

IN THE NORTH GAUTENG HIGH COURT
(PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
7/9/2010 DATE	CASE NO: A376/07 SIGNATURE

In the matter between

ABRAM MPHASANE

7/9/2010
First Appellant

PUSETSO KHANY

Second Appellant

and

THE STATE

Respondent

JUDGMENT

1. On 10 January 2005 the first and second appellants were convicted on a charge of robbery with aggravating circumstances by the Regional Court sitting at Benoni. Consequently each was sentenced to a 15 year term of imprisonment. In addition both were declared unfit to possess a firearm.
2. This appeal lies against both the conviction and sentence in respect of each appellant.
3. Mr Seabi, instructed by the Legal Aid Board, appeared for both appellants. His heads of argument were filed late because of

circumstances beyond his control, and accordingly the application for condonation in this regard was successful.

4. In his heads of argument Mr Seabi confined the submissions on behalf of the appellants to the issue of sentence only. At the outset of the hearing we enquired whether the appeal in respect of the issue of the convictions was being abandoned or not. It transpired that counsel, in the exercise of his professional judgment, was inclined to the view that the appeal in respect of the convictions was unassailable and for that reason only the appeal in respect of sentence would be pursued.
5. Be that as it may, we have nevertheless carefully considered the totality of the evidence before the trial court which, in summarised form, reveals the following.
6. The alleged offence was committed on Thursday 14 October 2004 at Benoni. At between 08:00 and 08:30 that morning the complainant, Mr Makate Abel Kgapola (also the first witness for the State in the court below), was on his way along Voortrekker Street when both accused ("the appellants"), who had approached him from the opposite direction, i.e. from the front, requested him for a loose R1 coin which they needed to play pool or snooker. This

occurred in close proximity to the taxi rank at the bottom end of Voortrekker Street and the complainant was alone at the time.

7. The complainant told the appellants that he did not have money. Thereupon the second appellant produced a firearm from the front of his trousers (presumably a revolver or pistol), audibly "bridged" or cocked it, and pointed it at the complainant. The complainant saw that it was black in colour but he could not say what the caliber was. He took it to be a real firearm.
8. Whilst the complainant was held at gunpoint by the second appellant, the first appellant proceeded to frisk him. Both the appellants remained in front of the complainant. The first appellant took possession of the complainant's Nokia 1100 cellphone (valued at approximately R1 100,00), which he had been carrying in his left trouser pocket. He also had R160,00 in loose notes in his right back pocket but the first appellant, whilst touching his trousers, did not find the money.
9. After being relieved of his cellphone the complainant snatched at the second appellant's firearm in an attempt to wrest it from him. A brief and futile struggle ensued.

10. Then the appellants set off on foot, together running up the street. The complainant set after them at close distance - estimated by the trial court to be approximately 10 metres until they entered Cranbourne Avenue. At this juncture the complainant ceased the pursuit and turned to telephone his brother to assist him.
11. Although the record is silent as to how the complainant accomplished this, it is clear that he did speak to his brother, Mr Majahladi Figeu Kgapola ("Kgapola") who rushed to his assistance. They met in Voortrekker Street at the Lakeside Mall. The complainant explained the attire of the his assailants to Kgapola and then proceeded to walk directly to Cranbourne Avenue along the left hand side of Voortrekker Street.
12. The complainant and Kgapola came upon the appellants in Cranbourne Avenue at the Kids Haven, approximately 45 minutes after the complainant had been apprehended as aforesaid. The appellants were found at the entrance to Kids Haven, where the complainant had seen them go to when he earlier turned to enlist the assistance of his brother. The appellants were in the company of others and were on the steps in front of the entrance. The complainant pointed his two assailants out to Kgapola, a private investigator, who then drew his firearm and held it face down while

he and the complainant approached the appellants.

13. In their approach to the appellants both the Kgapola brothers heard one of the appellants warn the other of their approach. The evidence variously describes words such as "Here is this guy. Come." and "Here comes this gentlemen, these two gentlemen" as having been said.
14. Upon the appellants having become aware of the approach by the complainant and Kgapola they evidently tried to escape. Two bystanders slipped into the entrance of Kids Haven but before the appellants could follow, Kgapola was upon them and ordered them to remain stationary so that he could search them. He had also trained his cocked firearm on them. Braving animosity from bystanders Kgapola ordered the appellants to lie down on their stomachs and they were then searched. The search only yielded glue and plain cigarettes. The stolen Nokia cellphone and the firearm were not found.
15. Thereafter Kgapola telephoned the Police, who later arrived and arrested the appellants.
16. The appellants were both positively identified by the complainant as

his assailants. In the first place he testified that he had ample opportunity to observe the faces of both while the robbery took place, and, secondly, he testified about the clothing the appellants were wearing on the day in question. The complainant also identified the first appellant by track suit pants with stripes on the sides of the legs, and second appellant by means of a black track suit top and blue denim jeans, which they respectively wore that day. In addition the second appellant sported a dreadlocks hairstyle. When the appellants were later confronted and arrested, they were still dressed in this apparel. Kgapola's evidence confirmed that his brother (the complainant) was capable of identifying the appellants by their appearance, although he was confused about their dress. He did, however, recall the striped track suit pants one of the appellants wore.

17. The second appellant took issue with the State about the clothing he wore on the day in question. He contended that he was wearing a creamish T-shirt and not a black track suit top. Although nothing turns on this, the trial court, incidentally, remarked that the T-shirt referred to was grey in colour. The complainant did earlier express the uncertain view that the first appellant might have been wearing a grey T-shirt.

