Not reportable

Date delivered: 10 SEPTEMBER 2007
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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the matter between:
CASE NO. A. 1150/06

CHARLES MASEMOLA BAILE SEASHALA

and

THE STATE

First Appellant Second Appellant
Respondent

JUDGMENT

1.The two appellants were both charged with two counts of robbery with aggravating circumstances in the regional division of Northern Transvaal. The charges emanated from a single series of events that occurred on the 3rd of June 2003 in the area of Mamelodi. The complainants were Lucky Mahlaole and Alex Shilenye. It was alleged by the state that the appellants had threatened the complainants by pointing a fire-arm at them and taking R37,00 and a Nokia cellular telephone from them. The appellants were arrested on the day of the crime. They were thereafter held in custody. Formal charges were put to them and they pleaded not guilty on the 6th of January 2004. Each was convicted on both counts on the 5th of October 2004. They were sentenced on the 5th of October 2004. The Regional Court Magistrate, Mr Shilubana, sentenced each to

15 years imprisonment on each count but the sentences were ordered to run concurrently.

2.The offence of robbery with aggravating circumstances is referred to in part 2 of schedule 2 of the Criminal Laws Amendment Act, 105 of 1997 (read with the definition of aggravating circumstances in section 1 (b) of the Criminal Procedure Act, 51 of 1977), and the prescribed minimum sentence is a period of 15 years for a first offence. The magistrate thus imposed the prescribed minimum sentence.

3.From the record of the proceedings it appears that the incident occurred during the early afternoon at the Denneboom Train Station. The two victims were accosted by two men who threatened them with a fire-arm and so overcame their resistance to hand over to them their valuables, viz R33,50 cash and the cellphone mentioned in the charge sheet. After the robbery, the victims gave chase to their assailants who ran away. The complainants later identified them at a hostel at Tsamaya Road and acting on this information, police officials arrested the accused the same day.

4.The only issue in the matter was that of the identity of the accused. The Magistrate, in a careful judgment, concluded that the two accused had been correctly identified.

5.The accused were represented by Mr Marais. They were not called to testify during the sentencing phase of the trial but Mr Marais addressed the court. What he said is recorded as follows:

"Your worship as to accused 1, his personal circumstances, your worship. He is 27 years old your worship, he is not married, he has one child, a 2 year old boy your worship .... He is living in Mamelodi your worship. As the state has just indicated he has no previous convictions and there is no pending cases. He was self employed as a hawker your worship. As to accused 2 your worship, he is 29 years old, not married, he has no children. He was living in Limpopo your worship, he has no previous, no pending cases. He was unemployed at the time of his arrest. Your worship it is defence's submission that both accused are still young men, they have been in custody since their arrest. Both are first offenders. Your worship as to the claim, although the victims could have felt threatened, no physical injuries were actually sustained. Your worship it is defence's submission that the court will come to an appropriate sentence, taking above into account your worship. And further your worship, we make ... submissions as to the accused's suitability to possess a fire-arm your worship. As it pleases the court."

6. The Magistrate then asked defence counsel the following question:

"Mr Marais, in your address I did not hear anything as to whether there are sort of if there are compelling circumstances in this case which you know would compel the court not to impose the minimum sentence. You were quiet about it, so do you not have anything to say?"

7. The answer given is "No your worship."

8. The Magistrate thereupon referred to the amendment of section 51 of the Criminal Procedure Act, 1977 by the Criminal Law Amendment of 1997 that I have referred to and emphasized subsection (3) thereof which provides that should substantial compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, the court has to enter the circumstances on the record of the proceedings and may then impose a lesser sentence.

9.The Magistrate found that there were no substantial compelling circumstances and he imposed the minimum sentences. He ordered the sentences to run concurrently. He did not make an order in terms of section 12(2) of the Arms and Ammunition Act of 1969 (which applies to the matter - the Firearms Control Act, 2000 commenced only on 1 July 2004, that is after the appellants had pleaded).

10.The appellants then applied for leave to appeal against their convictions and sentences to the Magistrate but he dismissed the applications. The appellants thereupon petitioned this court for leave to appeal and Mr Acting Justice Ranchod granted leave to appeal in respect of sentence only. He did not, I emphasise, grant leave to appeal against the convictions.

11.Mr Motsweni appeared on behalf of the appellants on behalf of the Legal Aid Board. He submitted that the Regional Court erred in ignoring the personal circumstances of the appellants, he emphasised that the first appellant is 27 years old, not married, has one child, a 2 year old boy, no previous convictions and was self-employed as a hawker at the time that the crime took place. The second appellant, he emphasised, is 29 years old, not married, has no children, no previous convictions and was unemployed at the time. He submitted that the robbery of which the appellants were convicted was not premeditated and highlighted the fact that the complainants were not injured by the appellants. In summary his argument on this part of the case was that the robbery was not of the worst kind.

12.Section 51 of the Criminal Law Amendment Act, 105 of 1997 read with the schedules thereto indeed provides for a minimum sentence of 15 years for a first conviction of robbery with aggravating circumstances. Aggravating circumstances include the use of a fire-arm in the robbery (section 1(b) of the Criminal Procedure Act, 51 of 1997). The offences consequently fall foursquare within the provision of section 51 (1) of the aforementioned Act.

