IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 72/94

DONOVAN SAMPSON 1st APPELLANT

GLEN ANDREW HALL 2nd APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, MARAIS et SCHUTZ JJ.A

DATE HEARD: 21 November 1995 DATE

DELIVERED: 24 November 1995

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

The two appellants, young men of respectively 18 and 20 years of age at the time of their trial, were convicted in the Regional Court of robbery, and were sentenced in terms of s 276(l)(i) of the Criminal Procedure Act 51 of 1977 ("the Act") to 42 months imprisonment, of which 18 months was conditionally suspended. An appeal to the Eastern Cape Division against conviction and sentence failed, but that Court granted leave to appeal to this Court on sentence only.

The facts are quite simple and are largely undisputed, although the appellants, neither of whom gave evidence, sought to impose a

frolicsome quality on the events. The magistrate was not impressed. Nor am I.

The complainant, a 15 year old scholar Daniel Lawler, was waiting to cross Luneville road, Lorraine, Port Elizabeth at about 22.00h on 19 December 1992 with a view to visiting a friend, when a car containing the two appellants passed him, made a U-turn and came back to him. Believing that the occupants were seeking directions he went up to the car. The second appellant was nearest him in the front passenger's seat and the first appellant was in the driver's seat. They asked him if he had any money on him. The second appellant produced what appeared to be a pistol. They then both demanded that he hand them money. He was girt with a moneybag (referred to in evidence as a "moonbag"). He

slipped it to his feet and kicked it under the car. At some stage the first appellant took the firearm from the second and pressed it against the complainant's forehead. It felt cold, not like plastic material. His attempts to hide the moonbag were not successful. The second appellant opened the door, reached down and took it. The appellants drove off.

The complainant crossed the street and phoned the police. The car number he gave them was incorrect. Some days later he again saw the car and he was able to give the police the correct number. This led to the appellants being called in, and the recovery of the moonbag. When it had been taken it had contained, R160 in notes, pay slips showing his and his employer's names (the complainant had a part-time job) and some bicycle tools. When the police returned it to him it contained only R110

and some cents and the tools. The pay slips were gone.

The complainant believed that he was being threatened with a real gun and feared for his life. It was put to him that the proceedings were conducted in a jovial mood. To this he responded, "When they stopped up next me (sic), they were quite happy, but then they got serious, very serious."

Lieutenant van Rooyen deposed that when the appellants attended at his office (after the complainant had identified the car) they did not dispute the incident but claimed that it had all been a joke. The first appellant took him to the car and produced the moonbag from under the passenger's seat. It contained only R110 and some cents. There were no pay slips. One of the appellants took him to a house where a friend

produced a toy pistol, which was an exact replica of a 9mm Browning pistol.

The defence led no evidence on sentence and made no request for a report in terms of s 276 A(l)(a) of the Act. The magistrate took into account in favour of the appellants their youth, the fact that they were first offenders, and certain personal circumstances. The first appellant worked at an hotel, earning R1700 per month. He had passed standard nine, was unmarried and had no dependents. The second appellant had matriculated, had a part-time job which brought in an average of R150 per week, and had R1300 available to pay a fine.

The magistrate was not impressed by a contention that the appellants had co-operated with the police. They had not given

themselves up of their own choice, and they had advanced an elaborate false story to the police, to the effect that when they had realized that their "joke" had turned sour because their victim was a stranger and not an acquaintance as at first believed, they had gone back to return the moonbag but had been frustrated by their victim's disappearance: and had thereafter been further frustrated because of his failure to leave any trace of his identity in the moonbag. Accordingly the magistrate found, "very little mitigation in your co-operation as to pointing out the moonbag and the gun."

The magistrate correctly emphasized the seriousness of the crime of robbery, which involves both violence and dishonesty. He alluded to the difficulty of catching robbers and opined that for this reason the

element of deterrence is of particular importance. The fact that most of the money was recovered had resulted from the efforts of the complainant, not the contrition of the appellants.

However, the magistrate correctly said that he should not look at robbery in abstracto but also at the facts of the particular robbery. He accepted (although there was no actual evidence of it) that the object used was a toy gun. On the other hand, because of its realism and the manner in which it had been used, this fact did not detract from the terror induced in the complainant. I would add that if the weapon used was a facsimile, it would mean that there would have been no temptation to shoot if there should have been a hitch in the robbery, a temptation so often succumbed to where real firearms are used. This does not mean,

of course, that the use of facsimiles is not a serious matter, because, if convincingly used, their minatory effect is the same as that of the real thing, and may lead to the same defensive reaction.

In the result the magistrate, whilst mindful of the undesirability of sending a first offender to gaol when that can be avoided, considered that a fine was not appropriate, nor a wholly suspended sentence. At most he was prepared to suspend a part of the sentence. As already stated 18 months of the 42 months sentence was conditionally suspended. In addition the magistrate tempered the remaining 24 months imprisonment by ordering, in terms of s 276(1)(i) of the Act, that the appellants might be placed under correctional supervision at the discretion of the Commissioner of Correctional Services.

In my opinion the magistrate has not been shown to have misdirected himself in any way. In particular I do not consider that he overemphasized deterrence without giving sufficient weight to the circumstances of the particular crime or of the appellants. The sentence is not a high one one for robbery, which reflects that the magistrate took into account the unusual features of the case, and correctly so.

It was further pressed on us that no actual violence (in the sense of manhandling) was used. But that is the usual nature of robbery under arms. The menace of the weapon far exceeds the persuasive force of an actual assault. And in so far as it has been suggested that the loss was relatively small (whether or not there was a partial recovery), it was sustained by a youngster to whom it was by no means small.

For these reasons the appeal is dismissed.

W P SCHUTZ
JUDGE OF APPEAL

VAN HEERDEN JA)
MARAIS JA)

CONCUR