



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: CA 35/14

In the matter between:

THABISO PHALANE

1st Appellant

WILLIAM MOTHLAKE

2nd Appellant

AND

THE STATE

Respondent

DATE OF HEARING

: 23 OCTOBER 2015

DATE OF JUDGMENT

: 12 NOVEMBER 2015

COUNSEL FOR THE APPELLANT

: ADV. KHAN

COUNSEL FOR THE DEFENDANT

: ADV. MOETAESI

JUDGMENT

DJAJE AJ

Introduction

[1] The Appellants were arraigned before the Regional Court sitting in Themba on three counts being Robbery with aggravating circumstances, unlawful possession of firearm and unlawful possession of ammunition. They were convicted on all three counts and sentenced as follows:

Count 1: Robbery with aggravating circumstances – 15 years imprisonment

Count 2: Unlawful possession of firearm – 5 years imprisonment

Count 3: Unlawful possession of ammunition – 5 years imprisonment.

The sentences in count 2 and 3 were ordered to run concurrently with the sentence in count 1. They are now appealing against sentence only.

Background

[2] The evidence can be succinctly summarised as follows:

The complainant was robbed in his store on 24 March 2011 at Marapyane Village. He was robbed of cash and air time vouchers. In the process of the robbery a firearm was used and he was butted with the said firearm on his head. After the robbery the police attended the scene and they together with the complainant

followed in the direction the two Appellants went. It was in that pursuit that the two Appellants were arrested and the airtime vouchers as well as the cash were recovered. The complainant positively identified the two appellants as the people who attacked and robbed him.

Submissions

- [3] The Appellants case is that the sentence imposed by the court a quo is shockingly inappropriate and that the court erred in finding that there are no compelling and substantial circumstances. It was further submitted that the court a quo in sentencing the Appellants failed to take into account that they were 18 and 19 years old respectively.
- [4] The Respondent in its argument before us conceded that the age and youthfulness of the Appellants should have been considered by the court **a quo** as compelling and substantial circumstances

Law

- [5] In the matter of **Marota v The State (300/15) [2015] ZASCA 130 (28 September 2015)** Petse JA stated as follows:

“The imposition of sentence is primarily a matter of judicial discretion by a sentencing court save where the legislature has decreed otherwise. This requires that a sentencing court should have regard to, inter alia, the peculiar facts of each case, the nature of the crime and the personal circumstances of the

offender. (See eg: *S v Zinn* 1969 (2) SA 537 (A) at 540G). Accordingly, a court of appeal will interfere with the exercise of such discretion only on limited grounds.”

See also: S v Malgas 2001 (1) SACR 469 (SCA)

[6] In the case of the **S v Vilakazi 2009 (1) SACR 552 (SCA)** Nugent JA said at par 15:

*“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 the context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)*

consist 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.

*If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in **Malgas**, which said that the relevant provision in the Act*

vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which ‘justify’...it.”

Analysis

[7] In mitigation Pre- Sentence reports were compiled and handed in by the Social Worker. The Appellants' personal circumstances were detailed in the said reports together with their family background. A recommendation was then made that a sentence in terms of section 297(1) (b) of the Criminal Procedure Act 51 of 1977 (which is a suspended sentence) be considered by the court *a quo* in respect of the two Appellants. I wish to highlight the following mitigating and personal circumstances of the Appellants:

1st Appellant

- At the time of the commission of the offence he was 20 years old,
- His parents are deceased and he is looking after his younger sister;
- He was doing odd jobs and earning R2 600-00 per month;
- He is a first offender;
- He is not married and has no children.

2nd Appellant

- At the time of the commission of the offence he was 19 years old;
- He dropped out of school due to continuous repeating of classes;
- He was doing odd jobs and earning R1 000-00 per month;

- He is a first offender;
- He is not married and has no children.

[8] Robbery with aggravating circumstances is a serious offence where a person's property is taken violently and in this case injuries inflicted on the complainant. However the complainant was fortunate due to the swift response of the members of South African Police, and his stolen property was recovered immediately.

[9] The court **a quo** dealt extensively with the aspect of whether there are any compelling and substantial circumstances and found none. The Social Worker in her pre- sentence report stated that the 1st Appellant lost both his parents in one year and as the eldest in the family his life changed dramatically as he now had the responsibility of taking care of his younger sister. He stopped going to school due to lack of proper school uniform. Further that the kind of new life style that he adopted after the death of his parents might have persuaded him to commit the crime at hand. The Social worker further reported that the 1st Appellant was described by his family as a respectful quiet person and they were shocked to hear that he committed the offence at hand. In evaluating the behavior of the 1st Appellant the Social Worker concluded that in committing this offence he was acting to satisfy a need without thinking of the consequences.

[10] As far as the 2nd Appellant is concerned the Social Worker stated that because of his young age and being close to the 1st Appellant, he was influenced to commit the offence. Especially as the 1st Appellant is the one who brought the firearm which belonged to his late father. It is also important to note that it was also stated in both reports that the Appellants were remorseful for their action and regretted having committed the offences.

[11] It is clear that the Appellants were immature and irresponsible. Furthermore the complainant was fortunate to have recovered his property. I am of the view that, looking at the facts of this case, the personal circumstances of the Appellants, the mitigating and aggravating features, as well as the submissions by both counsels that this court can interfere with the sentence imposed by the court *a quo*. I do find that there are compelling and substantial circumstances that warrant deviation from the prescribed minimum sentence of 15 years for robbery with aggravating circumstances.

[12] In respect of count 2 and 3 the sentences imposed is appropriate and there are no grounds for this court to interfere. The Appellants were in unlawful possession of a firearm without a license and there can be no justification for the 1st Appellant to take his late father's firearm.

Order

Consequently, I make the following order:

1. The appeal against sentence in count 1 is upheld.
2. The sentence imposed by the court ***a quo*** in count 1 is set aside and replaced with the following:

“Count 1: Both accused 1 and 2 are sentenced to 10 years imprisonment.”

3. The appeal against sentence in count 2 and 3 is dismissed.
4. It is ordered that the sentence in count 2 and 3 shall run concurrently with the sentence in count 1.
5. The sentence is antedated to 18 June 2014.

DJAJE AJ

ACTING JUDGE OF THE HIGH COURT

I AGREE

GUTTA J

JUDGE OF THE HIGH COURT