18. The trial court, understandably - in view of the failure by the first appellant to contest the evidence concerning identification and the failure by the second appellant to take issue with the evidence concerning his hairstyle, at least - found that despite the application of the cautionary rules applicable to the evidence of a single witness and evidence about the issue of identity that the appellants had been satisfactorily identified.
19. After considering all the evidence the trial court rejected the brief versions put up by the appellants, who denied having robbed the plaintiff. In my view the appellants were each properly and correctly convicted of the charge of robbery with aggravating circumstances.
20. This offence is referred to in part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Act"). In terms of section 51(2)(a)(i) of the Act the offence carries with it a minimum sentence of 15 years imprisonment, unless the court, in terms of section 51(3)(a), is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.
21. The court *a quo* sentenced both appellants to imprisonment for a term of 15 years pursuant to the provisions of the Act, not having

found that substantial and compelling circumstances which justify the imposition of a lesser sentence exist.

22. The correct approach by our courts to the consideration and application of minimum sentences prescribed by the Act was authoritatively laid down in *S v Malgas 2001 (2) SA 1222 SCA*. A succinct summary of the applicable principles is contained at pp 1235E-1236E of the report, and does not bear repetition here.
23. The trial court heard address from the appellants' legal representative concerning the matter of sentence. This revealed that the first appellant was 19 years old and the second appellant 18; both were single; both were jobless; both were homeless and living on the streets (so-called "street kids"); both were without income; both were only schooled to standard 5. These considerations provided a brief sketch of the personal circumstances of the appellants. No evidence was adduced in respect of any other factor relevant to the question of sentence. When the trial court enquired whether any "material and compelling circumstances" (clearly intended to be a reference to compelling and substantial circumstances alluded to in section 51(3)(a) of the Act) could be offered by the defence, the response was "none". It is plainly clear from the record that the trial court did not consider

the personal circumstances aforesaid sufficient to constitute compelling and substantial circumstances envisaged by the Act. This is expressly confirmed by the judgment of the trial court.

24. Counsel for the appellants submitted that the trial court had erred in under-emphasising the personal circumstances of the appellants and over-emphasising certain sentencing objectives. He submitted that compelling and substantial circumstances should have been found to exist, and hence advocated the substitution of the sentence imposed by a lesser one, which he suggested should appropriately be one of correctional supervision.
25. In studying the record of the trial proceedings two features of the approach towards sentencing adopted by the trial court come to the fore. Firstly, the court went to pains to emphasise that senseless loss of life is often the result of armed robbery and that this fact has brought about a pervasive fear in the minds of ordinary people to freely venture into the domain of the public. Assuming the correctness hereof this consideration would certainly justify imprisonment as an appropriate sentence, even for a first offender. As the court correctly remarked the Legislature had intervened and prescribed sentences for offences like armed robbery. The prescribed sentence is to be regarded as a sentence that should

ordinarily be imposed, in the absence of weighty justification of a lesser sentence (*Malgas supra at p 1235G*). However, there is no indication whatever that the trial court took cognisance of the fact that the robbery in this instance was committed without the infliction of any physical harm to the complainant.

28 Secondly, the trial court also placed emphasis on the subjective impression it had gained that the appellants, far from appearing destitute, actually seemed well-looked after and rather well-dressed. This was a recurring theme throughout the course of the trial. In view of the fact that the appellants were unemployed their inexplicable state of seeming well-being was viewed by the court *quo* as being "significant", to, at least, the extent that "it makes you think". Disturbingly this impression in the mind of the trial court raises the unavoidable spectre of an unexpressed suspicion that the appellants had all along been enjoying the fruits of a criminal lifestyle. Not only is such a suspicion wholly unjustified on the admissible evidential material which served before the trial court, but it would probably furthermore of necessity have negatively influenced a dispassionate and objective consideration of the question as to whether substantial and compelling circumstances in the case of the appellants existed.

27. Taking the aforesaid into account and bearing in mind that the personal circumstances of both appellants undeniably show that they are from extremely impoverished and disadvantaged backgrounds, coupled with the fact that the commission of the crime did not involve the infliction of physical harm on the complainant, I am on reflection of the view that the trial court misdirected itself in concluding that there were no "compelling and material circumstances" present.
28. The gravity of the offence committed by the appellants can never be gainsaid. However, I am convinced that the prescribed sentence of 15 years imprisonment imposed upon the appellants in the circumstances of this particular case is unjust in the sense that it is disproportionate to the crime, the criminals and the legitimate needs of society. It should be interfered with as being excessive.
29. The relative youthfulness of the appellants, the fact that they are first offenders, their other personal circumstances, the nature and limited extent of the harm occasioned by the commission of the offence, and the fact that they were remanded in custody for a period of almost 3 months before they were convicted and sentenced, cumulatively taken, to my mind constitute compelling

and substantial circumstances. I regard a sentence of imprisonment for a period of 9 years as appropriate.

30. Two further observations are apposite. The first appellant did not sign the special power of attorney required for this appeal. It is clear that throughout he intended pursuing the appeal, and the fact that he did not personally argue the appeal has not been prejudicial to him in any way. Mr Seabi advanced the cause of both appellants throughout, and it is in the interests of justice that the order I intend making also includes the first appellant. Finally - at risk of unnecessary repetition - it goes without saying that the trial court's declaration that the appellants are unfit to possess a firearm remains intact.

The following is ordered:

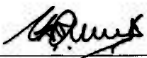
1. The appeal of both appellants against their conviction is dismissed.
2. The appeal of both appellants against the sentences imposed upon them is upheld and the sentence of the court *a quo* is set aside and substituted with the following sentence:

"First and second appellants are each sentenced to 9 (nine) years imprisonment".

3 The sentence is antedated to the 10 January 2015


A P LEDWABA
JUDGE OF THE HIGH COURT

I concur,


G W ALBERTS
ACTING JUDGE OF THE HIGH COURT