

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A129/08

In the appeal between:

MAKHOSI NKOMO

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* MOLOI, AJ

JUDGMENT BY:

MOLOI, AJ

HEARD ON:

27 OCTOBER 2008

DELIVERED ON:

6 NOVEMBER 2008

[1] The appellant was convicted in the Regional Court at Kroonstad on five counts of robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act, No. 105 of 1997. He was sentenced to the prescribed minimum sentence of fifteen (15) years imprisonment in respect of count 1 and to two (2) years imprisonment on each of counts 2 to 5. In respect of count 1 the trial court found that there were no substantial

and compelling circumstances justifying a lesser sentence than the prescribed minimum sentence whereas in respect of the other counts such circumstances were found to be present.

[2] The appeal served before us as regards the sentence alone after leave was granted on petition by this court, the trial court having refused the same.

[3] The circumstances of the case are that on 16 January 2005 the appellant and three others, all armed with fire-arms, attacked the Manny's Supermarket at Kroonheuwel in Kroonstad. The manager was held at gunpoint by the appellant and robbed of cash, cellular telephone, cellular telephone cards, a wrist watch, cigarettes and a necklace. The other three attackers held at gunpoint three employees of the supermarket and a client who happened to be in the supermarket at the time and robbed them of various items such as cellular telephones, cash amounts, golden ring and a necklace. The four attackers left the scene in the vehicle belonging to the appellant. The appellant was later arrested basically through the identification of the vehicle. When the

appellant accompanied the police to point out his co-attackers, a shootout ensued and two attackers escaped and one was killed in the fire exchange.

- [4] According to the evidence the appellant, on entering the supermarket, together with one of his co-attackers, focused their attention on the cashier, Ms Rousseau and demanded money from her. At that stage the manager, Mr. Menezes, appeared on the scene and the appellant turned his attention on him and left his co-attacker to deal with the cashier. The appellant ordered the manager to go open the safe in the main office from which money was taken. The cellphone cards and cigarette cartons were, in fact, handed to the other attackers by the other cashiers and were not taken from the manager who was directly involved with the appellant. Mr. Menezes is adamant the appellant did not assault him save for the initial pointing of a fire-arm to his side.

- [5] On the hearing of the appeal it was argued that the sentences imposed by the trial court ought to have been ordered to run concurrently. In support of this submission it was stated that the five convictions, in fact, constituted one

continuous criminal transaction committed by a group of attackers with common purpose and one intention to rob who-ever they would find in the business at that point in time.

I agree with this argument. The very argument further raises the question of a possible duplication of convictions: See the judgment of Streicher JA in LUVUYO MANELI v THE STATE, case number 494/07 (SCA) delivered on 1 April 2008 yet unreported. For our purposes, we are to decide on the question of sentence and believe the sentence below will cover this aspect as well but will not do away with that possibility of the duplication of convictions.

- [6] It was further argued that the trial court erred in not finding that in respect of count 1 the substantial and compelling circumstances making a lesser sentence than the prescribed minimum sentence possible existed. The trial court, in other words, erred in separating count 1 from the other counts when considering the existence or not of substantial and compelling circumstances. In respect of counts 2 to 5 the trial court found that the substantial and compelling circumstances existed and imposed a lesser sentence of two (2) years imprisonment in respect of each count on the

grounds of the cumulative effect of the following factors: that the appellant was a first offender; that the appellant spent two years awaiting trial; that no one sustained any serious physical injury except shock; that in as far as counts 2 to 5 were concerned the amounts involved were insignificant and that in as far as those counts were concerned, the appellant was not personally involved.

[7] There is evidence on record showing conclusively that the operation was planned and executed with a single intent to rob who-ever would be found in the supermarket on that night; that the execution plan was based on the agreed *modus operandi* that each one of the armed attackers would focus on victims found in the business; that the loot would be taken to some place for distribution among the attackers and that the attackers acted with a common purpose to rob.

[8] The question that arises is whether it is possible and, indeed, feasible to find, in a situation like this, the existence of substantial and compelling circumstances in respect of some counts and not in respect of the others on the grounds that in one instance the appellant was directly involved and

in others not. The trial court's other reasoning was that the amount involved in count 1 was more substantial than that involved in other counts clearly overlooking the fact that it was all, nonetheless, destined for a common pool from which each one of the attackers were to share. Furthermore, I believe the question of substantial amount, whatever the amount, would be relevant to the question of sentence and not so much to the determination of the existence or not of the substantial and compelling circumstances required for the deviation from the imposition of the minimum prescribed sentence.

- [9] The personal circumstances of the appellant require further attention. At the time of the commission of the offence he was 29 years of age; he was unmarried and had no children; he was an owner of an electronic business in Johannesburg from which he earned approximately R3 000,00 per month; he was an outright first offender and he had spent two years awaiting trial at the time of sentencing. He had not caused any physical injuries to the manager. He assisted the police in tracing the other culprits though it was not entirely out of own volition the circumstances compelling him so to act and

through his efforts most of the goods robbed were recovered though it also led to bloodletting. As a result of the conviction he, in addition to the sentence, suffered a loss in that his relatively new Ford Bantam van was forfeited to the State.

- [10] Recognising the fact that the court of appeal may not interfere with the sentencing discretion of the trial court unless justified to do so on the grounds of serious misdirection by the trial court; see **S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 l – j. See also the judgment of Howie JA in **S v MATLALA** 2003 (1) SACR 80 (SCA) at 83 e – f where the following was stated:

“In the latter situation interference would only be competent if the appellate Court were satisfied that the trial court had not exercised its sentencing discretion reasonably.”

- [11] Considering that the trial court had found that there were substantial and compelling circumstances present to justify a departure from the imposition of the prescribed minimum sentence of 15 years imprisonment in respect of the

convictions on counts 2 to 5 and considering that all the counts related to a single criminal transaction carried out with a single common purpose to rob, I find it unreasonable to rule out the existence of substantial and compelling circumstances in respect of count 1 on the grounds advanced by the trial court. At the same time I am mindful of the fact that:

“The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.”

Per Marais JA in **S v MALGAS** 2001 (1) SACR 469 (SCA) at 477 d – e. The trial court ought to have found that the substantial and compelling circumstances were present in as far as count 1 was concerned as well. The court of appeal is entitled to interfere with the sentence of the trial court in this matter.

[12] Bearing in mind the nature and the seriousness of the offences of which the appellant was convicted, the interest of the society as fully covered by the trial court, the personal circumstances of the appellant as alluded to above and

bearing in mind the purposes of sentence as set out in **S v KHUMALO AND OTHERS** 1984 (3) SA 327 (A) at 330 D – E where Nicholas JA stated:

“In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment mentioned by DAVIS AJA in *R v Swanepoel* 1945 AD 444 at 455, namely deterrent, preventive, reformatory and retributive...”

I am satisfied that the sentence imposed in respect of count 1 should be tempered with and agree that –

“...while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable.”

S v MALGAS, *supra*, at 477 g – h.

[13] The following order is consequently made:

1. The appeal on sentence is upheld.
2. The sentence of 15 years imprisonment in respect of count 1 is set aside and substituted by the sentence of

ten (10) years imprisonment which sentence is antedated to 2 February 2007.

3. The sentences imposed in respect of counts 2 to 5 are ordered to run concurrently. They are in addition ordered to run concurrently with the sentence in 2 above.

K.J. MOLOI, AJ

I concur.

C. VAN ZYL, J

On behalf of appellant:

Adv. T.B. van Rensburg
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. D.W. Bontes
Instructed by:
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/sp