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

CASE NO: A202/21

In the matter between

SHAWN HALI APPELLANT

AND

THE STATE RESPONDENT

CORAM: BINNS-WARD J and THULARE AJ

Heard: 12 November 2021 (in terms of s 19(a) of the Superior Courts Act)

JUDGMENT
Delivered by email to the parties' legal representatives and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00
on 19 November 2021

THULARE AJ (BINNS-WARD J concurring);

[1] The appellant was granted leave, on petition, to appeal against sentence only. He had been convicted in the Regional Court on a charge of robbery with aggravating

circumstances, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The magistrate found that there were no substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence and sentenced the appellant to 15 years' imprisonment. He was sentenced on 5 March 2021.

[2] The complainant was a young female Cape Town College student who was in Plein street in the city centre on the afternoon of 16 September 2018. She had a backpack on her back. She spoke to her mother on the phone as she received her order at a takeaway restaurant. As she left Fry King, she unzipped her jacket, placed her phone in the pocket and zipped up and continued walking. She realized that someone was following her and the person was walking faster than her. She then moved closer to the Woolworths building which she was passing to make way for the person behind her.

[3] The person did not walk past, and she looked at him. It was the appellant. The appellant instructed her to give him her phone. Before she answered, she felt that something was pressing against her pocket where she had put the phone. The appellant was using a knife to press against the phone whilst it was still in her pocket. The appellant then said she must unzip the jacket and hand over her phone. The appellant moved the knife slightly to make way for the removal of the phone. He still held the knife against her tummy. She unzipped the jacket and as the phone hung out the appellant took it.

[4] The appellant then demanded money and she told him that she did not have any. The appellant also demanded that she remove her backpack and hand it to him. As she removed the backpack, the appellant helped her remove it from her back. After he had taken her belongings, he then withdrew the knife. He put the backpack over his shoulder and told her that if she followed him, he would use the knife on her. He then walked back in the direction from which he had approached her. At all times that he was talking to her, from the moment he demanded her phone, the appellant held the knife against her.

[5] The complainant's phone was an HI Pulse Mobicell valued at around R1400. It was inside a pouch. In that pouch, she also kept her bank, library, medical and student cards. As she continued down the street after the robbery she saw a law enforcement vehicle and approached it. She reported the incident to the officer, Inspector Siyabulela Nomvula (Nomvula). He asked her to get into the vehicle and they drove around the building. They noticed the appellant with two other persons about to cross at a traffic light. The appellant was walking between the other two. He still had her backpack over his shoulder on his back. She pointed him out to Nomvula.

[6] Nomvula parked the vehicle and approached the three. When the appellant realized that Nomvula was approaching him he tried to run away but Nomvula chased and apprehended him and brought him back to the marked enforcement vehicle. Nomvula took the bag and handed it over to the complainant. It still had all its contents and nothing was missing from it. Nomvula searched the appellant. Although a phone was found hidden in his underwear, it was not the complainant's. The pouch and all its contents were never found. Nomvula found an okapi knife in the appellant's left-hand pocket.

[7] The appellant is 33 years old, unmarried and has no children. His mother is deceased and his father lives in the Eastern Cape. He is the third child of six siblings. He completed standard 5. He stayed with his sisters in Khayelitsha. He worked as a car guard daily and made on average between R350-00 and R400-00 per day. He had been in custody since his arrest. He had several previous convictions. In 1988 he was convicted for theft and cautioned and discharged. In 2002 he was convicted of housebreaking with intent to steal and theft and the passing of sentence was postponed for four years. In 2003 he was convicted of unlawful possession of suspected stolen property and the passing of sentence was postponed for three years on condition that he submitted himself if called upon to do so during the period.

[8] In 2004 he was convicted, on two different dates, of housebreaking with intent to steal and theft and sentenced as regards the first conviction, to 2 years' imprisonment wholly suspended for five years and as regards the second conviction

to eighteen months' imprisonment wholly suspended for 5 years, both on condition that he was not convicted of housebreaking and theft committed during the period of suspension. In the same year he was convicted for unlawful possession of a firearm and unlawful possession of ammunition. He was sentenced to one year's imprisonment in terms of section 276(1)((i) Act 51 of 1977 in respect of the former and to 6 months' imprisonment suspended for five years on condition that he is not convicted of unlawful possession of ammunition committed during the period of suspension.

