IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A237/2010

DATE: 26 NOVEMBER 2010

In the matter between:

L MATYWATYWA Appellant

and

THE STATE Respondent

J U D G M E N T

WEINKOVE, AJ:

Appellant was charged and convicted on three counts of robbery with aggravating circumstances, in that on 6 September 207 in Forest Drive Extension, Thornton in the Western Cape, he robbed the first complainant of a Samsung cell phone. He made use of a firearm which was probably a realistic toy gun. On the same day in Coral Tree Street, Thornton, appellant robbed the second complainant of a Samsung cell phone, again using a firearm, also probably a toy gun, in the robbery. On 13 September 2007 and in Forest Drive Extension, Thornton, appellant robbed third complainant

of a Motorola cell phone again using the same *modus operandi*, which involved showing the victim the gun which was either tucked into his trousers or held under his arm. Again it seems highly likely that this was also a toy gun.

Appellant comes before this Court with leave to appeal from the court *a quo* against the sentence imposed. Because appellant committed an offence for which a minimum sentence of 15 years has been prescribed by the legislature, the court, in imposing sentence, had to be satisfied that there were substantial and compelling circumstances which justified a deviation from the minimum sentence prescribed by the legislature. Before sentence was imposed, the prosecutor addressed the court and conceded that there were substantial and compelling circumstances which justified a deviation from the minimum prescribed sentence.

He proposed to the court that in respect of counts 1 and 2, a sentence of 15 years should be imposed on each count, but that five years of that sentence should be suspended and that the two counts should be regarded as one. He further proposed that in respect of count 3 a sentence of five years should be imposed to run concurrently with the sentence imposed in respect of counts 1 and 2. In effect, therefore, the prosecutor was proposing a sentence of ten years

imprisonment in respect of all three counts.

On the question of sentence the magistrate took into account that the appellant was only 23 years of age when he was arrested on 18 October 2007, more than three years ago, and that he was 25 years of age at the time of trial. He also was supporting a minor child and was a first offender. She took into account that he used a toy gun and did not physically harm any of the complainants and that he had been in custody since his arrest on 18 October 2007, which was more than three years ago.

The magistrate found that all three complainants testified they were traumatised by the experience and took into account that all three of them had permanently lost their cell phones. Taking into account all these factors, the magistrate then took counts 1 and 2 together for the purposes of sentence and imposed a sentence of 15 years in respect of these two counts. She further sentenced appellant to another five years imprisonment in respect of count 3 so that effectively appellant would have to serve 20 years imprisonment in respect of these three offences. This was double the period that the prosecutor himself had proposed.

It seems to me that imposing a sentence of 20 years on a first

offender for the robbery of three cell phone from three complainants, all within a few days of each other, is unduly harsh. Appellant was a young man and most importantly was a first offender. Imposing a sentence of 20 years imprisonment leaves little, if any, room for rehabilitation and will immediately place this first offender into the company of hardened criminals. I also do not think that the magistrate sufficiently took into account the long period of imprisonment which appellant was obliged to serve before the conclusion of his trial. He was an awaiting trail prisoner for nearly two years and that fact should have been taken into account in imposing sentence.

When the Court considers a suitable sentence in a particular case and there is a gross disparity between the sentence the Court would have imposed and the sentence which the magistrate imposed, then the Court should interfere and I believe this is such a case. Although the appellant's personal circumstances are very favourable, the sentencing court must also take into account the interests of society and the nature and seriousness of the offence. As far as the latter is concerned, what the evidence reveals is that the appellant was systematically preying on women in the Thornton area by robbing them in broad daylight of their cell phones, none of which were recovered.

Whilst it is a mitigating factor that in all probability the weapon used was not a real gun, the fact was, of course, not known to his victims, who to a lesser or greater extent, were traumatised by the robberies. As far as the interests of the community are concerned, it goes without saying that women should be able to walk the streets of their neighbourhood free of the fear that they will be robbed or injured. See S v Chapman 1997 (2) SACR 3 (SCA) at 5b-c.

Notwithstanding the existence of substantial and compelling circumstances, this Court is not at liberty to ignore the sentencing regime envisaged in the minimum sentencing legislation. As was stated by Marais, J in S v Malgas 2001 (1) SACR 469 (SCA) at 482e-g:

> "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."

As far as sentence is concerned, the robberies which were the subject of counts 1 and 2 took place only minutes apart and the magistrate properly took them together for the purposes of

sentence. However, the appellant committed a third robbery a week later and in the circumstances must be sentenced separately on this count. It would, in my view, be salutary for a part of the appellant's sentence to be suspended so as to put him on notice that should he again relapse in future he will pay a heavy penalty.

In the present case it would also be just if the 22 months spent by the appellant in prison awaiting trial, were brought into account. In this regard see S v Vilakazi 2009 (1) SACR 552 (SCA). In the circumstances I would order that a further 22 months be deducted from the appellant's effective sentence when calculating the day upon which the sentence is to expire. Taking all these circumstances together, mitigating and aggravating, I consider the following sentence would be appropriate:

1. The appeal against sentence is upheld.
2. The sentence imposed in respect of counts 1, 2 and 3 are set aside and replaced with the following:
   (a) Counts 1and 2 to be taken together for the purpose of sentence and the appellant to be sentenced to 7 (seven) years imprisonment on these counts, 3 (three) years of which is suspended for a period of 4 (four) years from

the date of his release on condition that he is not convicted of robbery committed during that period.

(b) On count 3, I would sentence the appellant to 4 (four) years imprisonment, 2 (two) years of which should run concurrently with the sentence imposed in counts 1 and 2.

(c) When calculating the date upon which the appellant's effective sentence of 6 (six) years is to expire, 22 (twenty two) months should be deducted therefrom.

For the sake of clarity I record that the above proposed sentence will result in an effective term of **IMPRISONMENT OF SIX (6) YEARS** subject to the appellant's release date being calculated taking into account the 22 months spent by him in prison awaiting trial.

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WEINKOVE, AJ

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

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BOZALEK, J