman J in **S v Dodo 2001(1) SACR 594(CC)** at [37] and [38] ***"the concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. … The cause justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. "Offence" consists of all the factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. The length of punishment must be proportionate to the offence. To attempt to justify any period of penal incarceration without inquiring into the proportionality between the offence and the period of imprisonment is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached. They are creatures with inherent and intimate worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence, the offender is being used essentially as a means to another end and the offender's dignity assailed. … mere disproportionally between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."***

[10] In **S v Malgas** it was held that the determinative test for deciding whether a prescribed sentence may be departed from, makes plain that the power of the court to impose a lesser sentence… can be exercised well before the disproportionally between the mandated sentence and the nature of the offence become so great that it can be typified as gross [and thus constitutionally offensive].

[11] Incongruous and disproportionate sentences can only be avoided if the courts approach sentencing under the Act in the manner that was laid down in **S v Malgas** and subsequently approved in **S v Dodo**. (See **S v Vilakazi** above.)

[12] The following are aggravating circumstances:

(i) A firearm was used in the commission of the offence. The appellant loaded the firearm in front of the complainant.

(ii) The amount stolen was never recovered.

(iii) The complainant suffered traumatic consequences of the offence.

(iv) The appellant was employed. Thus, the offence was perpetuated by greed.

(v) This type of offence is prevalent in our country.

(vi) The offence was premeditated, as gleaned from the numerous occasions the appellant entered and exited the shop.

(vii) The appellant had two relevant previous convictions, one of housebreaking with intent to steal and theft, and one of theft.

(viii) The firearm was not recovered. This increases the potential of the commission of further offences with the said firearm.

(ix) By virtue of his age and previous brushes with law, the appellant is a potential re-offender.

[13] The following are mitigating factors:

(i) The appellant was 20 years old at the time of the commission of the offence.

(ii) No visible injuries were inflicted with the firearm.

(iii) The robbery was not that callous.

(iv) Appellants' youthfulness and impaired vision may have played a role in the commission of the offence.

(v) Appellant was employed and contributed positively to the economy of our country.

(vi) He had two minor children to support and was in a stable relationship.

(vii) The amount stolen was minimal.

(viii) The appellant stayed with his grandmother.

[14] By their nature, the mitigating factors far outweigh the aggravating factors. Furthermore, I have identified the following as substantial and compelling circumstances warranting deviation from the prescribed minimum sentence:

a) This is not the type of robbery envisaged by the Criminal Law Amendment Act 105 of 1997.

b) Except for the traumatic consequences of an offence, no physical injuries were caused to the complainant.

c) An amount of R400.00 was stolen.

d) The mode of commission of the offence reflects clouded judgment on the part of the appellant.

[15] I am fully alive to the remarks of Marais JA in **Sv Malgas** that:

"Court's are required to approach the imposition of sentence conscious that the Legislature has ordained the particular prescribed period of imprisonment as the sentence that should ordinarily be imposed, for listed crimes in specific circumstances, in the absence of weighty justification. The specified sentences are not to be departed from lightly and for flimsy

reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisonment of first offenders, personal doubts as to efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded".

[16] That the offence of robbery with aggravating circumstances is a very serious one needs no further qualification. In **S v Khambule 2001(1) SA 501 (SCA)**, the position was amplified as follows:

> ***"The commission of this offence had become so common, especially in and around our large cities, that innocent men and women used the roads with great fear and anxiety. The brutal acts of robbers caused enormous damage to our country and cast a dark shadow over the confidence of a community in policing, prosecution and administration of justice. An indication of the seriousness with which the Legislature viewed this sort of conduct appeared from the fact that a minimum sentence of 15 years' imprisonment for robbery with aggravating circumstances and for robbery of a motor vehicle was prescribed in s 51(1) read together with Part 11 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, even for a first offender…."***
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> See also **S v Mohase 1998(1) SACR 185(O)** where Hancke J held that "***Armed robbery was currently assuming serious dimensions, and that it was important that a clear message had to be sent to potential offenders that this conduct would not be tolerated by the courts. The elements of retribution and deterrence came strongly to the fore***". In **S v Maseko 1998(1) SACR 451 (TPD)** De Klerk J commented as follows: "***Armed robberies … were on the increase. The state was manifestly incapable of acting pro-actively to prevent this wave of crime, and all that remained was for the court, intervening reactively, to try to protect the public. The only weapon available to the courts was to impose more severe sentences***".

[17] The imposition of sentence is a matter falling pre-eminently within the judicial discretion of a trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by an irregularity or misdirection or is disturbingly inappropriate. (See **DPP Kwazulu-Natal v P 2006(1) SACR 243 (SCA)**. Furthermore, the sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court had not exercised its discretion properly or that it was in the interest of justice to alter it. See **S v Fhetani 2007(2) SACR 590 (SCA) at [5].**

[18] However, the combined impact of the mitigating factors and the substantial and compelling circumstances found justify a departure from the prescribed sentence. For that reason the sentence imposed on the appellant is out of proportion to the gravity and magnitude of the offence and is disturbingly inappropriate. I am convinced that the court ***a quo*** did not exercise its judicial discretion properly and thus, misdirected itself. I am obliged to consider the sentence afresh.

[19] The circumstances surrounding the commission of the offence suggest that it was premeditated and planned. The only appropriate sentence is that of direct imprisonment in view of the appellant's previous convictions, seriousness and prevalence of the offence nationwide.

[20] In cases of serious crimes, the personal circumstances of an offender do not come to the fore.

[21] I cannot agree with counsel for the appellant that correctional supervision would be the most appropriate sentence in this case. Marais JA in **S v Malgas** made it clear that the Act signalled that it was not to be "business as usual" when sentencing for the commission of the specified crime. At paragraph [8] of his judgment the learned judge stated the position to be thus:

> "***In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may***"

[22] It is well understood that previous convictions serve as guidance to the court as to the nature and magnitude of the sentence to be imposed. They also give a clue to the court as to the prospects of rehabilitation of the offender and the frequency and pattern of commission of offences and ability to re-offend. I cannot fault the court *a quo* for referring to the

previous convictions as they were relevant. In **S v Muggel 1998 (2) SACR 414 (C) at 419 D – G** Ngcobo J sets out the role of previous conviction when considering an appropriate sentence as the following:

"***4. In the exercise of its discretion, the sentencing court is required to have regard to the nature, the number and the extent of similar previous convictions and the passage of time between them and the present offence. The relevance and importance of those convictions depends upon the element they have in common with the offence in question. See S v J 1989 (1) SA 669 (A) at 675C-D.***

[23] I acknowledge the psychological impact the incarceration has on appellant's two minor children and the statement that he supported them. At the time he committed the offence he knew of his responsibility towards his children. He cannot shelter behind the children and avoid appropriate punishment. He has not been shown to be the primary care-giver for the children.

[24] A substantial period of ten years imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence, and to exact sufficient retribution for his crime. Fifteen years is grossly disproportionate.

[25] In the circumstances I propose the following order:

a) The conviction is confirmed.

b) The appeal against sentence succeeds.

c) The sentence imposed on the appellant is set aside and is substituted as follows:

The accused is sentenced to undergo 10 (ten) years imprisonment.

The sentence is backdated to 15 May 2007.

NGEWU, AJ

I agree with the outcome, but for different reasons which I prepared in writing. I hand down those reasons to form part of the record.

LE GRANGE, J