IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A692/2010

DATE: 13 MAY 2011

In the matter between:

JOHANNES MODUNGWE Appellant

and

THE STATE Respondent

J U D G M E N T

CLOETE, AJ:

The appellant, who had pleaded not guilty in the Regional Court at Paarl, was convicted on one count of robbery with aggravating circumstances and on 15 April 2010 sentenced to 12 years direct imprisonment. He unsuccessfully applied for leave to appeal against both his conviction and sentence. On petition he was granted leave to appeal against his sentence only.

In order to consider the sentence imposed by the trial court, it

is necessary to briefly refer to the events of 10 October 2009 when the appellant committed the offence. The complainant testified that on the morning of that day she was approached by the appellant whilst she was walking towards a shop. He struck up a conversation with her. She was not keen to speak to him and tried to end the conversation without success. The appellant then asked her for directions and she accompanied him to point out the address which he was seeking. He began to discuss strange topics and she became extremely nervous.

Whilst they were still speaking, another man approached them from the opposite side of the road. The appellant referred to him as Charles. Charles threatened the complainant with a knife which he held against her neck. The complainant was terrified and decided that rather than risk her life, she would hand over the cash which she had in her possession. She handed over R1 500,00 cash to Charles and the appellant, whereafter they fled the scene. The complainant reported the incident to the police and identified the appellant from a photograph in an album shown to her by the police. The appellant was arrested on 14 October 2009 and has been in custody since that date.

The appellant's version was that he was nowhere in the vicinity when the offence was committed. He denied any knowledge of

the crime. He called his girlfriend as an alibi, but there were material inconsistencies between her evidence and that of the appellant's. The appellant's girlfriend also eventually conceded that the appellant had told her what to say in court. The magistrate accepted the evidence of the state witnesses and rejected the evidence of the appellant and his witness.

The appellant had two previous convictions, one of culpable homicide for which he received a sentence of four years direct imprisonment and the other for murder, for which he received a sentence of eight years direct imprisonment. The offence of robbery with aggravating circumstances is one which falls within the minimum sentencing legislation contained in section 51(2) of the Criminal Law Amendment Act 105 of 1997. The appellant as a first offender for robbery with aggravating circumstances became liable to be sentenced to direct imprisonment for a period of not less than 15 years unless the trial court was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

The court found that (a) the appellant's age (46 years old; (b) the fact that he is the father of two children, who were aged 22 years and eight months respectively at the time; (c) that he had been in custody since 14 October 2009; and (d) that the

appellant had not re-offended for a period of approximately five years prior to the commission of the offence, constituted substantial and compelling circumstances which resulted in the trial court sentencing the appellant to 12 years direct imprisonment. The magistrate also took into account the fact that the complainant had not been injured during the commission of the offence.

The appellant argued that the trial court misdirected itself in that: (a) it failed to attach appropriate, if any, weight to the fact that the appellant is a first offender for the crime of robbery with aggravating circumstances; (b) attached undue weight to the appellant's previous convictions; (c) misdirected itself in failing to give notice of its intention to take judicial notice of the prevalence of robbery within its jurisdictional area; and (d) failed to attach sufficient, if any, weight to the fact that the appellant, although acting in common purpose, was not the knife wielder.

It is trite that the circumstances entitling a court of appeal to interfere in a sentence which another court has passed are limited and these circumstances were summarised by Marais, JA in S v Malgas 2001 (1) SACR 469 (SCA) at 478d-g as follows:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it, simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is, of course, entitled to consider the question of sentence afresh. In doing so, it assesses a sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can be properly described as "shocking", "startling" or "disturbingly inappropriate"."

In S v Nkomo 2007 (2) SACR 198 (SCA), the Supreme Court of Appeal expressed the view that the fact that a person is a first

offender for a rape conviction, must be regarded as a substantial and compelling circumstance justifying the imposition of a lesser sentence. In that matter the Regional Court had found that the appellant had raped the complainant five times during the course of a night. The appellant appealed only against his sentence of life imprisonment. The sentence had been imposed in 1999 before the Supreme Court of Appeal in the Malgas case determined the approach to be adopted in finding whether substantial and compelling circumstances exist. The court in the Nkomo case stated the following at 205h-i:

> "I do not believe that his crime should attract the heaviest sentence permitted by our law, life imprisonment. I recognise that it may be difficult to imagine a rape under much worse conditions, but it is possible and I consider that the prospect of rehabilitation and the fact that the appellant is a first offender, must be regarded as substantial and compelling circumstances justifying a lesser sentence. What must be borne in mind as well, is the statement of this court in S v Abrahams, cited in the passage from Mamotso above, that life imprisonment as a sentence for rape should be imposed only where the case is devoid of

substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."

It is so that the magistrate failed to attach any weight to the fact that the appellant is a first offender for the crime of robbery. However, this omission on its own does not warrant the conclusion that there was a material misdirection on his part, if regard is had to all of the other material factors which he took into account in finding that substantial and compelling circumstances existed to justify the imposition of a lesser sentence. The magistrate's comments as to the prevalence of crime in general within his court's jurisdictional area were made in the context of the need to also weigh up the interests of the community in arriving at an appropriate sentence. The magistrate's failure to inform the parties in advance of his intention to make these comments does not constitute a material misdirection on his part.

The magistrate did not attach undue weight to the appellant's previous convictions. On the contrary he regarded the fact that the appellant had not re-offended for approximately five years prior to the commission of the offence as a substantial and compelling circumstance which would justify the imposition of a lesser sentence. That the magistrate did not specifically deal with the fact that the appellant, although acting in

common purpose, was not the knife wielder, does not mean that he did not consider this, particularly inasmuch as he expressed the view that the fact that the complainant was not injured should count in the appellant's favour.

In all the circumstances of the matter, the sentence imposed by the magistrate was not disturbingly inappropriate. There was no material misdirection on his part. There is thus no basis for this court to interfere with the sentence which he imposed. I would, therefore, propose the following order: **THE APPEAL AGAINST SENTENCE IS DISMISSED**.

CLOETE, AJ

ALLIE, J: I agree and it is so ordered.

ALLIE, J