

**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

**Appeal number: A 108/2015**

**ANTHONY SIPHO MATSAU**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

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**CORAM:**

**RAMPAI, J et MURRAY, AJ**

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**HEARD ON:**

**24 AUGUST 2015**

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**JUDGMENT BY:**

**MURRAY, AJ**

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**DELIVERED ON:**

**3 SEPTEMBER 2015**

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[1] This is an appeal against the sentence of 15 years' imprisonment imposed on the Appellant on 14 December 2012 by the Magistrates' Court, Kroonstad,

after his conviction of Robbery with Aggravating Circumstances as meant in s 1 of the Criminal Procedure Act, Act 51 of 1977 (“the CPA”). His application for leave to appeal was dismissed on 19 December 2014, but the petition against his sentence succeeded on 20 April 2015.

[2] The Appellant was convicted of the said offence, read with the provisions of s 51(1) and (2) of the Criminal Law Amendment Act, Act 105 of 1997. He was charged with his co-accused who was not before us on appeal. The prosecution alleged that they unlawfully and intentionally assaulted Mr Maketekete (“the victim”) and removed a Volkswagen Polo 1.6 with registration number [HF.....], a lap-top, cell phones and R5600.00 from the victim’s lawful possession after having threatened to shoot him and to inflict serious injuries upon him.

[3] S 1 of the CPA includes in the definition of “aggravating circumstances” in subsection 1(b)(iii) *“a threat to inflict grievous bodily harm, by the offender or an accomplice, before, during or after the offence.”* And in **EX PARTE MINISTER OF JUSTICE: In re R v GESA; R v DE JONGH**<sup>1</sup> the court held that when the accused threatens the complainant with bodily injury in order to obtain possession of something belonging to the complainant and the complainant hands it over to avoid injury, the accused is guilty of robbery.

[4] In the present case, when the victim’s hijacked car was retrieved, the gun with which the complainant had been threatened was found to be a toy gun.

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<sup>1</sup> 1959 (1) SA 234 (A)

However, the court in **S v ANTHONY**<sup>2</sup> held that although a toy gun did not fall under the s 1(i) definition of a “firearm”, the presence of aggravating circumstances, which impacts on the sentence, must be determined objectively. Therefore, where an accused threatened his victim with a toy gun during a robbery, the “threat” requirement in s 1(b)(iii) would be satisfied if the victim subjectively experienced the conduct of the robber as a threat to inflict bodily harm. The court held that in such an instance aggravating circumstances would be present. Steyn J in **S v MDAKA**<sup>3</sup> held that a *‘subjective element is introduced by considering what the complainant believed’*. In the present case the complainant believed the threat to shoot him and the firearm to be real. A screw-driver, which could serve as a dangerous weapon, was furthermore retrieved from the front seat.

[5] The Appellant’s conviction of robbery with aggravating circumstances was therefore correct. This court then needs to examine the nature and seriousness of the crime and of the aggravating circumstances to weigh them up against the mitigating circumstances to determine whether the sentence was, in the specific circumstances of this case, appropriate and proportionate to the crime.

[6] A proper enquiry where an appeal is directed at a sentence which was imposed in terms of Act 105 of 1997, as was the one in the present case, according to the court in **S v PB**<sup>4</sup> needs to focus on whether the facts considered by the trial court had been substantial and compelling or not. As

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<sup>2</sup> 2002 (2) SACR 453 (C) at 454j – 455b and 456c – d.

<sup>3</sup> 2014 (2) SACR 393 (KZP) at [5]

<sup>4</sup> 2013(2) SACR 533 (SCA) at [20].

held in **S v MALGAS**<sup>5</sup>, in addition, the court of appeal should consider all other circumstances bearing on the question (See also: **S v GK**<sup>6</sup>) to enable it to assess the trial court's finding and determine the proportionality of the sentence. Then, as Ms Kruger, on behalf of the Appellant, with reference to **S v Malgas**,<sup>7</sup> submitted:

"If the sentencing court in consideration of all of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in 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."

[7] The Constitutional Court in **S v BOGAARDS**<sup>8</sup> recently described an appeal court's discretion to interfere with a sentence as follows:

"It can only do so when there has been an irregularity that results in a failure of justice; the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[8] Ms Kruger argued that the trial court had indeed misdirected itself in finding that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence than the prescribed one of 15 years' imprisonment for a first offender. She averred that the result was a shockingly inappropriate sentence and that this Court would be justified to interfere. Mr Strauss, for the State, on the other hand argued that the court had correctly made such finding and supported the sentence.

