



IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO: CA&R 27/2021

REGIONAL COURT CASE NO.: RCL-118/19

In the matter between:

THOBANI MALMAN

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

CHITHI AJ:

[1] The appellant together with his co-accused, who is not party to this appeal, stood charged in this matter before the regional court for the Eastern Cape region held at Mdantsane with one

count of robbery with aggravating circumstances read with the provisions of ss 51(2), 52A and 52B of the Criminal Law Amendment Act¹ ('CLAA').

[2] The robbery allegedly took place on or about 14 July 2019 at or near NU 17 Mdantsane, in the regional division of the Eastern Cape, wherein the appellant together with his companion, unlawfully and intentionally assaulted one Nangamso Booï and with force took from him one Mobicel cellphone valued at R1200.00, property in his lawful possession. The aggravating circumstances being the wilding of the knife.

[3] On 28 January 2021 after the trial the appellant and his companion were found guilty as charged. On 29 January 2021, the appellant together with his companion were sentenced, with the appellant having been sentenced to undergo 15 years' imprisonment and his companion to undergo 17 years' imprisonment. The appellant's appeal is only against his sentence, he having been granted leave to appeal against his sentence by the regional court on 16 February 2021.

[4] The appeal is premised broadly on the following grounds:

- 4.1 A sentence of 15 years imprisonment which was imposed by the learned presiding judicial officer induces a sense of shock considering the facts of the case as a whole. Accordingly, he erred in over-emphasising the legal convictions of the community over the personal circumstances of the appellant, especially as the appellant had no previous convictions.
- 4.2 The court erred in failing to take into account the relative youthfulness of the appellant at the time of the commission of the offence.
- 4.3 The court erred further in not considering the period of 10 months which the appellant spent awaiting his trial which was between July 2019 and May 2020 when he was released on warning, since the Wesbank Correctional Centre where he was detained awaiting his trial was declared a Covid-19 hotspot. Consequently, the court erred in

¹ Act 105 of 1997.

not offsetting the period of 10 months which the appellant spent in prison awaiting trial to the sentence of 15 years imprisonment.

- 4.4 The court erred in not taking into consideration the prevailing circumstances at the time of the sentencing of the appellant, particularly the Covid-19 variant which was exacerbated by congestion and overcrowding in correctional facilities, in particular Wesbank Correctional Centre which was at the time declared to be a hotspot and a super spreader of Covid-19.
- 4.5 The court erred in not balancing the fact that the appellant was the first offender with the fact that although the appellant and his companion had been alleged to have been in possession of a knife or knives, such knife or knives were not used.
- 4.6 The court erred in not considering that when the appellant and his companion took the cell phone there was no violence perpetrated.
- 4.7 The court erred in finding that the appellant failed to show that there were substantial and compelling circumstances justifying the court to deviate from imposing the prescribed minimum sentence when all the personal circumstances of the appellant were considered cumulatively.

[5] The appellant's grounds of appeal were further buttressed in the appellant's heads of argument as follows:

- 5.1 The appellant only threatened the complainant with a knife by inspiring a belief in the complainant that if he does not release the phone the knife could be used.
- 5.2 The court *a quo* erred in not properly taking into consideration that the degree of violence involved in the complainant's robbery was limited.
- 5.3 The court *a quo* further erred in not taking into consideration that the complainant was threatened rather than physically assaulted and injured and that ought to have been

weighed in determining whether a departure from the prescribed minimum sentence is not warranted.

5.4 The appellant's personal circumstances which included the fact that he was 27 years old, was gainfully employed, had one minor child, was a first offender, had been in custody awaiting trial for 10 months should have been taken together with the fact that the complainant's cellphone was recovered and the complainant did not suffer any physical injuries. All these factors, considered cumulatively, should have led the trial court to conclude that there were substantial and compelling circumstances justifying the court to depart from imposing the prescribed minimum sentence of 15 years imprisonment.

5.5 The court *a quo* ought to have found that the sentence of 15 years imprisonment is unduly harsh and that such a sentence is disproportionate to the crime of which the appellant was convicted.

5.6 A sentence of 8 years imprisonment backdated to the date of his sentence would satisfy all the aims of punishment and be just.

[6] *Ms. Ngxingwa*, on behalf of the respondent, argued that the trial court correctly considered all mitigating and aggravating circumstances when it concluded that no substantial and compelling circumstances were present to justify a lesser sentence other than 15 years imprisonment. Consequently, she supported the sentence which was imposed by the trial court considering aggravating factors which were present during the commission of the offence and submitted that this court should dismiss the appeal against sentence.

