

SOUTH AFRICA / JUDGMENT

Manyathi and Another v S (A140/2014) [2014] ZAGPJHC 225 (15 September 2014)

[2014] ZAGPJHC 225**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Opperman, Sutherland

CASE / FILE NUMBER

A140/2014

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REPUBLIC OF SOUTH AFRICA
SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE NO. A140/2014
DATE: 15 SEPTEMBER 2014

In the matter between: MANYATHI,
 SIYABONGA.....Appellant
 1
 NENE,
 MANDLA.....Appellant
 2
 Versus
 THE
 STATE.....Respondent

JUDGMENT**OPPERMAN AJ****INTRODUCTION**

- [1] The appellants were charged in the Regional Court for Johannesburg with robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, No 51 of 1977 ("the Criminal Procedure Act"), read with the provisions of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 ("the Act") (count 1), the unlawful possession of a firearm, being a contravention of section 3 read with sections 1, 103, 117, 120(1)(a) and section 121, read with schedule 4 of the Firearms Control Act, No 60 of 2000, and further

read with section 250 of the Criminal Procedure Act (count 2), and the unlawful possession of ammunition as provided for in section 90, read with sections 1, 103, 120(1)(a) and section 121 read with schedule 4 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the Criminal Procedure Act (count 3).

- [2] Count 1 related to the forceful taking of two Blackberry cell phones, a Samsung phone, a wallet containing R800 cash, a driver's licence and bank cards. Count 2 related to the possession of a 9mm parabellum calibre norinco model 213 semi-automatic pistol and count 3, to 8 cartridges.
- [3] On 2 April 2013, the appellants were found guilty of all three counts. They were sentenced to fifteen years imprisonment in respect of count 1, five years imprisonment in respect of count 2, and one year imprisonment in respect of count 3. The Court a quo ordered that the sentence for count 3 was to run concurrently with the sentence imposed in respect of count 2 and that two years of the sentence for count 2, was to run concurrent with the sentence for count 1. The effective sentence was thus eighteen years imprisonment.
- [4] The Court a quo dismissed both appellants' applications for leave to appeal but subsequently this Court granted the appellants leave to appeal against their sentences only.

FACTS UNDERPINNING THE CONVICTIONS

- [5] On 1 April 2010 and at Sportline Graphics, at 23 Bezuidenhout Street, Troyville, Johannesburg, a robbery occurred. Two men, of which one was Appellant 1, had posed as customers of Sportline Graphics and sought an estimate of the cost payable for what is known in the trade as "a full car wrap" which I understand to mean the cladding of the vehicle in advertising words and images. They were told that the vehicle would have to be measured to give an accurate estimate. They returned with four more

men and forcefully took two Blackberry cellphones, a Samsung cellphone, a wallet containing R800 in cash, a driver's licence and

bank cards. This was taken from Mrs Luana van der Merwe, Mrs Tracey Habebe, Mrs Christine Swanepoel and Mr Gareth Gert van der Merwe. Of the six assailants, three were bearing firearms.

- [6] Appellant 1 had cocked the firearm and had pointed it in the face of Mrs Luana Van der Merwe. Other assailants twisted Mrs Christine Swanepoel's arm where she was standing next to the photocopier and demanded to know where the money was kept. Another of the assailants had cocked a gun and pointed it at Mrs Hadebe's stomach.
- [7] Some of the items taken were recovered due to the swift intervention of Mr Da Paiva (the landlord) who had followed two of the suspects in a car chase. During this pursuit, appellant 1 had pointed a firearm at him in a threatening and provocative manner, smiling at him in the process. The police finally apprehended both appellants and found the appellants in possession of the firearm forming the subject of count 2 and the ammunition, forming the subject of count 3.

GROUNDS OF APPEAL

[8] The appellants raised two arguments on appeal. They are:

8.1. Both appellants were arrested on 1 April 2010. The trial was only finalised on 18 June 2013. Both appellants thus spent over three years in custody awaiting trial. The Court a quo did not have sufficient regard to the three years in custody awaiting trial.

8.2. The sentences imposed in respect of counts 2 and 3, ought to have been ordered to run concurrently in their entirety with the sentence imposed in respect of count 1.

[9] I intend dealing with the two arguments under separate sub-headings.

Three years in custody awaiting trial

[10] Having regard to the particular facts of the matter, the Court a quo could not find that it constituted substantial and compelling circumstances which would entitle it to deviate from the mandated sentence on count 1.

[11] Having been convicted of robbery with aggravating circumstances, the Court a quo sentenced the appellants to the minimum prescribed sentence in respect of first offenders, being a period of 15 years. The Court a quo held that there existed no substantial and compelling circumstances to deviate from the minimum sentence.

[12] The issue before us, thus, is whether or not the Court a quo was correct in this finding. Whether or not substantial and compelling circumstances exist is, essentially, a factual enquiry. The appellants' submissions in respect of the existence of substantial and compelling circumstances were focused on the Court a quo's failure to have regard to the 3-year period in which the appellants were incarcerated before sentencing took place.

[13] In *S v Matyityi*, 2011 (1) SACR 40 (SCA) at 46D-E Ponnann JA held as follows:

"*S v Malgas* is where one must start. ... *Malgas*, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*: the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present."

[14] In *S v Kwanape*, [2012] ZASCA 168, Petse JA cautioned as follows:

"[15] Recently this court reiterated in *S v Matyityi* 2011 (1) SACR 40 (SCA) that 'the crime pandemic that engulfs our country' has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that 'ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed."

[15] In *S v PB* (supra), Bosielo JA formulated the approach as follows:

"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing

court are substantial and compelling, or not."

[16] *S v Vilakazi*, 2009 (1) SACR 552 (SCA), Nugent JA said at 562G : " it is enough for the sentence to be departed from that it would be unjust to impose it ". To determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing and referred to as "mitigating factors".

[17] In *S v Nkomo*, 2007 (2) SACR 198 (SCA) Lewis JA at 201e-f held as follows:

"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

[18]I turn now then to the central issue and consider all the circumstances available to the court a quo to assess whether the facts which were considered are substantial and compelling or not, or, put differently, whether it would be unjust to impose a sentence of 15 years in respect of count 1.

[19]Pre-sentencing reports were received as evidence in respect of both appellants. Appellant 1 was as at the date of the preparation of the pre-sentencing report, being 13 May 2013, 30 years of age. He grew up in Msinga, KwaZulu-Natal and was the first-born in a family of ten children. He was raised by both parents in a stable family environment. His parents and siblings stay at Msinga and he visits them during holidays. He has a good relationship with his family and was supported by them during his trial. He had a good childhood despite growing up under poor conditions. The family is affiliated to the Nazareth Church and was raised according to Christian principles. Appellant 1 is still an active member of such church. He only completed Standard 3

due to

financial constraints. He came to Johannesburg during 2004 to find employment. He could not find employment and eventually started a small business selling cold drinks and meat. He generated enough money to look after both himself and his family. He is in a

traditional marriage relationship with Jikele Majola and they have two children, a girl aged 8 and a boy aged 4. The children stay with their mother at Msinga. She is unemployed and is struggling to meet the needs of the children, due to their father's incarceration. He also has another child from an extra-marital relationship and such child is 4 years of age. The mother and child live in Hillbrow. He was maintaining all of them prior to his incarceration. He is a first offender. He maintains his innocence and did not show any remorse during consultation with the probation officer.

[20]Appellant 2 was born at Kwamaphumulo in KwaZulu-Natal on 16 April 1983 as the second child from a family of three children. He was raised by both his parents who passed away in 1999. He did not have a good upbringing as his mother was struggling to raise him on her own in the absence of his father. His father did not contribute towards his maintenance. He had an unhappy childhood in that he was bullied by other boys. He is not married, although he has children with his previous girlfriend. He completed Grade 12 during 2005 at Inanda Secondary School and failed to further his studies due to financial constraints. Prior to his arrest, he was employed at the Brenthurst Clinic as a general worker. He supported his entire family. He is affiliated to the Zion Church. He is a first offender and maintains his innocence.

