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

Case no.A(R) 48/13

In the matter between:

GANIEF FORTUNE Appellant

And

THE STATE Respondent

Coram: BINNS-WARD J *et*MANCA AJ

JUDGMENT DATED 22 NOVEMBER 2013

BINNS-WARD J:

[1] The appellant was convicted of robbery with aggravating circumstances. The trial court found that there were no substantial and compelling circumstances to justify a departure from the minimum sentence of 15 years' imprisonment prescribed for the offence in terms of the Criminal Law Amendment Act 105 of 1997 and therefore, as it was then bound to do, imposed the prescribed sentence. The appellant has come to this court on appeal against the sentence imposed on him. The appeal was brought with leave given by the trial court. In his judgment granting leave to appeal the magistrate remarked on what he described as '*certain trends that have emerged, more specifically* [in] *the Western Cape High Court, where a number of people who have been convicted of the same type of offence and the same type of sentences having* [been] *imposed have had their sentences reduced by the High Court*'. The magistrate expressed the hope that this matter would afford the opportunity for this court to '*provide some guidance with regard to how* [it] *sees the question of substantial and compelling circumstances*'. The magistrate appears to have considered that he and his colleagues in the Regional Court would benefit from the provision of '*a far greater degree of legal clarity*' in this regard.

[2] The perception that there is a need for greater clarity on the proper approach to sentencing in matters subject to the prescribed sentencing regime under Act 105 of 1997 is unfortunate, but perhaps not so surprising because, as will be apparent from

references to some Supreme Court of Appeal judgments to be mentioned later, disparities in the application of the legislation have been noted.

[3] The applicable principles were clearly stated in the seminal judgment in *S v Malgas*2001 (2) SA 1222 (SCA).[1] That statement of principle received the affirmation of the Constitutional Court in *S v Dodo* 2001 (3) 382 (CC). In *Dodo,* at para 40, the Constitutional Court endorsed the statement in *Malgas*that '*If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence*'.The principles described in *Malgas* are so well established in our criminal law jurisprudence that it would be a supererogation to rehearse them. In *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and others*2009 (2) SACR 361 (SCA), atpara 12, they were referred to as '*enduring and uncomplicated*'. The difficulty has lain in their application. What appear to be incommensurate sentences are in many cases explicable by the realities that no one case is exactly like another, and the applicable principles, although they contain a recognition that the legislation enjoins standardised rigour and severity, nevertheless emphasise that the statutory provisions do not derogate from the duty on sentencing courts in prescribed sentence matters to have appropriate regard to the individual characteristics of each case. Indeed it is the latitude allowed to courts by the legislation to depart from the prescribed minimum sentences in appropriate cases that resulted in it passing constitutional muster.

[4] However, rather as used to be the case in the dark days of mandatory death penalties, the individualisation of the sentencing process in matters in which the prescribed minimum sentences apply does result to some extent in the sentences imposed reflecting the individual attitudes of judicial officers towards the legislative dispensation. The impression that some judicial officers have been inclined to discount the effect of the minimum sentence legislation in the sentences they impose in matters in which the legislative scheme is applicable is impossible to ignore. The tendency has been remarked upon and deprecated in judgments of the Supreme Court of Appeal ('SCA'); see, for example, *S v Matyityi*2011 (1) SACR 40 (SCA),[2010] 2 All SA 424, in which it was remarked that '*one notices all too frequently a*

[1]See especially the summary at para 25 of the judgment.

willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons'; and the very recently delivered decision in *S v Nkunkumaand others* [2013] ZASCA 122 (23 September 2013).

[5] In *Matyityi* the appeal court held '*As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order*'.[2] In *S v Kwanape*[2012] ZASCA 168, at para 15, the SCA reiterated that '*courts are duty-bound to implement the sentences prescribed in terms of the Act and that 'ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed*'. These sentiments echo what was said concerning the finding of 'substantial and compelling circumstances' in *Malgas* at para 9: '*The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.*' That

[2]In its judgment in *Nkunkuma* supra, the SCA misdirectedly criticised the trial judge for using the expression '*predictable outcomes*' with reference to *Matyityi*, stating inaccurately (at para 10) '*The phrase 'predictable outcomes' does not appear in Matyityi*.'

notwithstanding, there is a manifest tension between the concept of 'predictable outcomes' or 'standardisation' of sentences and the notion, also confirmed in the *Malgas* principles, that a just sentence depends on the individual characteristics of each case and that even in prescribed sentence cases there should not be an *à priori*disposition in favour of the appropriateness of the prescribed minimum sentence. In the result the application of the minimum sentence legislation is unavoidably going to be affected to a greater or lesser degree by judicial nuance.

