

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A283/2010

In the appeal between:-

LINDIKAYA MADONCI

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* DAFFUE, J

HEARD ON:

6 FEBRUARY 2012

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

5 APRIL 2012

[1] The appellant and a co-accused, Hendrik Diapopa Mphahlele, were charged with one count of housebreaking with the intent to rob and robbery. Both were convicted on 7 August 2006 as charged by the Regional Court Magistrate of Sasolburg, Me Ngewu.

[2] The court *a quo* sentenced appellant and his co-accused as follows:

“For housebreaking with intent to rob, each accused is sentenced to: undergo 7 years imprisonment. For robbery each accused is sentenced to: undergo 7 years imprisonment.”

Appellant and his co-accused were sentenced as such notwithstanding the fact that they were charged with one count and convicted as charged in respect of this one count only.

- [3] It is not clear from the record whether appellant applied for leave to appeal to the court *a quo*. I have to assume so, but what is certain from the record is that his co-accused applied for leave to appeal against both conviction and sentence. The court *a quo* dismissed the application. Thereupon appellant applied for leave to appeal to this court which application was partially successful in that leave was granted to appeal in respect of the sentence only. It is recorded at this stage that during oral argument the legal representatives of the parties were requested to investigate whether appellant's co-accused also applied to this court for leave to

appeal and if so, what the outcome thereof was. We were of the view that appellant's possible success on appeal should benefit his co-accused as well. We have now been informed that no record of an application for leave to appeal by appellant's co-accused to this court could be found.

[4] Appellant's application for leave to appeal to this court is contained in a standard document which is probably available to all inmates. It is clear from the application that appellant considers the effective term of 14 years imprisonment as strikingly inappropriate. He also relies on the fact that the time spent in custody awaiting trial was not considered and that the court *a quo* erred in over-emphasising factors such as the seriousness of the offence, interest of society and the retributive element of sentence.

[5] In his written Heads of Argument, Mr Reyneke on behalf of appellant, submitted that the effective sentence was shockingly inappropriate and that a sentence of 5 years imprisonment in terms of section 276(1)(i) would be appropriate. However during his oral argument in court he conceded that a term of 8 years imprisonment would be

more appropriate. Mr Strauss, on behalf of the State, also submitted that the appeal against sentence should succeed, but that a sentence of 8 years imprisonment ought to be imposed.

- [6] Both legal representatives referred to the misdirection of the court *a quo* in, as they called it the splitting of the charge, for purposes of sentence. It is not necessary to consider whether appellant and his co-accused could be charged with separate counts, the first being housebreaking with the intention to rob and the second being robbery. They were not charged as such and found guilty in respect of two different offences, but in respect of one offence only. The court *a quo* clearly misdirected itself and the sentence cannot be allowed to stand. One sentence should have been imposed and not two separate sentences. It is also apparent from the judgment on the application for leave to appeal that the court *a quo* was of the view that the two accused could be sentenced to the minimum sentence of 15 years imprisonment on the count of robbery. Although not relevant to the present appeal, this is again a misdirection in so far as the accused have not been charged with or

convicted in respect of robbery with aggravating circumstances. We are at liberty to consider the sentence to be imposed afresh.

[7] There is no doubt that the offence of housebreaking with the intention to rob and robbery is an extremely prevalent offence in the court *a quo*'s jurisdiction, as is the case countrywide. The community should be protected and in order to do so severe sentences should be imposed, even on first offenders. See: **S v MOSWATHUPA** 2012(1) SACR 259 (SCA).

[8] The following is taken into consideration pertaining to the appellant's personal circumstances:

- (a) his age when the offence was committed, to wit 18 years;
- (b) he spent just over 2 years in custody awaiting trial;
- (c) he is a first offender;
- (d) he stayed with his mother who was unemployed at the time.

[9] In the circumstances an effective sentence of imprisonment

of 8 years is an appropriate sentence and should be imposed.

- [10] The co-accused's position must be considered. As indicated above, he has not applied for leave to appeal to this court. However we have now taken cognisance of the fact that the sentence imposed on him was not in accordance with justice and consequently this court is entitled in accordance with the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977 to deal with the situation of appellant's co-accused, Hendrik Diapopa Mphahlele. His personal circumstances differ slightly from those of appellant. He was 24-years old when the offence was committed, and thus appellant's senior by 6 years. Two previous convictions for housebreaking were proven against him. However he should also be considered a first offender as it appears from the record that those offences were committed after the offence *in casu* and prior to his arrest. Clearly he has a propensity to commit serious crimes. His sentence should also be set aside, but replaced with a more severe sentence than the one to be imposed on appellant, to wit 9 years imprisonment.

[11] Therefore, I would make the following orders:

1. The appellant's appeal succeeds.
2. The sentence imposed by the court *a quo* is set aside and replaced with the following sentence:
8 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.
3. The sentence imposed upon appellant's co-accused, Hendrik Diapopa Mphahlele is reviewed and set aside and replaced by the following sentence:
9 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.
4. The sentences are anti-dated to 7 August 2006.

J.P. DAFFUE, J

I concur and it is so ordered.

C. VAN ZYL, J

On behalf of appellant: Mnr. J D Reyneke
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. M. Strauss
Instructed by:
Office of the Director of Public
Prosecutions
BLOEMFONTEIN

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