IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

01 SEPTEMBER 2020
DATE

SIGNATURE

CASE NO: A10/2020

In the matter between:

BONGANE SENZO ZWANE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MADIBA, AJ

Introduction

[1] The appellant was convicted of robbery with aggravating circumstances on 22 September 2017. He was sentenced to fifteen (15) years imprisonment after pleading guilty.

Factual Matrix

[2] The evidence against the appellant is that he, in the company of his friend Sipho Mtshali, robbed the complainant of her cell phone while walking along the street. They demanded that she hand over her cell phone to them and she refused to do so.

[3] She was threatened with knives and ultimately handed her phone to the appellant and his companion. The two then left in possession of the complainant's phone.

[4] The complainant screamed for help and members of the public came to her assistance. The appellant and his friend were apprehended and handed over to the police who effected an arrest on them.

[5] The appellant tendered a plea of guilty. The appellant submitted a statement in terms of section 112 (2) of the Criminal Procedure Act of 1977 as amended.

[6] The state accepted the appellant's guilty plea and his plea statement was accepted by the court.

[7] The appellant was sentenced to fifteen (15) years imprisonment in accordance with provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 51 of 1977 as amended.

Grounds of appeal

[8] The appellant submitted that: -

a) A term of fifteen (15) years is shocking and disproportionate to the facts of the case.

b) The court erred in not taking into account the age of the appellant;

c) The appellant showed remorse by pleading guilty to the offence and that the prospects of rehabilitation were not considered.

d) The trial court over-emphasized the seriousness of the offence and the interests of society;

e) The court erred in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence.

Sentence

[9] The court hearing an appeal must be guided by the principle that punishment is a matter for the discretion of the trial court. The sentence should only be altered if the trial court did not exercise its discretion properly and judicially.

[10] It is trite law that the test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[11] The conviction of the appellant fell within the ambit of the prescribed minimum sentence in terms of Section 51 (1) of the Criminal Law Amendment Act of 105 of 1977.

[12] His prospects of success in the appeal lies in the finding that substantial and compelling circumstances exist justifying the imposition of a lesser sentence or whether the trial court misdirected itself and that it did not exercise its discretion reasonably and properly.

[13] It has been left to the court to decide whether the circumstances of any particular case call for deviation from the prescribed minimum sentence.

[14] The appellant placed the following factors before the trial court: -

a) That he is 29 years old and unmarried;

b) He has two minor children boy and a girl aged 18 months and 2 months respectively;

c) That he is temporarily employed earning R150.00 per day;

d) That he is a primary care giver to his children who do not have any other means of support or assistance;

e) He attended school until Grade 10;

f) That he pleaded guilty and showed remorse;

g) He is a first offender; and

h) The court erred in not showing a measure of mercy to the appellant.

[15] The trial court has to consider whether or not these factors are indeed substantial and compelling to justify deviation from the prescribed sentence. In the

absence of weighty justification as to why the prescribed minimum sentence should not be imposed, the court will impose the prescribed sentence.

[16] The legislator has refrained from defining what factors constitute substantial and compelling circumstances. It is therefore the sentencing court which is seized with the discretion to take all the factors into consideration when deciding whether substantial and compelling circumstances do exist in a particular case. Such discretion is to be exercised judicially.

[17] The ultimate impact of all circumstances relevant to sentencing must be measured against the phrase substantial and compelling circumstances. All circumstances taken into account when a sentence is meted out, must cumulatively justify the minimum sentence to be imposed.

[18] I have perused the record in this matter and failed to find where the trial court paid attention to all the circumstances prevailing in this matter. When addressing the fact that the accused pleaded guilty and showed remorse, the trial court attached no weight to this factor.

[19] The trial court expressed itself as follows: On page 18 of the record paragraph 10: -

"it is true that you have pleaded guilty and did not have much choice. As I say in a poker game there were no outs, what defence could you have raised?... you cannot claim any mitigation from the fact that the cell phone was retrieved, that is thanks to the community of Actonville who came to the rescue of the complainant."

[20] On page 17 of the record, paragraph 20 the trial court said: -

"Although I appreciate the fact that you have shorten proceedings that is only in your interest."[1]

[21] It is my view that factors weighing heavily in favour of the appellant were simply ignored. They were actually relegated to the back seat even being compared to a game of poker.

[22] The trial court when addressing the objectives of punishment stated in paragraph 4, page 10 of the record that: -

"*The interest of society can only be served by first of all removing people of this conduct from society and second of all to send a clear message to serve as deterrent that this kind of conduct will resolve in long terms of prison*".

[23] Although mention was made of other objectives of punishment like rehabilitation and prevention, my view is that the trial court only paid lip service to the other objectives of punishment and over emphasized the interest of society and the aspect of deterrence.

[24] In *S. v. Mahlakaza and Another*[2], the court held that: -

"*The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusive for public opinion is inherently flawed. It remains the court's duty to impose fearlessly*

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[1] Own emphasis
[2] 1997 (1) SACR 515 SCA at 523 g-j 524 e-f and 518 a-g

and appropriate and fair sentence even if that sentence does not satisfy the public".

[25] Although it is in the interest of the public that the sentence should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence. I am of the view that the interests of society can still be served by imposing other sentences than removing the accused from society for a long time. It was contended on behalf of the appellant that he is the sole caregiver to his children and the children do not receive social grants.

[26] The trial court expressed disbelief and said: -

"*Why not? Everybody has children with grants and the mother should go and apply for a grant.*"

[27] It is quite clear that the trial court failed to consider this factor simply diverting it to the door steps of the children's mother who must go and apply for the social grants. The situation was that the appellant was a sole caregiver to his children at the time of conviction and sentencing.

[28] The appellant raised the fact that he does not have a permanent job and may earn R150.00 per day if employed for that day.

[29] The comments by the trial court were:

"*Gentlemen, do not think for a minute that I do not know that it is terrible that one is unemployed. And I am a firm believer until this politics in the country actually serves the people and ensure that the economy start growing instead*

of dealing with other sentiments which you cannot eat and which will not create jobs, that the crime rate will always remain high, but we cannot allow it to continue because one day when there are jobs for everybody, we will have no country left, we will be another Zimbabwe."[3]

[30] It is disturbing that the trial court failed to consider and attach any weight on the factor and blamed the politicians for the appellant's mishap.

[31] When refusing an application for condonation by the appellant, as he should have lodged his appeal within 14 days as prescribed, the learned Magistrate said that the appellant had more than four and half months to do so. He had so much time, he could have written a book in prison and appellant must go and serve his sentence.

[32] In *S v Rabie*[4], the court held that the punishment should fit the criminal as well as the crime, be fair to accused and to the society and be blended with a measure of mercy.

[33] True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself.[5]

[34] It is incumbent upon the court to consider all the factors when exercising its discretion, which discretion is to be exercised reasonably and judicially. In my view, the cumulative effect of factors raised in mitigation by the appellant were

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[3] page 10 of the record paragraph 10

[4] 1975 (4) SA 885 A

[5] See S. v. Sparks and Another 1972 (3) AD 396; and S. v V 1972 (3) AD 611 at page 614

not taken into account as the trial court only paid lip service to those factors. I find that the learned Magistrate failed to sufficiently consider the personal circumstances of the appellant in this matter. The trial court has misdirected itself and did not exercise its discretion reasonably and properly.

[35] In *S v Skenjana,*[6] the court held that "*...my personal view is that the public interest is not necessarily served by the imposition of very long sentences of imprisonments. So far as the deterrence is concerned, there is no reason to believe that deterrent effect of prison sentence is always proportionate to its length.*"

[36] The court in *S v Khumalo and Another*[7] stated as follows: -

> "*It is the experience of the prison administrators that unduly prolonged imprisonment brings about the complete and physical deterioration of the prisoner*".

[37] I am of view that the trial court failed to carefully consider and balance the aggravating circumstances against the mitigating circumstances of the appellant. I find that indeed there are substantial and compelling circumstances in this matter. The sentencing court should guard against imposing disproportionate sentences merely on the basis that they fall within the category of the prescribed minimum sentence.

[38] The appeal court is to apply its mind to the question as to whether the sentence imposed by the trial court was proportionate to the offence. In the circumstances, I find that the sentence imposed by the trial court is disturbingly disproportionate to the gravity of the offence as it is excessive under the

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[6] 1985 (3) SA 51 (A) at 51 (1)
[7] 1984 (3) SA 327 at 331

circumstances. It is in the interest of justice that the sentence meted out by the trial court be interfered with and altered.

[39] The sentence imposed by the trial court should be set aside.

[40] Therefore, the following order is proposed:

1. The appeal against sentence succeeds.
2. The sentence of the trial court is set aside.
3. The sentence of six years imprisonment is imposed ante dated to the date of sentence by the trial court in this matter.

MADIBA SS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

MAKHOBA D
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Appearances:

Appellant's Counsel	: Advocate OKK Matshego ogeholdings@gmail.com 082 954 9438
Appellant's Attorneys	: Legal Aid South Africa
First Respondents' Counsel	: E Leonard SC 084 700 3279
First Respondents' Attorneys	: National Prosecuting Authority

Date of hearing : 17 August 2020

Date of judgment : 01 September 2020