

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : 90/2012

In the appeal between:-

ISAAC BOROLE

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J et DA ROCHA-BOTLNEY, AJ

JUDGMENT BY: DA ROCHA-BOLTNEY, AJ

HEARD ON: 11 FEBRUARY 2013

DELIVERED ON: 28 FEBRUARY 2013

[1] This is an appeal against sentence. Leave to appeal was refused by the court *a quo* and, after a successful petition, the Judge President of this court granted leave to appeal against sentence.

[2] On the 23 February 2011 the appellant was convicted in the Regional Court at Welkom on a count of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, Act 51 of 1977 (the CPA), and sentenced to 12 (twelve) years imprisonment.

- [3] Appellant was initially charged with 3 co-accused but the matter was later withdrawn against the latter. Appellant pleaded guilty to the charge.
- [4] The court of appeal may interfere with a sentence of the trial court when it is considered shockingly inappropriate and induces a sense of shock.
See **S v Pieters** 1987 (3) SA 717 (A).
- [5] Mr Reyneke, who appeared for the appellant argued that the sentence is too severe. He argued that the court *a quo* erred by not considering the impact of long term imprisonment; that the court *a quo* erred in not considering the possibility of rehabilitation of appellant and that the court *a quo* erred in not attaching enough weight to appellant's personal and mitigating factors, including the fact that he pleaded guilty and by so doing showed remorse.
- [6] The respondent, through Mr J M de Nysschen, argued that the court *a quo* erred in finding that there are substantial and compelling circumstances which would justify a lesser sentence than that which the Criminal Law Amendment Act, Act, no 105 of 1997 (Minimum Sentences Act) as amended prescribes. He further gave notice of the State's intention to apply for the aggravation of sentence. He further contended that the court should have imposed 15 years imprisonment for a first offender as per the Act.

- [7] Appellant is a 24 year old married man with two minor children. His spouse is unemployed. The appellant was employed as a general labourer and earned an amount of R1 200,00 per month. Appellant has one relevant previous conviction, to wit, he was found guilty of theft on 19 November 2001. In terms of section 276(1)(h) of the CPA appellant was sentenced to 6 months correctional supervision and he had to do 16 hours of community service per month for a period of 6 months. Appellant was in custody for a period of 8 months awaiting trial.

THE FACTS

- [8] In his statement, submitted in terms of sec 112(2) of CPA, the appellant admitted that on the relevant day he came from a tavern, was drunk, although he was still in his full senses when he saw the complainant, he attacked him with a knife and robbed him of his belongings, to wit R200, 00 cash, and a Motorola V360 cell phone. He thereafter ran away, but was apprehended by the police a few minutes later.
- [9] The complainant sustained injuries to wit a wound on his chest approximately 9cm in length a scratch mark on his arm and abrasions on his back. According to the medical report, namely, the J88, the wound across complainant's chest, was very near his heart and could have been fatal, if it was deeper.
- [10] The complainant's items were found on the appellant and returned to him.

This offence is listed under Part 11 of Schedule 2 of the Minimum Sentences Act. According to section 51(2) (b) read with subsection 3(a), it is stated that:

“If any court ... is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

[11] It seems that the court *a quo* considered the fact that the appellant was in custody awaiting trial for nearly a year, as well as the fact that he has a previous conviction for theft which was 10 years old sufficient to deviate from the Minimum Sentence Act.

[12] In **S v Malgas** 2001 (1) SACR 469 (SCA) at 29(D) it was stated:

“The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.”

And also in **S v Malgas** (*supra*)

“Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardized and consistent response from the courts.”

- [13] It was argued on behalf of appellant that the court should have regard to **S v Mnguni** 1994 (1) SACR 579 (A) at 583C; as well as **S v Sebata** 1994 (2) SACR 319 (C) at 325F, where it was held:

“... those who are prepared to co-operate with authorities should receive credit, they make a very real contribution towards combating the crime.”

This court is of the opinion that as appellant was apprehended shortly after the incident, whilst being in possession of the complainants' goods, his guilty plea is a neutral factor.

See **S v Barnard** 2004 (1) SACR 191 SCA at 197.

- [14] It was further submitted on behalf of appellant that because he drank (I assume alcohol), it should affect his moral blameworthiness. Respondent argued that this should be seen as an aggravating factor – see section 2 of Act 1 of 1988.
- [15] No mention was made of remorse by appellant in his section 112(2) statement. In an address to the court *a quo* before sentencing his defence counsel mentions remorse. Ponnann

JA in **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [13] distinguishes between regret and remorse:

“Remorse was said to be manifested in him pleading guilty and apologising, through his counsel ...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse ... Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.”

- [16] I am of the opinion that the reasons offered by the trial court to deviate from the penalties as prescribed in the Minimum Sentences Act are a material misdirection on its part. The factors that the court *a quo* took into account are specifically excluded when one has regard to the guidelines laid down in **Malgas** (*supra*). The fact that the appellant was in custody for nearly a year proved to be a misdirection on the part of the learned Regional Magistrate, as the record shows that

the appellant was only in custody for a period of 8 (eight) months.

[17] I accordingly make the following order:

17.1 The appeal is dismissed and the conviction confirmed:

17.2 The sentence is set aside and replaced with the following:

“The Appellant is sentenced to 15 (fifteen) years imprisonment.”

17.3 The sentence is antedated to 23 February 2011.

P. W. DA ROCHA-BOLTNEY, AJ

I concur.

L. J. LEKALE, J

On behalf of the appellant: Adv. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Mr. J M de Nysschen
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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