

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A490/2007

In the appeal between:

ISMAEL MAROTHODI

1st Appellant

ISAAC MOLATEDI

2nd Appellant

ISAAC TSOUTE

3rd Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE *et* MOLOI, JJ

HEARD ON:

31 JANUARY 2011

DELIVERED ON:

3 FEBRUARY 2011

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APPEAL

MOCUMIE, J

[1] The three appellants appeared in the Regional Court, Welkom on 20 July 1999 on several charges. On 12 January 2000 they were convicted by the same court on robbery with aggravating circumstances, rape and two counts of attempted rape. On 3 February 2000 each appellant was sentenced as follows:

“Count 2, housebreaking with intent to rob and robbery: Fifteen (15) years imprisonment.

Count 3, rape: Ten (10) years imprisonment.

Count 4, attempted rape: Five (5) years imprisonment.

Count 5, attempted rape: Five (5) years imprisonment.”

The trial court apparently dismissed the application for leave on 31 October 1999. The appellants then petitioned this Court. Leave was granted only against sentence. The appeal is then against sentence only. The appeal is opposed.

[2] Mr Tshabalala in his Heads of Argument and in his oral arguments, on behalf of the appellants, submitted that the provisions of the Criminal Law Amendment Act 105 of 1997 (“the minimum sentencing legislation”) were not pertinently drawn to the attention of the appellants. He argued that the trial court did not take into account the period the appellants spent in custody pending finalisation of the matter, awaiting trial; that the appellants were relatively young and that the third appellant was a first offender at the time of the commission of these offences.

[3] The proven facts of this case can be summarised as follows. On 9

August 1998 Elisa Kwaaiman and her family comprising of a girl and her two friends were asleep when a group of five young men burst into her home and robbed her of money, raped her daughter and attempted to rape her two friends. All three appellants were part of this group.

[4] The offences committed are very serious and the experience was undoubtedly traumatic on Ms Kwaaiman and her family and will take time before it can be erased from their mind.

[5] It has been set down by the Supreme Court of Appeal in **S v Ndlovu** 2003 (1) SACR 331 (SCA) at 335j that:

“[11] Whilst it is desirable that the charge-sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. R v Zonele and Others 1959 (3) SA 319 (A) at 323A - H; S v Moloi 1969 (4) SA 421 (A) J 2003 (1) SACR p336 MPATI JA at 424A – C.”

[6] The Court stated further at 336f:

“(Michael Legoa v The State, case No 33/2002, judgment delivered on 26 September 2002, in para [20].) Cameron JA declined, however, to lay down a general rule that the charge-sheet must in

every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000) with which an accused is charged, or the facts the State intends to prove to establish it. He held, in the end, that: 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will depend on a vigilant examination of the relevant circumstances'."

See also **S v Seleke en Andere** 1976 (1) SA 675 (T) SA 675 (T) AT 682h.

- [7] In applying the approach set down in **Legoa** *supra* and approved in **S v Ndlovu** *supra* the enquiry therefore in this case is whether, on a vigilant examination of the relevant circumstances, it can be said that the appellant had a fair trial.
- [8] During the trial only the third appellant was legally represented during the entire trial. Through his legal representative he was able to answer the charge. Extensive and thorough cross-examination by his legal representative bears testimony to this. In my mind the third appellant was properly represented and there can be no doubt that he was appraised of and warned of the applicability of section 51 of the Act by his legal representative in the absence of any contradictory

evidence.

[9] Insofar as the first and second appellants are concerned, both were legally represented until after two key state witnesses had testified. From there on they conducted their own defence.

[10] When their legal representatives withdrew in the middle of the trial due to lack of instructions on 29 November 1999, the first appellant's legal representative pertinently requested the court (at p 107 of the transcribed record) to explain the accused's right to legal assistance/aid and that a lawyer should be appointed for him. I take it he did so wisely and knowing the sentence his client faced. All the trial court said in this regard is as reflected on p 108 of the record:

“Kan u aandui ...wat u gaan doen rakende u verdediging”

The appellants then indicated that they will conduct their own defence. With no further ado the trial continued with the two appellants conducting their own defence and blatantly not assisted by anyone including the trial court at all stages of the trial.

[11] Advocate Hoffman was constrained to concede that this was irregular or at least that the trial court should have warned the two appellants

at an early stage of the trial of the impending applicability of the minimum sentencing legislation. Either at the outset or at the stage when their legal representatives withdrew from the matter. To inform the two appellants at sentencing was not fair nor did it give the appellants time to prepare themselves.

[12] Applying the approach set down in Legoa the question remains whether these two appellants had a fair trial. In my view, as correctly conceded by the State, they did not.

[13] Upon conviction the two appellants became liable to a minimum sentence of life imprisonment in respect of the robbery and rapes unless substantial and compelling circumstances were present justifying a departure from the prescribed sentence. The trial court without saying so specifically found such circumstances to exist and purportedly imposed lesser sentences. Clearly the trial court, despite saying that it tempered with the prescribed sentence overreached its discretion in its zeal to satisfy the interests of the society regardless of the favourable personal circumstances of the appellants such as their relative youth and the fact that they spent at least two (2) years in prison pending the finalisation of this matter.

[13] The purpose of sentencing is generally known. It has been repeatedly stated that a sentencing court must consider the three basic principles of sentencing, the triad, when considering an appropriate sentence, viz The seriousness of the offence, the personal circumstances of the offender and the interests of society as propounded in **S v Zinn** 1969 (2) SA 357 AD. As Friedman J formulated it in **S v Banda and Others** 1991 (2) SA 352 (BG) at 355A-B:

“The elements of the triad contain equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between the elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others...”

[14] I am of the view that the trial court did not strike that counter balance referred to in **Banda** *supra* and in the process failed to exercise its discretion judiciously which entitles this Court to interfere with the sentences imposed.

[15] There is a close link between the offences and in such

circumstances, the concurrence of sentences is always appropriate. In **S v Koutandos and Another** 2002 (1)SACR 219 (SCA the Supreme Court of Appeal interfered with the cumulative sentences of 15 years and 27 years imprisonment imposed on two appellants respectively upon conviction of motor vehicle theft and fraud. The Court upheld the appeal and imposed lesser sentences on the basis that:

“When regard is had to the cumulative effect of the sentences imposed on both appellants, the result strikes me as so excessive as to justify interference by this Court.”

(Per Scott JA at 221g).

See too **S v Senatsi and Another** 2006 (2) SACR 291 (SCA).

[16] I am of the view that, utilising the **Koutandos** decision *supra* as a guideline, whilst bearing in mind that every sentence must be individualised, an effective twenty five (25) years will be appropriate. Such sentence can be attained by ordering that the sentences imposed to run concurrently.

[17] In the circumstances the appeal ought to succeed and I make the following order.

ORDER:

1. The appeal against sentence by all three appellants is upheld.

2. The convictions and sentences imposed on 3 February 2000 are set aside and replaced by the following:

“Count 2: Fifteen (15) years imprisonment.

Count 3: Ten (10) years imprisonment.

Count 4: Five (5) years imprisonment.

Count 5: Five (5) years imprisonment.”

3. *In terms of section 282 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences in counts 4 and 5 should run concurrently with the sentences in counts 2 and 3.”*

B.C. MOCUMIE, J

I concur.

K. J. MOLOI, J

On behalf of the appellant:

Adv. L. Tshabalala
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN