REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: A15/2018

DATE OF HEARING: 24 APRIL 2019

(1) REPORTABLE: ~~YES~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~
(3) REVISED.

2019-05-24

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In the matter of:

BAFANA MBENYA — **APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

Bam AJ

Introduction

1. The appellant was convicted of robbery with aggravating circumstances in the Regional Court held at Benoni. Section 51 (1) of the The Criminal Law Amendment Act 105 of 1997 (the Act) was applicable. The trial court, having found no substantial and compelling circumstances to justify the departure from the minimum sentence specified in the Act, sentenced the appellant to 15 years imprisonment. His appeal against the sentence was dismissed by the trial court. On petitioning the Judge President of this court, he succeeded, and the order was granted on 22 November 2017. The matter is before this court only on the question of sentence.

2. The facts, broadly stated are: During the afternoon of 6 May 2017, at or near Great North Road in Benoni, the appellant accosted a 14 years old boy, ("the complainant") who was standing at the gates of a church and holding a mobile phone in his hands. Pointing a knife, an Okapi, at the complainant's throat, appellant demanded that the complainant hand him the mobile phone, which the complainant did. Appellant left the scene. He was subsequently arrested by the South African Police Services, (SAPS) and charged with robbery with aggravating circumstances.

3. He appeared before the Regional Court on 5 July 2017 where he pleaded guilty to the charge of robbery with aggravating circumstances. His statement in terms of section 112 (2)[1], was read into the record by his legal representative. After the court had satisfied itself that it covered the elements of the offence, the statement was accepted and the appellant subsequently convicted and sentenced as previously mentioned in this judgment.

Appellant's case on appeal

4. Before I go into the detail of the appellant's case, it is only fair that I record that both counsel are in agreement that, given the circumstances of this case, the sentence meted out by the trial court is disproportionate and induces a sense of shock. Both counsel submitted that this court has a duty to step and correct the injustice.

The trial court misdirected itself

5. It was submitted on behalf of the appellant that the trial court misdirected itself in disregarding evidence placed before it, which when looking at the circumstances of the case, constituted substantial and compelling circumstances. The evidence included: (a) The youthful age of the appellant. (At the time of committing this offence, the appellant was 18 years old); (b) That the appellant had pleaded guilty, which his legal representative suggested it demonstrated a sense of taking responsibility for his actions and remorse; (c) That the complainant's phone had been returned to him, as such he had suffered no loss; (d) The value of the goods stolen; (The trial court had accepted that the phone was valued at R2000); (e) Even though a weapon had been used, it was only used to obtain submission from complainant and that no physical injuries

[1] of the Criminal Procedure Act 51 of 1977

were inflicted; (f) The appellant is a first offender; and had spent two months in prison while awaiting trial.

6. All of the factors set out in the preceding subparagraph, considered cumulatively, render the sentence imposed out of proportion and unjust, submitted counsel for the appellant. That the trial court had a duty to guard against injustice in meting out punishment.

7. In S v Vilakazi[2] it was said that the sentencing Court had a duty to guard against injustice in meting out punishment :

> '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.....It is only by approaching sentencing under the Act (The Criminal Law Amendment Act 105 of 1997) in the manner that was laid down by this court in S v Malgas[3]– which was said by the Constitutional Court in S v Dodo[4] 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'.

8. The court below, as I shall demonstrate, incorrectly rejected the factors mentioned in paragraph 5 of this decision, insisting that according to the principles articulated in S v Malgas[5] the minimum sentences should not be deviated from on the basis of flimsy reasons. To an extent, the court was correct, Malgas

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[2]Vilakazi v The State (576/07) [2008] ZASCA 87 (2 September 2008)
[3]S v Malgas 2001 (1) SACR 469 (SCA)
[4]5 2001 (3) SA 382 (CC)
[5]supra

conveys as much to judicial officers. But, as shall be shown from the remarks of the court in Vilakazi[6], Malgas goes further:

