IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWM

CASE NO: CA&R 201/2016
Date heard: 26 October 2016
Date delivered: 28 October 2016

In the matter between

NKOSANA MANUEL YANTA Appellant

And

THE STATE Respondent

JUDGMENT

GOOSEN, J.

1. The appellant and a co-accused were convicted of robbery with aggravating circumstances committed at Louwterwater, Joubertina on 26 June 2013. The appellant pleaded guilty to the charge admitting that on the day in question he entered the business premises of the complainant and that he robbed him of R4800 in cash and three cell cellphones valued at R8800. In the course of committing the robbery the appellant's co-accused held a knife against the complainant's neck. The robbery was committed in broad daylight. Members of the local community who witnessed the events were able to identify the accused to the police and they were both arrested shortly after the offence was committed.

2. The appellant, who was 18 years old at the time of the commission of the offence, was sentenced to 15 years imprisonment. The magistrate found that

there were no substantial and compelling circumstances which would warrant deviation from the prescribed sentence. Leave to appeal against the sentence was granted on petition to this court.

3. On behalf of the appellant it was submitted that the trial court had erred in coming to the conclusion that no substantial and compelling circumstances were present, inasmuch as the court had failed to take due cognizance of the youthfulness of the appellant, his personal circumstances and the circumstances in which the offence was committed. It was, quite correctly, conceded that the offence is a very serious one, involving as it did the robbery of a business under threat of violence in which the victim was a foreign national now living in South Africa. It was submitted that the appellant had not been armed and that while he clearly made common cause with the co-accused, that there was evidence suggesting that the appellant had acted under the influence of his co-accused. In this regard the prosecution had accepted the facts set out in the plea where the appellant stated that he committed the offence upon the instigation of his co-accused. This was also reflected in the pre-sentence report which was received in evidence by agreement. The complainant had not been injured in the course of the robbery.

4. In his judgment the magistrate stated that the fact that the complainant had not been injured was not as a result of the appellant's conduct because the complainant had managed to flee while the goods were being taken. The magistrate expressed the view that had the complainant resisted in any way the two accused would have used the knife. In this, the magistrate misdirected himself. The objective gravity of an offence, as is established in evidence, is relevant to the determination of an appropriate sentence. In this instance the fact

is that the complainant was not injured. To speculate as to what might have occurred is inappropriate.

5. The magistrate was similarly dismissive of the appellant's plea of guilty, coming to the conclusion that the appellant had little choice because of the speedy arrest brought about by the actions of community members. In this regard the magistrate was on much firmer ground since it appears that the appellant and his co-accused were clearly identified and pointed out by community members to the police.

6. In regard to the youthfulness of the appellant the magistrate considered it in the light of the fact that the appellant had committed a serious offence notwithstanding his age, and took into account that the accused has a previous conviction for housebreaking in respect of which he was under a suspended sentence at the time of the commission of this offence. It does not appear from the judgment that the magistrate considered the totality of the appellant's circumstances, as detailed in the pre-sentence report. These included his home circumstances where he grew up with little or no contact with his biological father; that alcohol and domestic abuse characterised the relationship between his mother and her present partner. According to the pre-sentence report the appellant left school in 2011 having completed grade 8. He was thereafter employed for a total period of just under 1 ½ years as a seasonal worker on a farm; a saw operator and for a short period in the Working for Water Project. He was employed at the time the commission of the offence. The report records that the appellant started to use the drug Tik in 2008 and that he was smoking Tik every second day prior to his arrest. Although it there is no evidence regarding the role that this drug abuse played in the commission of the offence,

the fact of drug abuse is a factor to be considered in regard to the cumulative mitigating effect of the appellant's social circumstances.

7. When imposing a sentence of trial court is required to weigh all of the mitigating circumstances cumulatively in seeking to strike a balance between the interests of the society and those of the accused. It does not appear from the judgment that the magistrate did so and in this regard he erred. The magistrate also did not give consideration to the proportionality of the prescribed sentence having regard to the appellant's personal circumstances. The finding that the no substantial and compelling circumstances are present is accordingly tainted by misdirection.

8. The question accordingly arises whether on the facts before the trial court it can be said that substantial and compelling circumstances are present. The answer to this question must, in my view, be in the affirmative. When the appellant's age is considered in conjunction with his social circumstances: the role he played in the commission of the offence and the particular circumstances of the offence permit of a finding that there are substantial and compelling reasons present enabling the court to depart from the prescribed minimum sentence.

9. Furthermore, the legislative prescription of certain minimum sentences has limited, but not eliminated the sentencing discretion of the court. The sentencing court is required, notwithstanding the legislative provisions, to determine an appropriate sentence. That in the context of prescribed sentences requires the court to decide whether the prescribed sentence is proportionate. If the imposition of a prescribed sentence will, in the view of the sentencing court, bring about an injustice them that alone is a ground for finding substantial and

compelling circumstances present which would warrant a departure from the sentence.

10. In *S v Vilakazi* [1] it was held that,

> It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)
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> 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.'

11. This court, in *Ntozini v the State* [2] , held that:

> This passage from *Vilakazi* indicates that a sentencing court is required, notwithstanding the existence of a prescribed sentence, to give careful consideration to the proportionality of such sentence in the circumstances of the case. This requirement gives expression to the discretion exercised by a court in the imposition of sentence. A trial court faced with the imposition of sentence in circumstances where a prescribed sentence applies is required, in the first instance, to consider whether the facts establish substantial and compelling circumstances to warrant the imposition of a sentence other than the prescribed sentence. This requires consideration of the personal circumstances of the accused person, the nature of the crime and its impact upon the victim and the interests of society. The sentencing court is required to make a finding of fact in relation to the existence or otherwise of such substantial and compelling circumstances. In addition hereto, and as a further consideration, the trial court is required to consider the appropriateness of the sentence which is prescribed. This involves consideration of the proportionality of that sentence. As noted in *Vilakazi*, if the trial court comes to the conclusion that the imposition of a prescribed sentence in a particular matter would be disproportionate then a departure from the prescribed sentence is warranted.

12. The magistrate did not undertake this exercise. When I consider the prescribed sentence and weigh both the interests of the society and the interests of the accused as a youthful offender whom it must be accepted acted to some extent under the influence of his co-accused, then it must be accepted that the

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[1] 2009 (1) SACR 552 (SCA) at par [15]
[2] Unreported, ECG case no 46/2014, delivered 7 September 2015, par [17]

prescribed sentence is disproportionate and would bring about an injustice if it were to be imposed.

13. It remains to consider what would be an appropriate sentence in this case. The offence is undoubtedly a serious one. It was committed by a young person who was already fallen foul of the law, and who has been subjected to corrective punishment. These factors point to the need for a substantial period of imprisonment during which such rehabilitative programmes as the Department of Correctional Services may provide can offer a prospect of successful corrective action. Imprisonment, of course, necessarily carries with it the risk that the offender may be exposed to a culture of criminal conduct and therefore have precisely the opposite of its intended effect. It is for this reason that youthful offenders are to be imprisoned only for so long as is strictly necessary in the circumstances of the case. It is of course difficult to determine with precision how long that period should be. The period should however reflect both the serious of and the nature of the crime and should allow for the objectives of punishment to be met.

14. In this instance I consider that a period of imprisonment for eight years would be appropriate.

15. I therefore make the following order:

1. The appeal against sentence succeeds.
2. The sentence of the magistrate is set aside and replaced with the following sentence:
    1. Accused is sentenced to undergo eight years imprisonment.

2. The sentence is antedated to 10 October 2013.

G.GOOSEN
JUDGE OF THE HIGH COURT

BESHE, J.

I agree.

N.G. BESHE
JUDGE OF THE HIGH COURT

Appearances: For the Appellant
N.M. Mazibukwana
Grahamstown Justice Centre

For the Respondent
D. Els
Director of Public Prosecutions
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