

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A233/2010

In the appeal of:

MPUMELELO MOYO

First appellant

LINDINKOSI KHESWA

Second appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* SINGH, AJ

HEARD ON:

7 FEBRUARY 2011

JUDGMENT BY:

SINGH, AJ

DELIVERED ON:

10 FEBRUARY 2011

- [1] The first and the second appellant were tried and convicted in the Regional Court, held at Petrus Steyn, of the crimes of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 (count 1), possession of firearm (count 2) and possession of ammunition (count 3) in contravention of the Firearms Control Act 60 of 2000 read with section 250 of Act 51 of 1977, and each of the appellants was sentenced to a term of fifteen (15) years imprisonment in respect of count

1 and five (5) years in respect of counts 2 and 3 taken together for purposes of sentence.

[2] Defence attorney, Mr. Stoffberg, who represented the first and second appellant at their trial, obtained leave to appeal for each appellant from the court *a quo*.

[3] The appeal before this court is in respect of sentence only and this court refrains from dealing with the merits of the conviction of each of the appellants.

[4] The central issues of this appeal are whether the learned magistrate acted correctly in imposing sentence and in finding that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence on the first and second appellants in respect of count 1.

[5] The defence counsel argued at the trial that the fact that the goods were recovered and handed in, that no-one was injured during the incident and that first and second appellant were first offenders were substantial and compelling

circumstances justifying lesser sentences. It was further argued that the sentences were shockingly inappropriate and that the magistrate erred in not treating all counts as one for purpose of sentencing.

- [6] In respect of count 1, robbery with aggravating circumstances (section 1, Act 51 of 1977) this court finds that the background facts at the trial of both appellants established that this was a planned, armed robbery. The arguments raised by the defence in respect of count 1 are untenable. In **S v ROSLEE** 2006 (1) SACR 537 (SCA) Navsa JA indicated at paragraph [33] that:

“Although there is no *onus* on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration. In a given case it may not be enough for an accused to argue that such circumstances should be inferred from or found in the evidence adduced by the State.”

The essence of the **MALGAS** judgment 2001 (2) SA 1222 (SCA) and of the **DODO** judgment 2001 (3) SA 382 (CC) is

that disproportionate sentences are not to be imposed. Also, the fact that an appellant is a first offender is not in itself necessarily sufficient to depart from the prescribed minimum sentence.

[7] In imposing sentence on count 1 in terms of the discretionary minimum sentence provisions of the Criminal Laws Amendment Act, 105 of 1997 (as amended), this court finds that the regional magistrate considered all material facts relevant to sentence, Further, this court finds that the regional magistrate exercised its discretion judicially and correctly. There is also no misdirection on the facts relevant to the sentence imposed. Consequently this court finds no reason to interfere with the sentence imposed by the regional magistrate in respect of count 1.

[8] In respect of counts 2 and 3 (possession of firearm and ammunition respectively) the defence argued that the regional magistrate misdirected itself in imposing sentence on the appellants in that

(i) the magistrate did not take into consideration that the first appellant and the second appellant had been

incarcerated for approx one (1) year before sentence.

- ii) the regional magistrate did not take into consideration that the three counts arise from the same set of facts as to time and place and the cumulative effect in respect thereof.

[9] It is a well-established principle that the appeal court may interfere in a lower court's decision, where such court had not exercised its discretion judicially. There is merit in counsel's argument in that this court is persuaded that the abovementioned constitute material misdirection by the regional magistrate, and, the interests of justice allows this court to interfere with the sentence imposed by the lower court in respect of counts 2 and 3. In our view, an appropriate sentence, in respect of each appellant on counts 2 and 3, taken together for purposes of sentence, is three (3) years consequently, the sentence imposed by the regional magistrate on counts 2 and 3 falls to be set aside and replaced.

[10] In the result this court makes the following orders:

10.1 The appeals of the first appellant and the second

appellant on count 1 are dismissed and their sentences are confirmed.

10.2 The appeals of the first appellant and the second appellant on counts 2 and 3 are upheld.

10.3 The sentences of the first appellant and the second appellant are set aside and replaced with the following sentence:

first appellant and second appellant are each sentenced to three (3) years imprisonment.

S. SINGH, AJ

I concur.

C.H.G. VAN DER MERWE, J

On behalf of appellants: Mr. L. Stoffberg
Instructed by:
Stoffberg Attorneys
LINDLEY

On behalf of respondent: Adv. W.J. Harrington
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp