

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A161/2012

In the appeal between:-

TSHEPO GEORGE NKALA

and

THE STATE

CORAM: EBRAHIM, J *et* MATLAPENG, AJ

JUDGMENT BY: MATLAPENG, AJ

HEARD ON: 8 OCTOBER 2012

DELIVERED ON: 25 OCTOBER 2012

[1] The appellant was charged with two counts of robbery with aggravating circumstances in the Regional Court at Viljoenskroon. At the conclusion of the trial, he was found guilty as charged and sentenced to two terms of twelve years imprisonment in respect of the two counts. It was however ordered that the two sentences should run concurrently. The appellant, with leave of the trial court, appeals against his sentence only.

- [2] The facts that led to the conviction of the appellant are briefly as follows: Appellant in concert with seven other people robbed the two complainants of two cellular phones and cash. The evidence was that whilst four people kept watch outside the shop, the appellant and three others entered the shop. One of the assailants had a firearm and the appellant and others had knives.
- [3] During the robbery, the appellant injured one of the complainants. The injuries are according to the J88, described as 1,5cm scratch marks on both the head and the forehead respectively.
- [4] Sentencing is described as being pre-eminently within the discretion of the trial court and a court on appeal may only interfere where it is shown that the trial court failed to properly exercise its discretion. This is limited to those instances where there is an irregularity or a misdirection or where there is a striking disparity between the sentence imposed by the trial court and the one the appeal court would have imposed. This is explained as follows in the seminal case of **S v MALGAS** 2001 (1) SACR 469 (SCA) paragraph 12:

“[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which

it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[5] It was submitted in this court by both the appellant and the respondent that the sentence imposed by the trial court induces a sense of shock especially when one takes into account the criteria laid down for sentencing which has developed over the years in our courts.

[6] It is trite that when a court imposes a suitable sentence, it has to take into account the nature of the crime, the interests of the community and the personal circumstances of the offender and lastly the element of mercy also comes to the fore.

[7] In mitigation of sentence the following personal circumstances of the appellant were placed before the court namely he is 18-years of age and was 17 years when he committed the offence, he was not married and had no dependants. He was still attending school and doing standard 7 now known as grade 9. He was a

first offender. He had been in custody for about seven months at the conclusion of the trial.

[8] The offence with which the appellant is convicted attracts a minimum sentence in terms of Criminal Law Amendment Act, No 105 of 1997. The trial court however, correctly found that the provisions of the Act are not applicable to the appellant as a result it stood free to impose whatever sentence it saw fit.

[9] The trial court although it recognised that the appellant was a youthful offender, seems to have paid mere lip service to this aspect when it considered an appropriate punishment to impose on him. As a result, it sentenced him to two terms of imprisonment of twelve years each.

[10] There are good policy reasons why youthful offenders are treated differently to adult offenders. This is based amongst others on their immaturity and lack of judgment. Because of their immaturity they lack judgment and are prone to irrational and reckless behaviour. This was aptly put as follows in **S v Zen Vier Ander Sake** 1999 (1) SACR 427 (E) at 430f:

“Besondere omstandighede geld by die bestrawwing van jeugdige oortreders, juis vanweë die feit van hul jonkheid. Die jeug is kenlik van kosbare waarde vir die gemeenskap - soos weerspieël word in art 28 van die Grondwet. Hulle is ons toekoms. Verbandhoudend hiermee is die feit dat jeugdiges se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard meer vatbaar vir beïnvloeding, ten goede sowel as ten kwade. Kriminele wangedraginge deur 'n jeugdige voorspel àl te dikwels (maar nie noodwendig nie) 'n kriminele volwassenheid. Jeugdiges wat misdrywe pleeg is dus potensiële volwasse misdadigers en is as sulks 'n bedreiging nie net vir die gemeenskap nie, maar ook vir hul eie welsyn en toekoms. Dit is derhalwe die dure plig van elke persoon en instansie gemoeid met jeugdiges, ook dan die howe, om te poog om jeugdige oortreders vir die geledere van wetsgehoorsames te win.”

- [11] Youthful offenders are more amenable to rehabilitation and a sentencing court has to take this into account. In **S v NKOSI** 2002 (1) SACR 135 (W) at 143b the following is said:

“The fine balance that needs to be struck between society's need to punish crime while not overlooking the interests of a juvenile offender was emphasised by Botha JA in *S v Jansen and Another* 1975 (1) SA 425 (A) at 427 *in fine* - 428A 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.'”

[12] Whilst the interest of the society has to be taken into account when an appropriate sentence is imposed, this should not be at the expense of the offender. In this matter, it is clear that the interest of the community took a much more central role at the expense of the offender's personal circumstances with the resultant loss of an appropriate balance between them.

[13] In **S v FAZZIE AND OTHERS** 1964 (4) SA 673 (A) at 684B – C the following is said:

“Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh.”

I am of the view that failure by the trial court to accord due weight to the personal circumstances of the appellant especially his youthfulness which stood out like a sore thumb screaming for attention has sadly led to this shockingly inappropriate sentence. This in my judgment constitutes a misdirection as a result this

court is entitled to interfere in the sentence imposed by the trial court.

[14] It cannot be emphasised enough that the appellant has been convicted of a very serious and violent offence. Regard can be taken to the fact that our country is in the grip of a violent crimes epidemic which more often than not are committed by youthful offenders. The robbery was committed in a brazen manner and one of the complainants was injured especially by the appellant. The goods that were robbed were not recovered.

[15] Taking into account both mitigating and aggravating factors, I am of the view that an appropriate sentence would be one of imprisonment part of which should be suspended.

ORDER

[16] In the circumstances I make the following order:

1. The appeal against sentence is upheld.
2. The sentence imposed by the Magistrate is set aside and replaced with the following:
 - (a) On count (i) the accused is sentenced to twelve years imprisonment, five years of which is suspended for a

period of five years on condition that the accused is not found guilty of robbery or theft committed during the period of suspension.

- (b) On count (ii) the accused is sentenced to twelve years imprisonment, five years of which is suspended for a period of five years on condition that the accused is not found guilty of robbery or theft committed during the period of suspension.
- (c) It is hereby ordered that the sentence in count 1 shall run concurrently with the sentence in count 2.
- (d) The sentences are antedated to 24 November 2011.

D. I. MATLAPENG, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant: Adv. T B van Rensburg
Instructed by:
Jacques Groenewald Attorneys
KROONSTAD

On behalf of respondent: Adv. E Liebenberg
Instructed by:
The Director:
Public Prosecutions
BLOEMFONTEIN

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