

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

Appeal Number: A13/2013

In the matter between:

MAKHENE STEYN MOLETSANE

Appellant

And

THE STATE

Respondent

CORAM: DAFFUE, J et MOENG, AJ

JUDGMENT: MOENG, AJ

HEARD ON: 3 NOVEMBER 2014

DELIVERED ON: 6 NOVEMBER 2014

[1] On 25 November 2011, the appellant herein was charged in the Thaba Nchu regional court as accused 3 together with two other accused's on three counts, being robbery with aggravating circumstances, contravention of section 3 (possession of an unlicensed firearm) and contravention of section 90 (possession of ammunition) of the Firearms Control Act 60 of 2000.

[2] Accused 1 was found guilty on all three counts but accused 2 and appellant were convicted on the robbery count and acquitted on the possession of an unlicensed firearm and ammunition counts. The court a quo concluded that substantial and compelling circumstances existed that warranted a lesser sentence. She thereafter sentenced the appellant to 12 years imprisonment.

- [3] The appellant sought leave to appeal against both his conviction and sentence but was only granted leave to appeal against sentence by the court a quo. His petition to the Judge President for leave to appeal against conviction was unsuccessful. This appeal is therefore only directed at sentence. The appeal by accused 1 has already been concluded but the position with regard to accused two is not clear at this stage.
- [4] The state alleged in count one that on 5 September 2008, the accused's robbed Thato Lithokong of a Toyota Hi Ace minibus as well as one cellphone at gun point. A short factual background disclosed that the complainant was driving the minibus in question in the course of his employment as a taxi driver in Botshabelo.
- [5] He was stopped by the appellant and his co accused's pretending to be commuters at around 6:00 am. He proceeded further on this route and as he was about to pick up another passenger, the three accused's pointed firearms at him and ordered him to drive in the direction of Dewetsdorp. He was later forced out of the minibus and robbed of his cellphone.
- [6] He was assisted by a passing vehicle and taken to the Boithuso Police Station where he reported the incident. The three were soon thereafter arrested being in possession of the minibus and the complainant's cellphone.
- [7] In imposing sentence, the regional magistrate took into account that the appellant was 26 years old, that he was unmarried with a 3 year old child and that he was permanently employed before his arrest. She also took into account that the accused had been in custody awaiting trial for 3 years and 5 months and that he was a first offender. She lastly considered that the victim did not sustain any physical injuries.

- [8] The court a quo was however also alive to the seriousness of the offence indicating that the mere inclusion of this offence under the provisions of section 51(2) of the Act was indicative of the seriousness thereof. She also concluded that the offence was clearly premeditated and that the minibus and cellphone were not recovered with their assistance. She resolved that the ordeal should have been traumatic on the complainant and that the community had to be protected against such criminal activities.
- [9] The highlight of her conclusion was that the position of appellant differed from that of accused 1 and 2 as he was a first offender though also incarcerated as an awaiting trial prisoner for the same period of time. This in her view was substantial and compelling to warrant a deviation from the minimum sentence and she imposed a sentence of 12 years imprisonment.
- [10] I should pause to comment that accused 1 and 2 were both sentenced to 15 years imprisonment in respect of the robbery count. The court a quo concluded that the term spent in custody awaiting trial could not be regarded as substantial and compelling in their case having regard to their previous convictions.
- [11] Accused 1 however successfully appealed against his sentence. Rampai J held that the accused had duly paid his debts to society for his past criminal activities and that the period spent in custody was a strongly mitigating factor which could not simply be ignored on account of his previous convictions. He concluded that the marginal differences in the degree of participation between the offenders did not warrant differentiation in sentencing and substituted the sentence to 12 years imprisonment.

- [12] On behalf of the appellant, Mr. Pretorius standing in for Mr. Makhene, who compiled the heads of argument, conceded that the 12 year sentence is not disproportionate to the offence committed. He however stated that the sentence for accused 1 was reduced to 12 years imprisonment by Rampai J and bearing in mind that appellant was a first offender as opposed to accused 1, we should consider reducing his sentence.
- [13] Mr. Strauss for the respondent was however of the view that the circumstances between appellant and accused 1 did not differ such that it would warrant different sentences. He argued that their degree of participation in the commission of the offence did not vary to such an extent that would warrant different sentences.
- [14] In every appeal against sentence the Court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and the Court hearing the appeal should be careful not to erode such discretion. The sentence should only be altered if the discretion has not been judicially and properly exercised. The court hearing the appeal should only interfere if the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. (See S v Rabie 1975 (4) SA 855 (A).)
- [15] One should look at the ultimate cumulative effect of all the circumstances to see whether they justify a departure from the prescribed sentence. Any aggravating factors may lead to an upward course thereby an increase in the minimum sentence and conversely, some mitigating factors, viewed cumulatively with all other circumstances, may lead to a downward course, thereby the imposition of a lesser sentence. What should ultimately be achieved is for the sentence to be proportionate to the crime.

- [16] As indicated here above the main factor that the court a quo took into account in deviating from the prescribed minimum sentence was that the appellant had been in custody awaiting trial for 3 years and 5 months and that he was a first offender.
- [17] Time spent in custody while awaiting trial is traditionally taken into account for purposes of sentencing. In S v Stevens & Another 1994 (2) SACR 163 (W) at 168 E to G, the view was that the agonising period of an accused spent behind bars while awaiting his trial was the equivalent of a sentence twice that length. Such time is usually deducted from the sentence of imprisonment on the grounds that a period of incarceration has already been undergone.
- [18] This view was however criticized in S v Radebe and Another 2013 (2) SACR 165 (SCA). The Court held that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused in prison awaiting trial. The circumstances of an individual accused must be assessed cumulatively in each case in determining the extent to which the sentence proposed should be reduced and whether such period qualifies as substantial and compelling.
- [19] A better approach, so the SCA held, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified.
- [20] A mathematical calculation of merely subtracting the period spent in custody from the 15 year prescribed sentence would therefore lead to an absurdity as all the circumstances should be cumulatively viewed and weighed against each other to determine what would be suitable under the circumstances.
- [20] The court a quo also took into account that the appellant was a first offender in reducing his sentence. In this regard, section 51(2)(b) provides that a court shall sentence a person who has been convicted of an offence referred to in

“(a) Part II 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;”

[21] Section 51(2)(b) creates a differentiation between the sentences prescribed for first, second, third or subsequent offenders. The Legislature has clearly made provision for first offenders and has provided for their lesser degree of moral blameworthiness as compared to second and subsequent offenders. A first offender therefore already derives the benefit of a lesser sentence and this factor can in my view not be taken into account in further reducing the prescribed minimum sentence.

[22] Argument was advanced in the heads that the appellant is still of a youthful age. It was also argued during sentence proceedings that he was only 22 years of age when this offence was committed. He is admittedly therefore at an early and prime stage of his adulthood.

[23] The main reason why age is normally considered as a mitigating factor is as a result of the maturity of the concerned offender, hence the younger the offender the more lenient courts would be when sentencing and conversely for reasons of compassion, old age would attract leniency.

[24] In S v Mabuza and Others 2009 (2) SACR 435 (SCA) at par [23] Cachalia JA found that although youthfulness can in certain circumstances constitute substantial and compelling circumstances, the legislature:

“... in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained the age of 18 only if substantial and compelling circumstances justify this departure... has clearly intended that youthfulness no longer be regarded as per se a mitigating factor.”

[25] It was further held in S v Matyityi 2011 (1) SACR 40 (SCA) that:

“a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.”

[26] The appellant conversely appeared to be mature. He was at age 22 already employed as a floor manager at Cash Built Botshabelo, and this position is indicative of the responsibilities that were upon his shoulders. He further took an active role in the commission of the offence. I am therefore of the view that his age becomes an irrelevant factor and thus not mitigating having regard to these factors.

[27] The appellant has a minor child; no evidence was led to determine whether this child was residing with him and to determine whether he could be regarded as the primary care giver of the said child. It was merely indicated that he has a girlfriend and that he was maintaining the child. It is not clear from the record whether the mother to the child is employed or not.

[28] Even if he may be regarded as the primary care giver, the view expressed in S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC), that parents should not be allowed to use their children as a pretext for escaping the otherwise just

consequences of their own misconduct since this would be a mischaracterization of the interests at stake, will be appropriate under the circumstances.

- [29] One should in addition take into account that hijacking of motor vehicles is prevalent country wide. This minibus taxi was used to generate an income and was out of operation during this ordeal. Taxi drivers are an easy target of this kind of robbery and are at the mercy of commuters who stop them. This incident is indicative of the fact that their safety is never guaranteed since they cannot choose the commuters that board their taxis.
- [30] I am satisfied that there was no misdirection on the part of the court a quo based on the cumulative effect of the factors that she took into account and based on the concession by Mr. Pretorius that the sentence imposed by the regional magistrate is proportionate to the offence.
- [31] The issue that remains, although only raised during the appeal deliberations, is whether the sentence of imprisonment for 12 years warrants interference on the ground of its disparity from the sentence imposed on accused 1 by Rampai J on appeal.
- [32] The argument in casu is that the sentence of accused 1 and appellant should differ based on the previous convictions of accused 1 as opposed to the clean slate that appellant has. It should be noted that this was also a factor that the court a quo took into account in imposing a lesser sentence on appellant.
- [33] It is a well-established principle that justice is best seen to be done in the matter of sentence, if participants in an offence who have equal degrees of involvement are punished equally, if there are no personal factors warranting disparity.

[34] In S v Giannoulis 1975 (4) SA 867 (A) Holmes JA, after having reviewed a number of judgments over the past 60 years, concluded that there was a distinct and fairly consistent thread running in the same general direction in determining the parity of sentences between co participants.

[35] The following principles were set out:

1. In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.
2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.
3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances.

[36] The manner of approaching such disparity of sentence on appeal, where two or more accused are jointly tried and are sentenced by the same court, or in this instance where the sentence of the co participant was reduced on appeal, will be to determine the degrees of involvement and any factors personal to each accused, affecting his sentence.

[37] The facts in casu revealed that all three accused were in possession of firearms, appellant searched and removed the victim's cellphone and he drove off in the company of his

accomplices. His personal circumstances and that of accused 1 were similar in that both were in their mid-twenties when they were sentenced, both were unmarried, were gainfully employed and both had one minor child.

[38] The only difference related to their past criminal conduct. Rampai J in my view correctly concluded that accused 1 had paid his dues to society through the sentences that were imposed. As indicated here above, the Legislature has clearly made provision for first offenders and has provided for their lesser degree of moral blameworthiness as compared to second and subsequent offenders. A first offender therefore already derives the benefit of a lesser sentence through the provisions of section 51(2)(b).

[39] What is noteworthy is the conclusion by Rampai J that the marginal differences in the degree of participation between the offenders did not warrant differentiation in sentencing. He thereby ensured that there was parity between the two sentences and also imposed a sentence of 12 years on accused 1.

[40] I am therefore satisfied that the sentences imposed on appellant and accused 1 are proportionate having regard to the factors I mentioned here above. I am also satisfied that the sentence of 12 years was appropriate in the circumstances of the case.

ORDER

[41] The appeal against sentence is dismissed.

L.B.J. MOENG, AJ

I concur.

J.P. DAFFUE, J

On behalf of the appellant:

Mr. K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Strauss
Instructed by:
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