[6] The duty to apply the legislation in a constitutionally compatible manner entails that that the aforementioned inherent tension must be resolved with especial regard to the peculiarly individual features of every case. Those features have to be assessed in the context of the applicable legislation.[3] Judgments such as those in *Matyityi*and *Nkunkuma* supra, fall to be understood as bearing critically on the failure of the trial courts in question to adequately acknowledge the contextual role of the legislation in their formulation of the sentences imposed and the flimsiness in the peculiar factual context of the cases of the bases asserted for departing from the precepts of the legislation.

[7] The prescribed sentencing regime does not exclude consideration of the factors ordinarily taken into account for the purposes of sentencing. They are factors that a court must weigh in determining whether circumstances do exist that justify a deviation from the applicable prescribed sentence. As Marais JA noted in *Malgas*, at para 9, *'…I can see no warrant for deducing that the legislature intended a court to exclude from consideration, <u>ante omnia</u> as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders*'. Read in context, however, that remark did not purport to suggest that the prescribed sentence should not be imposed unless there are weighty considerations justifying a departure from it in the peculiar circumstances of a given case.

[8] What might constitute weighty considerations? The answer to the question enjoyed consideration in the compelling analysis of the application of the minimum sentence provisions provided in the SCA's judgment in *S v Vilakazi*[2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353. The judgment notes the bluntness of the statutory provisions read at face value and stresses that it was only their application using the so-called 'determinative test' identified in *Malgas*that saved

[3]See *Malgas*supra, at para 8.

them from unconstitutionality. In view of the concern expressed by the judicial officer in the court below for a need for guidance it would perhaps be useful to quote the pertinent part of the judgment in *Vilakaziin extenso* (footnotes omitted and emphasis in the original; the underlining is mine):

> [13] ….
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> It is not surprising that the leading writer on the subject of sentencing in this country, Professor Terblanche, advanced the following acerbic observation on the Act ten years after it took effect:
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> > 'I have criticised the Act elsewhere and, if anything, have become more critical with time. There is hardly a provision in sections 51 to 53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences.'
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> [14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in *S v Malgas* – which was said by the Constitutional Court in *S v Dodo* to be 'undoubtedly correct' – that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in *Dodo* found the Act to be not unconstitutional. For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some case that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in *Malgas*, and in particular its 'determinative test' for deciding whether a prescribed sentence may be departed from,
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> 'makes plain that the power of a court to impose a lesser sentence … can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross' [and thus constitutionally offensive].
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> That 'determinative test' for when the prescribed sentence may be departed from was expressed as follows in *Malgas*and it deserves to be emphasised:
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> '**If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'**
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> [15] It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)
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> > 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which

> could have a bearing on the seriousness of the offence and the culpability of the offender.'

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Malgas,* which said that the relevant provision in the Act

> 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which '*justify*'…it'.

[16] It was submitted before us that in *Malgas* this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in *Malgas.* The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter '**conscious of the fact that the Legislature has ordained** [the prescribed sentence] as the sentence which should *ordinarily***and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances' (the emphasis in bold is mine). In the context of the judgment as a whole, and in particular the 'determinative test' that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite 'weighty justification' for the imposition of a lesser sentence.

[17] ….. To say that a court must regard the [prescribed] sentence as being proportionate *à priori* and apply it other than in an exceptional case runs altogether counter to both *Malgas* and *Dodo*. Far from saying that the circumstances in which a court may (and should) depart from a prescribed sentence will arise only as an exception *Malgas* said:

> 'Equally erroneous…are *dicta* which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.'

[18] It is plain from the determinative test laid down by *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed *à priori* to be proportionate in a particular case. It cannot even be assumed *à priori* that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For

> the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.
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> [19] In a variation upon the earlier submission it was also submitted that the prescribed sentence must be imposed in 'typical' cases and may be departed from only where the case is atypical. We were not told what constitutes a 'typical' case nor how such a case is to be identified. All that is typical of cases that fall within a specified category is that they have the characteristics of that category. But for that, no case can be said to be 'typical'. The submission finds no support in *Malgas* or in logic and it has no merit.
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> [20] …..I have pointed out that the essence of the decisions in *Malgas* and in *Dodo* is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in *Malgas*. It was also pointed out in *Malgas* that a prescribed sentence need not be 'shockingly unjust' before it is departed from for 'one does not calibrate injustices in a court of law'. It is enough for the sentence to be departed from that it would be unjust to impose it.

[9] The aforegoing thumbnail review of the pertinent jurisprudence of the top-tier courts affirmsmy view that the constitutionally compatible administration of the minimum sentence legislation is reliant on judicial nuance. That is hardly desirable, as indeed certain passages in *Vilikazi* clearly imply. It is a position that is bound in practice to result in approaches to sentence that are difficult to reconcile and appear to be discordant.[4] This is indeed the very problem that probably has given rise to the court a quo's plea for the provision of 'greater legal clarity'. It seems to me that the nature of the question defies a more finite answer than that already afforded in the judgments in *Malgas*, *Dodo* and *Vilakazi*. What is clear though is that the criminal law courts have the duty to approach sentence treating each case on its individual merits and mindful of the need to apply the minimum sentence legislation in a manner that does not result in punishment that is disproportionate having regard to the peculiar circumstances of the commission of the offence and the personal circumstances of the offender.Punishment that is disproportionately severe infringes the convicted person's right in terms of s 12(1)(e) of the Constitution not to be punished in a cruel, inhuman or degrading way. The provisions of the prescribed minimum sentence legislation fall to be applied in a manner that avoids an

[4]Compare, for example, the majority and minority judgments in *S v Nkomo* [2007] 3 All SA 596 (SCA); S *v Opperman and Another* 2010 (2) SACR 248 (SCA); [2010] 4 All SA 267; and in *S v Monageng* [2009] 1 All SA 237 (SCA)

infringement of the convicted person's basic rights in terms of s 12 of the Bill of Rights.

[10] So much for the principles that the court below was required to apply when determining sentence in the current matter. It is time to consider whether the appellant has shown a material misdirection by the sentencing court in their application.

[11] In prescribing a minimum sentence of 15 years for robbery when there are aggravating circumstances the legislature drew no distinction between robbery in which a firearm was used and robbery in which a knife was wielded to threaten the victim, or between cases in which physical assault was actually perpetrated or merely threatened. Act 105 of 1997 implicitly adopted the definition of 'aggravating circumstances' in s 1 of the Criminal Procedure Act 51 of 1977,[5] which reads as follows:

> **"aggravating circumstances",** in relation to—
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> (*a*) . . . . . .
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> (*b*) robbery or attempted robbery, means—
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> (i) the wielding of a fire-arm or any other dangerous weapon;
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> (ii) the infliction of grievous bodily harm; or
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> (iii) a threat to inflict grievous bodily harm,
>
> by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence

Regard to the principles rehearsed above, however, makes it clear that it is appropriate for a sentencing court nevertheless to have regard to the gradations in the manifestations of the listed offence in determining an appropriate sentence. The fact that the complainant was threatened rather than physically assaulted and injured is a relevant factor to be taken into account along with all the other factors that should be weighed in determining whether a departure from the prescribed sentence is warranted.

[12] In the current case the appellant threatened the complainant with a knife on a street on the edge of Cape Town's central business district in broad daylight, and by these means was able to wrest from her and steal the handbag that she had been carrying. He had initially pretended to approach her for the purpose of asking for a match to light a cigarette. His conduct qualified as a robbery with aggravating circumstances on two bases; it involved the wielding of a dangerous weapon and the

[5] Cf. *S v Dhlamini* 2012 (2) SACR 1 (SCA) at para 13.

tacit threat to inflict grievous bodily harm. Quite apart from the matter of technical definition, there can be no doubting the seriousness of the offence and the expectation by the community that the courts should reflect an appreciation of this in the type of sentence imposed. That said, the weapon was not used in a way that caused the complainant any physical injury. The offence was at the lower end of the scale of instances of robbery with aggravating circumstances. This should have been taken into account in assessment of a proportionate sentence.[6] It does not appear to have been. Instead, the magistrate would appear to have adopted the 'typical case' approach discussed and discredited at para 19 of *Vilakazi*, supra. This constituted a material misdirection.

[13] Having identified a material misdirection by the magistrate, it falls to this court to consider sentence afresh.