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<sup>5</sup> 2001 (1) SACR 469 (SCA)

<sup>6</sup> 2013 (2) SACR 505 (WCC) at [71]

<sup>7</sup> 2001 (1) SACR 469 (SCA) at par [12].

<sup>8</sup> 2013 (1) SACR 1 (CC) at [41]. See also *S v Madiba* [2014] ZASCA 13 (unreported, SCA case 497/2013, 20 March 2014).

[9] In argument Ms Kruger listed the personal circumstances which she alleged that the trial court should have taken into consideration but did not, namely that the Appellant was 48 years old at the time of sentencing; that he had passed matric; that he is married with four children, three of whom were still minors at the time of sentencing; that his children lived with their grandparents; that he was arrested on 8 January 2011 and had therefore been awaiting trial for almost two years; and that he was a first offender. I agree with Mr Strauss, however, that the trial court did take these factors into account as mitigating personal circumstances.

[10] Ms Kruger argued, furthermore, that at least three of the above-mentioned factors would both in isolation and cumulatively constitute substantial and compelling circumstances, namely that the Appellant was a first offender at the advanced age of 48 years; that he was in custody awaiting trial for almost two years; and that the Complainant was not injured during the incident, the measure of violence was minimal and the stolen items were all recovered.

[11] However, in **S v VILAKAZI**<sup>9</sup> Nugent JA explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Regarding the accused's being a first offender at the age of 48 years, Mr Strauss in my view correctly pointed out that at that age he should have known better than to become involved in crime. It accords with the notion expressed by Ebrahim J

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<sup>9</sup> 2009 (1) SACR 552 (SCA) at [15]

in **S v BEYI**<sup>10</sup> that the appellant in that case as a father (*in casu* of four children) and bread-winner should have known, better than anyone else, that he was placing the well-being of his family in jeopardy by resorting to crime.

[12] Although ‘*high age*’ is usually regarded as a factor against imprisonment<sup>11</sup>, the accused *in casu* in my view does not fall into that category yet. There is no evidence that he is sickly, suffers from any age-related disability or has a short life expectancy. In his case the notion that the period in prison would form a ‘*high proportion or percentage of his remaining life expectancy*’, as would be the case if he were in his sixties or older, or that his imprisonment ‘*would be difficult to rationalise in light of the purposes of sentencing, as retribution might be pointless and individual deterrence and rehabilitation irrelevant for the elderly*’ is not applicable.

[13] The accused *in casu* at 48 is far from the 74 years of age of the accused in **S v KLEINHANS**<sup>12</sup> in which Bozalek J regarded the accused’s age as the most weighty of several mitigating circumstances and reduced his sentence of 15 years’ imprisonment to one of an effective 4 years’ imprisonment, with a further 4 years’ imprisonment suspended on various conditions, because the 15-year sentence at his age “*undoubtedly induce[d] a sense of shock*” and because the court regarded it as “*neither a realistic nor a humane sentence*”. I do not regard the sentence *in casu* as inducing a sense of shock, unrealistic

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<sup>10</sup> 2011 (2) SACR 23 (ECG)

<sup>11</sup> Du Toit, *supra*, Service 24, 2015 at 28-18V.

<sup>12</sup> 2014 (2) SACR 575 (WCC) at [21]

or inhumane in view of the accused's age in the particular circumstances of this case.

[14] That does not mean, however, that advanced age, like youthfulness, should not be taken into account as a factor in sentencing, as the court did in **S v BARENDSE**<sup>13</sup>. The Constitutional Court, in **MPOFU v MINISTER FOR JUSTICE AND CONSITUTIONAL DEVELOPMENT**<sup>14</sup>, in fact, did identify age as a highly relevant mitigating factor in sentencing, but in my view, in the present case, it is but one of the factors to consider, and not the most weighty one as in **S v Kleinhans**, *supra*. I am therefore satisfied that the trial court did not misdirect itself by not attaching more weight to the Appellant's age.

[15] Regarding the significance of time spent in detention, pre-sentencing, Lewis JA in **S v RADEBE**<sup>15</sup> made it clear that, that too is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proportionate to the crime committed and therefore justified<sup>16</sup>. In **DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG: PRETORIA v GCWALA & OTHERS**<sup>17</sup>, in a case of robbery with aggravating circumstances, she held that in determining whether substantial and compelling circumstances warrant a lesser sentence than the prescribed minimum one:

“the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence

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<sup>13</sup> 2010 (2) SACR 616 (ECG) at 619c-d.

<sup>14</sup> 2013 (2) SACR 407 (CC) at [66]

<sup>15</sup> 2013 (2) SACR 165 (SCA) at [14]

<sup>16</sup> Du Toit, *supra*, Service 54, 2015 at 30-49.

<sup>17</sup> 2014 (2) SACR 337 (SCA) at [16]

proposed is proportionate to the crime or crimes committed; whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.”

[16] The accused *in casu* had been incarcerated for almost two years before he was sentenced by the trial court. The trial court singled that out as the only factor which could possibly persuade it to make a finding of substantial and compelling circumstances. As Binns-Ward J in **S v FORTUNE**<sup>18</sup> found, although the fact that a convicted offender has spent time in prison awaiting trial or for the duration of the trial, is undoubtedly a relevant consideration in determining an appropriate sentence, it is not one that “*carries any mechanical effect*”.

[17] The SCA in **S v Radebe**<sup>19</sup> has already disapproved of the notion expressed in **S v Brophy**<sup>20</sup> that time in prison before sentence should count as the equivalent of double the time of post-sentence incarceration. Lewis JA made it clear that there should be no rule of thumb or mechanical formula regarding the calculation of the weight to be attached to the period spent awaiting trial. Rather, in each case the court should assess the individual accused’s circumstances to determine the extent to which the proposed sentence should be reduced, if at all. In determining whether the effective period of imprisonment is justified and proportionate to the crime committed, the period in detention pre-sentencing is but one of the factors to be taken into account.

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<sup>18</sup> 2014 (2) SACR 178 (WCC) at [15] at 188c-e.

<sup>19</sup> *Supra*, at [11] – [15].

<sup>20</sup> 2007 (2) SACR 56 (W)

[18] Rogers J in **S v GK**<sup>21</sup>, for instance, lowered the sentence of a 56-year old second offender from life imprisonment to 18 years' imprisonment for rape, with a further 13 months' deduction for the time spent in incarceration. As Binns-Ward J in **S v Fortune** said, what the magistrate *in casu* had to ask himself in respect of the two years spent in custody, was whether its effect, taken together with the prescribed minimum sentence, would render the imposed sentence so disproportionate to the offence of which the accused had been convicted as to amount in the context of all the relevant factors to substantial and compelling circumstances warranting the imposition of a lesser sentence.

[19] Adding the two years which the accused *in casu* had spent in detention, pre-sentence, to the 15 years' sentence imposed on him, results in an effective period of incarceration of 17 years. By now it is trite that a court is not to depart from a prescribed sentence lightly or '*for flimsy reasons*' (See: **S v GK**<sup>22</sup>), a principle which applies equally to imposing a lesser and a lengthier sentence than the prescribed one.

[20] In the present case the crime of which the accused had been convicted was that of robbery with aggravating circumstances (the threat of serious injury) where the main item so robbed was the victim's car, besides the R 5600.00 in cash, the victim's laptop and his two cell-phones. Robbery is a scheduled crime which falls under Part II of Schedule 2 of Act 105 of 1997 (a) when there are aggravating circumstances present, **or** (b) when it involves the

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<sup>21</sup> *Supra*, at [29] at 518h-l and [33] at 520a.

<sup>22</sup> 2013 (2) SACR 505 (WCC) at 20 at 523e-f.

taking of a motor vehicle. Either of these two manifestations of robbery as a Part II Schedule 2 crime has been regarded as serious enough for the Legislature to make it punishable with a minimum sentence of 15 years' imprisonment for first offenders.

[21] In the instant case both manifestations, namely aggravating circumstances and the taking of a vehicle, are present. Where there are no substantial and compelling circumstances to justify a decremental deviation from the prescribed minimum sentence in terms of s 51 of Act 105 of 1997, aggravating factors may persuade the sentencing court to increase the sentence to a level above the prescribed minimum sentence.<sup>23</sup> It therefore makes sense that the magistrate considered the theft of the vehicle to add significant weight to the aggravating factors to be taken into account.

[22] The trial court took into account, furthermore, as aggravating the careful planning of the hijacking, and even more compelling, the attempt to escape conviction of the hijacking by trying to introduce into evidence a fraudulent traffic-ticket purporting to show that the complainant had previously allowed the Appellant's co-accused to drive his car and that there never was a hijacking, but merely a request from the complainant for them to drive his car to a certain hospital.

[23] In that fraud, the trial court found the justification for imposing a heavier sentence than the prescribed one. It then found the weightiest of the

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<sup>23</sup> Du Toit, *supra*, Service 54, 2015 at 30-46.

mitigating circumstances and the weightiest of the aggravating circumstances to balance out and accordingly held the prescribed sentence to be the appropriate one to impose.

[24] Du Toit is of the opinion that, although advisable, it is not peremptory for the trial court to give reasons for increasing the sentence above the prescribed minimum. In **S v DAIL**<sup>24</sup>, for instance, the court of appeal was not persuaded that the trial court's failure to give reasons for imposing a heavier sentence constituted a misdirection which justified intervention on appeal. In the present case, the court also did not specify why it did not compensate for the Appellant's time in detention but allowed the two years to lead to the prescribed sentence effectively being lengthened to 17 years' imprisonment, but did imply that the fraud was just the last straw which tipped the scale towards a heavier sentence.

[25] I am unpersuaded by Ms Kruger's submission that the minimal degree of violence that was used during the robbery in the particular circumstances of this case in itself, or cumulatively with the other mitigating factors, constituted substantial and compelling circumstances which would warrant the imposition of a lesser sentence. In my view the trial court was correct in not regarding it as such.

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<sup>24</sup> Unreported, FB case no A145/2012, 12 June 2014

[26] In **S v MULLER**<sup>25</sup> with reference to minimal violence being used during a crime, for instance, the trial court held that the offences ‘*cannot be regarded as falling within the upper echelons of the scale of severity*’. And in **S v FORTUNE**<sup>26</sup> where the appellant had threatened the complainant with a knife on a street in broad daylight and robbed her of her handbag without causing her any physical injury, the court held the offence to have been at the lower end of the scale of instances of robbery with aggravating circumstances, and stated that it was a factor which should have been taken into account in the assessment of an appropriate sentence. The trial court *in casu* did take it into account.

[27] Binns-Ward J in **S v Fortune**<sup>27</sup> found it “*appropriate for a sentencing court to have regard to the gradation in the manifestations of the listed offence*” of robbery with aggravating circumstances which are set out in ss 1(b)(i) to (iii) of the CPA to determine an appropriate sentence. The court held that:

“the fact that the complainant was threatened rather than physically assaulted and injured is a relevant factor to be taken into account, along with all the other factors that should be weighed in determining whether a departure from the prescribed sentence is warranted”.

[28] That court of appeal accordingly interfered and imposed a sentence of 8 years’ imprisonment instead of the 15 years minimum prescribed for robbery with aggravating circumstances. But one has to keep in mind that even though in the present case minimum violence was also used in that the victim was only threatened and not injured, the object of the robbery, namely to

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<sup>25</sup> 2012 (2) SACR 545 (SCA) 550c

<sup>26</sup> 2014 (2) SACR 178 (WCC) at 187d-f

<sup>27</sup> S v Fortune, *supra*, at [12] at 187h-i

hijack the victim's car, and the threat of shooting the complainant, were much more serious than the grabbing of a handbag.

[29] Furthermore, there were two perpetrators and the absence of injuries was not attributable to the accused, but simply resulted from the complainant's wisely allowing himself to be pushed from the car before the screw-driver could be used to stab him into submission. Likewise, the fact that all the stolen items were recovered could in no way be attributed to the accused, but to the presence of the Tracking device in the car and good police-work. In the circumstances these factors can therefore at best for the Appellant only be neutral factors.

[30] Whereas Ms Kruger mentioned only two aggravating factors, namely that the complainant was robbed of his vehicle and that the Appellant and his co-accused planned the offence, Mr Strauss added the nature and seriousness of the crime of robbing someone of his vehicle and personal belongings under threat of violence, which calls for severe punishments to be seen to follow (See: **S v VALLEY**<sup>28</sup>) as is clear from the provisions of Act 105 of 1997; the pre-planning of the crime; the accused's absence of any remorse; the fact that the offence involved a hijacking and the interests of a society which is tired of this type of violent crime and looks to the courts for assistance. (See: **S v MASHAINE EN ANDERE**<sup>29</sup>).

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<sup>28</sup> 1998 (1) SACR 417 at 420 b – d.

<sup>29</sup> 1998 (2) SACR 664 (NC) AT 669.

[31] Although the court did not mention the Appellant's lack of remorse and the interests of the community to be rid of such violent crimes, they are material factors in considering whether a sentence is appropriate and proportional to the crime. In the present case I am satisfied that the aggravating circumstances so far outweigh the mitigating ones, that the sentence is appropriate and just, despite the Appellant's age, the time spent awaiting trial and the absence of serious violence, so that there would be no justification for this court to intervene.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The appeal is dismissed and the conviction and sentence of 15 years' imprisonment are confirmed.

I concur and it is so ordered.

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H MURRAY, AJ

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M H RAMPAL, J

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