[7] It is a well-established principle that a court should not deviate from imposing the prescribed minimum sentence for flimsy reasons and speculative hypothesis favourable to the offender. Before imposing the sentence, which is sought to be assailed by the appellant, the trial court considered factors which included among other factors the prevalence of the offence in the area of jurisdiction and country-wide in general. This included the fact that appellant and his companion had targeted the complainant due to his young age and vulnerability. The trial court

did not consider the recovery of the cellphone as a factor favourable to the appellant and his companion. Instead, the court *a quo* credited it to the prompt response of the police after the robbery was reported to them. The trial court specifically recorded that ‘the appellant was found wanting and had no option but to divulge the whereabouts of the phone.’ The trial court regarded the production of knives to induce fear on the complainant, and found that knives would be used if the complainant offered any resistance as an aggravating factor. The trial court also considered that the appellant was 27 years of age at the time of the commission of the offence, was employed, had one child, was a first offender and was in custody for 10 months awaiting his trial. Essentially, the trial court considered the totality of all the factors including the traditional triad consisting of the nature of the offence, the personal circumstances of the appellant and the interests of society and found that there were no substantial and compelling circumstances entitling it to deviate from the prescribed minimum sentence of 15 years.

[8] It is trite that sentencing resides pre-eminently within the discretion of the trial court. In *S v Malgas*,² Marais JA enunciated the test 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, the 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.’

All factors (other than those set 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. The ultimate impact of all circumstances relevant to sentencing must be measured

² 2001 (2) SA 1222 (SCA) para 12 and 25F, G, I.

against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they rendered the prescribed sentence unjust and 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.'

[9] In this case the trial court imposed the prescribed minimum sentence after it found that there were no substantial and compelling circumstances entitling it to deviate from imposing such sentence as it was obliged to. In the circumstances, I find that there was no material misdirection on the part of the trial court in finding that there were no substantial and compelling circumstances entitling it to deviate from imposing the prescribed minimum sentence of 15 years imprisonment and thus imposed it.

[10] This, however, is not the end of the enquiry. This court sitting as a court of appeal even in the absence of any material misdirection 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. I find that there is a marked disparity between the sentence of the trial court and the sentence which this court would have imposed had it been the trial court. It is so marked that it can properly be described as disturbingly inappropriate. This, therefore, means that this warrants an interference by this court with the sentence which was imposed by the trial court.

[11] It is common cause that when the robbery was carried out minimum force was used. What happened is that after the struggle between the complainant and the appellant's companion, the appellant drew out his knife and asked his companion to take out his knife and hand it over to him so that he could fix something wrong with his knife. Other than seeing the knives and letting go of his cell phone there is nothing which was done with the knives which the appellant and his companion produced. The manner in which the knife was wielded, in these circumstances, was markedly less than the type of aggression frequently associated with armed robberies. The cellphone concerned was not disposed of, but it was at the instance of Mr Bongani Gxidi that the phone was used as collateral for R190.00 which the appellant borrowed from Mr Gxidi. Although

the cellphone was not recovered through any effort on the part of the appellant, what is significant is that the complainant did lose this asset permanently. The value of the cellphone was only a sum of R1200.00, in addition to the fact that it was recovered. The fact that after the complainant came out of the store, he went looking for the appellant and his companion amply demonstrates the absence of fear on the part of the complainant after the incident, and that this was robbery of an unusual kind.

[12] Having regard to what the value of the cellphone was, that the cellphone was not disposed of, that the cellphone was recovered, that minimal physical violence was used in carrying out the robbery, and that the appellant spent a period of 10 months awaiting trial I am of the view that a sentence of 15 years imprisonment as imposed on the appellant is unjust and disproportionate to the crime for which the appellant was convicted, to the appellant and the needs of society.

[13] Considering all relevant factors, I am of the view that a period of 9 years' imprisonment would satisfy the aims of punishment. This would be fair to society, the victim, and the appellant in the sense that it leaves the door open to the possibility of the appellant being rehabilitated.

[14] In the result I propose to make the following order:

- (1) The appeal against sentence is upheld as set out below.
- (2) The sentence imposed by the regional court is set aside and the following is substituted for it:
The Appellant is sentenced to undergo 9 years' imprisonment.
- (3) In terms of Section 282 of the Criminal Procedure Act 51 of 1977 the substituted sentence is antedated to 29 January 2021, being the date on which the appellant was sentenced.

M. M. CHITHI

ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.



A. GOVINDJEE

JUDGE OF THE HIGH COURT

APPEARANCES:

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