[14] The appellant was three days short of 30 years of age when the offence was committed. The information placed before the trial court was that he was handyman earning a monthly income of approximately R4000. He had a drug abuse problem. He has several previous convictions, including convictions for robbery, malicious injury to property, housebreaking with intent to steal and theft and common theft. The impression is that the appellant has repetitively been guilty of anti-social and criminal behaviour and has shown no amenability to rehabilitation or reform. The magistrate correctly took into account as aggravating factors the appellant's criminal record and the fact that he had no pressing financial need to tempt him to resort to crime.

[15] The appellant had been incarcerated for nine months before he was sentenced by the trial court. The fact that a convicted offender has spent time in prison awaiting trial or for the duration of his trial is undoubtedly a relevant consideration in determining sentence. It is, however, not a consideration that carries any mechanical effect. The notion expressed in *S v Brophy*2007 (2) SACR 56 (W) that time in prison before sentence should count as the equivalent of double the time of post-sentence incarceration has been disapproved by the SCA; see *S v Radebe and another* 2013 (2) SACR 165 (SCA), at para 8-15. What the magistrate had to ask himself in respect of the nine months that the appellant had already spent in custody was whether its effect,

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[6]Cf. e.g. *S v Maselani and Another* 2013 (2) SACR 172 (SCA), especially at para 26-29 and *S v SMM* 2013 (2) SACR 292 (SCA).

taken together with the prescribed minimum sentence, would render a sentence so disproportionate to the offence of which the accused had been convicted as to amount in the context of all the relevant factors to substantial and compelling circumstances warranting the imposition a lesser sentence. His point of reference in this regard would be the prescribed sentence itself. The magistrate did not in his sentence judgment deal expressly with the nine months that the appellant had spent in custody. He was, however, clearly cognisant of it because he mentioned it in relation to accused 1 in the trial, who had been arrested on the same day as the appellant. It is evident that the magistrate was not persuaded that the period that the appellant had been incarcerated prior to sentence being imposed was a sufficiently weighty reason,by itself,in the circumstances to depart from the prescribed sentence. I am not persuaded that he was guilty of any misdirection in this regard. After all, if time spent in custody were to be mechanically deducted in any case in which the prescribed minimum sentence was applicable, there would hardly be a matter in which the minimum sentence would actually be imposed. Relative to the 15 year sentence that was prescribed, the nine months spent by the appellant in prison prior to the imposition of sentence was not a sufficiently weighty consideration in the context of all the other circumstances to impel a deviation from the prescribed sentence. The period spent in custody would, however, fall for further consideration in determining an appropriate sentence if the trial court were on an overall consideration of the other relevant factors convinced that a departure from the prescribed 15 year sentence was appropriate.(Of course, owing to the misdirection identified earlier, the trial court could not reach the potential latter stage of enquiry.)

[16] In my judgment, a sentence of 15 years' imprisonment is disproportionate in the peculiar circumstances of the commission of the offence. A sentence of 15 years' imprisonment would unjustly equate the punishment of the offence with that imposed under the applicable legislation for far more serious instances of the crime of which the appellant had been convicted. In the current case the complainant was not physically injured and the value of the property stolen (a handbag containing credit/debit cards, R800 in cash, a camera and personal documentation and house keys) was relatively small. There is also the consideration that the brazenness of the appellant's conduct lends support to his claim to have been disinhibited to some extent by the use of drugs. Although this affords no excuse and, because the

widespread occurrence of crime committed under the influenceof drugs is a scourge that merits a standardised severe response, it is to an extent an aggravating feature, it does nonetheless also pointon a subjective assessment to reduced moral blameworthiness on the part of the appellant. These conclusions constitute sufficiently weighty reasons in the overall conspectus of the case to find the existence of substantial and compelling circumstances to depart from the prescribed minimum sentence.

[17] Appropriate weight must, however, also be given to the aggravating features of the case. It must also be remembered that, even if the prescribed minimum sentence is not applied, the effect of the legislation is that it is not 'business as usual' and the sentence actually imposed must thus acknowledge some relationship to that which the legislature has prescribed. Adopting that approach, but also being mindful that the appellant had spent nine months in prison before he was sentenced and that he eventually showed a measure of regret or remorse by pleading guilty, I consider that a sentence of eight years' imprisonment would be appropriate.

[18] In the result –

1. The appeal against sentence is upheld.
2. The sentence of 15 (fifteen) years' imprisonment imposed by the trial court is set aside.
3. A substituted sentence of eight (8) years' imprisonment is imposed on the appellant.
4. The substituted sentence of imprisonment is antedated to 20 June 2013 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

A.G. BINNS-WARD
Judge of the High Court

I agree.

B. J. MANCA
Acting Judge of the High Court