"SPECIAL INTEREST"

CASE NO.: CA 149/2005

SUMMARY

BAFANA KASTOOR versus **THE STATE**

DAMASEB, JP

27/09/2006

<u>SENTENCING</u>

- On appeal against a sentence of 12 years for armed robbery imposed by the Regional Court

  - Judicial officer must **eschew anger** in considering an appropriate sentence, and must give proper weight to all factors in aggravation and mitigation of sentence.

  - Magistrate's conduct during trial creating inference that he evinced anger towards, and frustration and impatience with, appellant and *that* causing him not to approach sentencing in balanced way. Sentence of 12 years, although appellant having 10 previous convictions, set aside and substituted with one of 8 years of which 3 years suspended on conditions.

"***SPECIAL INTEREST***"

CASE NO. CA 149/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BAFANA KASTOOR

and

THE STATE

CORAM: DAMASEB, J.P.

Heard on: 2006.09.22
Delivered on: 2006.09.27

JUDGMENT

[1] **DAMASEB, J.P.:** The first accused in the court *a quo* (hereafter the appellant) was found guilty by the Regional Court sitting at Walvis Bay of robbery of a bicycle with aggravating circumstances, and was sentenced to 12 years imprisonment. Initially he sought to challenge both the conviction and the sentence. His objection to the conviction was based on the fact that, as he said, he should not have been found guilty of armed robbery but only of theft.

[2] In fact, in the court *a quo* he pleaded guilty when the charge was put to him, admitting he stole the bicycle but denying that it was with knives and a pistol as alleged in the charge sheet. The learned Magistrate therefore correctly entered a plea of not guilty and after a full trial, the appellant was found guilty as charged.

[3] Counsel appearing *amicus curiae,* Mr Louis Du Pisani, to whom the Court is indebted for his assistance, at the beginning of argument indicated that, having perused the record, he intends to pursue only the appeal in respect of sentence. I did confirm with the appellant that he was satisfied with that approach and that he did not wish to pursue the appeal in respect of conviction. The concession is properly made for the evidence proving armed robbery is overwhelming. The conviction is therefore proper.

[4] The objection to the sentence is based on the allegation that it is inappropriate as being shockingly excessive. Mr Du Pisani's attack against the sentence was confined to it being shockingly excessive in the light of the fact that the previous convictions were all of a minor character, and that the Magistrate over-emphasised the seriousness of the offence at the expense of the personal circumstances of the appellant.

[5] There are about 4 instances on the record of this case which raise a doubt whether the Magistrate approached the sentence in a balanced way as is expected of a judicial officer, eschewing anger. The first is at pages 23 and 24 of the record where the following transpired: (The complainant was being asked to explain to Court

how he came to retrieve his stolen bicycle at the police station where it was kept.)

> "Court: Where was this bicycle? --- It was inside the cell at the police station.
> Ms Fouche: Did you go and look at the bicycle? --- I went to look at the bicycle and
> there were marks on my bicycle. Did you recognise, identify your bicycle? --- Yes,
> the one pedal of the bicycle is gone and we also used (incomplete) (intervention)
> Court: Well that is not of importance.
> Ms Fouche: That is no (intervention)
> Court: He recognised his bicycle, suffering years with it." [1](My emphasis)

[6] The second is at pages 28 & 29 of the record, where the following is recorded at the stage in the proceedings when the complainant was being asked to explain how the robbery actually happened and the role played by the appellant in it - which is a factor most relevant to sentencing:

> "Accused No. 1: Who took the bicycle from you when you were threatened with a knife? --- The Rasta man. The time that I was standing in front of you with the knife, what did I do or whatdid I say? --- The time I was pushed with the pistol, I thought that the people are going to kill me, so I left the bicycle.
> Court: Yes but the question was, what did the accused No. 1 say to you or what did he do to you. --- He didn't say anything, the only one who spoke was the one who was behind who said you are taking a long time.

1 There is no such evidence on the record: The word 'suffering' was never used by the complainant. He did not even testify how long he had owned the bicycle.

> Accused No. 1: So, how is it that I was standing in front of you with a knife and I did not do anything and you said that somebody spoke from behind and the Rasta man took the bicycle? Court: Yes Sir that is what the witness is telling the Court that is what happened and unluckily it happens on a daily basis nowadays, so this is not a strange thing that happens."[2] (My emphasis)

[7] The next appears at page 46, just after the prosecutor finished cross-examining the appellant and without the Court even affording the opportunity to the appellant to clarify any confusion which may have arisen in his evidence overall:

> "Ms Fouche: And first you denied that you knew of the bicycle and then you said it was your property. Which one was the truth or not one of them was the truth obviously, but it's two different stories and today it's a third story? --- (No reply). So, did you not tell the truth? --- I told the truth Your Worship. That's all Your Worship. NO FURTHER QUESTIONS BY MS FOUCHE
>
> Court: The only answer can be Sir, why you said that to the Court, is because you knew about the robbery with the pistol where a bicycle was robbed from a man. That is the only answer that you could give or that the Court can accept. You may go back to the dock. Any address by the prosecutor?" (My emphasis)

Very little value should be attached to the fact that the Magistrate then proceeded to invite the parties to make submissions, on account of the fact that he had in any event already concluded that the appellant was guilty of the offence charged. In my view, it shows the Magistrate's impatience and frustration with the appellant which

2 First, the interference with the cross-examination is undesirable and, secondly, to conclude that the appellant did what was alleged solely because things like that happen everyday, shows bias on the part of the magistrate.

affected the sentence he imposed at the end of the day. That does not accord with the tenets of a fair trial.

[8] The last appears at page 48, after the accused was found guilty, as follows:

> "Ms Fouche: Your Worship the accused (intervention) Court: I think or do you have his previous convictions? Ms Fouche: Yes Your Worship.
> Court: For I think that may make some interesting reading."
> (My emphasis)

This shows again the impatience of the Magistrate: He just wanted to get to the sentencing process as quickly as possible. It also assumes that the previous convictions of the appellant, which at that stage were not known to the Court, were not favourable to the appellant and it is difficult, for that reason, to resist the inference that the Magistrate had already at this stage taken the view, without hearing the evidence in aggravation or mitigation of sentence, that the appellant deserves a severe penalty. How else can one interpret the reference to 'interesting reading'?

[9] What bothers me about these incidents is what appears to me to be the impatience, frustration and anger that the Magistrate appears to have harboured towards the appellant. Most of the comments were just not justified on the facts of this case. That much was conceded by counsel for the state. I asked counsel whether, if I am satisfied that these incidents taken together, evince anger towards the appellant on the part of the judicial officer, such

would be a misdirection justifying interference by this Court. That question was posed to counsel for the state before I had referred him to those instances; when he indicated that he did not think so. After I had referred him to the instances, counsel for the state, at least as far as I understood him, seemed to concede that such may amount to a misdirection. Mr Du Pisani also took the same view. There is abundant authority that a judicial officer must approach sentencing in a balanced way, free of anger towards an accused person. I only need to refer to the case of *State v Zinn,* 1969 SA (2) 537 at 541, where the following is said:

> "It is true, as Cicero says in his work on *Duties,* Bk. 1, Ch. 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."

[10] Having regard to the incidents to which I referred, regrettably, the conclusion to which I have come is that the learned Magistrate did not approach the sentencing of the appellant in a balanced way and that if he had approached the matter in a balanced way, the sentence may very well have been different. But that is not the end of the matter.

[11] In sentencing the appellant the learned Magistrate said the following:

"Sir it is indicated on the charge sheet that you are now 25 years old, that was last year some or other time. I have no reason to doubt that information as correct. Is that correct? You are now 25 years old?

Accused No. 1: I will turn 26 this year Your Worship. I was born in 1976.

