

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A481/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
18/11/2013	<i>E. H. M. M. M.</i>
DATE	SIGNATURE

In the matter between:

MOJELA THABISO MAKGALO

FIRST APPELLANT

JOSEPH NGOEPE

SECOND APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

Date of Hearing: 5 October 2013

Date of Judgment: 18/11/ 2013

KUBUSHI, J

- [1] The appellants and the third accused were charged with two counts of Housebreaking with intent to rob and robbery with aggravating circumstances and sexual assault. They pleaded not guilty to all the charges. At the end of the trial they were all acquitted on the count of sexual assault. The trial court having found no aggravating circumstances convicted the appellants of housebreaking with intent to rob and robbery. Each of the appellants was sentenced to fifteen (15) years imprisonment, which is ordinarily the maximum sentencing jurisdiction of the regional court. They are therefore appearing before us the trial court having granted them leave to appeal against sentence only.
- [2] At the beginning of the hearing the appellants' counsel applied for condonation for the late filing of the appellants' heads of argument which was granted.
- [3] The state's case is that three men, two of whom are the appellants, unlawfully entered the house of the complainant, an 82 year old woman. They gained access into the house by breaking the burglar bars to the kitchen window. They went to the complainant's bedroom. One of them assaulted the complainant by hitting her with fists on the face. The complainant suffered bruises on her face and had to spend a few days in hospital as a result. During the ordeal the complainant's pyjamas and panties were removed and she was threatened with rape. The complainant took out an envelope with R3 000 in it and handed it to the man who assaulted her. The other two assailants rummaged through the bedroom and removed certain items.

Some of these items were found in the possession of the third accused. The complainant could not identify the man who assaulted and threatened her with rape which resulted in the trial court concluding that the state did not prove aggravating circumstances beyond reasonable doubt.

- [4] The appellants appeal is based on the ground that the sentence of fifteen years imposed by the trial court is shockingly inappropriate and induces a sense of shock. At the hearing the appellants' counsel conceded that the offence of housebreaking with intent to rob and robbery is a serious offence and calls for a sentence of imprisonment. She contended however that imprisonment for fifteen (15) years in the circumstances of this case was grossly inappropriate. She based her contention on the ground that the trial court found no proof of assault or common purpose or aggravating circumstances.
- [5] The respondent's counsel disagreed with the contention by the appellants' counsel. She is of the opinion that, firstly, this court cannot temper with the sentence as the trial court did not in any way misdirect itself when passing the sentence imposed. Secondly, the sentence is proportionate to the offence committed and as such the trial court was not incorrect to sentence the appellants to imprisonment for fifteen (15) years. According to her, even though the trial court found otherwise, the offence was pre-meditated, there was common purpose and the aggravating circumstances in this case far outweigh the personal circumstances of the appellants.

- [6] According to her, what is important is that the complainant was an elderly person, a woman of 82 years, she was vulnerable, she was alone in the sanctity of her home, she must have suffered massive trauma. The complainant's son did everything to ensure that the complainant was safe.
- [7] As is trite, the imposition of sentence is the prerogative of the trial court. The exercise of its discretion in that regard is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. Where, however, there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed, interference is justified. The approach to appeals against sentence on the ground of excessive severity or excessive leniency where there has been no misdirection on the part of the court which imposed the sentence is that the appellate court must conclude that its choice of penalty is the appropriate penalty and that of the trial court is not. See S v Sandler 2000 (1) SACR 331 at para [8] – [10].
- [8] It is my view that the choice of sentence imposed by the trial court is inappropriate in the circumstances of this case. The submission by the respondent's counsel that the sentence is proportionate on the basis that the aggravating circumstances outweigh the appellants' personal circumstances because the offence was premeditated, the complainant was an elderly person and the effect of the trauma she experienced, does not persuaded me otherwise. Firstly, the submission that the

offence was planned has no factual basis and should in my view be rejected. There is no evidence on record that indicates that the offence was planned. The contention by the respondent's counsel that normally where robbery is committed in a house there is prior planning is in this instance mere speculation as it is factually unsubstantiated. The evidence placed either before the trial court or this court does not support such assumption.

[9] I am also mindful of the submission by the respondent's counsel that the age of the complainant, the fact that she was vulnerable and that she was attacked in the sanctity of her home where she had lived for more than thirty years which resulted in her having to move are factors which should be considered in aggravation of sentence. To my mind, in the circumstances this case, these factors do justify imprisoned for a long time. They however, do not justify imprisonment for a period of fifteen (15) years.

[10] In my opinion, a just and appropriate sentence in the circumstances of this case is nine (9) years imprisonment. The appellants should each be sentenced to nine (9) years imprisonment.

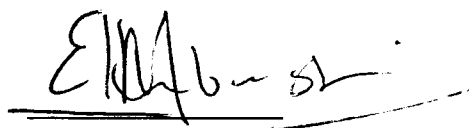
[11] In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence should be ante-dated to 31 August 2010 being the date on which the appellants were sentenced.

[12] In the premises I make the following order:

- a. The conviction is confirmed.
- b. The sentence imposed by the trial court is set aside and replaced by the following:

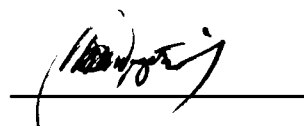
“Accused 1 and 2 are sentenced to nine (9) years imprisonment.”

- c. The sentence is ante-dated to 31 August 2010.



KUBUSHI, J

I concur



MOGOTSI, AJ

Appearances:

On behalf of the appellant:

Adv. L. AUGUSTYN

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On behalf of the respondent:

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