IN THE HIGHT COURT OF SOUTH AFRICA

(Transvaal Provincial Division)

Date : 9 February 2009 Case A 324/2008

KENNETH MBEKISA APPELLANT

vs
THE STATE RESPONDENT

JUDGMENT

VAN ROOYEN AJ

[1] THE APPELLANT WAS CONVICTED OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES OF A CELL PHONE FROM THE COMPLAINANT, WHO WAS WALKING WITH A FRIEND IN A STREET IN PRETORIA AT MORE OR LESS 18:47 ON THE 27TH JULY 2005. HE WAS SENTENCED TO 15 YEARS IMPRISONMENT, THE REGIONAL MAGISTRATE NOT HAVING FOUND SUBSTANTIAL AND COMPELLING CIRCUMSTANCES. THE APPELLANT FILED AN APPEAL AND TWO JUDGES OF THIS COURT ALLOWED THE APPEAL AGAINST SENTENCE.

[2] THE LEARNED REGIONAL MAGISTRATE ACCENTUATED THE WIDESPREAD THEFT AND ROBBERY OF CELL PHONES AND THAT STRICT MEASURES SHOULD BE TAKEN TO CURB THIS CRIME. THE APPELLANT WAS, ACCORDING TO HIS TESTIMONY, ALSO AWARE OF THIS EVIL.

[3]THE LEARNED MAGISTRATE REFERRED TO TESTIMONY OF THE COMPLAINANT THAT THE APPELLANT HAD TAKEN OUT A "GUN" AND, HAVING REALIZED THAT "MAYBE HE IS GOING TO DO SOMETHING STUPID, THEN I TOOK OUT MY PHONE. HE DID NOT REQUEST FOR MONEY. THEN 1 GAVE HIM THE PHONE. THEN AFTER THAT HE RAN ACROSS THE OTHER SECTION OF THE FLATS. THEN HE WENT UNDERNEATH THE

Nelson Mandela Drive bridge." A little later in her evidence she added that the appellant had also said that he was "going to shoot our brains out" if she did not hand the phone to him. She also testified that she cried when she got home and related the incident to her husband. This was confirmed in the testimony of the husband.

[3] IN *S* V *MALGAS* 2001(2) SA 1222(SCA) MARAIS JA STATED AS FOLLOWS:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . . However even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed

had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

THE LEARNED JUDGE OF APPEAL ALSO SAID THE FOLLOWING:

"[22] ... THE GREATER THE SENSE OF UNEASE A COURT FEELS ABOUT THE IMPOSITION OF A PRESCRIBED SENTENCE, THE GREATER ITS ANXIETY WILL BE THAT IT MAY BE PERPETRATING AN INJUSTICE. ONCE A COURT REACHES THE POINT WHERE UNEASE HAS HARDENED INTO A CONVICTION THAT AN INJUSTICE WILL BE DONE, THAT CAN ONLY BE BECAUSE IT IS SATISFIED THAT THE CIRCUMSTANCES OF THE PARTICULAR CASE RENDER THE PRESCRIBED SENTENCE UNJUST OR, AS SOME MIGHT PREFER TO PUT IT, DISPROPORTIONATE TO THE CRIME, THE CRIMINAL AND THE LEGITIMATE NEEDS OF SOCIETY. IF THAT IS THE RESULT OF A CONSIDERATION OF THE CIRCUMSTANCES THE COURT IS ENTITLED TO CHARACTERISE THEM AS SUBSTANTIAL AND COMPELLING AND SUCH AS TO JUSTIFY THE IMPOSITION OF A LESSER SENTENCE.

[23] WHILE SPEAKING OF INJUSTICE, IT IS NECESSARY TO ADD THAT THE IMPOSITION OF THE PRESCRIBED SENTENCE NEED NOT AMOUNT TO A SHOCKING INJUSTICE ("'N SKOKKENDE ONREG" AS IT HAS BEEN PUT IN SOME OF THE CASES IN THE HIGH COURT) BEFORE A DEPARTURE IS JUSTIFIED. THAT IT WOULD BE AN INJUSTICE IS ENOUGH. ONE DOES NOT CALIBRATE INJUSTICES IN A COURT OF LAW AND TAKE NOTE ONLY OF THOSE WHICH ARE SHOCKING.

[24] IT HAS BEEN SUGGESTED THAT THE KIND OF CIRCUMSTANCES WHICH MIGHT QUALIFY AS SUBSTANTIAL AND COMPELLING ARE THOSE WHICH REDUCE THE MORAL GUILT OF THE OFFENDER (ANALOGOUSLY TO THE CIRCUMSTANCES CONSIDERED IN EARLIER TIMES TO BE CAPABLE OF CONSTITUTING "EXTENUATING CIRCUMSTANCES" IN CRIMES WHICH ATTRACTED THE SENTENCE OF DEATH). THAT WILL NO DOUBT OFTEN BE SO BUT IT WOULD NOT BE RIGHT TO SUPPOSE THAT IT IS ONLY FACTORS DIMINISHING MORAL GUILT WHICH MAY RANK AS SUBSTANTIAL AND COMPELLING CIRCUMSTANCES."'

IN S V *DODO* 2001(3) SA 382(CC) THE CONSTITUTIONAL COURT (PER ACKERMANN J) HELD THE APPROACH OF THE SUPREME COURT OF APPEAL TO BE CONSTITUTIONALLY COMPATIBLE. THE LEARNED JUSTICE ADDED THAT, ULTIMATELY, NO PUNISHMENT MAY CONFLICT WITH A PERSON'S FUNDAMENTAL RIGHT, AS ENSCONCED IN SECTION 12(1)(E) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA" NOT TO BE TREATED OR PUNISHED IN A CRUEL, INHUMAN OR DEGRADING WAY". ACKERMANN J SUMMARIZED THE MALGAS APPROACH AS FOLLOWS:
In Malgas the words 'substantial and compelling circumstances' in s 51(3)(a) were interpreted by, amongst other things, detailing a step-by-step procedure to be followed in applying the test to the actual sentencing situation.

'A SECTION 51 HAS LIMITED BUT NOT ELIMINATED THE COURTS' DISCRETION IN IMPOSING SENTENCE IN RESPECT OF OFFENCES REFERRED TO IN PART 1 OF SCHEDULE 2 (OR IMPRISONMENT FOR OTHER SPECIFIED PERIODS FOR OFFENCES LISTED IN OTHER PARTS OF SCHEDULE 2).

B COURTS ARE REQUIRED TO APPROACH THE IMPOSITION OF SENTENCE CONSCIOUS THAT THE LEGISLATURE HAS ORDAINED LIFE IMPRISONMENT (OR THE PARTICULAR PRESCRIBED PERIOD OF IMPRISONMENT) AS THE SENTENCE THAT SHOULD ORDINARILY AND IN THE ABSENCE OF WEIGHTY JUSTIFICATION BE IMPOSED FOR THE LISTED CRIMES IN THE SPECIFIED CIRCUMSTANCES.

C UNLESS THERE ARE, AND CAN BE SEEN TO BE, TRULY CONVINCING REASONS FOR A DIFFERENT RESPONSE, THE CRIMES IN QUESTION ARE THEREFORE REQUIRED D TO ELICIT A SEVERE, STANDARDISED AND CONSISTENT RESPONSE FROM THE COURTS.

D THE SPECIFIED SENTENCES ARE NOT TO BE DEPARTED FROM LIGHTLY AND FOR FLIMSY REASONS. SPECULATIVE HYPOTHESES FAVOURABLE TO THE OFFENDER, UNDUE SYMPATHY, AVERSION TO IMPRISONING FIRST OFFENDERS, PERSONAL DOUBTS AS TO THE EFFICACY OF THE POLICY UNDERLYING THE LEGISLATION, AND MARGINAL DIFFERENCES IN PERSONAL CIRCUMSTANCES OR DEGREES OF PARTICIPATION BETWEEN CO-OFFENDERS ARE TO BE EXCLUDED.

E THE LEGISLATURE HAS HOWEVER DELIBERATELY LEFT IT TO THE COURTS TO DECIDE WHETHER THE CIRCUMSTANCES OF ANY PARTICULAR CASE CALL FOR A DEPARTURE FROM THE PRESCRIBED SENTENCE. WHILE THE EMPHASIS HAS SHIFTED TO THE OBJECTIVE GRAVITY OF THE TYPE OF CRIME AND THE NEED FOR EFFECTIVE SANCTIONS AGAINST IT, THIS DOES NOT MEAN THAT ALL OTHER CONSIDERATIONS ARE TO BE IGNORED. F
F All factors (other than those set out in D above) 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 in the sentencing process.

G 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 G JUSTIFY A DEPARTURE FROM THE STANDARDISED RESPONSE THAT THE LEGISLATURE HAS ORDAINED.

H IN APPLYING THE STATUTORY PROVISIONS, IT IS INAPPROPRIATELY CONSTRICTING TO USE THE CONCEPTS DEVELOPED IN DEALING WITH APPEALS AGAINST SENTENCE AS THE SOLE CRITERION. H

I IF THE SENTENCING COURT ON CONSIDERATION OF THE CIRCUMSTANCES OF THE PARTICULAR CASE IS SATISFIED THAT THEY RENDER THE PRESCRIBED A 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.

J IN SO DOING, ACCOUNT MUST BE TAKEN OF THE FACT THAT CRIME OF THAT PARTICULAR KIND HAS BEEN SINGLED OUT FOR SEVERE PUNISHMENT AND THAT THE SENTENCE TO BE IMPOSED IN LIEU OF THE PRESCRIBED SENTENCE SHOULD BE B ASSESSED PAYING DUE REGARD TO THE BENCH MARK WHICH THE LEGISLATURE HAS PROVIDED.'

[5] RETURNING TO THE FACTS OF THE PRESENT CASE:

(1) THE COMPLAINANT DID NOT TESTIFY THAT THE APPELLANT POINTED THE FIREARM AT HER, WHILST HER FRIEND REFERRED TO A POINTING OF THE FIREARM. IN ONE INSTANCE THE PROSECUTOR ASKED THE COMPLAINANT A LEADING QUESTION WHICH INCLUDED A REFERENCE TO THE FIREARM HAVING BEEN POINTED TO HER. SHE REACTED POSITIVELY. IT WOULD NOT BE ADMISSIBLE TO TAKE HER POSITIVE REACTION INTO CONSIDERATION, SINCE THE QUESTION WAS A LEADING QUESTION. THIS DIFFERENCE IN THE EVIDENCE AS TO POINTING OF THE FIREARM WAS NOT EXPLORED BY THE PROSECUTOR. IN THE LIGHT OF THE PAUCITY OF EVIDENCE IN THIS REGARD, THIS COURT WOULD BE ACTING UNFAIRLY IN SIMPLY ACCEPTING THAT A POINTING OF THE FIREARM HAD TAKEN PLACE. IF SUCH A POINTING HAD TAKEN PLACE, THE COMPLAINANT WOULD HAVE TENDERED THE EVIDENCE. THIS SHE DID NOT DO.

(2) Furthermore, it is significant that the complainant only introduced the words "or I will shoot your brains out" later in her evidence. Complainant testified that the appellant had spoken Xhosa. Her friend was, however, of the view that he had spoken Sotho. She had not heard him say that he would "shoot their brains out". As a possible reason for not having heard this, she said that she had been scared. My conclusion is that, in spite of this explanation, it would be unfair to accept that the words were, indeed spoken. This aspect of the evidence was not sufficiently explored and the appellant must get the benefit of the doubt.

(3) THE APPELLANT WAS A FIRST OFFENDER. IT IS TRUE THAT FIRST OFFENDERS ARE NOT NECESSARILY ENTITLED TO NOT HAVE HEAVY SENTENCES IMPOSED UPON THEM. HOWEVER, THIS ASPECT MUST ALWAYS BE CONSIDERED. THIS WAS NOT REFERRED TO BY THE LEARNED REGIONAL MAGISTRATE IN HIS JUDGMENT ON SENTENCE, EXCEPT WHERE IT IS OBSERVED THAT FOR A FIRST OFFENDER, ACCORDING TO THE CRIMINAL PROCEDURE ACT, THE SENTENCE IS 15 YEARS. THE LEARNED REGIONAL MAGISTRATE STATES THAT HE CONSIDERED THE PERSONAL CIRCUMSTANCES OF THE APPELLANT, BUT THAT THEY DID NOT WEIGH HEAVIER THAN THE INTERESTS OF SOCIETY. IT IS, HOWEVER, CLEAR THAT THE LEARNED REGIONAL MAGISTRATE WAS AWARE OF THE FACT THAT HE WAS A FIRST OFFENDER. FROM *MALGAS* IT IS CLEAR THAT ALL THE TRADITIONAL EXTENUATING CIRCUMSTANCES SHOULD STILL APPLY, EVEN IF THE PRESCIBED FIFTEEN YEARS IS CONNECTED TO A "FIRST" OFFENDER. THE FACT OF BEING A FIRST OFFENDER MUST ALWAYS BE WEIGHED WITH ALL THE OTHER FACTORS TO ESTABLISH WHETHER THERE ARE "SUBSTANTIAL AND COMPELLING CIRCUMSTANCES".

(4) THE FACT THAT THE APPELLANT WAS WILLING TO COOPERATE WITH THE POLICE, ACCORDING TO THE EVIDENCE OF THE POLICEMAN, SHOULD ALSO HAVE BEEN TAKEN INTO CONSIDERATION. OF COURSE, AS APPEARS FROM THE RECORD, APPELLANT CHANGED HIS STANCE AT THE HEARING, PLEADED NOT GUILTY AND DENIED ANY INVOLVEMENT. HE WAS, HOWEVER, PERFECTLY ENTITLED TO HAVE DONE SO AND HIS PLEA OF NOT GUILTY ACCORDS WITH HIS CONSTITUTIONAL RIGHT - THE STATE HAVING TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

[6] CONSIDERING THE FACTS AS A WHOLE, I AM OF THE VIEW THAT IN TERMS OF *MALGAS* AN INJUSTICE WOULD BE PERPETRATED AGAINST THE APPELLANT IF THE FIFTEEN YEARS WERE TO BE APPLIED TO HIM FOR THIS RATHER LOW KEY OFFENCE. AS A RESULT OF CONTRADICTIONS IN THE TESTIMONY OF THE TWO LADIES, I CANNOT CONCLUDE THAT HE POINTED THE FIREARM AT THEM AND THAT HE INDEED SAID THAT HE WOULD BLOW THEIR BRAINS OUT. OF COURSE, HIS DEED REMAINS A VERY SERIOUS ONE. YET, AS CONVINCINGLY ARGUED BY MS *AUGUSTYN*, THIS ROBBERY WAS CERTAINLY NOT ONE OF THE MOST SERIOUS ROBBERIES OFTEN DEALT WITH BY THE COURTS. I BELIEVE THAT A SENTENCE OF TEN YEARS IMPRISONMENT WOULD BE SUFFICIENT TO TAKE CARE OF THE INTERESTS OF THE COMMUNITY AND STILL GRANT THIS YOUNG MAN, WHO WAS TWENTY FIVE YEARS OLD WHEN HE COMMITTED THE CRIME, A REASONABLE OPPORTUNITY OF RETURNING TO SOCIETY AND ASSUMING HIS RESPONSIBILITIES, HOPEFULLY REHABILITATED AND TAUGHT TO DO SOMETHING USEFUL IN PRISON.

IN THE RESULT I PROPOSE THE FOLLOWING ORDER:

(1) THAT THE APPEAL AGAINST SENTENCE SUCCEEDS IN THAT THE IMPRISONMENT IS REDUCED;

(2) That the sentence of fifteen years imprisonment be replaced with a sentence of ten years' imprisonment

J CW VAN ROOYEN
Acting Judge of the High Court **9 February 2009**

E MAKGOBA
JUDGE OF THE HIGH COURT
For the State: N Molepo from the Office of the Director of Public Prosecutions, Pretoria
For the Appellant: L Augustyn from the Legal Aid Board, Pretoria.