

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. A211/2014

In the matter between:

KOTSOANE JOSEPH MOLIKO

Appellant

And

THE STATE

Respondent

CORAM:

RAMPAI, J et NAIDOO, J

JUDGMENT BY:

NAIDOO,J

HEARD ON:

9 FEBRUARY 2015

DELIVERED ON:

19 MARCH 2015

NAIDOO J

- [1] The appellant and another person (accused 2) were charged in the Kroonstad Regional Court, with Robbery with Aggravating Circumstances, as defined in section 1 of the Criminal Procedure Act 51 of 1977, read with section 51 of Act 105 of 1997 (the Minimum Sentences Act). The appellant pleaded not guilty but was found guilty and sentenced on 9 December 2013 to twelve years' imprisonment. The appellant comes before us after having successfully

petitioned the Judge President for leave to appeal against his conviction and sentence. Mr JS Makhene appeared for the appellant in this court and Ms S Giorgi appeared for the State.

- [2] In the early hours of 4 March 2012, the complainant, Trynos Makanga, was in the company of the appellant and accused 2. He was robbed of his cellular telephone by accused 2 and of his wallet and R450.00 in cash by the appellant who threatened the complainant with a knife, inducing him to hand over his wallet containing the cash. The appellant proffered an alibi defence, stating that he was earlier in the evening at a tavern, but had later gone home to sleep. He alleged that the complainant had mistakenly identified him as one of the people that had robbed him. In his Heads of Argument, Mr Makhene argued strongly against the appellant's conviction on the basis that the appellant was not properly identified by the complainant. However, at the hearing of this matter, Mr Makhene advised that he reconsidered the totality of the evidence and reflected on the submissions he had made. After such reflection, he was unable to sustain his earlier submissions and conceded that the appellant was correctly identified by the complainant. Ms Giorgi agreed that the appellant was properly identified. The issue of the appellant's conviction, therefore, need not detain us further. I am, in any event, satisfied that the appellant was correctly convicted.

- [3] As regards sentence, Mr Makhene argued that twelve years'

imprisonment was excessive. He conceded that the Minimum Sentences Act prescribes a minimum sentence of 15 years' imprisonment, but that the sentence imposed ought to be reduced further. One of the reasons he cited is that although the complainant's wallet was worth R900.00 this was not mentioned by the trial court and therefore did not appear to have been taken into consideration. In effect, therefore, he was sentenced to twelve years' imprisonment for taking R450.00 in cash. I do not agree. In my view, the cash was contained in the wallet, and the fact that the trial court did not specifically mention the value of the wallet should not be interpreted to mean that such value was not taken into account. In any event, that is but one factor amongst the many that the court considered in imposing the sentence that it did.

- [4] It is well settled in our law that an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. [The principle in this regard is expressed as follows by Trollip JA in **S v Pillay** 1977 \(4\) SA 531 \(A\) at p 535 E-F:](#)

["Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree,](#)

or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

In the case of **S v Rabie** 1975 (4) SA 855 (A) Holmes JA set out on page 857 the following guiding principles with regard to interference with a sentence on appeal:

- “1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
 - (a) should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial Court”; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

This principle was confirmed by Holmes JA in **S v Giannoulis** 1975 (4) SA 867 (A).

- [5] In the present matter, the appellant’s personal circumstances are that he was a 25 year old unmarried man with no dependants. He passed grade 10 at school and was employed at the time of his arrest. He had a previous conviction for being in possession of goods reasonably suspected to be stolen and for which he was

sentenced to three years' imprisonment. At the date of sentencing in this matter, he had spent 1 year and 9 months in custody.

[6] The trial court balanced the appellant's personal circumstances against what it considered to be aggravating factors, namely that the crime committed by the appellant was serious, that he had used a knife to threaten the complainant and that he was not deterred from committing crimes by the three year sentence he had served in respect of the previous conviction. The court took into account in the appellant's favour the time spent in custody awaiting trial, that the complainant suffered no physical injuries, and that there was no evidence of pre-meditation or pre-planning on the appellant's part. It is clear that the trial court did consider that the personal circumstances of the appellant were substantial and compelling, justifying it in not imposing the prescribed minimum sentence of 15 years' imprisonment.

[7] I cannot fault the reasoning of the trial court with regard to sentence. It is also apparent that it gave proper consideration to all pertinent circumstances for the purpose of sentencing, and in the fine balancing act that it was required to perform, it imposed a sentence which took account of the interests of society, the seriousness of the crime and the interests of the appellant.

[8] I am, therefore, unable to find any misdirection on the part of the trial court to warrant the interference of this court in the sentence imposed in this matter. In my view the sentence is not inappropriate or so excessive as to induce a sense of shock.

[9] In the circumstances, the following order is made:

The appeal against the conviction and sentence is dismissed.

S. NAIDOO, J

I agree

M. H. RAMPAL, J

On behalf of the Appellant: Mr. J. S. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the Respondent: Ms S. Giorgi
Instructed by:
The State
BLOEMFONTEIN