IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: SS24/10

DATE: 8 December 2010

In the matter between:

LINDELA MGWALI 1st Applicant

and

THE STATE Respondent

JUDGMENT

(Application for Leave to Appeal)

BINNS-WARD, J

In this matter there is before me an application for condonation for the non-appearance of the applicant for leave to appeal's legal representative on the day the application for leave to appeal was set down and the application for leave to appeal itself.

The application for leave to appeal in the current matter is by Lindela Mgwali, who was accused 1 in the trial, heard and determined by me. His application for leave to appeal had been due to be heard together with that of his co-accused. I handed down judgment in the application by accused 2 for

leave to appeal on 15 November 2010 and in that instance granted leave to appeal to accused 2 against his conviction only. Accused 2's application for leave to appeal against his sentence was dismissed.

My judgment in regard to the current application for leave to appeal, which I am entertaining because condonation for the non-appearance of his legal representative will be granted, because of the primary interest of the applicant himself, should be read together with my judgment in the application for leave to appeal by accused 2. I referred quite extensively in that earlier judgment to the recent judgment of the Supreme Court of Appeal in S v Matyityi [2010] ZASCA 127 which was delivered on 30 September 2010. I do not intend to repeat those references in this judgment, regard should be had to them with reference to the earlier judgment.

The application for leave to appeal against sentence is based on four grounds set out in the notice of application. The first ground is "that the sentence of 15 years imprisonment for one count of robbery with aggravating circumstances is shockingly inappropriate". There is no substance in that contention, the sentence imposed for the offence of which the applicant was convicted was the prescribed minimum sentence and the Court was bound to impose it unless the existence of substantial and

compelling circumstances not to do so was proven.

In that regard Mr Raphaels for the applicant today submitted in support of his argument that there was a reasonable prospect that another Court might find that I have erred in not finding the existence of such substantial and compelling circumstances. The issue that accused 1 had after the fatal shot had been fired at the deceased shown a moment's hesitancy in joining his co-accused in the motor vehicle which they had robbed the deceased of and in which they departed the scene. That was a factor that I took into account in determining an appropriate sentence, and it was the factor which resulted in a minor differential between the sentence imposed on accused 1, the applicant in this matter, and his co-accused.

It could not be overlooked in having regard to that factor that notwithstanding the hesitancy referred to the accused had thereafter participated in the further conduct of the perpetrators of the offence with no indication of any intention by him to distance himself from what had occurred.

The other factor that was urged in support of the existence of substantial and compelling circumstances was the alleged youthfulness of the accused. The accused was 25 years of age

at the time of sentencing, and that occurred about a year after the commission of the offence. As is apparent from Matyityi's case the age of the accused does not count on the face of matters as bringing him within the concept of youthfulness. The fact that he completed his high school education, two or three years later than might ordinarily have occurred had the accused commenced his schooling and progressed therewith in the ordinary course is by itself, and in isolation, not a factor suggesting any diminished moral blameworthiness on his part. The Court can take judicial notice that the education system in this country, particularly in deprived areas, is such that it is not at all unusual for persons to complete their schooling later than might ideally have occurred. What is notable is that the accused reached Grade 12 in schooling, which suggests that he was able to progress to an advanced stage at high school.

The other issues were that he was gainfully employed at the time of his arrest and that he had maintenance obligations to a minor child.Those also are, although in the ordinary sentencing sense valid considerations in the context of a minimum sentence regime not a basis to depart from it. I am not persuaded that there is a reasonable prospect that another Court would find that I had erred in not finding the existence of such circumstances.

/ds

A further ground of the application was that the trial court had erred in overemphasizing the interest of the community and had put too little emphasis on the interest of the accused. I need say no more in that regard than to refer to my comments, with reference to Matyityi's case, in the judgment dismissing accused 2's application for leave to appeal against sentence.

The other ground on which the application was brought was that the trial court had erred in finding that there are substantial and compelling circumstances present which would allow it to impose a lesser sentence in the prescribed minimum, and then failing to do so. That ground is plainly formulated on a misreading of the judgment – I did not find the existence of any substantial or compelling circumstances to depart from the prescribed minimum sentence.

In the circumstances the APPLICATION FOR CONDONATION IS GRANTED. The APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE IS DISMISSED.

BINNS-WARD, ~~AJ~~ J

/ds