REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 588 / 06

In the matter between

J BLIGNAUT **APPELLANT**

and

THE STATE **RESPONDENT**

Coram : **MTHIYANE, HEHER and PONNAN JJA**

Date of hearing : **16 AUGUST 2007**

Date of delivery : **30 AUGUST 2007**

SUMMARY

Sentencing – minimum sentence – substantial and compelling circumstances – misdirection by trial court

Neutral citation: This judgment may be referred to as :
***Blignaut* v *The State* [2007] SCA 94 (RSA)**

JUDGMENT

PONNAN JA

[1] The appellant, a first offender, was convicted, pursuant to his guilty plea, by the Port Elizabeth Regional Court on charges of robbery with aggravating circumstances and kidnapping. In terms of s 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 (the Act), a regional court is obliged to sentence a first offender on a conviction of the former offence to a term of imprisonment of not less than 15 years. A lesser sentence may only be imposed if substantial and compelling circumstances within the meaning of that expression are found to exist justifying the imposition of such lesser sentence (s 51(3)(a)). The regional magistrate, being of the view that no such circumstances existed, thus imposed a sentence of 15 years' imprisonment on the robbery count. On the kidnapping, the appellant was sentenced to a term of imprisonment for a period of 5

years which was ordered to run concurrently with the 15 years imposed on the robbery. An appeal to the Grahamstown High Court (Erasmus J, Maqubela AJ) against the finding that no such circumstances existed proved unsuccessful and the further appeal to this Court is with its leave.

[2] The facts and circumstances relating to the conviction can be gleaned from the appellant's written statement adduced in amplification of his plea, which reads:

'My family had been going through a financial crisis for quite some time. I had a lot of debt at the time. In April 2001 I had lost my job after I had an argument with my supervisor. About a month later my wife got retrenched from her job. Both of us were unemployed at that stage. I used the money which I had received from my provident fund to pay most of our debts. However I still owed Credit Indemnity (a cash loans company) R3 000.

By January 2002 all of our monies were finished. My wife started complaining about money that we didn't have. My parents in law by whom we were living, complained

to my wife that we were not paying rent. She in turn complained to me. I was getting tired of all the moaning and groaning about money and food that was not there. There was no income in the household. I then started drinking alcohol regularly. Previously I drank occasionally on weekends. I started drinking a lot with my friends. This continued for a long time. About a week before the incident, I decided to break away from the pressure and decided to go and stay with my wife's cousin in extension 29 in Bethelsdorp. I left the Thursday and went back home on the Saturday. When I got home, it was the same story about money and food shortages in the house. It continued for the Sunday and Monday. I got to the stage where I could not cope anymore. On that Monday I decided to go for a walk. I walked from our house in Extension 21 toward Arcadia. At the Shopping Complex in Arcadia, I picked up a shoe box, which I intended to use to hold all of my radio cassettes. I then walked further through West End toward Cleary Park. I walked through the park near Machu Primary School where I picked up a motor with the wires attached to it, that belongs to a washing machine. Our washing machine had recently broken. I then put this part into the box and continued to walk towards Cleary Park. When I got to Cleary Park Shopping Centre I sat outside the complex

for a long while. I then picked up paper and plastic packets and stuffed it in the box. I picked up 2 plastic packets and put the box in these packets. I then went into the complex and sat inside First National Bank. I then fetched a deposit slip and wrote on it. I wrote the following words, “I HAVE A BOM GIVE ME SOME MOYNE OR I WILL BLOW YOU UP”. I then went to the counter and gave the slip to the teller. The lady teller took the note and then went to the teller next to her.

She showed her the note and I remained waiting at the counter. I indicated that I have a bomb in the box and that I have a detonator in my hand. Shortly after that I saw all the people going out of the bank. I asked what is happening and the teller told me that they want to get all the customers out of the bank. I told them that I am looking for money. I was told to wait. The lady then went to the back of the bank and I remained standing at the counter.

I then heard a knock at the door. The lady told me that it was the bank manager. Thereafter the lady gave me a sum of R5 000.00. I told the man and the lady that both of them must come with me to get out of the bank. I told them that I was going to use the lady as my hostage. We then proceeded out of the building. The man who pretended to be the bank manager then convinced me to let the lady go and I

agreed to that. When we got outside, the so-called bank manager then took a bakkie from a gentleman in the parking lot and the two of us drove off in the direction of Bethelsdorp. While we were driving in Bethelsdorp the man convinced me to throw away the detonator. I then threw it away out of the window. He then stopped the bakkie and I got out of the bakkie. He also got out and then arrested me. He took the box, which contained the so-called bomb and took the money from me. I later learn that the man was a police officer.'