[21]In assessing the personal circumstances of the appellants, I am mindful of the comments of Nugent JA at 574D in *S v Vilakazi* supra:

"Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

[22]Particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial and compelling circumstances, see *S v Radebe* 2013 (2) SACR 165 (SCA) at p170 g. I am to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence, see *S v Dodo*, [2001] ZACC 16; 2001 (1) SACR 594 (CC).

[23]I am satisfied that the prescribed sentence of 15 years' imprisonment is justified in respect of the robbery committed by both appellants. The robbery was planned, firearms were used, Mrs Christine Swanepoel was assaulted, Mrs Luana van der Merwe and Mrs Tracey Hadebe were held at gunpoint and cellphones, a wallet, cards and cash were stolen. It is so that the appellants spent almost three years in detention awaiting trial and that this is a factor which should be taken into account. In my view it does however not outweigh the aggravating circumstances attendant on

the crime committed. I will however when considering the cumulative effect of all the sentences imposed, have regard to this factor.

Sentences imposed in respect of counts 2 and 3 – Concurrency

[24]The appellants argued that the sentences imposed in respect of counts 2 and 3 ought to have been ordered to run concurrently in their entirety with the sentence imposed in respect of count 1.

[25]They argued that the sentences imposed, viewed cumulatively with the sentence for count 1, are shockingly inappropriate alternatively that the court a quo misdirected itself by not ordering that the sentences in respect of counts 2 and 3 run concurrently with the sentence imposed in respect of count 1.

[26]With reference to the matters of *S v Mate* 2000 (1) SACR 552 (T) and *S v Brophy and Another* 2007 (2) SACR 56 (W), the appellants argued that the fact that the appellants were in (joint) possession of firearms during the robbery was a factor

that brought the robbery charge within the definition of aggravating circumstances and thus within the scope of section 51(2)(a) of the Act. The sentence for the robbery, so the argument ran, thus already took into account the fact that the appellants had been in possession of unlicensed firearms and ammunition.

[27]The state argued that section 51(2), although encompassing a scenario including the use of a firearm, does not require the use of an unlicensed or unlawful firearm. The acts being punished in counts 2 and 3 are thus related to the unlawful possession of the firearm and ammunition, which makes this matter distinguishable from *S v Mate* (supra) and *S v Brophy* (supra). It is the moral guilt of an accused person that is sought to be addressed at sentencing stage. The robbery in this matter took into account that it occurred with a firearm. The argument advanced by the state addresses whether or not the charges in this matter have been split. They clearly have not and the convictions on all three separate charges are sound. As the possession of the firearm and ammunition took place during the course of the robbery, I am of the view that the sentences in respect of such charges should run concurrently with the sentence imposed in respect of count 1.

CUMULATIVE EFFECT OF SENTENCES

[28]Having regard to all the circumstances of this case, I consider an effective term of 15 years imprisonment appropriate. The overall sentence of 15 years imposed in respect of all three counts, in my view has regard to the three years awaiting trial.

CONCLUSION AND ORDER

[29]In the circumstances the appeal on sentence is upheld and the order of the trial court is set aside and substituted for an order to apply in respect of each of the Appellants:

1.Fifteen (15) years direct imprisonment on Count 1, robbery with aggravating circumstances.

2. Five (5) years imprisonment on Count 2, possession of firearm, which shall run concurrently with the sentence on Count 1.

3. One (1) year imprisonment on Count 3, possession of ammunition, which shall run concurrently with the sentence on Count 2.

4. The Appellants are thus sentenced to an effective Fifteen (15) years imprisonment each.

5. In terms of section 103(1) of Act 60 of 2000, the Appellants shall remain unfit to possess firearms.

I OPPERMAN

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I Agree

R SUTHERLAND

Judge of the High Court

Heard: 15 September 2014

Judgment delivered: 15 September 2014

Appearances:

For Appellant: Adv EA Guarneri

Instructed by: Johannesburg Justice Centre

For Respondent: Adv SH Rubin

Instructed by: Office of the Director of Public Prosecutions

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