[9] In 2006 he was convicted of theft and fined R300 or 30 days imprisonment wholly suspended for three years on condition that he was not convicted of theft committed during the period of suspension. In 2007 he was convicted of failure to appear in court after being granted to bail and was fined R200 or ten days' imprisonment. In the same year he was convicted of theft and sentenced to 24 months' imprisonment in terms of section 276(1)(i) of Act 51 of 1977. In 2015 he was convicted of unlawful possession of dependence-producing substances and fined R100-00 or 5 days' imprisonment.

[10] The issue is whether the trial court in imposing sentence, exercised its discretion judicially and properly.

[11] In *S v Dodo* 2001 (3) SA 382 (CC) at para 37 it was said:

"The concept of proportionality goes to the heart of the enquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."

In *S v Malgas* 2001 (1) SACR 469 (SCA) at para 25 it was said:

"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."

In *S v Vilakazi* 2012 (6) SA 353 (SCA) at para 14, referring to this comments in *S v Malgas* it was said:

"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) consists of all the 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 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 provisions 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."

[12] The offence was committed in broad daylight in the city centre. A young, innocent, vulnerable and defenceless female student was walking to the student residence alone and became a soft target. In recent times a cellphone is not only a means of communication between a student and its parents for example. It is a necessary tool for studies and research. The right to privacy, freedom of movement as well as personal property were violated. A knife was pressed against her stomach to threaten her life and induce fear. It was a traumatic experience for a young woman. The city is home to a great number of students, not only from other provinces but also from other countries, most of whom are in Cape Town primarily for their education. The sentence should reflect that their safety is a concern for the court and that the justice system will respond swiftly and appropriately. The close proximity of law enforcement and the alertness and quick reaction of both the complainant and the law enforcement officer led to the arrest of the appellant. The backpack containing the lunch box and text books were found but the pouch was never recovered. A cellphone, identity document, bank card, library and student cards which were in the pouch are necessaries in the life of a student. Their loss occasioned a major disruption in the life of the complainant, who had to relive the trauma every time that she had to apply for the re-issue at every issuing authority for all these necessaries.

[13] The appellant is a mature man who worked as a car guard and earned an income. His actions were motivated by simple greed. His previous convictions present a man who had a history of not respecting other people and their property. Greed and the use of force have characterized his previous offences. No doubt a long term of imprisonment was called for under the circumstances. The appellant has been for a long period a beneficiary of non-custodial sentences and this did not help him in any way. On the two occasions that he was imprisoned, it was for a short period and it did not have the desired effect as regards rehabilitation.

[14] The crime is indeed a serious one. The circumstances, however, are that the degree of physical violence was minimal. The level of violence, for all intents and purposes, amounted only to a threat of violence by wielding and pressing a knife against the body of the victim. The complainant suffered no physical injuries. Some of the stolen items were recovered. These facts in my view distinguishes this case. In my view they should have been accorded due weight, which the trial court failed to do. This in no way seeks to undermine the trauma that such threats induced on the victim.

[15] The failure to accord due weight to the distinguishing circumstances of the case was a misdirection which warrants an inference that the trial court did not exercise its discretion properly and reasonably [*S v Pillay* 1977 (4) SA 531 (A) at 5353E-F]. The appellant was arrested on 16 September 2018 and was sentenced on 5 March 2021. He had been in custody for about two years and six months awaiting trial. This pre-conviction period of imprisonment was a relevant factor as well for the trial court to consider in relation to the proportionality of the sentence [*Ngcobo v S* [1344/2016] 2018 ZASCA 06 (23 February 2016) at para 14]. The impact of the period on the sentence was not explored.

[16] In my view, had the magistrate accorded due weight to the circumstances of this case and due regard to the pre-conviction period, he would have found that the minimum prescribed sentence was disproportionate and unjust. The magistrate would have found substantial and compelling reasons to deviate from the prescribed sentence. I would make the following order:

(a) The appeal on sentence is upheld.

(b) The sentence of the trial court is set aside and replaced with the following:
The accused is sentenced to 10 years' imprisonment.
(c) The substituted sentence is antedated to 5 March 2021 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

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D.M. THULARE
Acting Judge of the High Court

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