13.Section 51 (3), however, provides an escape hatch. It provides that if the court is satisfied "that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed ... it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".

14.Speaking for myself, I find the imposition of a 15 year period of imprisonment for the crimes described in the evidence to be harsh. A cellphone and a pithy amount of cash was the prize and the complainants were not injured. But a fire-arm was used to instill fear and although no actual injuries were caused, the crime was of a serious nature. Although a court without strictures on its sentencing discretion would probably have imposed a term of imprisonment less than 15 years for the crime described in the evidence, the legislature has in its wisdom prescribed the minimum sentence of 15 years for the offence.

15.In S **v Malgas** 2001 1 SACR 469 (SCA) the question of minimum sentences imposed in terms of sections 51 , 52 and 53 of the

aforementioned Act was considered by the Supreme Court of Appeal. It held that:

15.1 section 51 has limited, but not eliminated, the court's discretion in imposing sentence;

15.2 specified sentences are not to be departed from lightly or for flimsy reasons;

15.3 the legislature has however deliberately left it to courts to decide whether the circumstances of any particular case called for a departure from a prescribed sentence;

15.4 in applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion;

15.5 all factors traditionally taken into account in sentencing, whether or not they diminish moral guilt, will thus continue to playa role;

15.6 the court is entitled to impose a lesser sentence if the sentence called for after consideration of the circumstances of a particular case, appears to be unjust in that it would be disproportionate to the crime, the criminal and the needs of society, and an injustice would be done by imposing that sentence.

16.In my view a substantial circumstance would be one so exceptional In nature that it would expose an injustice should the prescribed sentence be imposed. The fear of such an injustice must compel to court - in an

attempt to avoid the injustice - to impose a lesser sentence. "Substantial" qualifies the circumstance whilst there must be a causative element between the substantial circumstance and an injustice should the sentence be imposed. This is what "compelling" refers to.

17. The only factor in both cases of the appellants that may approach a "substantial" circumstance is that both appellants were first offenders. It would, however, not matter to the victims of their crimes that they were first offenders and society would not think that a crime such as that committed by the appellants by a first offender stands on any footing other than the same crime committed by a repeat offender. Looking at it from the perspective of the appellants, it seems to me that it cannot be said that the mere fact of a first offence is a substantial factor that compels the court to find that the prescribed sentence is unjust. The appellants resorted to using a fire-arm to commit a very serious and widespread crime. They, themselves, placed themselves on the side of the criminals in the veritable war between the victims and the perpetrators of violent crime in this country. Of the traditional triad of factors to take into account when imposing sentence, the personal circumstances of the appellants _ and in particular the fact that they were first offenders - does not outweigh the other two elements. This is indicative, to my way of thinking of the absence of substantial circumstances. If there are no substantial circumstances, the court cannot be compelled to impose a lesser sentence. In any event, the act itself differentiates between a first offender and a repeat offender - a repeat offender is to be sentenced to an even

longer term of imprisonment than a first offender. Consequently the fact that the appellants were first offenders cannot be a factor that may legitimately be taken into account where the question is precisely how to punish a first offender.

18. For these reasons I can see no reason to interfere in the sentence imposed by the Magistrate and I would dismiss the appeals of both appellants.

19. As pointed out above, the Magistrate made no finding in terms of section 12 of the Arms and Ammunition Act, 75 of 1969 which applied when the crimes were committed. The section reads:

"12. **Unfitness, upon conviction, to possess arm.-**

(1) A person who is convicted by a court of a contravention of a provision of this Act relating to the unlawful possession of an arm without the required licence, permit or other authorization, or of section 39(1)(i), U), (k), (I) or (m), or of any other offence in the commission of which an arm was used (excluding any such conviction following upon the payment of an admission of guilt fine in terms of section 57 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), is deemed to be declared unfit to possess an arm, unless the court determines otherwise.

(2) A person convicted by a court of an offence referred to in Schedule 2 to this Act in the commission of which an arm was not used, may, except in the case where such a conviction follows upon the payment of an admission of a guilt fine referred to in sub-section (1), be declared unfit to possess an arm in the discretion of the court concerned.

(3) The court shall upon convicting any person referred to in subsection (1) or where the court exercises a discretion as referred to in subsection (2), bring the provisions of the subsection concerned to the notice

> of such person and afford him an opportunity to advance reasons and present evidence why he should not be declared unfit to possess an arm."

20. It appears that the court a quo did not act in terms of sub-section 12(3). However, subsection 12(1) makes it clear that upon conviction the appellants were deemed to be declared to be unfit to possess an arm. Nothing further was required and the lack of an opportunity to make the representation meant in section 12(3) does not entitle the appellants to possess fire-arms. The Magistrate's failure does not affect the sentence imposed and appealed against and the leave to appeal granted does not cover the deeming provision of sub-section 12(1). The deeming provision follows on the conviction and the sub-section 12(3) process is an administrative procedure and not part of the sentence procedure which is the subject matter of this appeal. I thus have to say nothing more about the Magistrate's failure.

P F LOUW AJ

I agree

A PJOUBERT AJ