

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) FILED: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED:
17/5/11
DATE SIGNATURE

CASE NUMBER: A35/2011

Appeal Date: 17 May 2011

In the matter between:

MODUPE LEETO
SIBUSISO BUTHELEZI
MOEKETSI FONYA
THABO PHOHU

First Appellant
Second Appellant
Third Appellant
Fourth Appellant

and

THE STATE

Respondent

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

(1.1) This is an appeal against sentence only.

- (1.2) Leave to appeal was refused by the Court *a quo*.
- (1.3) On petition to the High Court leave to appeal against sentence only was granted.
- (1.4) The Appellants were legally represented during the proceedings in the Court *a quo*.
- (1.5) The Four Appellants appeared in the Regional Court, Springs on a charge of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977, read with the provision of section 51 of the Criminal Law Amendment Act, 105 of 1977 as amended by Act 38 of 2007.
- (1.6) The Learned Magistrate did not find substantial and compelling circumstances which may have compelled the trial Court to deviate from imposing the prescribed minimum sentence and sentenced each of the Appellants to fifteen years' imprisonment.

[2] ARGUMENT ON BEHALF OF THE APPELLANTS:

(2.1) The gist in this regard follows hereinafter.

(2.2) Paragraph 7 of the Appellants' heads *inter alia* read as follows:

"

- *Finding that there were no substantial and compelling circumstances.*
- *Finding that the period spent in custody awaiting trial as well as being first offenders 'does not warrant a sentence more than more than (sic) the minimum prescribed', despite the fact that the judgments of **S v Vilikazi and Others** 2000 (1) SACR 140 (W), **S v May** 2005 (2) SACR 331 (SCA) and **S v Brophy and Another** 2007 (2) SACR 56 (W) were all reported when this matter was tried.*
- *Dismissing the submission that the complainant was not injured by entertaining a speculative question with a multitude of possible answers that are not supported by the facts on record (despite referring to **S v Vermeulen**).*

- *Dismissing the cumulative weight of the submissions (i) on the value involved, (ii) the fact that some items were recovered, (iii) the relative youthfulness of the appellants and that (iv) they are first offenders.*
- *Seemingly referring to rehabilitation only as part of the purpose of punishment as the reasons for sentence and the sentence does not refer to, indicate or reflect that the rehabilitation of the appellants were seriously considered."*

(2.3) The Appellants also point to the following:

- 2.3.1 The period spent in custody (8 months) awaiting trial was not considered by the trial Court.
- 2.3.2 The personal circumstances of the Appellants were not properly considered, especially the needs and rights of the minor children of the Second and Fourth Appellants.

[3] ARGUMENT ON BEHALF OF THE RESPONDENT:

In essence the argument boils down to the following:

- (3.1) The Appellants have been convicted of a very serious offence which is on the increase on a daily basis;
- (3.2) There is little respect of one's being; and
- (3.3) The complainant *in casu* was running his small business for living and providing services for the legal community;
- (3.4) The Appellants motivated by greed;
- (3.5) The "stock" was valued at between R8 000,00 and R10 000,00;
- (3.6) Only a fraction of the stolen items were recovered by the complainant;
- (3.7) No substantial and compelling circumstances exist.

[4] CONCLUSION:

- (4.1) It is trite law that a Court of appeal will not likely interfere with the sentence of a trial Court unless there was a miscarriage of justice or the sentence is shockingly inappropriate.
- (4.2) The Appellants were found guilty of an offence which falls squarely within the provisions of section 51(2) of Act 105 of 1997 which prescribes a minimum sentence of 15 years imprisonment for first offenders, save where the Court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence.
- (4.3) The circumstances (age of the accused, families of accused no 2 and no 4 etc) are circumstances which can and should be considered as being "substantial and compelling". The same goes for time spend in custody awaiting trial.
- (4.4) Having carefully studied the heads of argument, the record of the proceedings and the judgment of the Magistrate and his reasons for judgment I am of the opinion that considering all factors that there is room for interference with the sentence.

(4.5) In the result I suggest that the following order should be made:

- "1. The appeal (sentence only) is upheld;
2. The sentence of 15 years imprisonment imposed by the magistrate (per accused) is substituted with 10 years imprisonment. * antedated to the 18 Aug 2010 1)



GOODEY AJ



MNGQOBISA-THUSI J

Date of hearing: 17 May 2011

Date of Judgment: 17 May 2011

On behalf of the Applicant:

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On behalf of the Respondent

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