IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A418/2014

DATE: 5 DECEMBER 2014

In the matter between:

ALLAN ADAMS 1st Appellant

ELROY HANSON 2nd Appellant

and

THE STATE Respondent

J U D G M E N T

RILEY, AJ:

The appellants were charged in the regional magistrate's court at Wynberg on three counts, namely robbery with aggravating circumstances (read with the provisions of section 51(1) and section 51(2) of the Criminal Law Amendment Act 105 of 1997 as amended), possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000 and possession of ammunition in contravention of section 90 of the Firearms Control Act 60 of 2000.

The charges can be summarised as follows: on count one it is

alleged that on 17 April 2009 at Wynberg the appellants unlawfully and with intent to force him into submission, threatened the complainant with a firearm and then unlawfully with the intent to steal took from his control and / or possession a Volkswagen Golf motor vehicle, a cellular phone and a wallet. The State alleged that aggravating circumstances as described in section 1 of Act 51 of 1977 was present when the crime was committed, in that during the commission of the crime the appellants handled a 9mm firearm and threatened to inflict serious bodily harm on the complainant.

On count two it is alleged that on 17 April 2009 and at Wynberg the appellants did unlawfully have in their possession a 9mm short calibre Izmech semi-automatic firearm without being the holder of a license, permit or authorisation issued in terms of the Act to possess that firearm. On count three it is alleged that on the same day and at the same incident the appellants did unlawfully have in their possession ammunition to wit 9 x 9mm short cartridges without being the holders of a license in respect of the firearm capable of discharging the ammunition.

The appellants, who were represented in the court *a quo*, pleaded not guilty to all three charges. On 12 August 2013 the

appellants were both convicted on all three counts and sentenced as follows:

Count one: fifteen years imprisonment.

Count two: six years imprisonment.

The court ordered that one year of the sentence imposed in count two be served concurrently with the sentence imposed on count one.

Count three, three years imprisonment.

The court ordered that the whole of the sentence be served concurrently with the sentence on count one.

The appellants applied for leave to appeal in the court *a quo* against both their convictions and sentence. Leave to appeal was refused in respect of the convictions, but granted in respect of the sentences imposed. The facts giving rise to the convictions are as follows: At 6h15 pm on 17 April 2009 the complainant had pulled up on the side of Broad Road, Wynberg. As he was getting out of his vehicle he was approached by the appellants. The first appellant who had a firearm pushed him back into his vehicle and told him that if he made a noise he would be shot.

Whilst this was taking place, the second appellant opened the passenger door behind him and got into the vehicle. First

appellant, who was still outside the vehicle at the driver's side, asked him for his wallet (which contained R2 000,00 cash and credit cards) and cellular telephone and then proceeded to take it out of the top pockets of his jeans. When first appellant had his cellular phone and wallet, he then told the complainant that the complainant was going to drive them. The complainant then pleaded with the appellants to take whatever they wanted but to allow him to get out of the car. First appellant then ordered him to unlock the gear lock and to start the vehicle.

According to the complainant whilst this was taking place, first appellant had the firearm pressed against his side. Whilst he was being ordered to start the vehicle the second appellant attempted to take his wristwatch off his arm. After he had started the vehicle, first appellant allowed him to get out of the vehicle. First appellant then got into the vehicle and he and the second appellant then drove off. The complainant then went to his friend and related what had happened and they, together with another person who had witnessed the incident, then proceeded to follow the appellants in the complainant's friend's vehicle.

They pursued the appellants and caught up with them at Makro on Old Strandfontein Road. Whilst in pursuit they contacted

the police and reported the incident. They lost the appellants when they had to stop at a red robot. Whilst driving in the area in search of the appellants they were contacted by SAPS who advised them that the complainant's vehicle had been found. When they came to the scene further down on Strandfontein Road in the vicinity of Strandfontein, his vehicle was on the side of the road and the police were on the scene.

The appellants were already in the police van. His motor vehicle was not damaged but the contents of two bags that he had on the backseat, containing books and a laptop computer, were on the backseat. He recovered his cellular telephone and his wallet less an amount of R800,00 and his motor vehicle. During the search of the vehicle the police found the Izhmech Makarov 9mm pistol which was loaded with 9 x 9mm rounds of ammunition. A short while later and whilst he was at Wynberg SAPS the complainant saw the appellants after their arrest and he pointed out to the police that the second appellant was wearing his black leather jacket which he then recovered.

As a result of the incident the complainant was traumatised and for a few weeks after the incident suffered flashbacks and was scared to drive his vehicle. It was contended on behalf of the appellants that the court *a quo* had misdirected itself in respect of sentence in the following respects:

(1) That it failed to take into account the cumulative effect of the sentence imposed, considering that it was dealing with multiple offences and that since count two and three is an integral part of count one, the sentences on counts two and three could easily be taken together for the purposes of sentencing.

(2) That the court *a quo* erred and misdirected itself by not exercising its discretion judicially and properly by not attaching sufficient weight to the main purposes of punishment, namely deterrence, prevention, reformation and retribution.

(3) That the court *a quo* erred by not taking properly into consideration the nature of the offence and the prospects of rehabilitation.

Section 52(2)(a) of the Act provides *inter alia* that a regional court or a high court shall, in respect of a person who has been convicted of robbery when there are aggravating circumstances, sentence a first offender to imprisonment for a period of not less than 15 years, unless the court is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence than the sentence prescribed. See S v Malgas 2001 (1) SACR 469 (SCA).

It is trite law that a court of appeal will only interfere with a sentence of a lower court in circumstances where the court *a quo* has not exercised its discretion in regard to sentence properly or judicially. It is however also accepted that courts should as far as possible have an unfettered discretion in relation to sentence and that this is a principle which has been constantly recognised. See S v Thoms; S v Bruce 1990 (2) SA 802 (A) at 806H-I.

It must be borne in mind as stated by Trollop, JA in S v Pillay 1977 (4) SA 531 (A) at 535e-f that:

> "As the essential inquiry in an appeal against sentence however is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, the mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree; or seriousness that it shows; directly or inferentially; that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

In S v Moswathupa 2012 (1) SACR 259 at 261, paragraph 4 Theron, JA restated the general sentencing principles that:

> "In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that, 'punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy'. In addition to that the Court must also consider the main purposes of punishment, which are deterrent, preventive, reformative and retributive. In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others'."

See also S v Rabie 1975 (4) SA 855 (A) at 862g-h. It also important that the sentencing court must avoid imposing a sentence that is so disproportionate to the nature of the offence that it can 'be typified as gross [and thus constitutionally offensive]'. See S v Vilakazi 2009 (1) SACR 552 (SCA) at 560. In S v Mahomotsa 2002 (2) SACR 435 the

SCA held that even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. The Court held further that there should however be no misunderstanding about this as they will all be serious but some will be more serious than others and subject to the caveat that it is only right that the difference in seriousness should receive recognition when it came to the meting out of punishment. See also S v MN 2011 (1) SACR 286 (ECG).

Our courts have consistently held that where a court has to impose a sentence for multiple offences, the court has to seek an appropriate sentence for all offences taken together. Accordingly, when dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe. See S v Moswathupa above at paragraph [8] at page 263g and S v Mabunda 2013 (2) SACR 161 (SCA).

Where counts are closely connected in time, place and circumstances, they may still be taken together for the purposes of sentence and treated as one. In the present matter the evidence shows that the relevant offences are 'inextricably linked in terms of locality, time, protagonist and importantly, the fact that they were committed with one common intent'. See S v Mokela 2012 (1) SACR 431 (SCA) at

paragraph [11].

