

IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
11.03.10 DATE	 SIGNATURE

CASE NO: A198/08

DATE: 16/3/2010

IN THE MATTER BETWEEN

THAMSANGA HANDSOME GXOWA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

POSWA. J

Background and Introduction

- [1] The Appellant, an 18 year old young man, was charged with two counts of robbery, which he allegedly committed on 19 April 2000 and 21 April 2000, respectively, at Kwa-Thema. According to the charge-sheet and its annexures, his first appearance before the Magistrate's Court was sixty seven days after his arrest, having been in custody all that time. During the trial, he was legally represented. He pleaded not guilty, alleging that he knew absolutely nothing about the allegations in respect whereof he was charged.

- [2] Having heard evidence from witnesses, including the Appellant's testimony, the Magistrate found him guilty in respect of both counts. He was sentenced to fifteen years imprisonment, in respect of each count, there being no order with regard to the second sentence or part thereof running concurrently with the first sentence. The Appellant's application for leave to appeal was turned down by the Regional Court Magistrate, resulting in his petitioning the High Court for such leave. The latter Court granted leave to appeal only in respect of sentence, hence the appeal presently before us.

Appropriateness or otherwise of sentence

- [3] In order to arrive at an appropriate sentence, the Regional Court Magistrate emphasised, correctly in my view, the fact that, in both instances, the Appellant made use of a fire-arm, which, in itself, is a major consideration. He, for that purpose, relied on the case of *S v Mohase* 1998(1) SACR 185 (O). The learned Regional Court Magistrate also mentioned that the Court has an obligation to pass sentences that will make the inhabitants of Kwa-Thema safer, which requirement, therefore, entails passing sentences that will scare offenders like the Appellant away from crimes of the type of which the Appellant was convicted. The learned Magistrate stated that the victims in these cases want to see retribution and he gave the assurance that they were going to receive it from his Court.

[4] The Regional Magistrate also took into account the Appellant's personal circumstances, viz., that:

- (a) the Appellant was aged 18 at the time of the commission of the offences;
and
- (b) the fact that he is a first offender.

The learned Regional Court Magistrate stated, however, that Parliament had deliberately enacted that there be a minimum sentence of fifteen years imprisonment where an accused person is convicted of robbery, in circumstances such as those in which the Appellant has been convicted. The Regional Court Magistrate pointed out, however, that, as from 1 May 1988, when the Criminal Law Amendment Act, 105 of 1997 ("the Minimum Sentences Act") came into operation, persons who have committed robbery, in circumstances similar to those under which the Appellant committed the two robberies, should be sentenced to a minimum period of fifteen years imprisonment, unless substantial and compelling circumstances exist for the passing of a lighter sentence.

[5] Relying on the case of *S v Mofokeng & Another* 1999(1) SACR 502 (W), the judgment of STEGMANN, J, as he then was, at 523i-524d, the Regional Court Magistrate held that the Appellant's youthfulness and absence of previous convictions were ordinary factors ("*gewone faktore*"), which did not constitute substantial and compelling circumstances. In fairness to the Regional Court Magistrate, that is precisely what STEGMANN, J also held in the following passage, at 523i-524d:

*"The absence of previous convictions, the comparative youthfulness of the prisoners, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor they had taken, the absence of dangerous weapons, and the fact that the complainant had not suffered serious injury, are all factors that a court sentencing a convicted rapist, in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However, in my judgment, these factors, 'substantial' though they are, are matters that Parliament must be taken to have had in mind as **everyday circumstances** that would be found present in any or most of the crimes referred to in Part I of Schedule 2 to Act 105 of 1997. Without emasculating the legislation, they cannot be thought of as 'compelling' the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. ... As I understand the legislation [Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act)], 'substantial and compelling' circumstances must be factors of an **unusual and exceptional kind** that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2" [emphasis added].*

- [6] In *S v Rabie* 1975(4) SA 855 (A), at 857D-E, HOLMES, JA stated the following with regard to how an appeal on sentence should be approached:

- "(1) In every appeal against sentence, whether imposed by a Magistrate or a Judge, the Court hearing the appeal –
- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court;
 - (b) should be careful not to erode such discretion: hence the further principle that a sentence should only be altered if the discretion has not been judicially and properly exercised;
- (2) The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[7] In *S v Pillay* 1977(4) SA 531 (A), at 535E-F, TROLLIP, JA explained what must be understood by the concept of "misdirection" on the part of a court *a quo*. He stated that the misdirection:

"must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercise it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."

[8] More than a decade later, the SCA dealt with that aspect in *S v Malgas* 2001(1) SACR 469 (SCA) per HARMS, JA, at para [9], 477f-i, giving judgment on behalf of the Court, thus:

"... I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding **even from consideration** any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative **impact** of those circumstances must be such as to **justify** a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."

- [9] Although the Regional Court Magistrate in the present matter was relying on a High Court judgment and would not have known what was to be stated in *Malgas* two years later, the fact of the matter is that his decision is incorrect, to the extent

that he did not consider youthfulness and absence of previous convictions as factors relevant to determining whether or not there were substantial and *compelling* circumstances. This Court is, therefore, at liberty to interfere with the Magistrate's judgment on sentence. In any event, it is, in my view, disturbingly inappropriate.

- [10] In *R v Swanepoel* 1945 AD 444, DAVIS, AJA, quoted the following from Salmond on *Jurisprudence*, 3rd ed, sec 28:

"[t]he ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him."

The Magistrate in the current matter omitted the reformative aspect of the purposes of punishment which, it is by now trite, is a major consideration. A first offender is, by definition, one who can easily be rehabilitated. So also, ordinarily, is a young person.

- [11] It has to be emphasised that the proverbial triad mentioned in *S v Zinn* 1969 2 SA 527 (A) includes the offender. That is contained in the famous passage that reads:

"[w]hat has to be considered is the triad consisting of crime, the offender and the interests of society." [p455]

In his judgment, the Magistrate has totally disregarded *"the offender"*. He, in my view, over-emphasised the question of deterrence and the need to appease or please the committee.

- [12] Whilst retribution is a very important element in determining an appropriate sentence, it ought not to be over-emphasised. In that regard, CHASKALSON, P (as he then was) said the following, at para [130], 52g, in *S v Makwanyane* 1995(2) SACR 1 (CC):

"Retribution ought not to be given undue weight in the balancing process. The Constitution is premised on the assumption that ours will be a constitutional State founded on recognition of human rights."

- [13] Whilst public opinion should play an important part in determining an appropriate sentence, care should be taken not to over-emphasise the need to pass a sentence that will satisfy the community. What was stated by, *inter alia*, CHASKALSON, P, at para [139], LANGA, J, as he then was, at para [222], 87i-88a and MACHALA, J, at para [255], 91g, in the *Makwanyane* judgment, with regard to the need to accommodate the community's or the public's righteous anger, with succumbing thereto, when determining an appropriate sentence, must be heeded. After the latter judgment, HARMS, JA, stated the following, in *S v Mhlakaza & Another* 1997(1) SACR 515, at 518e-j:

"The object of sentencing is not to satisfy public opinion but to serve the public interest ... sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains a Court's duty to impose fearlessly an appropriate and fair sentence **even if the sentence does not satisfy the public**. In this context the approach expressed in *S v Makwanyane & Another*, *supra*, at 38-9, paras 87-9 (per CHASKALSON P) applies *mutatis mutandis*. Public opinion may have some relevance to an enquiry, but, in itself, it is no substitute for the duty invested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. That, in the words of SCHREINER JA, in *R v Karg* 1961 1 SA 231 (A) at 236B-C, does not mean that it is:

'wrong that the natural indignation of interested persons and the community at large should receive some recognition in the sentences the courts impose, and it is not irrelevant to bear in mind that, if sentences for serious crimes are too lenient, administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

But, he added,

'righteous anger should not becloud judgment'." [emphasis added.]

[14] Before dealing with what I consider to be an appropriate sentence in respect of each of the counts, in the present appeal, I must state, categorically, that I find absolutely no justification for not making the two sentences run concurrently. The Magistrate gave no reasons for that decision, on his part. I am of the view that ten years imprisonment in respect of each count is a disturbingly appropriate sentence.

[15] In the circumstances I make the following order:

1. The appeal against sentence succeeds in respect of each count.
2. The sentence is set aside and replaced with the following:
 - (a) the Appellant is sentenced to a period of ten years imprisonment, in respect of each count;
 - (b) the sentence on count 2 will run concurrently with the sentence on count 1, resulting in the Appellant serving an effective period of ten years imprisonment.
3. The sentences on counts 1 and 2 are backdated to 15 August 2000.


J N M POSWA
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree


L M MOLOPA (Ms)
JUDGE OF THE NORTH GAUTENG HIGH COURT