IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A128/2011

DATE: 9 SEPTEMBER 2011

In the matter between:

JULIAN SMALL Appellant

and

THE STATE Respondent

J U D G M E N T

DOLAMO, AJ:

On Friday 15 January 2010 at approximately 17:30, the complainants, Mr Wong and his colleague, Mr Bullock, were sitting in the latter's vehicle which was parked next to a place called 22 Hofley, here in Cape Town. They were waiting for another colleague, with whom Mr Wong was to share an apartment. As Mr Wong was moving places, he had with him all his belongings. This included his clothes, briefcase, CD's, flash drive, a diary, bank cards, cheque book and keys. Mr Bullock also had his own valuables, which included his two cell

phones, cheque books and other loose items.

The complainants were rudely interrupted by two men, one of whom was armed with a firearm, who robbed them of their possessions, including Mr Bullocks' motor vehicle, a Mercedes Benz with registration numbers CA 336301. On Sunday, 17 January 2010 the police, acting on information, went to an address in the Athlone area where they found in a backroom the appellant and a lady, presumably his wife. On searching this room they found items which were later identified by the complainants. These were most of the items which they were robbed of two days earlier.

The items which were recovered included the flash drive, briefcase, cheque books, CD covers and keys. The appellant admitted to bringing certain inscriptions in Mr Wong's diary and of writing out certain cheques from his cheque book. When confronted about these items, the appellant failed to give an explanation. His wife, however, confirmed that he was the one who brought them to the house. Appellant was arrested. A search by the police at another address unearthed the cell phone which belonged to Mr Bullock and which he lost in the robbery. This was found in the possession of one Adiel Saphta.

On a later date, the vehicle was found abandoned in observatory. Appellant and the said Mr Saphta were tried on one count of robbery with aggravating circumstances where the provisions of the Minimum Sentences Act found application. Although the appellant pleaded not guilty, he was convicted as charged, the trial court rejecting his version that he got the items which were found in his possession from one Kalied Jansen. He was sentenced to 15 years imprisonment, the court *a quo* finding no substantial and compelling circumstances to justify a departure from the minimum prescribed sentence. His co-accused escaped with a conviction on a contravention of section 36 of the General Laws Amendment Act 62 of 1955 and a wholly suspended sentence. The appellant was thereafter granted leave to appeal against both his conviction and sentence.

Before us it was submitted as well as argued on behalf of the appellant, that the court *a quo* erred in accepting, without exercising the mandatory caution in such circumstances, of Mr Bullock's dock identification of the appellant. In the heads of argument. Our attention was drawn in this respect to the judgment of Blieden J in S v Moradu 1994 (2) SACR 410 (W) at 413j where he said that the danger of dock identification is the same as a leading question which should be inadmissible save in certain special circumstances. It was also submitted that

the appellant's version was reasonably possibly true.

As regards the sentence, it was argued that the trial court erred by failing to consider all available mitigating factors. I understood this argument to mean that these factors, cumulatively, would have amounted to substantial and compelling circumstances. These were that the appellant had been living a clean life for the past 21 years; that the robbery *in casu* was not one of the worst kind; that most of the items which were robbed were recovered; that the trial court failed to investigate the appellant's prospects of rehabilitation and that in the circumstances the sentence was shockingly inappropriate.

The state on the other hand argued that the appellant's guilt was proved beyond reasonable doubt. It was argued that the state did not rely solely on the dock identification of the appellant, but also on the doctrine of recent possession of the stolen property which, if the argument is taken to its logical conclusion, means corroboration of Bullocks' identification of the appellant.

As regards the appellant's version and the arguments that were advanced on his behalf, I respectfully disagree with the submissions that the appellant's version is reasonably possibly true. I say so for the following reasons: At the first available

opportunity when asked by the police as to where he found the stolen items, the appellant failed to give an explanation. While this is not fatal, he also failed, through the cross-examination of state witnesses, to put to them that he obtained the goods from Kalied Jansen, satisfied with only stating, at that stage, that he got the goods from someone, without mentioning a name.

He and his co-accused only came up with the name, that is Kalied Jansen, for the first time when they took the witness stand. It is inconceivable in the circumstances that if they had informed their legal representative as to the name of the person from whom they received the goods, she would have only put to the witnesses that appellant and his co-accused got the goods from somebody. Appellant's version that this Kalied, for no apparent reason, gave him a bag full of valuables, is so highly improbable as to be rejected as false.

It is made even more improbable if one considers that the appellant's co-accused received the cell phone as part payment of R200,00 of the R400,00 he was allegedly owed by Kalied. Why, in these circumstances, would Kalied not settle his own debt in full-by giving the goods to appellant's co-accused in full and final payment of his debt instead of making gratuitous donation to the appellant. This remained

unexplained and in my view is one of the most important factors that one will have expected the appellant to address.

I agree with the state's submission that appellant's recent possession of the goods enhances the gravity of the appellant's suspicious possession thereof. In the circumstances of the case his recent possession of these goods and on his own admission, hardly two hours after the robbery, leaves no other reasonable inference to be drawn, other than that the appellant was one of the robbers and was properly identified by the witness Bullock. His version that he was given these goods *ex gratia* by Kalied, is so palpably false as to be summarily rejected. The learned magistrate, in my view, correctly accepted the state's version and furthermore correctly rejected the appellant's version as false. The Appellant was in my view guilty and correctly found guilty.

I turn to the argument and submissions made in respect of sentence. While there is no onus on the appellant to prove the existence of substantial and compelling circumstances, there is at least a duty on him to pertinently raise such circumstances for consideration by the court. In this respect it is my view that the existence of the substantial and compelling circumstances were never brought pertinently to the attention of the trial court.

In argument before this court today, Ms Mahlasela, on behalf of the appellant stressed the fact that the appellant has no previous conviction. The appellant was still very young, aged 21yrs and that the circumstances of this robbery makes it not one of the worst kind. Furthermore, that the items which were robbed, most of them at least, were found. These factors taken cumulatively, according to Ms Mahlasela, amounted to substantial and compelling circumstances.

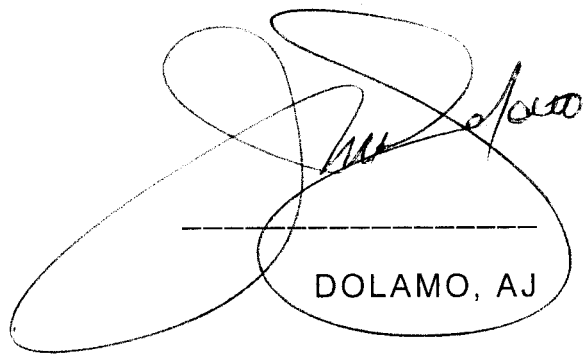
I am of the opinion that indeed there are substantial and compelling circumstances that will justify a departure from the prescribed minimum sentence. In this respect I find that the appellant's age, the fact that he is a first offender, as well as the circumstances of the robbery, that is that it is not of the worst kind, amounts to substantial and compelling circumstances. In the premises, I am of the view that this court can interfere with the sentence that the trial court had imposed. But bearing in mind the prescribed minimum sentence for first offenders, 15 years will be the point of departure.

In the circumstances the order I propose is the following:

1. The appeal on conviction is dismissed.

2. The appeal on sentence succeeds.

3. The sentence of 15 years imprisonment imposed on the appellant is set aside and the appellant is sentenced to **TEN (10) YEARS IMPRISONMENT**.



DOLAMO, AJ

I agree and it is so ordered:

LE GRANGE, J