The court *a quo* took into account that the first appellant was 36 years old, was unmarried, passed grade 9, was self-employed and earned R900,00 per week and that he had three minor children aged 13, 9 and 5 years old, who lived with their mother. In respect of the second appellant the court *a quo* took into account that he was unmarried, had three children aged 14, 7 and 5, with two different women, that the children were still at school, that he had left school after passing grade 10 and that he had been employed as a mechanic a few years before the matter. I pause to mention here that it is clear that both appellants spent at least two years in custody awaiting trial before bail was set for them.

In considering an appropriate sentence and in deciding whether or not the appellants had proved the existence of substantial and compelling circumstances, the trial magistrate stated as follows at paragraph 22 at record page 329:

> "I find no circumstances that may lead this court to deviate from the prescribed sentence as sought by the defending advocate here today. Aggravating circumstances I have mentioned regarding your personal circumstances, as well

as the nature of the crime and also the interest of the community."

And further:

"I am not moved as well by the plea regarding accused two for the court to direct that the sentence that is going to be imposed should run concurrently with the sentence that he is now serving regarding the crime that he was (sic) committed (sic) of in August 2012, because I believe that each crime that the offender has committed he must pay for it. I however have been persuaded to direct that some of the imprisonment term is going to be imposed on you should run concurrently with a term of imprisonment on each of the counts regarding the nature of these crimes that you have been found guilty of." [See paragraph 6 to 16 and at the record page 330.]

It is correct that violent crime of this nature is endemic in this country and that in an attempt to combat this kind of crime, the legislator has provided for a prescribed minimum sentence of 15 years for a first

offender who commits the crime of aggravated robbery.

There is further no doubt that in crimes like the present, punishment and deterrence are factors that stand out in determining an appropriate sentence. It is however clear that in considering an appropriate sentence in this matter, the trial magistrate did not properly have regard to the principles set out in S v Mahomotsa, S v Mabunda, S v Moswathupa and Kruger above, nor did the trial magistrate take into account the determinative test in relation to prescribed minimum sentences which was laid down in S v Malgas at paragraph 25, which deserves to be emphasised:

> "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 to society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

The court *a quo* was required by Malgas to apply its mind to whether the sentence was proportional to the offence. The court *a quo* failed altogether to do so. See S v Vilakazi

(supra). The approach adopted by the trial magistrate and his failure to have regard to the principles as set out in the authorities referred to hereinbefore, amount to a misdirection. Although by their very nature all cases of robbery with aggravated circumstances are severe, this robbery was not associated with the level of gratuitous violence which is all too often the case. And although the complainant was clearly terrified of being shot, traumatised and suffered flashbacks of the incident for a few weeks thereafter, no further physical violence was inflicted and no bodily injuries was suffered. He recovered his motor vehicle and items of value, less the amount of approximately R800,00.

What is aggravating is that both appellants have previous convictions. Although first appellant does not have previous convictions for robbery, he does have previous convictions for receiving stolen property, assault with intent to do grievous bodily harm, resisting arrest/obstructing members of the police in the execution of their duties and possession of dependence producing drugs, first appellant has never been sentenced to direct imprisonment. At the time of sentencing, the second appellant on the other hand, had three previous convictions for theft, one for housebreaking with intent to steal and theft, one for assault with intent to do grievous bodily harm, a contravention of the Domestic Violence Act and for possession

of arms and ammunition.

Second appellant had in the past received the benefit of the imposition of fines, suspended terms of imprisonment, periodical imprisonment, correctional supervision (which was later converted into imprisonment due to non-compliance) and direct imprisonment. In fact on 21 June 2007 he was sentenced to one year imprisonment. He was released on parole on 20 June 2008 and committed these offences within a year. At the time of sentencing in this matter he had been sentenced to five years imprisonment for attempted theft.

It is a general accepted principle of our law that sentencing should be individualised. It is clear that the trial magistrate did not apply the principle of individualisation in regard to sentence. It is further clear that, if one has regard to their respective previous convictions, the second appellant falls into a completely different category of offender, if compared to the first appellant. The trial magistrate made no distinction between the appellants and clearly approached this matter on the basis that the prescribed minimum sentence would be imposed as a matter of course unless the personal circumstances of the appellants disclosed it to be an exceptional case.

