IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A109/2012

DATE: 18 MAY 2012

In the matter between:

BATHANDWA NGWAZA 1st Appellant

WANDO MDELELWA 2nd Appellant

MSIMELELO SIGEBASHO 3rd Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The three appellants in this matter were charged with robbery with aggravating circumstances, two counts of possession of an unlicensed firearm and two counts of the unlawful possession of ammunition. They were legally represented and pleaded not guilty to all charges.

However, on 14 September 2011, all three appellants were

convicted on the robbery charge, whilst the second appellant was found guilty of the possession of an unlicensed firearm and unlawful possession of ammunition referred to in counts 2 and 3 and the first appellant was convicted of similar offences referred to in counts 4 and 5.

The first and second appellants were sentenced to 15 years imprisonment, the magistrate taking the three counts of which first and second appellants were convicted together for the purposes of sentence. The third appellant was sentenced to 15 years imprisonment on his sole conviction on count 1 of which two years were conditionally suspended.

Much of counsel's heads of argument were taken up with the merits of the conviction. However, the magistrate's notes for the final appearance on 19 January 2012 when she heard the appellants' application for leave to appeal, record that the application was granted in respect of sentence only. There is, therefore, no appeal against conviction before court.

No injustice is done in this regard since a reading of the record reveals that the convictions are completely sound. The appellants were charged with robbing a Somali run shop in Joe Slovo Township in Milnerton on 5 October 2010, in the process robbing the complainants of groceries, cell phone vouchers

and a cell phone, all to the value of R7 480,00.

The evidence led reveals that the appellants were caught red-handed and apprehended by the police as they emerged from the shop. Each of the appellants was convincingly identified by not only the two occupants of the shop but by the two arresting police officers. When the appellants were searched a firearm and ammunition were found on both first and second appellants whilst the third appellant was found to be in possession of a knife.

This mirrored the evidence of the complainants to the effect that two of the appellants brandished firearms whilst the third was armed with a knife. The grounds of appeal advanced in respect of sentence were that the magistrate failed to take into account the appellants' personal circumstances, including the fact that they were first offenders and had spent months in prison awaiting trial, and had placed too much emphasis on the seriousness of the offence and the interests of society.

It was further contended that their personal circumstances, coupled with certain other factors, constituted substantial and compelling circumstances which justified a sentenced other than the minimum sentence. Finally, it was contended that the sentences imposed induced a sense of shock. The magistrate

did not set out the appellants' personal circumstances in her judgement on sentence. They were as follows: first appellant was 23 years old at the time of the commission of the robbery, whilst the second appellant was 27 years of age and the third appellant 20 years of age. None of the appellants had previous convictions and all had been in gainful employment when arrested.

The first appellant had two young children, had been working as a packer earning R2 500,00 per month and was said to be suffering from asthma and tuberculosis. The second appellant, similarly, had two young children and had been employed as a panel beater earning R4 000,00 per month. The third appellant had no dependants and had been employed in his uncle's shop earning R500,00 per week.

The magistrate correctly observed that the appellants had been convicted of a very serious offence, namely, a robbery which had been pre-planned and in which firearms had been used. She regarded the fact that the appellants had expressed no remorse as an important factor counting against them and concluded that she was unable to find any substantial and compelling circumstances. She differentiated between the third appellant and the other appellants by reason of the fact that former had only been armed with a knife and presumably

on account of his youth.

In my view, the fact that each of the appellants was a first offender was a strong mitigating factor. However, this seemed to carry little, if any, weight with the magistrate who observed that the minimum sentence legislation applicable to the robbery conviction prescribed a minimum sentence of 15 years for first offenders. It is not entirely clear what the magistrate meant by this observation but its implication appears to be that first offenders' status does not, in these cases, count as a factor to be weighed when considering the existence or otherwise of substantial and compelling circumstances. To this extent the magistrate's observation was a misdirection.

As was stated in S v Malgas 2001 (1) SACR 469 (SCA) at 481c-d:

> "All factors ... traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration and the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick, (substantial and compelling), and must be such as

cumulatively justify a departure from the standardised response that the Legislature has ordained."