> 'Malgas did not say that prescribed sentences should ordinarily be imposed. What the court 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' (.....) In the context of the judgement 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.[7]'

9. I now turn to the transcript, to bring home the misdirections committed by the trial court. In extracting these excerpts care was taken to collect sufficient material to show the trail of thought such that there can be no question that the court has been quoted out of context. At the early stages of sentencing, the court noted[8]:

10. 'I know it is comfortable to have a cell phone but in fact parents who put their children in possession of a cell phone also put their children at risk. Armed robbery in itself is very prevalent. Armed robbery of cell phones is extremely prevalent. It will not be facetious to think or to estimate that nine out of ten armed robberies, nine will be robbing of cell phones. It is in the interests of society that this scorch be stopped and that can only be done by serving in the first instance of the court objectives preven-

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[6] supra
[7] Vilakazi v The State (576/07) [2008] ZASCA 87 (2 September 2008)
[8] Page 14 of the record, line 3 to 7.

tion, deterrence, rehabilitation, and punishment to serve the objective of the deterrence. **Other people must see what happens to you and refrain from this kind of conduct**.' (emphasis is mine)

11. The Constitutional Court in Buzani Dodo v The State[9] warned against using human beings as means to an end:

'[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed.'

12. There can be no question when reading the extract from the court record that the court imposed the lengthy term of imprisonment because of its general deterrence even though the circumstances warranted a lesser sentence. This was a misdirection on the part of the court. In the paragraph below, the court rejected relevant evidence, which given the circumstances of the case, ought to have led the court to a lesser sentence:[10]

13. 'Your personal circumstances are, the address on the J15..... is your parental home. You claim you live there. The prosecutor claim (sic) that you decided to leave home but there is a save (sic) haven at your disposal. You only went up to Grade 8 so if you drop out of school at that low grade I do not know how you could ever dream of having a future. You are single, you have got no children and you did piece

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[9] 2001 (3) SA 382 (CC)
[10] Page 14 line 9 to 25

jobs when you get you will earn R150 a day. Adv..... .....[referring to the appellant's legal representative], as material and compelling circumstances offered the fact that you are 18 years old and that you are a first offender. Section, Act 105 of 1997 prescribes a sentence of 15 years' imprisonment for a first offender 18 years and older so that in itself does not amount, do not amount to material and compelling circumstances. He added that you pleaded guilty and that you have been in custody since 6 May 2017, almost two months. The fact of the matter is Mr Benya on the merits of this case your robbed this 14 year old school T.....T [name of complainant] in broad day light'.....' 'So Mr Benya for robbing this vulnerable member of our society, a child of society I found no material and compelling circumstances that will enable the court to motive (sic) in terms of section 51 (3) of the act 105 of 1997 a deviation from the prescribed sentence[11].'

16. Some of the remarks made by the court (as shown in this extract) were unwarranted. Suffice to conclude that the court misdirected itself, nothing further need be said.

17. The cardinal rule in our law which has been espoused in many a decision by the SCA is that sentencing is at the discretion of the trial court and that an appellate court should not easily interfere with the sentence imposed. In The Director of Public Prosecutions v Oscar[12] it was said:

> 'An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where, there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it'.

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[11] Page 15 line 10 to 14
[12] The Director of Public Prosecutions, Gauteng v Oscar Leonard Carl Pistorius (950/2016) [2017] ZASCA 158 (24 November 2017) para 17

18. In Hewitt v The State[13] the court stated:

> 'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

19. Having demonstrated that the court had misdirected itself, it is now incumbent upon this court to consider the question of appropriate sentence afresh. The offence committed by the appellant is a serious offence, and as the trial court had noted, armed robbery involving mobile phones is prevalent. The appellant may not have physically harmed the complainant but mention was made in court that the complainant had been left traumatised by the incident. Factors which count in the appellant's favour however, include the fact that this offence was committed when he was 18. The knife was used only to subdue the complainant and no injuries were inflicted. There was also no suggestion that there had been premeditation. In Damgazela v The State[14], where the offenders

