

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.:A140/2012

In the matter of:

VICTOR SELLO TEBHOHO GODLA
ZACHARIA MEPHA

1st Appellant
2nd Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, J *et* DA ROCHA-BOLTNEY, AJ

JUDGEMENT BY: MOLEMELA, J

HEARD ON: 18 FEBRUARY 2013

DELIVERED ON: 25 APRIL 2013

[1] On the 14th April 2011 the two appellants and a third person were convicted of robbery with aggravating circumstances by the regional court in Viljoenskroon and sentenced to 10 year's imprisonment. The two appellants unsuccessfully applied for leave to appeal against both conviction and sentence. They subsequently approached this court on petition and were granted leave to appeal only against their sentence. The basis of their appeal is that the court *a quo* under-emphasised their personal circumstances and over-emphasised the seriousness of the

offence and the interests of the society, culminating in a sentence that is shockingly inappropriate.

[2] The two appellants' prosecution arose from the fact that on the night of the 27th August 2010 they, together with their co-accused, accosted the complainant in the street, stabbed him with a knife and robbed him of an amount of R25.00 in cash and a waist belt. The complainant sustained several cuts on the body.

[3] It was argued on behalf of the respondent that the fact that the court *a quo* found that there were substantial and compelling circumstances warranting deviation from the applicable minimum sentence of 15 years imprisonment demonstrated that the court *a quo* had considered the triad of sentence in a balanced fashion. It was further contended that even though the sentence imposed by the court *a quo* could be regarded as severe, it was not so shocking as to warrant interference therewith.

[4] The following are the mitigating factors that were considered by the court *a quo* in respect of the first appellant:

4.1 that the first appellant was 20 years old and had impregnated his lover;

4.2 that he was unemployed even though he had attended school up to grade ten level.

In respect of the second appellant, the following mitigating factors were considered:

4.3 that he was 19 years old;

4.4 that he had no dependants;

4.5 that he attended school up to grade 10 level and did odd jobs.

[5] The following aggravating factors were considered by the court *a quo*:

- 5.1 the seriousness and prevalence of the offence;
- 5.2 the interests of society;
- 5.3 the appellants' previous conviction (*viz* assault with intent to do grievous bodily harm).

[6] Although the two appellant's ages were, at the time of their sentencing, accepted as 20 years (first appellant) and 19 years (second appellant), respectively, it is evident from their date of birth as reflected in the form setting out their criminal record, known as Form SAP69, that as at the time of the commission of the offence, the first appellant was 18 years and 6 months old while the second appellant was 17 years and 10 months old. It is also evident from the record that the court *a quo* considered the two appellants' co-accused, who was accused no. 1 during the trial, to have been the one that played a leading role in the attack.

[7] It is settled law that a youthful offender should not be deprived of his or her liberty except as a measure of last resort and, if incarceration is unavoidable, then his incarceration must be for the shortest possible period. In the case of **S v Phulwane and Others** 2003 (1) SACR 631 (T), the three appellants, aged 20 years, 22 years and 18 years respectively had been convicted of housebreaking with intent to steal and theft of groceries worth R1 500,00. The trial court had sentenced all three of them to an

effective term of imprisonment for three years. On appeal the appellants' sentences were set aside and the matter was remitted to the trial court for acquisition of pre-sentencing reports and sentencing *de novo*. It is apposite to quote from the following part of that judgment:

"It is true that where a crime is serious and prevalent, particularly where it threatens the well-being of society, that courts should impose appropriate sentences. However, it remains a trite principle of sentencing that each case has to be decided on its own merits ... A sentencing officer must never allow the seriousness of the offence and the interests of the community to receive undue weight at the expense of the personal circumstances of the accused. This will inevitably lead to a sentence which is flawed."

At p 634 the court went on to state as follows:

"When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers entrusted with the task of sentencing such a youth to ensure that he or she receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best-suit the needs and interests of the particular youth. It is after all a salutary principle that sentence must be individualised."

[8] In the case of **S v Nkosi** SACR 135 (W) at 143, the court remarked as follows:

"The fine balance that needs to be struck between society's needs to punish crime while not overlooking the interests of a juvenile offender was emphasised by Botha JA in **S v Jansen & Another** 1975 (1) SA 425 (A) at 427 – 428 in the following terms: The

interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society.”

I echo the sentiments expressed in the afore-mentioned cases.

[9] I am alive to the fact that the two appellants were not first offenders. They had a previous conviction which had an element of violence. Thus, they were not entitled to be treated as first offenders and the court *a quo* correctly took their previous conviction into account. This, however, does not detract from the fact that the second appellant was a juvenile at the time of commission of the offence. As for the first appellant, at 18½ years of age, he was indeed already an adult. Having achieved the age of majority a mere six months prior to commission of the offence, few can quarrel with the fact that he was still a youthful offender. I am of the view that all things considered, including the principles laid down in the afore-mentioned cases, as well as the value of the items the complainant was robbed of, a proper consideration of the triad of sentence ought not to have resulted in the sentence imposed on the appellants by the court *a quo*. The court *a quo* thus committed a material misdirection.

[10] The following was aptly stated in the case of **S v Malgas** 2001 (1) SACR 369 (SCA) at 478 d – h: “A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an

appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance”.

[11] The misdirection committed by the court *a quo* is thus of such a nature as to warrant interference with the sentence it imposed, thus necessitating a fresh consideration of an appropriate sentence. Given the lapse of time between the conviction and the appeal, I do not deem it prudent to remit the matter to the trial court for purposes of acquiring a pre-sentencing report.

[12] The mitigating and aggravating factors in this matter have already been canvassed. The court *a quo* correctly found that the mitigating factors, cumulatively viewed, constitute substantial and compelling circumstances warranting deviation from the applicable sentence. However, robbery with aggravating circumstances remains a serious offence. In the case of **S v Mondi & Another** 1999 (1) SACR 292 (O) the court considered appropriate sentences for robbery committed under more or less similar circumstances to the present by two mature adults who had numerous previous convictions, to be seven and eight years' imprisonment, respectively. In this matter, the appellants are much younger than the appellants in that matter. However, regard has to be paid to the fact that in that matter the complainant had not sustained any injuries, whereas in this matter the complainant sustained several injuries inflicted with a knife. Although the appellants' youthfulness counts in their favour, they have not showed any remorse and thus failed to take responsibility for their actions. This lack of remorse impacts negatively on their

prospects of a quick rehabilitation. Under the circumstances, a relatively lengthy term of imprisonment is the only appropriate sentence, especially on account of the seriousness of the offence that the appellants have been convicted of. Having considered all the circumstances of this case, including the six months' period spent by the appellants in detention while awaiting their trial, I deem a sentence of seven years' imprisonment to be appropriate.

[13] The following order is made:

- (i) The appeal against sentence succeeds in respect of both appellants.
- (ii) The sentence imposed by the court *a quo* on the two appellants is hereby set aside and replaced with following:

Seven years' imprisonment

- (iii) The sentence referred to in clause (ii) above is antedated to the 14th April 2011.

M. B. MOLEMELA, J

I concur.

DA ROCHA-BOLTNEY, AJ

On behalf of the applicant: Attorney P L van der Merwe
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of the respondent: Adv. M. A. Mohlala

Instructed by:

The Director: Public Prosecutions

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