122/86

PAUL EDWARD McINTYRE — APPELLANT

and

THE STATE — RESPONDENT

CASE NO. 289/85
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PAUL EDWARD McINTYRE APPELLANT

and

THE STATE RESPONDENT

CORAM: TRENGOVE, SMALBERGER JJA et NESTADT AJA

HEARD: 19 SEPTEMBER 1986

DELIVERED: 30 SEPTEMBER 1986

J U D G M E N T

TRENGOVE/ .....

TRENGOVE, JA:

On 5 September 1984 the appellant and a co-accused ("accused 1") were charged in the regional court at Johannesburg with the crime of robbery with aggravating circumstances. It was alleged that they had robbed one Ricky Windt of an amount of R560,23 at Johannesburg on 18 August 1984. They were both unrepresented. They pleaded guilty to the charge, and after the magistrate had put some questions to them in terms of section 112 of the Criminal Procedure Act, they were convicted of the robbery as charged. They were first offenders and they elected not to give evidence in mitigation of sentence.

Accused/ .....

Accused 1, however, called the investigating officer, warrant officer Calitz, to testify on his behalf; and, in response to questions by the magistrate, both accused 1 and the appellant gave the court some information about their background and personal circumstances. The magistrate, thereupon, sentenced accused 1 to receive a whipping of 7 strokes with a cane, and the appellant to 7 years' imprisonment.

On appeal by the appellant to the Witwatersrand Local Division against his sentence, Steyn AJ (with Esselen J concurring) held that interference with his sentence was warranted by reason of the disturbing disparity between the said sentence and that of accused 1. In my opinion the court a quo could also have interfered with the sentence on the grounds of a misdirection of fact

by the magistrate to which I presently refer more fully. The sentence was reduced to one of 3 years' imprisonment plus a further 4 years' imprisonment suspended for 5 years on certain conditions. And it is against this sentence that the appellant has now appealed by leave of this court. Counsel for the appellant contended that this court would be justified in interfering with the sentence imposed by the court a quo on the ground that the disparity between the sentences was still too great.

The circumstances in which a court of appeal would be entitled to interfere with a sentence on the grounds of the disparity between sentences imposed on participants in the same offence are discussed in S v Giannoulis 1975(4) S A 867 (A). Having considered

the views expressed in a long line of cases on the subject, Holmes JA remarked (at p 873 E - F):

> "1. In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.
> 2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the

sentence is disturbingly inappropriate.

3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

I now come to the evidence. The facts relating to the robbery and to the personal circumstances of accused 1 and the appellant are, unfortunately, very scanty. In view of the gravity of the charge, the fact that both accused were unrepresented, and the fact that the appellant was tried on the day following upon his arrest, I find it somewhat disquieting that the trial court was not presented with a fuller picture of the robbery and all its facets, and more detailed enquiries were not made into the background and personal circum-

stances of each of the accused. However, the appellant has not applied for the case to be remitted to the magistrate for further evidence. We have been asked by his counsel to deal with the appeal on the record as it is. I proceed to do so.

I refer, firstly, to the particulars of the personal circumstances of accused 1 and the appellant. Accused 1 was a scholar, in standard 9 at a school in Northcliff, he was 18 years old, and he was apparently staying with his parents. The appellant was an apprentice electrician, he was earning about R120 to R130 per week, his parents were divorced, and he was staying with his mother. There is no evidence, on record, of his

age and he was not asked about it. In the charge sheet, under the heading "Particulars of the accused", the appellant's age is given as 20 years and the magistrate appears to have assumed that this was correct. This is the sum total of the information before the trial court of the personal circumstances of the two accused.

The facts relating to the robbery are as follows. On 18 August 1984, it is not clear at what time of the day it was, the appellant and accused 1 went to a building somewhere in Johannesburg on a motorcycle driven by the appellant. They apparently went there with the intention of robbing the complainant

who had an office in the building. Accused 1 was armed with an unloaded firearm which the appellant had provided. It does not appear from the record how the appellant came to be in possession of this fire-arm. However, when they arrived at the building accused 1 went inside. He said that he waited on the ground floor for a while. Then, when it was quiet, he ran upstairs to the complainant's office where he "whispered to him for the money". He had the firearm in his hand but he did not point it at the complainant. The complainant then went to a safe and handed over R236 (not R560,23 as alleged in the charge sheet) to accused 1. In the meanwhile the appellant was waiting outside the

building and when accused 1 returned they drove off. It does not appear from the record whether accused 1 shared the R236 with the appellant or what subsequently happened to the money.

About a fortnight after this incident, the police arrived at the home of accused 1 in connection with a matter entirely unconnected with the robbery. Accused 1, whose conscience had apparently been troubling him, then gave himself up to the police voluntarily and told them of his involvement in the robbery. From then on, he gave his full co-operation to the investigating officer, warrant officer Calitz. As a result, the appellant was arrested. He too

co-operated/ .....

co-operated fully with the police and handed over the firearm in question to them.

Against this factual background, I turn again to the judgment of the court a quo. Steyn AJ made it clear, as I have already mentioned, that the disparity between the sentences of the appellant and accused 1 was regarded as sufficient justification for reducing the sentence imposed by the magistrate on the appellant. And, in considering what an appropriate sentence would be, the learned judge a quo then said:

> "Taking into account all the factors in favour of the appellant, the three outstanding factors still remain. Firstly, he was the leader in the criminal undertaking. Secondly, he did supply the firearm which

> was fortunately not pointed and not loaded and thirdly, he was the elder of the two participants manifestly a man with greater responsibility and the final factor in connection with sentencing is the grave interest that society has to suppress this growing crime of robbery by means of firearms which has been classified as a crime which even merits the death sentence in certain cases."

This was also the magistrate's approach to the question of the extent of the appellant's complicity in the robbery. In my view, there is a basic flaw in the learned judge's approach and that is the finding that the appellant played the leading role in the robbery. This finding is not supported by the evidence on record. This is the misdirection to which I referred earlier on.

> There is no evidence whatsoever as to

how it happened that the appellant and accused 1 became involved in the robbery. They appear to have been friends. Accused 1 did not say, nor even suggest, that the appellant was the author of the plan to rob the complainant, that he played the leading role in executing it, or that he influenced him (accused 1) in any way. Having regard to the role that accused 1 played, I am of the view that the reasonable possibility cannot be excluded that the scheme may even have originated with him. He appears to have known his way about the building where the complainant's office was situated and he was, after all, the one who confronted and robbed the complainant. Be that as it may, this question of leadership was never put to the appellant and he had no opportunity of dealing with it. It is true that the appellant

provided/ .....

provided the firearm but he might have done so at the request of accused 1 for he had the firearm in his hand when he coerced the complainant into handing over the money. And finally, even if one were to accept that the appellant was a year or two older than accused, it would not necessarily follow that he was more mature, or that he had a stronger personality, than the latter.

To sum up. In my view the learned judge a quo erred in holding that the appellant was "the leader in the criminal undertaking". He should have found that the appellant and accused 1 had participated in the robbery to a more or less equal degree. This court is, therefore, entitled to interfere and to impose

what it considers to be an appropriate sentence. I fully agree with the remarks of the learned judge as to the seriousness of crime of which the appellant was convicted. I do not think that this court would be justified in equating the appellant's sentence to that of accused 1. He was probably fortunate in getting off somewhat lightly. This court must do what it considers appropriate in the circumstances. Having carefully considered all the circumstances of this case, as set out above, I am of the view that a sentence of 3 years' imprisonment, of which 18 months are suspended, would be appropriate.

In the result, the appeal is allowed.

The/ .....

The sentence imposed by the court a quo is set aside, and the following sentence is substituted therefor:

"3 years' imprisonment of which 18 months is suspended for 5 years on condition that accused 2 (i e the appellant) is not convicted of the crimes of robbery or theft committed during the period of suspension."

TRENGOVE, JA

SMALBERGER, JA)
)
) CONCUR
)
NESTADT, AJA)