IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A606/2010

DATE: 15 APRIL 2011

In the matter between:

SIYABONGA MBELESHE Appellant

and

THE STATE Respondent

J U D G M E N T

OLIVIER, AJ:

This is an appeal against sentence only. The appellant was charged that he had on 1 January 2010 and at Joe Slovo, Milnerton, wrongfully, unlawfully and intentionally assaulted Priscilla Linda-Jusa, and robbed her of property lawfully in her possession, namely a handbag, a Motorola cell phone, a Makro card, a wine opener, R240,00 cash, and a small pouch with Mugg & Bean logo thereon. The appellant pleaded not guilty on 23 June 2010, was convicted on 3 August 2010 and sentenced to three years imprisonment.

Ms Linda-Jusa testified that the appellant had approached her from behind, grabbed her bag from her right shoulder. He demanded the cell phone from her and she informed him that she did not have one. He then opened the bag and searched it. Thereafter he pushed her to the ground. He was stooped over her and frisked her, looking for her cell phone. He took the phone from her bra. He ran off with the phone and the pouch.

Ms Linda-Jusa, with the assistance of two off-duty security guards, somewhat fortuitously, managed to track the appellant down at a junction about 100 metres from the taxi rank at Joe Slovo in the direction of Century city. When the phone was demanded from him, he denied that he had it. She insisted that he did have the phone and the pouch. The guards then apprehended him, hailed a taxi and accompanied the complainant, the appellant and her aunt to the nearest police station. In the taxi the appellant produced the phone. He held on to the phone until they were in the police station. Ms Linda-Jusa testified that the police handed back to her the R221,00 and the phone at the police station which they had recovered from the appellant.

The appellant was convicted as charged. When it came to sentence, both the prosecution and the appellant made

submissions from the bar. The appellant is 30 years old, a taxi conductor and though not married, has a minor child who is three years old. Importantly, he is also a first offender. He had been in custody for almost six months at the time of sentencing. The state emphasised the seriousness of the offence and the fact that unsuspecting members of the public are often robbed of their earnings.

The learned magistrate, in my respectful view, took into account all relevant factors so as to further and eventually satisfy the well know purposes of punishment, namely retribution, deterrence, rehabilitation and prevention. He also pointed out that an effective sentence is one that strikes a fine balance between the interests of society, the crime and the offender. With regard to the seriousness of the offence, he pointed to S v Mondi & 'n Ander 1999 (1) SACR 292 (O), where Lombard, J held as follows at 296b:

> "Die arrogansie en gebrek aan respek vir die besittings en privaatheid van 'n medemens is haas onbegryplik. Om 'n persoon helder oor dag in 'n besige straat en ten aanskoue van lede van die publiek op 'n sypaadjie te stop en sonder om te blik of te bloos om te beroof, getuig van absolute wetteloosheid en barbaarsheid."

He also placed reliance on S v Myute & Others, S v Maby 1985 (2) SA 58 (CSC), where De Wet, CJ on review with Pickard, J concurring, emphasised that robbery is a most serious crime and that the offence consists of the two elements of violence and dishonesty. Importantly, De Wet, CJ pointed out that one of the accused, who had no previous convictions, ought to have received a non-suspended sentence of 12 months imprisonment. The magistrate had sentenced that accused to 12 months imprisonment, wholly suspended for three years. In Myute's case the accused had assaulted the victim, struck him on the head with a brick, felled him to the ground and held down by the accused, they proceeded to rob him. Armed with knives, they also threatened to cut his throat.

A court of appeal does not readily interfere with a sentence imposed by a lower court. In S v Anderson 1964 (3) SA 494 (A), Rumpff, JA, as he then was, held:

> "The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offences committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if a difference between that sentence and the sentence actually imposed is

so great that inference can be made that the trial court acted unreasonably and, therefore, improperly, the court will alter the sentence. If there is not that degree of difference, the sentence will not be interfered with."

Smuts, J, as he then was, in S v F 1983 (1) SA 747 (O) held as follows at 754D-E:

"Alvorens hierdie hof kan inmeng met die vonnis wat opgelê is deur die landdros, moet gesê kan word dat die vonnis wat deur hierdie hof sou opgelê word, soveel verskil van die vonnisse wat wel opgelê is, dat gesê kan word dat die opgelegde vonnis ontstellend onvanpas was."

There is, however, one aspect which appears to me may not have received sufficient attention from the learned magistrate. It would seem that the learned magistrate could have given more attention to the fact that the appellant was a first offender. In S v Ceylon 1998(1) SACR 122 (C), Van Reenen, J, with Louw, J concurring, held as follows at 123j-124c:

"Ons howe het al op verskeie geleenthede beklemtoon dat kort termyn gevangenisstraf in die

geval van eerste oortreders vermy behoort te word, indien dit enigsins moontlik is."

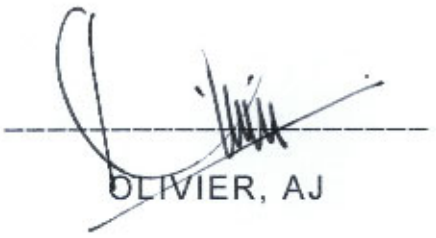
Sien byvoorbeeld: S v Cercic 1968 (2) SA 541 (K); S v Sakabula 1975 (3) SA (K); S v Makkahela 1975 (3) SA 788 (K)).

"Ek weet van ervaring dat ons tronke oorbevolk is en dat die toestande aldaar uiters onbevredigend is. In die omstandighede is daar groter rede as in die verlede dat ons howe in gepaste gevalle alle beskikbare vonnisopsies ernstig moet oorweeg. Ek is nie tevrede dat dit in die onderhawige geval gebeur het nie.

Gedagtig aan die oortreder, die oortreding en die belange van die gemeenskap, is ek van mening dat in die onderhawige geval, gevangenisstraf 'n gepaste straf is, maar myns insiens moet 'n gedeelte daarvan opgeskort word. Die opskorting van die geheel, of 'n gedeelte van 'n vonnis op voorwaarde dat 'n beskuldigde nie skuldig bevind word aan 'n bepaalde misdryf wat gedurende die tydperk van opskorting gepleeg word nie, het ten doel om eerste 'n herhaling van 'n bepaalde misdadige optrede deur die beskuldigde in die toekoms te ontmoedig en tweedens, om indien enigsins moontlik en sonder om die ernstigheid van die misdryf te ondermyn, die nadelige

gevolge van direkte gevangenisstraf te voorkom. Die onderhawige is myns insiens so 'n geval."

I agree with the sentiments expressed by Van Reenen, J. In the circumstances I would set aside the sentence imposed and substitute it with the following sentence. **THREE (3) YEARS IMPRISONMENT**, whereof **18 (EIGHTEEN) MONTHS IS SUSPENDED FOR A PERIOD OF THREE (3) YEARS** on condition that the appellant is not convicted of an offence of which violence or dishonesty forms an element during the suspension.



OLIVIER, AJ

STEYN, J: I agree and it is ordered accordingly. The conviction is confirmed and the sentence is amended accordingly.

STEYN, J