



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: AR 749/16

In the matter between:

NKOSINATHI EMMANUEL NYAWO

Appellant

and

THE STATE

Respondent

JUDGMENT Delivered on 21 September 2017

HIRALALL AJ: (Koen J concurring)

[1] The appellant was charged with two counts of robbery with aggravating circumstances, read with Section 51(2)(a) of Act 105 of 1997 in the Regional Court. He pleaded not guilty to both counts. He was convicted on both counts and sentenced to 15 years imprisonment, the magistrate taking both counts as one for the purpose of sentence.

[2] The appellant now appeals against the sentence only, having been refused leave by the court a quo to appeal against the convictions.

[3] Section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years for robbery with aggravating circumstances. Section

51(3)(a) provides that a lesser sentence may be imposed if the court is satisfied that substantial and compelling circumstances exist.

[4] In the court a quo, the state led the evidence of the two complainants, and the arresting officer. Mamsie Mthiyane and Zandile Mthiyane testified that at approximately 20h30 on the night of 17th September 2010 whilst they were waiting for their sister near a bus stop, they observed a 'cream/white' car with a sunroof pass them slowly. The car stopped some distance away. Two males alighted and walked in their direction. One of them produced a knife and the other a firearm. They robbed both complainants of their cellphones and fled in the 'cream/white' car which had by then made a U-turn and passed them again. The two complainants did not leave the matter there. They obtained transport and went to report the matter to their brothers at the Red Dog Tavern. When they arrived at the Red Dog Tavern, they saw the 'cream/white' vehicle parked outside. When they emerged from the tavern, the car was gone. They reported the matter to a policeman and gave him a description of the car. Sometime later, they were informed that the car and its driver had been located. They went to the scene and identified the car, and the driver, and Mamsie Mthiyane retrieved her cellphone from the dashboard of the car. Zandile never recovered her cellphone. Both complainants identified the appellant as the driver of the car at the time in question, and not as one of the people who had robbed them.

[5] The policeman testified that he had spotted the car whilst he was taking a statement from another complainant who had been robbed by the same people. He gave chase for some three kilometers but when the car stopped, its occupants alighted and fled, leaving the driver, the appellant in this case, behind.

[6] The appellant's defense was one of an alibi. He stated that he had been at the tavern from 19h00 until 02h00 the next morning, and that he had only given the three males a lift when he was leaving for home at 02h00 the next morning.

[7] The magistrate rejected the appellant's version as being false.

[8] The appeal against the sentence imposed is pursued on two grounds:

[8.1] That the court a quo over emphasized the seriousness of the offences, thus misdirecting itself by not striking a judicious balance on all the sentencing factors; and

[8.2] That the ultimate sentence imposed is disproportionate to the personal circumstances of the appellant, the gravity of the offence and the interests of society.

[9] I have considered the judgment of the court a quo. I made the following observations:

[9.1] The magistrate made reference to an SCA case, *S v Senatsi* and another 2006 (2) SACR, and then quoted an extract from an unidentified source (page 114 of the transcript):

“The commission of this offence has become common especially in and around large cities. [It was a robbery of a motor vehicle but robbery generally with firearms and the lot are used]. The innocence (sic) men and women use the roads with great fear and anxiety. The brutal acts of robbers [that is more appropriate in this case] caused enormous damage to our country and cast a shadow over the confidence of the community in policing, prosecution and the administration of justice. An indication of the seriousness with which the legislator viewed this sort of conduct appeared from the fact that a minimum sentence of 15 years imprisonment for robbery with aggravating circumstances was prescribed in Section 51(1).”

[9.2] The magistrate went on to refer to the following in *S v Swart* 2004 (2) SACR 370, SCA:

“[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role. Moreover, as pointed out in *S v Malgas* 2001 (2) SA 1222 (SCA) at 1236E, where a court finds that it is not bound to impose a prescribed sentence ‘the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark

which the Legislature has provided’.

[9.3] The magistrate then went on to list the following considerations which he considered:

- The appellant was not merely a victim of circumstances who merely gave some robbers a lift, as he would have the court believe;
- He actively assisted the robbers in the perpetration of the robberies which were committed in different places on the same night;
- The court heard evidence only on one count, whereas there were items belonging to other people which were found and it was not known where they were robbed;
- The appellant was the person in control of the ‘operation’ on the night in question;
- This was the night the appellant (and his accomplices) were caught and this only because the complainants were proactive;
- The appellant had since the date of his arrest continued to defeat the ends of justice by protecting those he had been associated with;
- As a result, there were three robbers still at large and the appellant had assisted them in that regard; and
- All of this suggests that the accused is a danger to society and the sentence as set out by the legislator would indeed be appropriate ...

[10] It appears from the judgment that the magistrate’s main focus, if not the sole focus, was retribution and deterrence. In addition, whilst he quoted correctly from *S v Swart*, he seems to have misinterpreted its import by not attaching sufficient weight to the appellant’s personal circumstances.

[11] In *The State v Ndlovu* 2007 (1) SACR 539, a case where the facts are somewhat similar to the present case, the court stated as follows:

“[12] Section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years for robbery with aggravating circumstances. Section 51(3) provides that a lesser sentence may be imposed if the court is satisfied that substantial and compelling circumstances exist. In the present case the magistrate considered that the appellant was only 20 years old. He was adamant, however, that the levels of crime in this country were such as to justify imposing the prescribed minimum sentence of 15 years’ imprisonment. The court found that there were no substantial and compelling circumstances to warrant a lesser sentence.”

[13] The appellant's youth is certainly a factor the magistrate ought to have considered more seriously. Whilst one appreciates the magistrate's frustration at the current levels of crime he did not properly take into account that in the present case the degree of violence involved in the robbery was limited. Furthermore, a significant number of the articles removed from the optometrist was recovered. The robbery was executed in a clumsy and inept manner. The appellant spent approximately four months in custody pending the finalisation of the trial. These are factors not given due weight by the magistrate or by the court below. In my view, and considering the dicta in this court's judgement in *S v Malgas* 2001 (2) SA 1222 (SCA) (at 1230E-G and 1231 A-D) these factors cumulatively constitute substantial and compelling circumstances. We must guard against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders.”

[12] In the present case, the appellant’s counsel listed the following considerations which do not appear to have been taken into account:

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- The appellant was 25 years old and relatively young, a first time offender with no previous convictions.
- The appellant was supporting two of his minor children aged 5 and 2 years old at the time of his conviction. The evidence does not show that he was a hardened criminal and he can be distinguished from that category.
- The appellant was in gainful employment as a taxi driver.

- The appellant was in custody for a year before being sentenced.
- The appellant being a first time offender has good prospects of rehabilitation and his sentence should have reflected a measure of mercy.
- The evidence presented by the state indicates that he was only the driver of the motor vehicle while other occupants committed the crimes.”

[13] Whilst I do not agree that the appellant ‘was only the driver of the motor vehicle’, I find that the rest of the factors listed above cumulatively constitute substantial and compelling circumstances which justify a departure from the minimum sentence of 15 years.

[14] I have taken into account the fact that the magistrate treated both counts as one.

[15] In the circumstances, I find that having regard to the totality of the evidence, a sentence of 12 years’ imprisonment is proportionate to the crime.

1. The appeal against sentence is upheld.
2. The sentence imposed upon the appellant is set aside. It is substituted by a sentence of imprisonment for twelve years. Insofar as it may be necessary to do so, the sentence so imposed is antedated to 29th September 2011, being the date upon which the sentence of 15 years’ imprisonment was imposed.

HIRALALL AJ

KOEN J

DATE OF HEARING: 12 September 2017

DATE OF JUDGMENT: 21 September 2017

FOR THE APPELLANT: P Marimuthu, instructed by the
Durban Justice Centre

FOR THE RESPONDENT: IP Cooke, instructed by the
Director of Public Prosecutions,
Pietermaritzburg, KwaZulu-Natal.