Court: Maybe that's the truth I don't want to take up any quarrel with you on that. But that means that in 1992 you were 16 years of age when you started with your criminal career of theft and disrespect for other people's property and also having regard to your conviction assault by threatening and crimen injuria, not only disrespect for other people's property but also disrespect for other people themselves. In 1992 that career of yours started. In 1995, when you were convicted of crimen injuria, you never, notwithstanding the fact that you were convicted three times already for theft or housebreaking, you never went to jail actually, for you, every time received a suspended sentence. And it was only in 1996 when you were again convicted of shoplifting that an effective term of imprisonment was imposed of 400 dollars or 6 months imprisonment. Thereafter in 1997, 24 months imprisonment, then again for shoplifting, 400 dollars or 4 months imprisonment and again for theft of a crate of cool-drink, 300 dollars or 3 months imprisonment. So, the suspended sentences did no warn you, effective imprisonment did not warn you, that has no effect on your behaviour and thus it leaves the Court with only one option and that is to take you out of the community for as long as the Court possibly can do so under the circumstances, and having regard to the fact that the bicycle was robbed under threat of a firearm and knives and the Court do so in the interest of society. If one opens the newspapers nowadays it is just armed robberies, people are killed for the sake of a few dollars. People are killed for a handbag and people are threatened with their lives if they do not depart of something that is of no real value. And under that circumstances the Court has no other option but to send you to jail for a long period of time. I am afraid if your parents are elderly people you will not be in the position to pay your respects for them because of your own behaviour. You are sentenced, under the circumstances, Sir to TWELVE YEARS (12) imprisonment." (Emphasis is mine)

[12] Mr Du Pisani argued that it was obvious when the Magistrate came to sentence the appellant that he had already served 11 months in prison awaiting trial and that the Magistrate did not take that into account when he sentenced the appellant. Although I am reluctant to accept that because the Magistrate did not mention it he did not have regard to this factor, the absence of its mention in the reasons for the Magistrate's decision seems to strengthen the view expressed by Mr Du Pisani. Mr Du Pisani also argued that the Magistrate paid no regard at all to the fact that there was no actual violence involved in this robbery and that no regard at all was paid to the personal circumstances of the appellant. I must agree.

[13] It seems to me the Magistrate wanted to make an example of the appellant for crimes committed by other people. The over-emphasis of the appellant's previous convictions and the prevalence of this kind of crime, and the underestimation of the personal circumstances of the appellant, in my view, constitute a further misdirection which justifies this Court interfering with the sentence. (See S *v Zinn* supra at 540 F.)

[14] There being reasonable prospects of success on appeal against sentence, and being satisfied that the appellant gave a reasonable explanation for the failure to lodge the appeal on time, the application for condonation for the late filing of the appeal is allowed.

[15] I must now consider what sentence to impose. There is little doubt that the appellant is a man who has not learnt a lesson as is shown by his previous convictions. The complainant's evidence is clear: He was confronted by five men, one of whom was the appellant, threatened with knives and a pistol before his bicycle was taken away. Aggravating circumstances were therefore established. A custodial sentence is therefore unavoidable in the circumstances of this matter. That much was conceded by Mr Du Pisani. The appellant was a young man (26 years at the time) for whom a partly suspended sentence could have been considered and shall be considered: No actual violence was used; the bicycle was recovered, and he admitted very early in the proceedings that (at the very least) he stole the bicycle. He had also already served 11 months in prison awaiting trial. That, in my view, is a relevant factor which should be taken into account in this case.

[16] In the result I make the following order:

a) The appeal against sentence succeeds and the sentence of 12 years imprisonment imposed by the Magistrate is set aside.

b) In substitution thereof, the appellant is sentenced to eight (8) years imprisonment of which three (3) years are suspended for a period of five (5) years on condition that he is not found guilty of the offence of armed robbery, theft, or housebreaking with intent to steal, committed during the period of suspension. The effective term of five (5) years imprisonment takes effect from 8th April 2003, when the appellant was initially sentenced in the court *a quo.*

DAMASEB, J.P.

ON BEHALF OF THE APPELLANT **Mr L Du Pisani**

Instructed by: **Metcalfe Legal Practitioners**

ON BEHALF OF THE RESPONDENT **Mr D Lisulo**

Instructed by: **Office of the Prosecutor-General**