

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

CASE NUMBER:

A784/2010

5 **DATE:**

10 JUNE 2011

In the matter between:

GODFREY MANXILANE

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

15 **BOZALEK, J:**

The appellant was convicted on 21 August 2008 of robbery with aggravating circumstances to which he was sentenced to 15 years imprisonment and attempted robbery with aggravating
20 circumstances to which he was sentenced to five years imprisonment. Three years of the latter sentence were ordered to run concurrently with the sentence on count 1, thus leaving him with an effective sentence of 17 years imprisonment. He was also convicted of reckless driving and sentenced to a fine
25 of R3 000,00 or two years imprisonment.

/bw

/...

A784/2010

The appellant unsuccessfully sought leave to appeal from the magistrate against conviction and sentence. On petition to this court, leave was granted to appeal against sentence only. The facts are briefly as follows. On 13 May 2003, Ms Anja
5 Badenhorst, the complainant, dropped a friend off at 01:00 a.m. in Barnard Street, Bellville. She had stopped on the side of the road in front of a shop. While the complainant was seated in the car, a stone was thrown through the driver's window. Thereafter a hand reached in to grab the keys out of
10 the ignition. The door was opened and she was pulled out of the vehicle. Her friend was also pulled out on the passenger side.

The evidence indicates that three men were involved in the
15 incident. The complainant tried to grab the keys back, but was not successful. She grabbed her jacket out of the car as her cell phone was in the pocket. She was thrown to the ground in the struggle that ensued. Complainant got up and ran around the corner to call the police. When she returned, her friend
20 approached her and they returned to the vehicle. The key was still in the ignition. The attempted robbery had been foiled by the vehicle's immobiliser. The complainant felt a sharp pain in her shoulders and discovered three puncture wounds on her back. The complainant's handbag carrying the keys to her flat
25 was stolen. She, however, retrieved these when her handbag

A784/2010

was found in another vehicle driven by the appellant and carrying two others.

On the same night a Mr J P Swart was driving a Toyota
5 Conquest in Herbert Street in the area nearby Barnard Street, Bellville, when two men stepped in front of his vehicle. Upon stopping his vehicle, a third man attacked him with a screwdriver. Swart tried to drive away and realised that his female passenger was being pulled out of the vehicle by the
10 other men. These men were engaged in a struggle with her for her cell phone. Swart got out and grabbed his keys out of the ignition. He ran to assist his friend and to retrieve her cell phone from the men struggling with her.

15 During this time one of the men drove off with his vehicle and Swart discovered that the keys had remained in the ignition, since the key ring had become detached from the keys when he tried to grab them out of the ignition. A policeman who lived close by drove them around the area to search for the
20 vehicle. The eventually came upon an accident involving Swart's stolen vehicle and a police vehicle. His vehicle's windows were broken, the lights were shattered and it was punctured with bullet holes. The passenger, Ms Marlise Vivier, testified that one of the men tried to grab her cell phone and
25 threw her to the ground in the struggle. She would not give up

her cell phone and the men banged her head on the tarmac. They then drove off in Swart's Conquest.

According to the police witnesses who testified at the trial,
5 Constable Van Rensburg and Constable Kemp, they were driving on Stikland bridge when a Toyota Conquest approached them, driving on the wrong side of the road. It collided with their vehicle but continued driving. The police pursued the vehicle and called for reinforcements to assist
10 with the pursuit. The police fired shots at the vehicle. The third occupant was shot and died on the scene. The appellant was the driver of the stolen vehicle. In due course he testified, *inter alia*, that his co-accused assumed control of the vehicle steering wheel and caused the collision with the
15 oncoming police vehicle. This version, together with his version that he was forced to commit the crimes in question, was rejected by the magistrate.

Section 51 of the Criminal Law Amendment Act 105 of 1997
20 was applicable to count 1, the charge of robbery with aggravating circumstances, and carries a prescribed minimum sentence of 15 years imprisonment. In determining the appropriate sentence the magistrate had regard to various factors. The appellant was on bail pending the outcome of the
25 trial. He found employment during this time and was able to

continue his life in society. In contrast his co-accused was in custody during this period. The criminal proceedings lasted for five years, *inter alia* due to the appellant's co-accused being stabbed in the throat whilst in prison. He required
5 medical treatment and thereafter had speech problems which caused the delays in the trial.

The magistrate took into account that during the trial, the appellant had been on bail and his life continued as normal in
10 comparison to his co-accused who had to remain in custody. The magistrate also took into account against the appellant that he had not pleaded guilty despite the overwhelming evidence against him. The appellant testified that he had committed the crimes to obtain money to pay his girlfriend's
15 family damages for his impregnating her. His mother, the appellant's witness who testified in mitigation of sentence, stated that she was not approached by the woman's family for money and somewhat confusingly referred also to another girlfriend of the appellant's who had had a miscarriage the
20 previous year.

The appellant was 20 years old when the offences were committed. He was not married and has a six year old child who lives with her mother. He reached Grade 10 but failed the
25 exams because he did not write the midyear exams in June as

he was in custody on these charges in that particular year. He studied motor mechanics briefly but stopped due to a lack of finances. None of the above circumstances, individually or combined, was regarded as substantial and compelling
5 circumstances by the magistrate.

The appeal lies against sentence only and we are urged on behalf of the appellant in the original heads to find that the magistrate imposed a sentence that induces a sense of shock.
10 Counsel for the appellant also submitted that the magistrate erred in failing to attach sufficient weight to the personal circumstances of the appellant and the fact that he rehabilitated himself. The appellant relies on S v Ndhlovu 2007 (1) SACR 535 (SCA) as authority for the view that the
15 appellant's age and personal circumstances can cumulatively constitute substantial and compelling circumstances.

In S v Malgas 2001 (2) SA 122 (SCA), the court per Marais, JA, noted that the legislature did not intend to exclude a court
20 from considering those factors traditionally taken into account in sentencing offenders when deciding whether a departure is warranted from the prescribed minimum sentence in that substantial and compelling circumstances exist. This approach is also referred to in S v Ndhlovu supra. Both Malgas and
25 Ndhlovu recognise that factors such as those placed before the

A784/2010

magistrate herein may cumulatively constitute substantial and compelling circumstances.

In the recent case of S v Vilakazi, the Supreme Court of
5 Appeal made it clear that the minimum sentence legislation should not be a vehicle for perpetrating unjust sentences. In the present matter the proceedings lasted five years. During this period the appellant endured the anxiety accompanying a protracted trial. His evidence indicated that he failed Grade
10 10 as he could not write mid-year exams due to the trial proceedings. It is not unlikely that this impacted on the appellant sufficiently to distract his focus from his education.

His youth and his status as a first offender are also highly
15 material factors to take into account as is his evidence in mitigation that he had a change of heart and consequently a change in the direction in his life after committing the offences in question. He explained that he lost his best friend that night and he decided then that a life of crime was not for him.
20 He found employment and appears to have rehabilitated himself without having to be incarcerated or through intervention from an outside source. It is also noteworthy that the appellant has a minor child to care for and contributes to the child's care and did so since his employment after the
25 commission of the offences. The existence of this child gives

/bw

/...

credibility to the appellant's evidence that he impregnated a girl who is not known to his family, and is not "nonsense" as observed by the magistrate.

5 In this regard it should be said that the magistrate was highly sceptical of several aspects of the appellant's evidence including his rehabilitation and his reasons for committing the crimes. From a careful reading of the record this scepticism is, in my view, largely unjustified and based upon an incorrect
10 or somewhat superficial assessment of the evidence in mitigation of sentence. It is, however, an aggravating circumstance that the women in both vehicles were attacked and sustained injuries during the incidents. While the magistrate recognised the seriousness of the offences and
15 found that such offenders are not welcome in the community, his frustration at the level and prevalence of crime appears to have weighed too heavily in comparison to other factors relevant to sentence and the existence of substantial and compelling circumstances.

20

The magistrate noted that youth of its own accord is not, *per se*, a substantial and compelling factor and he is correct in this regard. He found substantial and compelling circumstances present in relation to the appellant's co-accused having regard
25 to his age, his status as a first offender, the five year duration

A784/2010

of the trial and the fact that he was attacked whilst in prison awaiting trial. Although the magistrate noted the age of the appellant, that he was a first offender, secured employment and appears to have rehabilitated himself, in my view he did
5 not accord sufficient weight to the cumulative effect of these factors or the duration of the trial and its impact on the appellant. There is a difference between noting factors such as these and giving weight thereto.

10 Nor did the magistrate appear to have adequate regard to the fact that the appellant now earns a regular income and is using it for the benefit of his mother and child. There is no evidence indicating that his financial contribution is sporadic. The court noted that shots had been fired in the incident, that one of the
15 appellant's friends had been killed and that the appellant had been shot but concluded that there was no long term effect according to the appellant's evidence.

This view appears to place little or no weight on the
20 appellant's evidence that the incidents and the loss of his best friend impacted on him to such an extent that he decided to change the course of his life and manifested this by finding employment and contributing financially to his mother's home as well as his child's maintenance. Thus the appellant's stable
25 employment and regular income and contribution to two

A784/2010

households was ignored in the magistrate's view that the appellant contributed only sporadically to maintenance of his mother and child.

5 Having regard to the mitigating factors placed before the court, most notably the appellant's youth, first offender status, his efforts to rehabilitate himself and his capacity for rehabilitation as evidenced during the lengthy awaiting trial period. I consider that these amount to substantial and compelling
10 circumstances which entitled the court to depart from the prescribed sentence of 15 years imprisonment. The imposition of a period of fifteen years imprisonment on count 1 does not take adequate account of the cumulative effect as mentioned above and of the personal circumstances of the appellant.

15

The magistrate erred, in my view, in according undue weight to the nature of the offences and the interest of society and having insufficient regard to the offender as a person, including most notably his prospects of rehabilitation, itself an
20 important consideration in assessing the interests of society. Further, in my view, the magistrate's error in underemphasising certain factors and overemphasising others amounted to a misdirection in the determination of whether substantial and compelling circumstances existed. These
25 misdirections were material. I do not consider, however, that

/bw

/...

any serious fault can be found with the sentences imposed on counts 2 and 3.

In the light of the above I consider that this court is justified in
5 intervening in relation to the sentence imposed on the first
count. Having regard to all relevant factors, I consider that
substantial and compelling circumstances exist which justify a
departure from the minimum sentence and further that a
sentence of eight years imprisonment on count 1 is
10 appropriate. Accordingly the following order is proposed:

1. the appeal against sentence in respect of count 1 is
upheld and the sentence of 15 years imprisonment is set
aside and substituted with a sentence of eight years
15 imprisonment.

2. the sentence of five years imprisonment on count 2 is
confirmed as is the sentence of R3 000,00 or two years
imprisonment on count 3.

20

3. the order that three years of the sentence on count 2 is
to run concurrently with the sentence on count 1 is
confirmed, with the result that the effective sentence
imposed upon the appellant is one of 10 years
25 imprisonment. The substituted sentence is antedated in

terms of section 282 of the Criminal Procedure Act 51 of
1977 to 26 August 2008.

5



BOZAŁEK, J

FOURIE, J: I agree and it is ordered accordingly.

10

FOURIE, J