

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

Case No: A136/2014

In the matter between:-

LEBOHANG MOSHATA

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J *et* TSATSI, AJ

JUDGMENT BY: TSATSI, AJ

HEARD ON: 13 OCTOBER 2014

DELIVERED ON: 30 OCTOBER 2014

[1] This is an appeal against the sentence of the regional magistrate in Parys. The appellant and co-accused were charged with two counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 ("the Act"). The appellant pleaded guilty on both counts. A plea explanation was handed to court by the appellant's legal representative.

[2] The appellant was convicted of robbery with aggravating circumstances on 11 October 2010. He was declared to possess a firearm in terms of section 103 of Act 60 of 2000.

2.1 The appellant's leave to appeal against the sentence only and condonation for late filing of leave to appeal were granted on 31 March 2014 by the regional court.

[3] On 8 May 2010 at or near Vredefort in the Regional Division of Free State, the appellant and one Seun Selema Ramabodu, who was accused number two wrongfully and intentionally, assaulted Boropo Thabe and Moses Mpafa ("the complainants"). The appellant used a knife and inflicted serious injuries on both complainants. Appellant and accused number two stabbed Boropo Thabe, helped each other to search the complainant. They subsequently robbed Boropo Thabe of his cellphone worth R1 900,00 and R15 cash. On the same day, appellant and accused number 2, stabbed Moses Mpata, pushed him to the ground searched him and robbed him of his cellphone, driver's licence and R30 cash. Both appellant and accused number two were later arrested by two police officers who found the stolen items in their possession.

[4] The issue to be decided in this appeal was whether or not the 15 years sentences on count one and 15 years' sentence on count 2, wholly suspended, handed down against the appellant were appropriate.

4.1 The question was whether the court *a quo* erred and thus misdirected itself in finding that no substantial and compelling circumstances existed to deviate from minimum sentence.

- [5] The appellant's counsel submitted that the sentence imposed on count 2 be set aside and replaced with the following sentence: 10 years imprisonment to run concurrently with the sentence imposed on count 1.

5.1 Otherwise he further submitted that a shorter sentence did not guarantee that the appellant would be rehabilitated.

- [6] Counsel for the respondent argued that, it was trite that the appeal court will interfere with sentence only if of the opinion that such sentence was unreasonable, unjust or vitiated by irregularities or the court *a quo* misdirected itself. Counsel for the appellant referred us to **S v Kibido** 1998 (2) SACR 213 SCA at 216 I – J where Olivier JA said the following:

“... a mere misdirection is not by itself sufficient to entitle a court of appeal 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.”

It was further submitted on behalf of the respondent that the court *a quo* considered are relevant factors and the provisions of the Criminal Law Amendment Act 105 of 1997. The trial court did not find that substantial and compelling circumstances existed to warrant a lesser sentence.

6.1 The respondent's counsel submitted that the imposed sentence be confirmed and appeal be dismissed. He told the court that the appellant did not behave like a boy of his age.

[7] Counsel for the appellant argued that the appellant was still young and attending school. The appellant showed remorse by pleaded guilty. He could still be rehabilitated. The applicant was a first offender. It was further submitted on behalf of the appellant that the court *a quo* erred in suspending the minimum sentence on count 2. The court *a quo* should have ordered that sentence in count 2 run concurrently with sentence imposed in count 1.

[8] The court with appellate jurisdiction will interfere with the exercise of sentencing discretion only if it is of the opinion that such sentence is unreasonable, improper, unjust or vitiated by irregularities (**S v De Jager** 1965 (2) SA 626 (AD) at 629A – B).

When imposing a sentence a court must have regard to the fact that the imposition of sentence is a matter of judicial discretion. The sentencing court should have regard to, the peculiar facts of each case, the crime and the personal circumstances of the offender (**S v Zinn** 1969 (2) SA 537 (A) at 540 G).

[9] Our courts regard crimes involving violence, like robbery, in a serious light. The crime committed by the appellant is very serious and prevalent in society. However in the assessment of an appropriate sentence, the court must have regard to the main

purpose of punishment which is deterrence, preventive, reformatory and retribution (see **R v Karg** 1961 (1) SA 231 (A) at 236A – B. There are strong mitigating factors weighing heavily in favour of the appellant. The appellant was only 19 years at the time of the commission of the offence, he was still at school study matric and not working, he spent 8 months in prison awaiting finalisation of his trial, he was the first offender, and he was remorseful. The complainant's injuries were serious but not substantial.

[10] In contrast to the mitigating factors are the appellant's aggravating factors. Such factors are the nature and seriousness of the offence and the interest of society. The complainants were attacked for no reason and stabbed with knives. The offences were well planned and pre-meditated.

[11] I have given consideration to the cases cited in both the appellant's and respondent's heads of argument. It is clear that considering all the factors the circumstances weigh in favour of the imposition of reducing the sentence. In my view the cumulative impact of all relevant factors constituted substantial and compelling circumstances to justify deviation from the prescribed minimum sentence of 15 years in both count 1 and 2, wholly suspended on certain conditions. There is reason for this court to interfere, which I will therefore do. The rehabilitative objective of sentencing should prevail over the retributive and deterrent objectives thereof. It is my view that 10 year sentence on both counts running concurrently will be appropriate in the circumstances.

[12] I am of the view that the court *a quo* erred in suspending a minimum sentence wholly. This is in conflict with the provision of section 51(5)(a) which provides that the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act. Even though we have instituted the suspended sentence, this is negated by the fact that both sentences of count 1 and 2 run concurrently.

[13] I therefore make the following order:

13.1 The appeal as regards sentence succeeds. The sentence of the court *a quo* is set aside and is substituted as follows:

“Ten (10) years imprisonment on each count, to run concurrently with the sentence imposed on count 1.”

E. K. TSATSI, AJ

I agree.

C. VAN ZYL, J

On behalf of appellant:

Adv. Van Rensburg
Instructed by:
Jacques Groenewald Attorneys
KROONSTAD

On behalf of respondent:

Adv. Bontes
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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