Although the factors mentioned by the magistrate which I have referred to above were indeed aggravating, in my view she erred in concluding that:

"Only aggravating circumstances (were) present."

The appellants' personal circumstances, namely their relative youth, the fact that they were first offenders, the fact that they were all gainfully employed and had young dependants, as well as the fact that they had spent one year in prison awaiting trial, are factors that counted in their favour.

Turning to the offences themselves. Although the robbery was clearly a serious offence, no physical harm was done to any of the shop attendants, and all the goods stolen were recovered, albeit by the prompt and fearless response on the part of the two police officers in question. A further difficulty I have with the sentences imposed on the first and second appellants is that the magistrate took all three convictions together for the purposes of sentence. This had the inadvertent effect of imposing a minimum sentence in terms of

Act 105 of 1997 upon those appellants for the possession of an unlicensed firearm and the unlawful possession of ammunition, thereby conflating two separate sentencing regimes. See also in this regard S v Swart 2000 (2) SACR 566 where it was held that it was undesirable to take multiple convictions together for the purpose of sentence and this ought to be done only in exceptional circumstances.

In my view the magistrate erred in the respects I have alluded to above and overall in not finding that the mitigating factors present constituted substantial and compelling circumstances which justified, also in the case of first and second appellants, deviating from the prescribed minimum sentence. For these reasons I consider that this court is at large to sentence the appellants afresh and on the basis that substantial and compelling circumstances are present in relation to the conviction on count 1 of the first and second appellants.

In arriving at an appropriate sentence due weight must be given to the seriousness of the offence of which all three appellants were convicted under count 1 and the prevalence of this offence. It has become a notorious fact that armed robberies of Somali run shops are regular occurrences in and around Cape Town. Weight must also be given to the fact that, as was stated in S v Malgas (supra), even when there is a

deviation from the minimum sentence, it is no longer a question of "business as usual" as far as sentencing is concerned.

In my view, an appropriate sentence in respect of the first and second appellants, both of whom were armed with an firearm during the course of the robbery would be one of 12 years imprisonment. In respect of the offences of possession of the unlicensed firearms and unlawful possession of ammunition appropriate penalties would be two years imprisonment and six months imprisonment respectively.

The magistrate correctly distinguished between the first and second appellants on the one hand and the third appellant, the youngest of the appellants, on the other hand, who was not in possession of a firearm during the robbery. In my view an appropriate sentence in respect of the third appellant on count 1 would be one of 10 years imprisonment.

Should the sentences in respect of the firearm offences and ammunition be added to the sentences imposed on the first and second appellant in respect of the robbery conviction, the cumulative effect would, again in my view, be disproportionate and unduly harsh. The appellants are first offenders and their sentence should not be such as to break them or negate the

prospects of them rehabilitating themselves. In these circumstances, and given the fact that the firearm convictions are closely tied to the conviction for armed robbery, I would order that those sentences run concurrently with the sentence imposed on count 1.

In the result, I consider that the appellants' appeal against sentence should succeed and that their sentences should be set aside and be replaced with the following:

1. First appellant:

   Count 1: **12 (TWELVE) YEARS IMPRISONMENT**.

   Count 4: **TWO (2) YEARS IMPRISONMENT**.

   Count 5: **SIX (6) MONTHS IMPRISONMENT**.

   It is ordered that in terms of section 280 of Act 51 of 1997, the sentences imposed on counts 4 and 5 will run concurrently with the sentence imposed on count 1.

2. Second appellant:

   Count 1: **12 (TWELVE) YEARS IMPRISONMENT**.

   Count 4: **TWO (2) YEARS IMPRISONMENT**.

   Count 5: **SIX (6) MONTHS IMPRISONMENT**.

   It is ordered that the sentences imposed on counts 2 and 3 will run concurrently with the sentence imposed on count 1.

/bw

3. Third appellant:

Count 1: **10 (TEN) YEARS IMPRISONMENT**.

For the sake of clarity, it is recorded that the effective sentences imposed upon first and second appellants are **12 (TWELVE) YEARS IMPRISONMENT**. All sentences are, in terms of section 282 of Act 51 of 1997, antedated to 16 September 2011.

I agree:

SABA, AJ

It is then so ordered:

BOZALEK, J

/bw