

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A167/2013

In the appeal between:-

SIDEMA KHAKE

Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* REINDERS, AJ

HEARD ON:

21 OCTOBER 2013

JUDGMENT:

REINDERS, AJ

DELIVERED ON:

24 OCTOBER 2013

- [1] The appellant was convicted on a charge of housebreaking with the intent to rob and robbery with aggravating circumstances (read with section 51(2) of the Criminal Law Amendment Act, 105 of 1997) by the Regional Court, Bloemfontein, on 3 June 2013. Subsequently appellant was sentenced to 15 years imprisonment on 4 June 2013. Appellant was granted leave to appeal against his sentence by the Court *a quo*.

- [2] The grounds on which appellant rely for the setting aside of his sentence are:
1. That the court *a quo* erred in not properly taking into account that the appellant was a first offender;
 2. By finding that no substantial and compelling circumstances were present that would allow the court to deviate from the prescribed minimum;
 3. In finding that the factors in mitigation did not render the prescribed minimum sentence disproportionate to the offence.
- [3] In his heads of argument Mr Reyneke, on behalf of the appellant, stated the mitigating factors of the appellant as follows: The appellant was 27 years of age at the time he committed the offence. He had two children to support. He was a part time employee prior to his arrest. He attended school up to grade 7.
- [4] He furthermore argued that the Court *a quo* did not take into account the six months that appellant spent in prison awaiting trial. He referred to case law that a sentencing court has to take into account the term of imprisonment whilst awaiting trial.
- [5] It is clear from the record that the prosecutor in his address to the court before sentencing submitted that the appellant was incarcerated for six months awaiting trial. Mr Reyneke conceded that, even if the Court *a quo* did not specifically mention the fact that appellant was incarcerated for six

months pending trial, this was not a substantial period of time and would not be a factor that could sway the court's decision.

- [6] Mr Steyn in his heads of argument submitted that the appeal is without any merit and that the Court *a quo* considered and assessed sentence in a well-balanced manner. He pointed out all the aggravating circumstances taken into account by the Court *a quo*, viz the extremely serious nature of the crime; the degree of planning involved in executing the commission of the crime; the coordination of the attack by appellant and his henchman; the fact that the crime was committed out of greed; the losses suffered by law abiding citizens due to these crimes and the fact that appellant's criminal track record has escalated from assault to a more serious crime.

- [7] Mr Steyn also submitted that the Court *a quo* correctly found that no substantial and compelling circumstances could be found to allow a deviation from the prescribed minimum sentence. In arriving at a conclusion whether any substantial and compelling circumstances exist that would warrant a lesser sentence as the prescribed minimum, the Court *a quo* was guided by the principles laid down in **S v Malgas** 2001 (2) SA 1222 (SCA) at 1235F – 1236C. The Supreme Court of Appeal cautioned in **S v Matyityi** 2011 (1) SACR 40 (SCA) that courts have a duty to implement minimum prescribed sentences and that there was all too frequently a

willingness on the part of courts to deviate from these sentences for the flimsiest of reasons.

- [8] When it comes to interfering with the sentence imposed by the Court *a quo*, it is trite law that the jurisdiction of the Court of Appeal is not discretionary and in fact very limited, as it was stated in **S v Pieters** 1987 (3) SA 717 (A) on 727F. The discretion in imposing a sentence lies with the trial court. In the *locus classicus* **S v Holder** 1979 (2) SA 70 (A), it was held that an appropriate sentence will always be a sentence which is based on a balanced consideration of the personal circumstances of the accused; the seriousness of the crime and the interests of society. This was done by the Court *a quo*.
- [9] To my mind the Court *a quo* did not err in any way and quite correctly found that no compelling and substantial circumstances exist to deviate from the minimum prescribed sentence of 15 years.
- [10] In the result, I would dismiss the appeal.

C. REINDERS, AJ

I concur.

B.C. MOCUMIE, J

On behalf of appellant:

Mr J D Reyneke
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv C F Steyn
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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