This kind of approach is not permissible. Du Toit et-al, in their Commentary on the Criminal Procedure Act, 28-10B to 28-10B-1, state that:

> "A Court should at all times be alert to the fact that deterrence is not the main purpose of sentence and that the negation of the principle of individualisation of punishment can lead to the absurd situation where a convicted person is - for all practical purposes - punished for crimes not yet committed (individual deterrence) or for the crimes that other people might still commit (general deterrence)."

In my view this amounts to a further misdirection on the part of the trial magistrate. A distinction should be made in respect of the sentences imposed in respect of the first and the second appellants. I am satisfied that having regard to the principles as laid down in S v Mabunda (supra) and the cases referred to hereinbefore, that this robbery cannot be regarded as falling into the upper echelons of severity of crimes of this nature. In my view the effective sentence of 20 years imprisonment imposed on the appellants in respect of the three counts is shockingly inappropriate and disproportionate to the seriousness of the offences.

I agree with the sentiments of Leach, JA where he stated that:

> "As much as it is necessary both to punish the appellant and attempt to deter others from similar crimes, the effective sentence is one that is likely to break rather than to rehabilitate him. It would be wrong to sacrifice the appellant on the altar of deterrence. As was recently reaffirmed by this court, mercy and not a sledgehammer is the concomitant of justice."

Considering that a distinction must be made between the appellants I am of the view that a proper and just sentence in respect of the first appellant in the circumstances of this case would be an effective term of twelve years imprisonment on count one, together with an order that the sentences imposed on counts two and three be ordered to run concurrently with the twelve years imprisonment on count one.

As far as the second appellant is concerned I am of the view that a proper and just sentence for him on count one would be an effective term of fifteen years imprisonment, and that the sentences imposed on counts two and three be ordered to run concurrently with the fifteen years imprisonment on count one.

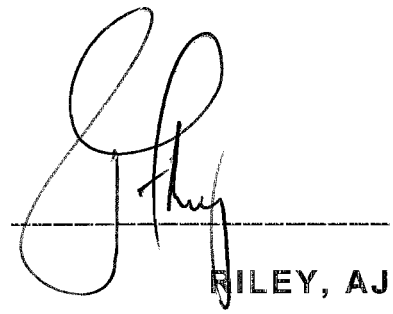
In the result I would propose the following order:

(a) **THE APPEAL SUCCEEDS IN RESPECT OF THE FIRST APPELLANT TO THE EXTENT THAT THE SENTENCE OF 15 (FIFTEEN) YEARS IMPRISONMENT ON COUNT ONE IS SET ASIDE AND REPLACED WITH A SENTENCE OF 12 (TWELVE) YEARS IMPRISONMENT. THE SENTENCES OF 6 (SIX) YEARS AND 3 (THREE) YEARS IMPRISONMENT IMPOSED IN RESPECT OF COUNTS TWO AND THREE RESPECTIVELY ARE TO RUN CONCURRENTLY WITH THE SENTENCE OF 12 (TWELVE) YEARS IMPRISONMENT IMPOSED ON COUNT ONE.**

(b) **THE APPEAL SUCCEEDS IN RESPECT OF THE SECOND APPELLANT TO THE EXTENT THAT THE SENTENCES OF 6 (SIX) YEARS AND 3 (THREE) YEARS IMPRISONMENT IMPOSED IN RESPECT OF COUNTS TWO AND THREE RESPECTIVELY ARE TO RUN CONCURRENTLY WITH THE SENTENCE OF 15 (FIFTEEN) YEARS IMPRISONMENT IMPOSED ON COUNT ONE.**

(c) **IN RESPECT OF BOTH THE APPELLANTS, THE SENTENCES ARE ANTEDATED TO THE DATE UPON WHICH SENTENCE WAS IMPOSED BY THE TRIAL**

COURT, THAT IS 12 AUGUST 2013.



RILEY, AJ

I agree.

MEER, J