



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A230/2017

In the matter between:

VUYANI MLANGENI

Appellant

And

THE STATE

Respondent

CORAM:

MHLAMBI, J et MURRAY, AJ

JUDGMENT BY:

MHLAMBI, J

HEARD ON:

14 OCTOBER 2019

DELIVERED ON:

24 October 2019

MHLAMBI, J

- [1] The appellant was convicted in the regional court on charges of robbery with aggravating circumstances and kidnapping. He was sentenced to 17 and 5 years imprisonment respectively and the sentences were ordered to run concurrently.
- [2] His application for leave to appeal against both conviction and sentence were dismissed on 11 December 2014. His petition to this court was successful and granted against the sentence of count 1 only.
- [3] The appellant's grounds of appeal against sentence are stated as follows:
1. An effective term of 17 years' imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation, is excessive in the circumstances and induces a sense of shock.
 2. The court erred by not finding that there were substantial and compelling circumstances to enable the court to deviate from the imposition of the prescribed minimum sentence, having regard to the totality of all the circumstances of the case, more particularly in view of the following factors:
 1. The appellant is not married and has a one year old child who resided with his mother. Both are supported by the applicant;
 2. The rehabilitation element;

3. He has previous convictions of robbery (2006), theft (2008) and assault (2009);
4. He is 25 years old, a security officer at CPIESA Engineering and earned, as the owner of a fruit and vegetable stand, R 700.00 a week;
5. His mother's health is poor and needed his support.

[4] In passing sentence, the court *a quo* stated that: *"In this instance I am of the view, in particular in count- firstly in count 1 that as a result of the fact that there was a minimum measure of violence, except for the pointing of the firearm, the fact that the- no one was injured or harmed in any particular manner, this would justify or render the sentence of – in respect of accused number 1, 4 and 5 of 15 years inappropriate and in respect of accused 2 and 3 also render the such sentence of 20 years inappropriate."* The appellant's co-accused numbers 1, 4 and 5 were each sentenced to 12 years' imprisonment while the appellant was sentenced to 17 years imprisonment. In the court *a quo*'s view, the appellant's previous convictions distinguished him from the rest of the accused as he was a second offender for the same offence.

[5] The sentence imposed by the court *a quo* is not supported by the state. The state submitted orally and in its heads of argument that in imposing the sentence it did, the trial court evidently had regard to the provisions of sections 51(2) of the Criminal Law Amendment Act 105 of 1997. The said section provides as follows:

"Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall-

Sentence a person who has been convicted of an offence referred to in-

(a) Part 2 of schedule 2, in the case of:

(i) A first offender, to imprisonment for a period not less than 15 years;

- (ii) A second offender of any such offence to imprisonment for a period not less than 20 years; and*
- (iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years"*

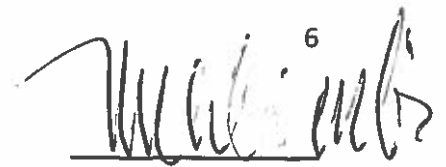
- [6] The state submitted that the trial court's view that the appellant was a second offender for the purposes of Part II of Schedule 2 as contemplated in section 51(2) of the Act was erroneous as the previous conviction of the appellant of robbery was not a previous conviction as contemplated in section 51(2) of the Act. This constituted a material misdirection by the trial court which justified interference by this court. The trial court should have imposed a sentence of 15 years' imprisonment. In the circumstances of this case, an appropriate sentence would have been the imposition of 12 years' imprisonment.
- [7] The appellant's legal representative confirmed this view and submitted that it was not sufficient that the appellant had a previous conviction for robbery, but that the conviction must be robbery with aggravating circumstances. Furthermore, the court convicted the appellant as an accomplice and not as a perpetrator. He was picked up after the robbery was committed and was involved with the selling of the stolen cigarettes. None of the complainants were injured during the commission of the offence and the appellant was not on the scene of the crime as at the time the robbery was committed. Consequently, the sentence of 17 years' imprisonment is disturbingly inappropriate.

- [8] It was submitted on behalf of the appellant that the court should consider imposing a sentence of 12 years' imprisonment, of which 2 years should be suspended for a period of 5 years as a deterrence to the appellant not to commit offences of a similar nature. That would also distinguish him as an accomplice from the perpetrators who were sentenced to 12 years' imprisonment each.
- [9] On a consideration of the trial court's reasoning on sentence, it is apparent that it would have imposed a sentence of 12 years' imprisonment to bring it in par with the sentences of the other accused, had it not been influenced by the notion that the appellant was a second offender with a previous conviction. I agree with the submissions made on behalf of the appellant and that an appropriate sentence would be the imposition of 12 years' imprisonment, two of which should be suspended for a period of five years.
- [10] In the result I make the following order:

Order

1. The sentence of 17 years' imprisonment in respect of count 1 is set aside and is substituted by the following sentence:
 - 1.1 12 years' imprisonment, of which 2 years is suspended for a period of 5 years;
 - 1.2 The sentence is antedated to 10 November 2014.

I concur


MHLAMBI, J


MURRAY, AJ

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