



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No. : A92/2018

In the matter between:-

SEBUSISO MALULEKA

Appellant

and

THE STATE

Respondent

CORAM: JORDAAN, J *et* MOLITSOANE, J

HEARD: 22 OCTOBER 2018

JUDGMENT BY MOLITSOANE, J

DELIVERED: 26 OCTOBER 2018

- [1] The appellant was convicted and sentenced in the Regional Court sitting in Sasolburg on a charge of robbery with aggravating circumstances, read with the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997(the Act). He was sentenced to 15 (fifteen) years imprisonment. This appeal on sentence is with leave of the Regional Court.
- [2] Briefly the facts surrounding this case are as follows:
On the 26th June 2009 the appellant and his former co accused, who is not before us, went to the tuck shop of the complainant and robbed her of money in the amount of R1000 and cigarettes valued at R800. The former co-accused of the appellant wielded a firearm while the appellant collected the money and the cigarettes. Having robbed the complainant they left the scene. They were captured on a video footage and the appellant was arrested first and he led the police to his former co- accused.
- [3] In a nutshell the grounds of appeal of the appellant may be summarised as follows:
1. That the appellant cooperated with the police and he did not play a major role in the robbery;
 2. That he was a first offender and had spent a year and 4 months awaiting trial.
 3. That he was remorseful of his deed.
- [4] Me. Kruger for the appellant submitted on behalf of the appellant that there were substantial and compelling circumstances which taken together cumulatively warranted a

deviation from imposing a prescribed minimum sentence of 15 years imprisonment. The following personal circumstances of the appellant were placed on record: That the accused was a first offender. He was married with one minor child. He had been in custody for a year and 4 months awaiting trial. Me. Kruger submitted that the fact that the value of the stolen amount was minimal was a factor to be taken into account. She submitted that sentencing regime in the Act was reserved for the most serious offences.

- [5] On the other hand, Adv. Van der Merwe for the respondent submitted that the appellant was convicted of a very serious offence. He submitted that the accused was convicted and sentenced in 2009 and yet he still contested his conviction. This, the argument goes, illustrates that the accused is not remorseful of his conduct. He submitted further that robberies of tuck shops were very rife.

- [6] Punishment lies pre-eminently in the discretion of the trial court. The court exercising appellate jurisdiction will not lightly interfere with the discretion of the trial court unless such a discretion is vitiated by irregularity or is disturbingly inappropriate. See *S v Rabie* 1975(2) SA 855(A) at 857 D-F; *S v Fhetani* 2007 (2) SACR 590 (SCA) at para [5].

- [7] The appellant was charged with robbery with aggravating circumstances read with the provisions of s51(2)(a) of Act 105 of 1997. The appellant was a first offender as alluded above. The court is obliged to impose an imprisonment term of 15

years imprisonment unless the court finds that there are substantial and compelling circumstances warranting the imposition of a lesser sentence. The argument that the Act is reserved for most serious offences loses sight of the fact that certain prescribed minimum sentences are ordained by the legislature upon conviction in offences where section 51 of the Act finds application. The offence for which the accused has been charged is such an offence. The court is obliged to impose the prescribed minimum sentence unless if it finds that substantial and compelling circumstances exist which warrants it to depart from imposing a prescribed minimum sentence. The court cannot deviate from imposing a prescribed minimum sentence for flimsy reasons.

- [8] The argument that the appellant did not play a leading role stands to be rejected. It is difficult to reject the finding of the trial court that this offence was planned and premeditated. The robbers had different roles to play which roles were predetermined. The role of the appellant was to collect money and the items to be stolen which role he executed excellently. By way of analogy, it would be absurd to think that where robbers go and rob a store and other robbers go inside the store and commit the robbery while another is sitting in the getaway car and drives the robbers away, the latter should be seen as playing a minor role. The appellant was indispensable for the successful execution of this robbery and played an important role in its ultimate success.

- [9] It was submitted in the Heads of Arguments that the appellant was instrumental in the apprehension of his former co-accused and it was argued that this indicates remorse. In order to assess any remorseful conduct on the part of the appellant one is also obliged to have regard to his conduct after the arrest. It is true that the accused has no obligation whatsoever to assist the state to prove its case against him. The appellant brought this application about 8 years after his conviction. On the 23rd of March 2016 he brought an application for leave to appeal his conviction and sentence. The application was granted. He subsequently filed a Notice of Appeal in which he again contested his conviction. It appears, however, that in 2011 he wanted to bring an appeal in the North Gauteng Division of the High Court. I can only surmise that such an appeal was not pursued in view of lack of jurisdiction of the said court. In the Notice of appeal of 2011 the appellant did not contest his conviction. Before us he also did not contest the conviction. What, however, is clear that from 2016 the accused had always contested his conviction. It is clear that in this regard he has shown lack of remorse. The evidence against him was overwhelming. He was also captured on a video footage. He wanted the court to believe that he was coerced into committing this offence. This, notwithstanding, he failed to own up to his deeds. I am unable to find that the appellant showed any remorse for his conduct.
- [10] The appellant spent 1 year and 4 months awaiting trial. The record is unhelpful as to the reasons why the appellant spent

this time awaiting trial. The time an accused person spent in custody while awaiting finalisation of his trial is but one of the factors to consider in the imposition of sentence. It is my considered view that it cannot be considered in isolation. This robbery was premeditated. Although no one was injured a firearm was used in the commission of the offence.

- [11] Having regard to the triad of the personal circumstances of the accused, the crime, the interest of society I am of the view that taking into account the appellant's cumulative personal circumstances they do not constitute substantial and compelling circumstances warranting deviation from imposing the prescribed sentence. I would propose the following sentence:

ORDERS

1. The appeal against the sentence is dismissed.
2. An order made in terms of s103 (1) of the Firearms Control Act 60 of 2000 is confirmed.

P.E. MOLITSOANE, J

I agree and it is so ordered.

A.F JORDAAN, J

On behalf of appellant: Ms S Kruger
Instructed by:
Legal Aid, South Africa
Bloemfontein

On behalf of the respondent: Adv. Van der Merwe
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN