



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case Nr: A109/2017

In the appeal of:

MOGOJE JOHANNES MOGOJE

1ST APPLICANT

LESOLE ELIAS MALETE

2ND APPLICANT

DAVID MOGOTSI

3RD APPLICANT

PHENTANI JOEL MBAMBO

4TH APPLICANT

and

THE STATE

RESPONDENT

CORAM:

MUSI, AJP *et* VAN SCHALKWYK, AJ

JUDGMENT BY:

VAN SCHALKWYK, AJ

HEARD ON;

14 AUGUST 2017

DELIVERED ON:

12 FEBRUARY 2018

[1] The Appellants were convicted of two counts of robbery with aggravating circumstances in the Regional Court on the 14th of November 2014. The appellants were each sentenced to eight year imprisonment in respect of accused numbers one and six, and ten and twelve years respectively in respect of accused number two and four. The Regional Magistrate found their individual involvement in the crime and their subsequent previous convictions to be the ratio for the remarkable difference in sentence. An application for leave to appeal was refused by the Regional Magistrate. The petition for Leave to Appeal against the respective sentences, imposed was granted by this Court, on the 01st of February 2017.

[2] Although the seriousness of the offences justify the imposition of at least the minimum sentence, the Regional Magistrate found that the offences were not coupled with unnecessary violence. Firearms were exposed at the scene of the offences but were not utilized. This single factor the Court has taken into account in consideration to deviate from the prescribed minimum sentence.

Although there is hardly any difference in the personal circumstances of the accused, there is a remarkable difference in their respective, previous convictions which warranted the Regional Magistrate to consider those previous convictions, as aggravating circumstances.

For purposes of sentence the Regional Magistrate has taken the two charges together due the fact that the offences were committed,

simultaneously. In conclusion the Regional Magistrate found that a sentence of direct imprisonment will be apposite.

In accordance with Section 51 (3) (a) of the Criminal Law Amendment Act 105 of 1997, if any Court referred to in subsection (1) or (2) is satisfied that substantial circumstances exist which justifies the imposition of a lesser sentence than those prescribed in the subsections, it shall enter those circumstances on the record of the proceedings and thereupon impose a lesser sentence.

- [3] In the *State vs Malgas 2001 (2) (SA) 1222 (SCA)*, it was held in determining whether there are substantial and compelling circumstances, a Court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crimes specified, and that there should be truly convincing reasons for a different response. It is for the Courts, imposing sentence, to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these mitigating factors must be weighed together with the aggravating factors, but none of these need to be exceptional.

- [4] In *Malgas*, the Supreme Court of Appeal, in considering "substantial and compelling circumstances", stated the following (1231A-D) "whatever

nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest 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".

- [5] Earlier in the *Malgas* (at 1230E-G), Marais JA said the following concerning the Act: "In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission in the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe standardised, and consistent response from the Courts to commission such crimes unless there were, and could be seen to be, truly

convincing reasons for a different response. When considering the sentence the emphases were to be shifted to the objective gravity of the type of crime and the public's need for sanctions against it. But that does not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may".

[6] Notwithstanding the fact that the Magistrate has taken into account the personal circumstances, ages and the previous convictions of the Appellants, it is important to take cognisance of the Judgment of Navsa JA in *S vs Rosslee* 2006 (1) SACR537 (SCA) at paragraph 33 thereof, where he said the following: "although there is no onus on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration. In a given case it may not be enough for an accused to argue that such circumstances should be inferred from or found in the evidence adduced by the State".

[7] An appellate court is entitled to vitiate a sentence imposed by a trial court in the exercise of its sentence discretion, where there is *inter alia* a material mis-direction committed by that court, or if it has exercised its discretion upon a wrong principle or if the sentence is shockingly inappropriate.

[8] In this instance, the Regional Magistrate has measured all the circumstances relevant to sentence against the composite yardstick (substantial and compelling), and as such, found circumstances which justify its deviation from the minimum sentence ordained by the Legislature.

[9] The Regional Magistrate has exercised his discretion towards sentence, properly and reasonably and this Court may therefore not interfere with the sentence imposed by the Trial Court.

The following order is issued:

1. The Appeal is dismissed.
2. The convictions and sentences are confirmed.

O.J. VAN SCHALKWYK, AJ

I concur.

C.J. MUSI, AJP

On behalf of the appellants: Mr. P.L. van der Merwe
Legal Aid SA
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On behalf of the respondent: Adv D.W. Bontes
Director Public Prosecutions
Bloemfontein