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[13](637/2015) [2016] ZASCA 100 (9 June 2016) para 8.
[14]*The State* (633/09) [2010] ZASCA 69 (26 May 2010) para 16

were 18 and 19 and charged with rape and sentenced to twenty years imprisonment, the court in reducing their sentence to 8 years, reasoned as follows:

> "Both appellants were first offenders, had left school prematurely and they were aged 18 and 19 years respectively at the time of the incident. They had both spent 20 months in custody awaiting trial. Aggravating features are the gravity of the offence and the prevalence thereof, the appellants' lack of remorse and the fact that there appears to be a degree of premeditation involved in the commission of the offence.....Appellate interference in respect of sentence on the striking disparity criterion is only competent in instances where the appellate court has formed a definite view as to the sentence it would have imposed and where the degree of disparity between that sentence and the one imposed by the sentencing court is so striking that interference on appeal is warranted."

20. In State v Matyityi[15], the court remarked:

> 'It is trite that a teenager is prima facie to be regarded as immature[16] and that the youthfulness of an offender will invariably be a mitigating factor[17], unless it appears that the viciousness of his or her deeds rule out immaturity[18]. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult[19]. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness[20]. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness[21].

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[15] State v Matyityi (695/09) [2010] ZASCA 127 (30 September 2010)
[16] S v Ngoma 1984 (3) SA 666 (A) at 674E-F.
[17] Terblanche p 196.
[18] 15 S v Diamini 1991 (2) SACR 655 (A) at 666b-f.
[19] 16 S v Mohlobane 1969 (1) SA 561 (A) at 565C-E.
[20] S v Lehnberg 1975 (4) SA 553 (A) at 561A-C.
[21] 18 S v Van Rooi & andere 1976(2) SA 580 (A)

21. In S Fortune[22], where the court dealt with a repeat offender, it noted the following in identifying substantial and compelling factors that ought to have directed the trial court to deviate from the minimum sentence:

> '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 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. 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.'

22. In S v Mavinini[23] where the appellant and three others had robbed a family with a fourteen month old baby, (the family had not just been robbed, they were robbed clean, observed the court). They were left with clothing on their persons, with one of the complainants (the husband) having been pistol whipped, resulting in the wound requiring some stitching, the court noted:

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[22] 2014 2 SACR 178 WCC paras 12 - 13

[23] State v Mavinini (224/2008) [2008] ZASCA 166 (1 December 2008) para 30

'These circumstances, while serious, do not justify the maximum sentence. They constitute reasons why the minimum sentence of fifteen years, and not a lesser sentence, was appropriate. The circumstances did not call for an exemplary sentence, which the maximum entails. That in my view would be disproportionate to the circumstances of the offence (see Vilakazi v The State [2008] 4 All SA 396 (SCA), (576/07) [2008] ZASCA 87 (2 September 2008)).

23. Without making light of the offence committed and elevating the personal circumstances of the appellant, the appellant is a first offender and had left school prematurely. There is no evidence of pre-meditation. The attack on the complainant was brazen but complainant was not physically harmed. All of these factors count in favour of the appellant in the circumstances of this case. Having considered the conspectus of the circumstances of this case, we conclude that the sentence was harsh and failed to heed the warming sounded in S v Vilakazi[24] . In the circumstances, a sentence of seven years should bring home the gravity of this offence. The court makes the following order:

(a) The appeal is upheld.

(b) The sentence is set aside and is replaced by the following sentence.

'The appellant is sentenced to seven years'.

NN BAM
ACTING JUDGE OF THE HIGH COURT,
PRETORIA

[24] para 8 of this judgment

I CONCUR

KHUMALO
JUDGE OF THE HIGH COURT,
PRETORIA

DATE OF HEARING: 24 April 2019

DATE OF JUDGMENT:

APPEARANCES

APPELLANT'S COUNSEL: Adv LA Van Wyk (Legal Aid SA)

RESPONDENT'S COUNSEL: Adv PCB Luyt (Office of the DPP, Pretoria)