

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.:A180/2011

In the appeal of:

MOHAU KHATI
MOLEFI PETRUS KHOLONG

1st Appellant
2nd Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, J et THAMAGE, AJ

HEARD ON: 15 OCTOBER 2012

DELIVERED ON: 07 FEBRUARY 2013

MOLEMELA, J

- [1] This is an appeal against sentence. The appellants were convicted of robbery with aggravating circumstances on the 28th October 2009. They were sentenced on the same day to twelve years' imprisonment. The appeal is only directed against their sentence and is brought with leave of this court.
- [2] The robbery took place at a crossroad between Welkom and Kroonstad, where the complainant was waiting for a taxi. He was robbed of his bag and its contents at knife-point.
- [3] The grounds on which the appeal is based are that the sentences imposed on the appellants is shockingly inappropriate and did not take proper cognizance of the appellants' personal circumstances.
- [4] It was argued that the court *a quo* committed a material irregularity by considering the appellants to be second offenders in respect of the offence of robbery and thus moved from the premise that the

applicable minimum sentence for robbery with aggravating circumstances was 20 years imprisonment as contemplated in section 51(2)(a)(ii) of Act 105 of 1997. It is common cause that even though both appellants had previous convictions, their previous convictions were not for robbery with aggravating circumstances. They were accordingly not second offenders in respect of this offence.

- [5] The state conceded that the court *a quo* had misdirected itself materially by considering the appellants to be second offenders in respect of the offence of robbery with aggravating circumstances and conceded that the applicable minimum sentence was 15 years and not 20 years imprisonment. The state however submitted that notwithstanding this misdirection the sentence imposed by the court *a quo* was not shockingly inappropriate, given the aggravating factors.

- [6] It is trite law that a court of appeal will interfere with the imposed sentence if it is of the view that such sentence as unreasonable, unjust is vitiated by irregularities or if the court *a quo* has misdirected itself materially.

- [7] As stated before, the state conceded that the court *a quo*'s consideration of a period of 20 years imprisonment as a minimum sentence instead of 15 years imprisonment constitutes a material misdirection. In my view, this concession was correctly made as it can be accepted that the court *a quo*, in its consideration of an appropriate sentence, used the twenty years' imprisonment as its benchmark in accordance with the principle laid down in the case of **S v Malgas 2001(1) SACR 469 (SCA)**. I am of the view that this material misdirection warrants the setting aside of the sentence and a fresh consideration of the sentence.

- [8] I now turn to consider sentence afresh. This exercise warrants a balanced consideration of the well-known triad of sentence as well as the objectives of sentencing.

[9] The offence committed by the appellants, i.e. robbery with aggravating circumstances is of a violent nature. There is no doubt that it falls under the category of violent crimes. This offence is unfortunately prevalent, not only in the court's area of jurisdiction but in the country as a whole. Members of the public are outraged by the prevalence of violent crime in this country. It comes as no surprise that the offence committed by the appellants is one of those singled out by parliament for imposition of lengthy sentences as minimum sentences. It is important for the courts to impose sentences that will assure the community that the courts are striving to maintain peaceful and safe living conditions. See **S v B** 1985 (2) SA 210 (A).

[10] The first appellant's mitigating factors are as follows:

- (i) He was 18 years old at the time of commission of the offence.
- (ii) He attended school up to grade 11.
- (iii) Both his parents passed away and he was raised by his grandmother.

[11] The second appellant's personal factors are as follows:

- (i) He was 26 years old at the time of commission of his offence.
- (ii) He has a son aged 12 years.
- (iii) He attended school up to grade 11.
- (iv) He was employed, earning R500,00 per week and using his earnings for the maintenance of his minor child.
- (v) His mother passed away and there is no one else available to look after his child.

[12] Both appellants spent 16 months in custody awaiting trial. This period will be taken into account.

[13] The aggravating factors are as follows:

- (i) Both appellants have previous convictions, viz assault. Their previous convictions have violence as one of the elements.

- (ii) The crime was planned and organised as part of a gang.
- (iii) The appellants showed no remorse for their actions.

[14] As stated before, the offence committed by the appellants falls under the category of sentences for which a minimum sentence of 15 (fifteen) years' imprisonment must be imposed on a first offender unless there are substantial and compelling circumstances that warrant deviation from such sentences. The first appellant was very young when he committed this offence and his age is a strong mitigating factor. I am satisfied that his mitigating factors, cumulatively viewed, constitute substantial and compelling circumstances that warrant deviation from the applicable sentence. Although the second appellant's age is a neutral factor, I am satisfied that his mitigating factors, cumulatively viewed, outweigh the aggravating circumstances and constitute substantial and compelling circumstances that warrant deviation from imposition thereof.

[15] Despite the fact that I have found a justification for deviating from the applicable minimum sentence, this does not detract from the fact that robbery with aggravating circumstances is a serious offence that warrants imposition of a lengthy sentence. Although the first appellant is a youthful offender, he already has a previous conviction viz assault. The sentence imposed for that conviction obviously failed to deter him from further involvement in crime. This court needs to send a stronger message to him, that crime does not pay. Instead, he graduated into committing a more serious offence as part of a gang. The offence previously committed by the appellants and the present offence they have been convicted of both have violence as one of their elements. Although the age of the first appellant counts in his favour, he has showed no remorse and thus failed to take responsibility for his actions. This lack of remorse impacts negatively on his prospects of a quick rehabilitation. Under the circumstances, a lengthy imprisonment sentence is the only appropriate sentence, especially on account of the

seriousness of the offence that he has been convicted of. It should, however, not be so lengthy as to kill his spirit.

[16] With regards to the second appellant, he is much older than the first appellant and was a mature adult at the time of commission of the offence. He too showed no remorse for his actions. He, too, had a previous conviction whose sentence failed to deter him from further involvement in crime. This previous conviction is of a significant weight because it has violence as one of its elements. The difference in the ages of the two appellants necessitates a distinction in their sentence. A heavier sentence will thus be imposed on the second appellant.

[17] It is trite law that the period spent in prison while awaiting trial must be taken into account. See **S v Stephen and Another** 1994 (2) SACR 163 (W). It was further laid down in the case of **S v Brophy** 2007(2) SACR 56 (W) that the period spent in custody while awaiting trial is equivalent to a sentence of twice that length.

[18] Having considered all the circumstances of this matter, I find that the appropriate order is the following:

1. Both appellants' appeal against their sentence succeeds.
2. The sentence imposed by the court *a quo* on both appellants is set aside and replaced with the following:
Appellant 1: 8 (Eight) years imprisonment.
Appellant 2: 10 (Ten) years imprisonment.
3. The sentence mentioned in paragraph 2 above, is antedated to 28 October 2009.

I concur.

S. J. THAMAGE, AJ

On behalf of the appellants: J. D. Reyneke
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S. Mthethwa
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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