[3] The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the Act is to be found in the detailed judgment of Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA). The main principles appearing in that judgment which are of particular application to the present appeal are: First, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. Secondly, for circumstances to qualify as substantial and compelling,

they do not have to be exceptional in the sense of seldom encountered or rare. Thirdly, although the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework nonetheless left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence. (See also *S v Fatyi* 2001 (1) SACR 485 (SCA) para 5; *S v Abrahams* 2002 (1) SACR 116 (SCA) para 13.)

[4] The circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated in *Malgas* (para 12), where Marais JA held:

'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. . . . 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 properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’

[5] The question therefore is whether there was a material misdirection by the trial court in the manner in which it weighed the factors relevant to the determination of sentence or, if not, whether the sentence imposed was in any event so shockingly inappropriate as to give rise to the inference that there had been a failure to properly exercise the sentencing discretion (*Abrahams* para 15).

[6] In my view the test for intervention on the first leg is satisfied and it is thus unnecessary to consider the second. The record reflects that the regional magistrate erred in several respects in his approach to sentence. He thus materially misdirected himself in imposing a sentence of fifteen years. First, he stated without elaboration or greater specificity that there were aggravating circumstances present. Plainly, there were none. Secondly, he wrongly characterised the appellant's conduct as an attempt to perpetrate, as he put it, a popular crime. Thirdly, the magistrate emphasised the community interest and general deterrence in arriving at what he considered to be a just sentence, whilst the other traditional aims of sentencing such as personal deterrence, rehabilitation and reformation did not merit a mention in his judgment. Fourthly, the many mitigating factors that were present were not afforded appropriate recognition by the magistrate, nor were they balanced against what he perceived to be the aggravating features in the commission of the

offences. It follows that the sentence imposed by the magistrate falls to be set aside and this Court is accordingly free to impose the sentence it considers appropriate subject of course to the provisions of the Act.

[7] Against that backdrop I turn to the mitigating factors present in this case. It is in the appellant's favour that his first criminal transgression had occurred at the relatively mature age of 34 and that he had maintained an unblemished record until then. He had, until the loss of his job, been in gainful employment and had supported his wife and two children. The loss of his employment had resulted in deteriorating financial security for his family and acute embarrassment for himself – resulting; it would seem, in him being driven to despair. To cope, he drew greater solace from alcohol. Despite all of this though, according to the probation officer, he continued to have a warm and meaningful relationship with his wife and children. The offence itself was ill-

conceived and executed in a rather inept and amateurish manner. It occurred without any real preplanning or forethought. Although the personnel at the bank responded to his bomb threat with genuine apprehension and anxiety, the appellant was in truth not possessed of a bomb or armed in any other manner; he thus posed no real danger to anyone. Although not proffered as an excuse for his conduct, his desperate situation no doubt drove him to commit the offences for which, by pleading guilty he has demonstrated remorse. He must undoubtedly have learnt from his first brush with the law and he is thus unlikely to resort to crime again. Personal deterrence accordingly ought not to weigh too heavily in the sentencing process. That all of the money was recovered and that the appellant was arrested with relative ease is perhaps indicative of his lack of sophistication and guile. In short, his conduct on the day in question was childlike and naïve and, if the truth be told, woeful and pathetic.

[8] In my view the cumulative effect of the aforegoing factors, all of which the sentencing court failed to take into account, constitute substantial and compelling circumstances within the meaning of that expression. I am thus persuaded that a departure from the prescribed minimum is justified on the basis that such a sentence would be disproportionate to the crime, the criminal and the legitimate interests of society (*S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 20). It follows that the fifteen years' imprisonment imposed on the appellant by the regional magistrate is not a just sentence. Plainly, for an offence of the kind encountered here, a custodial sentence is clearly warranted. Reconsidering the matter, I consider a sentence of 5 years' imprisonment to be appropriate in respect of count 1 – the robbery with aggravating circumstances.

[9] In the result:

(a) The appeal against sentence succeeds.

(b) The sentence of 15 years' imprisonment imposed by the regional court pursuant to the appellant's conviction on count 1 - the robbery with aggravating circumstances is set aside and replaced with the following: 'The accused is sentenced to imprisonment for a term of 5 years'.

V M PONNAN
JUDGE OF APPEAL
CONCUR: