

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A71/10

In the appeal between:-

PULE JAN MOLEHE

First Appellant

DIPHOKO CHRISTIAN MOTUMI

Second Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* MURRAY, AJ

HEARD ON:

11 JUNE 2012

DELIVERED ON:

19 JULY 2012

MOCUMIE, J

[1] On 29 August 2006 the two appellants appeared in the Regional Court, Thaba Nchu on one count of robbery read with section 1 of the Criminal Procedure Act (*“the CPA”*) and section 51 of the Criminal Law Amendment Act (*“the Criminal Law Amendment Act”*). Both were convicted as charged. On 26 February 2007 they were sentenced as follows:

“Accused 1: 10 years imprisonment

Accused 2: 15 years imprisonment.”

[2] The complainant in the trial was at a local tavern in Thaba Nchu on 13 April 2006 with a person by the name of Mafense. The two appellants were also at the same tavern although not in his company. At some stage, he left the tavern to smoke outside where he again saw both appellants. He gave the first appellant a cigarette. He had a conversation with them. In the fifteen minutes he was outside the tavern the two appellants and two other people who the police did not arrest, assaulted him by stabbing him with knives and robbed him of R400, 00 cash. He identified the two appellants on the following basis: The two were known to him over three years. Prior to this attack, he saw them in town during the day. He spoke to them shortly before the attack as he was smoking outside the tavern. The area where he had a short conversation with them, just before they grabbed him and pulled him to the dark area behind the tavern, was illuminated.

[3] The first appellant denied the allegations levelled against him vehemently. He disputed that the complainant knew him well

prior to this day. He maintained that when the complainant left the tavern, he stayed behind with a person called Noko who the complainant confirmed was at the tavern as well on that night. He left the tavern together with Noko until each went to his home.

[4] The point must be made immediately that Mr. Pretorius did not draw up the heads of argument. In his oral submission in court Mr. Pretorius submitted that taking into account all the circumstances of the case, he could not argue that the trial court committed any misdirection on the merits. To the contrary, he was of the view that the trial court was helpful at every step of the proceedings. Both appellants understood their rights and exercised their choice in terms of the Constitution.

[5] I am persuaded to think otherwise on one issue, although I agree that the trial court was helpful. In my view the trial court had the latitude to invoke section 186 of CPA to call any witness, which would assist it in coming to a just decision.

[6] Section 186 of the CPA provides:

“186 Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.”

[7] In his evidence-in-chief and cross-examination the first appellant alleged that he was at all times in the company of Noko. The complainant admitted that, that person was present at the tavern on this fateful night. In my view this witness was not only relevant but would have shed light on whether the first appellant was telling the truth. Alternatively he would have made the State’s case even stronger.

[8] The first appellant, however, decided not to call him as a witness as he wanted the trial to be finalised, as it had been dragging on for too long and he knew he was not guilty. After closing his case and hearing that the court was using the fact

that he did not call Noko as a witness to corroborate his version together with other evidence to convict him, he realised his mistake and asked for the witness to be called. An application was entertained after the trial court had delivered its verdict .The trial court was of the correct view that it was *functus officio* and could no longer entertain this matter. Unfortunately this matter was not raised on appeal on the basis that the trial court was correct. Thus no further evidence including that of Noko was allowed.

- [9] What is abundantly clear is that the trial court did not only rely on the evidence of the complainant of identification at the scene of the robbery but also on the fact that both appellants were well known to the complainant and importantly that he had seen them during the day and a few minutes before the attack. In any event in so far as s186 witnesses are concerned there is no guarantee that the witness that was never called, Noko, would have come to tell the court something different in the absence of any evidence presented and tested as in this case. This is a typical case of the first appellant trying to get a second bite of the cherry.

[10] Despite my view that this is a case where the presiding officer could have invoked s186 but to the extent that the two appellants were clear on their rights, I am satisfied that on a conspectus of all the evidence, its probabilities and improbabilities the conviction in respect of both appellants ought to stand.

[11] As far as the sentences imposed are concerned, Mr. Pretorius was *ad idem* with the State that the sentences imposed were neither severe nor inappropriate taking into account the seriousness of the offence committed and the serious injuries the complainant sustained.

[12] The trial court invoked section 51 of the Criminal Law Amendment Act and found that:

12.1 In respect of the first appellant there were compelling and substantial circumstances, which justified it to deviate from the prescribed minimum sentence of fifteen years for a first offender. It imposed ten years imprisonment.

12.2 In respect of the second appellant who had previous convictions of theft (4 October 2002) and robbery (17

February 2005) there were no compelling and substantial circumstances which justified it to deviate from the prescribed minimum sentence. It imposed fifteen years imprisonment.

[13] The trial court however without any explanation, then, imposed fifteen years on the second appellant who had previous convictions of robbery and theft instead of the prescribed twenty years. Theft is a competent verdict or similar offence to robbery. Besides the theft conviction, the fact remains that the second appellant had a previous conviction of two counts of robbery dated 17 February 2005, hardly a year before the commission of this robbery. The trial court was bound to take that into account to bring the second appellant as a second offender within the twenty years imprisonment prescribed sentence. That on its own is an irregularity on the part of the trial court. The question this Court must address is whether such irregularity vitiates the proceedings.

[14] Section 51 read with Part IV of Schedule 2 lays down minimum sentences for robbery. It provides that if a person

has been convicted of robbery when there are aggravating circumstances, a court must impose the following sentences:

- 14.1 fifteen years for a first offender;
- 14.2 twenty years for a second offender;
- 14.3 twenty five years in respect of a third or subsequent offender.

[15] I cannot find fault in the trial court's approach to the first appellant's case. In my view, it took into account all the factors it ought to have taken into account especially the first appellant's active and leading role in the commission of the robbery and came to a justifiable conclusion that ten years was appropriate in the circumstances.

[16] In respect of the second appellant, the trial court was indeed correct to find that there were no compelling and substantial circumstances justifying a departure from the prescribed minimum sentence. However the fifteen years it imposed, is not a competent sentence in terms of the law.i.e taking into account that he was not a first offender.

[17] In **S v Malgas** 2001 (1) SACR 469 (SCA) the Supreme Court

of Appeal emphasised that if the sentencing court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.¹ The same approach was adopted by the Supreme Court of Appeal recently in the judgment of **Simange Wiseman Mthembu v The State** Case No 206/11 delivered on 29 September 2011 *albeit* it in the context of a higher sentence than the prescribed minimum sentence.

[18] Importantly, it is trite that when the court of appeal contemplates a sentence greater than the sentence imposed the appellant must be forewarned of that fact. Arguably, as in the circumstances of this case, the second appellant was not forewarned of the possibility of the imposition of twenty years as prescribed, this Court cannot impose such increased sentence as it would be unfair to the appellant to be ambushed in that fashion and at such late stage. In my view, the irregularity committed as alluded to above in para [13] is

¹ In **Malgas** at para [18] Marais JA made it plain that “ What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases.”

not one that vitiates the proceedings.

[19] In the circumstances the appeal is dismissed and the convictions and sentences imposed on 26 February 2007 are confirmed.

B.C. MOCUMIE, J

I concur.

H. MURRAY, AJ

On behalf of appellants:

Mr. K. Pretorius
Instructed by:
Legal-Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv. E. Liebenberg
Instructed by:
Director Public Prosecutions
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BCM/