Republic of South Africa

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

CASE No: A355/2010

In the matter between:

MABUTI MNQANTSHA	**First Appellant**
VUYOLWETHU WITBOOI	**Second Appellant**

And

THE STATE	**Respondent**

APPEAL JUDGMENT: 03 MAY 2011

MANTAME, AJ:

[1] On 30th March 2010 the Regional Magistrate at Bellville convicted the Appellants on 3 counts of robbery with aggravating circumstances, 4 counts of the unlawful possession of a firearm as well as 4 counts of unlawful possession of ammunition and 1 count of assault with intend to do grievous bodily harm. On 09th

April 2010 the magistrate sentenced the appellants each to 13 years direct imprisonment in respect of the offences. This is an appeal against that convictions and sentences.

[2] The state led 13 witnesses from which the following appear:

a) On the 5 July 2008 the appellants and 2 others, each armed with a firearm entered Durban Road Liquor Store in Bellville, and robbed the employees of the store as well as some customers of cash, personal items such as a wallet, and content and in the process assaulted some of the complainants.

b) The Appellants and the co – perpetrators fled the scene of robbery in that process one was killed by a motor vehicle. The other got away and the appellants were arrested.

c) The police recovered some of the stolen cash as well as the personal items, bank cards and driver license that was robbed from one the complainants.

d) Some of the cash was recovered from the deceased perpetrator and the personal items and cash from second appellant.

e) The police recovered 4 firearms at the scene.

[3] The Appellants denied any involvement in the robbery. The magistrate rejected their versions. Advocate Fitzgerald, Counsel for the Appellants, correctly in my view, did not pursue the appeal against conviction. I cannot fault the court's findings in respect of the credibility of the state witness and the conclusions it drew in holding that the state had met the burden of proving its case beyond reasonable

doubt. In my view the convictions are clearly justified on the evidence on record.

[4] It was common cause that the minimum sentence regime, Act 105 of 1997, as amended, was applicable to the robbery counts and the act prescribed 15 years as a minimum sentence in respect of each count. The court *a quo*, correctly in my view, found that substantial and compelling circumstances existed allowing it to deviate from the prescribed minimum sentences. The personal circumstances of the appellants were as follows when they were sentence:

[a] Appellant no 1 was 35 years old, not married and had a thirteen (13) year old child who lives with his family. He had a mother who gets old age pension and a sister and a brother who work on a part time basis. Appellant no 1's previous conviction was for theft where he was sentenced in 1993, when he was sentenced to receive a moderate correction of five (5) strokes with a light cane.

[b] Appellant no 2 was 38 years old, married and had two children aged five (5) and two (2) years respectively. His children stay with their mother in his house and the mother is unemployed, but receives the child support grant. Appellant no 2's previous convictions are two. In 1988, he was sentenced for theft to six (6) strokes with a light cane, and in 1997, for theft to pay a fine of R400.00 or 80 days imprisonment. Appellant no 2 was fifteen (15) years when he committed the first offence and twenty three (23) when he committed the second offence.

[5] The appellants counsel submitted that the court *a quo* erred in the following respects:

(a) The court *a quo* failed to take into account the cumulative effect of

sentence imposed. For instance, in the offences of possession of firearm and ammunition, the sentence should have run cumulatively. Reference was made to "*Guide to Sentencing,*" page 179, "*when a sentence is imposed for each offence, a cumulative effect may develop. In other words, the combined punishment may become too severe. This was well explained by Reynolds J in* ***S v Mpofu 1985 (4) SA 322 (ZHC)***".

b) The court *a quo* failed to take into account the totality principle of the criminal behaviour. For instance, in the case of **S v Mate 2000 (1) SA CR 552 (T) at 555-6**, the court held that the need to give "*a discount*" is particularly important when the various charges are essentially part of the same course of action or of the same event.

(c) The effect of consecutive sentences negates the fact that the court *a quo* did not apply the minimum sentence. As a result, the application of sentence was disproportionate.

d) Although counsel conceded that the offences were serious and that the community has to be protected, she submitted that the court a *quo* over-emphasizing the interests of the community over the circumstances of the Appellants.

[6] Advocate Sibiya, counsel for the state, submitted that considering that the court *a quo* could have imposed 15 years in respect of the 3 counts of robbery, total 45 years, the court did not over emphasised the seriousness of the offences.

[7] It is trite law that in **S v Malgas 2001 (1) SACR 469**, a court exercising

appellate jurisdiction, cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were a trial court and then substitute the sentence simply it prefers another result.

[8] In my view, taking the facts of this case in its totality, this is not the matter whether the question of sentence need to be considered afresh. A sentence should only be altered if the discretion has not been judicially and properly exercised. The test is **R v Mapumulo 1920 AD 56 and S v Rabie 1975 (4) SA 855 (A)** was whether the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate or induces a sense of shock. This was not the case in this matter.

[9] In my final analysis, the proper sentence is always the product of a balanced consideration of the personal circumstances, fairness to society and should be blended with a measure of mercy. In my view, the sentence of eighteen (18) years imprisonment for both Appellants is just in the circumstances of this matter.

[10] I, for the reasons set out above, propose that the appeal against conviction and sentence in respect of both the appellants be dismissed.

MANTAME, AJ

I agree, it is so ordered.

BAARTMAN, J