

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : 257/10

In the matter between:-

MVULA WONDERFUL MSHUMPELA

Appellant

and

THE STATE

First Respondent

CORAM: MOCUMIE, J *et* CHESIWE, AJ

HEARD ON: 13 FEBRUARY 2012

JUDGMENT BY: MOCUMIE J *et* CHESIWE AJ

DELIVERED: 22 MARCH 2012

[1] The appellant was convicted in the Regional Court, Bloemfontein, on a charge of robbery read with section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) and was sentenced on 21 January 2009 to fifteen years imprisonment in terms of the Criminal Law Amendment Act 105 of 1997 as amended (“the Criminal Law Amendment Act.”). He sought leave to appeal against both his conviction and sentence but leave was granted by the court *a quo* against sentence only.

[2] The undisputed facts in this matter are briefly that on 7 November 2003 the complainant was driving in her car in Maitland Street, city centre, Bloemfontein. She was with her two young children aged five and two after dropping off her domestic worker at the taxi rank down town. She stopped at the intersection at Maitland and Wes Burger streets as the robot was red. Just as she was waiting for the robot to turn green, a man, who was later identified as the appellant, hit her passenger window and grabbed her hand bag. She held onto the bag until he threatened to stab her by putting his hand inside his pocket as if taking out a weapon. She let go of the handbag and the appellant ran away with it. The handbag contained valuable items: her identity document; Absa bank cards; Virgin Active membership card; a Casio calculator and lipstick all valued at R640, 00 thereby robbing her of her property.

[3] One of the good Samaritans who witnessed this whole incident followed the appellant as he went to the vegetable vendors in the city centre. He called the police from his cell phone and waited for them not far from where the appellant was standing making as if he was busy at the vegetable stalls in town. The

police arrived and he pointed the appellant out to them and they confronted him. They found the appellant holding a white plastic bag and in it they found a handbag which was later identified as the complainant's. They arrested him and took him to the police station. At the police station when he was searched the police found the complainant's purse in his underpants. The appellant was later positively identified at an identity parade by the same state witness that pointed him out to the police on the day of the incident. During the trial the appellant was represented by three different legal representatives. All attorneys eventually withdrew and the appellant conducted his own defence.

- [4] Advocate Tshabalala, on behalf of the appellant, in his Heads of Argument and oral argument submitted that fifteen years imprisonment is shockingly inappropriate as the minimum sentence is reserved for the most serious of cases. That this case was not the most serious in nature as no firearm was used and the complaint did not sustain any physical injuries.
- [5] He submitted that the personal circumstances of the appellant cumulatively amounted to compelling and substantial circumstances which justified the court *a quo* to have deviated

from the prescribed sentence. He highlighted the following:

- Appellant is a young man at the relatively youthful age of 24 years.
- He works as a vendor and has one child.
- He is HIV positive.

[6] Advocate Ferreira, on behalf of the State, conceded that the factors set out by the appellant were indeed compelling and substantial circumstances which justified the trial court to have deviated from the prescribed fifteen years. She however submitted that the aggravating factors in this case far outweighed the mitigatory factors to the extent that the appellant should be given a lengthy period of direct imprisonment. She highlighted the following aggravating factors:

6.1 The appellant was not a first offender. He had a previous conviction of theft which is similar to robbery committed during 2003 for which he was given a fine coupled with direct imprisonment;

6.2 The complainant and her two young children aged five and two were traumatized by this incident;

- 6.3 The complainant's car was damaged and she had to replace the window at her own costs;
- 6.4 Although the goods were retrieved it was through a member of the society's sheer guts and not the appellant's co-operation.
- [7] Both counsel were *ad idem* that the fifteen years imprisonment was severe in the circumstances of this case. We agree with them.
- [8] Section 1 of the CPA provides:
- “(1) In this Act [The Criminal Procedure Act 51 of 1977], unless the context otherwise indicates-
- ‘aggravating circumstances’**, in relation to
- (a) ...
- (b) robbery, or attempted robbery, means –
- (i) the wielding of a firearm or any other dangerous weapon’
- (ii) the infliction of grievous bodily harm,
- (iii) **a threat to inflict grievous bodily harm,**
- by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence...” (Own emphasis)

[9] Although in our view the appellant's actions fall squarely within the ambit of s1 of the CPA¹ and covered by the Criminal Law Amendment Act the facts of this case however, depict more of a typical snatch and grab incident instead of the so-called "*armed robbery*" or robbery with a firearm or any other dangerous weapon which the legislature had in mind and provided for specifically. Although this case is a serious one but, in our view, the dominant intent was clearly to steal and not to rob. It is the complainant's vigilance that made the appellant, cowardly so, to resort to threats. It is only right that the differences in seriousness should receive recognition when it comes to meting out of punishment. (Compare with the *dictum* in **Rammoko v Director of Public Prosecutions** 2003(1) SACR 200 at 205b-c *albeit* it in the context of rape.)

[10] In **S v Rabie** 1975 (4) SA 855 (A) at 857 D-F the Appeal court stated:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

1 (Du Toit et al, **Commentary on the Criminal Procedure Act**, Definitions, DEF 2.)

- (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

From this *dictum* of over 37 years and recent decisions of the Supreme Court of Appeal² it is now trite that an appeal court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.

[11] When imposing a sentence a sentencing court must consider the basic *Zinn triad* as propounded in **S v Zinn**³: the accused person's personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced against each other. In order to reach an appropriate sentence, the court should not place too much emphasis on one factor and ignore the others. In addition, the

2 **S v Salzwedel and Others** 1999 (2) SACR 586 SCA at 588 a-b.

3 1969 (2) SA 537 (A)

court must bear in mind the objectives of sentencing which are prevention, retribution, rehabilitation and deterrence. Not only retribution and deterrence.

[12] Rehabilitation as an objective of sentencing is aimed at rehabilitating and reforming an accused person to make him or her a valuable citizen. The fact that the appellant has a previous conviction(s) does not mean he cannot be rehabilitated if given an opportunity to do so. It may be that the appellant has not been given such opportunity to rehabilitate as the previous convictions show that he was never given correctional supervision in terms of section 276(1) (h) or section 276(1) (i) as provided for in the CPA when he was still young in order to mend his ways at that tender age. A fine which he evidently could not afford nor could anyone raise it on his behalf as he has no parents coupled with imprisonment or direct imprisonment has always been the norm in his case.

[13] Appellant was 23 years when he committed the offence. He has one previous conviction similar to this offence he has been convicted of i.e. theft committed during 2003. The other previous convictions older than ten years must be ignored and

not taken into account upon imposition of sentence as is provided in the CPA.⁴ He is not married and has one child. He worked as a vendor. He is HIV positive. At the time of the imposition of sentence in January 2009 he had been in custody for at least eight months. It is now trite that the court imposing sentence should take that period into account when imposing any custodial sentence.⁵ The complainant retrieved all her property.

[14] In our view, the trial court in this case clearly underplayed the appellant's personal circumstances and lamentably overplayed the gravity of the crime. Critically it blatantly disregarded the appellant's moral blameworthiness which plays an important role which a sentencing court ought to take into account. The overemphasis of the magnitude of the crime or the underestimation of the person of the appellant constitutes an appealable misdirection. The sentence imposed offends against our sense of justice which justifies interference by this Court.

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Section 271A of the

Criminal Procedure Act 51 of 1977 provides :

"Where a court has convicted a person of :

a) ...(not relevant)

b) Any offence in respect of which a sentence of imprisonment for a period not exceeding six months without an option of a fine ,may be imposed,

That conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence..."

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S v Vilakazi 2009 (1) SACR 552 (SCA) at 574 para [60].

[15] We are of the view that an appropriate sentence for the appellant is a term of eight years. This will strike a proper balance and restore justice in a sentence which was excessive and inappropriate in the circumstances.

[16] Lastly, although not canvassed in the Heads of Arguments by both Counsel but it was raised by this Court: this is one case where the trial court should have sought a presentence report. The appellant has been in conflict with the law since 1999 when he was only seven years of age. He was a difficult person to assist during the trial after he fired three capable attorneys of the Justice Centre he was provided with. He refused to follow the court procedures even when same were explained to him at every stage of the trial. As a result he ended up without putting enough facts before the trial court or even pleading for mercy in a proper manner or at least showing remorse for what he has done.

[17] In the circumstances the following order is made:

1. **The appeal against sentence succeeds.**
2. **The sentence imposed is set aside, and substituted**

with the following:-

- 1. 8 (eight) years imprisonment.**
- 2. In terms of sec 282 of Criminal Procedure Act 51 of 1977 the sentence is predated to 21 January 2009.**

B.C. MOCUMIE, J

S. CHESIWE, AJ

On behalf of appellant:

Adv. L.M. Tshabalala
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Ferreira
Instructed by:
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