THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 380/03

In the matter between:

THABANG NDLOVU Appellant

and

THE STATE Respondent

Coram: *Navsa JA, Malan et Cachalia AJJA*

Date of hearing: **20 November 2006**
Date of delivery: **30 November 2006**

Summary: Failure to consider factors that cumulatively constitute substantial and compelling circumstances – sentence overturned and substituted.

Neutral citation: This judgment may be referred to as *Ndlovu v The State* [2006] SCA 158 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] The appellant faced three charges in the Regional court, Vosloorus, namely, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. The regional magistrate convicted him on the first two counts and acquitted him on the last. The appellant was sentenced to 15 years' imprisonment on the first count (the prescribed minimum sentence for armed robbery in terms of s 51 of Act 105 of 1997) and two years' imprisonment on the second, with the latter sentence being ordered to run concurrently with the first.

[2] The appellant appealed against the convictions and the related sentences to the Johannesburg High Court. That court (Joffe J, Van der Walt AJ concurring) upheld his appeal against his conviction on the second count and dismissed his appeal against the conviction and sentence in relation to the first.

[3] This appeal, with the leave of the court below, was noted both against the appellant's conviction on the robbery count and the related sentence of 15 years' imprisonment. Before us the appellant's legal representative rightly restricted the appeal to one against sentence only, submitting that the state had failed to prove that the firearm used by the appellant in the robbery was real, rather than fake and that for that reason the appellant was entitled to be sentenced less harshly. In addition it was submitted that there were substantial and compelling circumstances justifying the imposition of a sentence less than the statutorily prescribed minimum of 15 years' imprisonment.

[4] It was not contested that on 12 February 2000 a robbery had occurred at the business premises of the complainant, Mr Lawrence Dube, an optometrist, and that optical frames and sunglasses to the value of approximately R22 000.00 were removed after two women who were in charge at the premises at the time had been forced at gunpoint to part with them.

[5] The appellant's version of events was that he happened to be at the premises coincidentally at the time of the robbery. He testified that he had been making enquiries from one of the women in attendance at the business about how he could acquire a pair of sunglasses when someone who was armed appeared and ordered him to gather the frames and sunglasses from behind the counter whilst at the same time forcing the two women to lie down behind the counter. According to the appellant he did as he was ordered and placed the items in question in a bag and when the armed robber was forced to flee and was being pursued he (the appellant) ran with the bag in his hand. When the police and others arrived the appellant was found with the bag with some of the optical frames and sunglasses still therein. The armed robber had disappeared from the scene.

[6] Not surprisingly, the appellant's version of events was rejected by the magistrate and the court below. Both women in attendance at the optometrist's premises testified that the appellant and a co-perpetrator had each wielded a firearm and used them to commit the robbery. It appears from their evidence that the appellant was at the forefront of the robbery. The court below nevertheless saw fit to uphold the appellant's conviction on the second count. The magistrate's findings in this regard and the court below's reasoning are set out hereafter.

[7] The magistrate had rejected the evidence of a policeman, that the appellant had confessed to him that an unloaded .38 firearm found in the vicinity belonged to the appellant and had been used in the robbery ─ the magistrate held the confession to be inadmissible. The magistrate nevertheless concluded that the firearm found by the policeman could only have been the property of the appellant.

[8] The court below considered the submissions on behalf of the appellant that the two women who had been robbed, had in their testimony, contradicted

each other, and held as follows:

'These contradictions are not material and do not result in any real doubt being created on the state's case. On the contrary, they tend to lend an element of credibility to it.

In all the circumstances no fault can be found with the magistrate's finding that the appellant's evidence was not reasonably possibly true and that the state proved his guilt beyond reasonable doubt.'

[9] However, the court below went on to state the following concerning the evidence on the second count:

'As far as the charge of possession of an unlicensed firearm is concerned both [women] testified that both robbers were in possession of a firearm. Their evidence is however not adequate to secure a conviction on that charge. Their evidence does not go to establish that, that which was in possession of the appellant was in fact a working firearm in particular a .38 Special revolver.'

[10] Whilst it is true that the magistrate wrongly held that the .38 revolver found by the policeman had been the firearm used by the appellant in the robbery ─ he ought to have excluded the confession in its entirety ─ it does not follow that the magistrate's conclusion that the appellant had been in possession of a firearm and had used it in committing the robbery can be faulted. Accepting the evidence of the two women and considering the absence of evidence by the appellant that the firearm used by him was fake or not one contemplated in the Arms and Ammunition Act 75 of 1969 the magistrate's conclusions in respect of the appellant's guilt on the first and second count cannot be faulted. The court below's conclusion in respect of the second count is bewildering and the appellant can consider himself fortunate that his appeal in the court below against his conviction on the second count was successful.

[11] It is necessary to consider the sentence imposed by the magistrate in respect of the first count.

[12] Section 51(2)*(a)(i)* of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment 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 judgment in *S v Malgas* 2001 (2) SA 1222 (SCA) (at 1230E-G and 1231A-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.

[14] In the light of what is stated in the preceding paragraph we are entitled to intervene and to substitute the sentence imposed by the magistrate and confirmed by the court below with one that is appropriate. In my view having regard to the totality of the circumstances, a sentence of ten years' imprisonment is appropriate.

[15] The following order is made:

'1. The appeal by the appellant succeeds to the following extent: the sentence of 15 years' imprisonment imposed upon him is set aside and there is substituted for it a sentence of imprisonment for ten years. Insofar as it may be necessary to do so, the sentence so

imposed is antedated to 5 June 2000, being the date upon which the sentence of 15 years' imprisonment was imposed.'

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

MALAN AJA
CACHALIA AJA