

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A52/2010

In the matter between:-

BOIKI ESAU LEHOLE

First Appellant

PAKISO BENNET MAKOKO

Second Appellant

versus

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* MTHEMBU, AJ

JUDGMENT:

MOCUMIE, J

HEARD ON:

3 MAY 2010

DELIVERED ON:

10 JUNE 2010

APPEAL

MOCUMIE, J

- [1] The two appellants, Mr Boiki Esau Lehole and Pakiso Bennet Makoko, appeared in the Regional Court, Kroonstad, on a charge of robbery with aggravating circumstances and a count of rape on 19 October 2009. The first appellant was convicted

of both robbery with aggravating circumstances and the rape charge and the second appellant was convicted of robbery with aggravating circumstances only. The first appellant was sentenced to fifteen years imprisonment for the robbery and eighteen years imprisonment for the rape. Both sentences were ordered to run concurrently. The second appellant was sentenced to ten years imprisonment for the robbery. The two appellants applied for leave to appeal against both their convictions and sentences to the court *a quo* which was refused. This appeal, with leave of the court *a quo*, is only against sentence.

- [2] Mr T.B. van Rensburg, for the appellants, submitted that the trial court erred by not finding that compelling and substantial circumstances existed which justified a departure from the prescribed sentence in respect of the robbery with aggravating circumstances. He submitted further that in respect of both counts the trial court erred by not taking both counts as one for purposes of sentence as the count of rape flowed from the robbery or was committed during the robbery. In respect of the

second appellant he submitted that the trial court overemphasised the seriousness of the offence and the interests of society taking into account the appellant's personal circumstances including, *inter alia*, his youthfulness and the fact that he was a first offender and that he was in custody for over two years and further the fact that he did not participate in the commission of the rape in count 2.

- [3] The applicable principles in an appeal against sentence are clearly set out in **S v Rabie** 1975 (4) SA 855 (A) at 857D-F where the Appellate Division stated:

"In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal - (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised". The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[4] The first appellant was 19 years of age and in Grade 11 at school at the time of the commission of this offence. He is unmarried and has one child. He was doing casual manual jobs and earning R50, 00 per day. He is not a first offender. He has two previous convictions, one of robbery and the other theft. He was arrested on 15 June 2007 and was kept in detention until he was convicted and sentenced on 19 October 2009, almost two years later.

[5] The Regional Magistrate's view in respect of the first appellant was as follows:

“Aan die ander kant bestaan daar geen twyfel by die hof dat die enigste gepaste vonnis wat aanklag 1 aanbetref maar die van direkte en langtermyn gevangenisstraf sal wees... Wat die aanklag van roof met verswarende omstandighede aanbetref... is die Hof van oordeel dat wat die aanklag van roof aanbetref daar nie meriete daarin sou wees om af te wyk van die minimum vonnis nie. Die hof sal egter ook wel die kumulatiewe effek van die gevangenisstraf wat hy op beide klagtes aan u gaan opleë terdeë in gedagte hou by vonnisoplegging.”

[6] The second appellant was 18 years at the time of commission of this offence. He was not attending school although he attained Grade 8. He also did casual labour and has one child. He is a first offender.

[7] The Regional Magistrate's view in respect of the second appellant was as follows:

“Aan die ander kant is die Hof ook in u geval van oordeel dat die enigste gepaste vonnis egter maar die van direkte en betreklik langermyn gevangenisstraf sal wees.”

[8] It is correct as the trial court found that the offences which the appellants committed are serious. I agree with him that these offences are rife in this province. It is also true that direct long term imprisonment is inevitable in respect of both appellants. However it is necessary to evaluate whether the trial court exercised its discretion judiciously and did not over-emphasise one or the other element of the basic triad: the accused's

personal circumstances, the seriousness of the offence and the interests of society.

[9] For convenience I will address the second appellant's circumstances first. In an **unreported appeal case, S v Petrus Lenyeta, Case No. A279/2009** by **Cillie J**, in which case I concurred, delivered on 4 February 2009, the personal circumstances of the appellant were almost similar to the present case. The appellant in that case was also convicted of robbery with aggravating circumstances. He was 18 years of age and pleaded guilty. The ten years imprisonment imposed by the Regional Court was set aside and substituted with six years of which two years was suspended for five years on certain conditions.

[10] In the aforesaid **S v Petrus Lenyeta** although the second appellant was 18 years of age, as in this case, he accepted responsibility immediately by pleading guilty, which on its own indicated a sense of remorse and a good prospect for rehabilitation. In this case the appellant pleaded not guilty and

protracted the proceedings despite the overwhelming evidence against him. However I am inclined to agree with Mr Van Rensburg that the Regional Magistrate overemphasised the seriousness of the offence at the expense of the other important factors, including the second appellant's personal circumstances and the fact that he had been in custody for two years. He also did not participate in the more serious offence of rape as the first appellant did. In my view the trial court indeed had room to impose a lesser sentence.

[11] In all the circumstances the appeal on sentence in respect of the second appellant ought to succeed and the sentence be reduced.

[12] Insofar as the first appellant is concerned, I am in full agreement with the Regional Magistrate that the first appellant's blameworthiness is higher than that of the second appellant. He is older than the second appellant by a year. In his instance as the trial court correctly observed:

“... (A)s die Hof ... in gedagte hou dat u as’t ware maar tot ‘n groot mate die persoon was wat ook ten tyde van die rooftog die leidende rol gespeel het, u het onder andere die mes voortdurend teen die klaagster gehou. Ook dat u nie ‘n eerste oortreder is nie, ook nie in verband met die aanklagte van roof nie...” (Own emphasis)

Furthermore despite the overwhelming evidence against the first appellant he persisted in his innocence, *albeit* his right to do so. The fact remains that he showed no sign of remorse or repentance.

[13] Section 51(2) (a) (ii) of the Criminal Amendment Act, 105 of 1997 (“the Criminal Amendment Act”), provides:

“51 Discretionary minimum sentences for certain serious offences

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years...”
- (Own emphasis.)

[14] I am of the view that the Regional Magistrate ought to have imposed twenty years instead of the 15 years because the first appellant falls within the category provided for in terms of s51 (2)(a)(ii) set out above on the basis of being ‘a second offender’ in respect of the robbery.

[15] The first appellant has two previous convictions of the same nature viz: robbery of which he was sentenced to a suspended sentence of four years in 2004 and theft for which he was given correctional supervision of two years in 2004. Notwithstanding these previous convictions the Regional Magistrate found that compelling and substantial circumstances existed in respect of count 2 of rape. He enumerated these to be the fact that the appellant had been in custody for almost two years; that the complainant did not sustain serious physical injuries; and that

the rape flowed from the robbery. In other words that the rape was committed during the same occasion as the robbery. The Magistrate lost sight of the fact that rape is a violent crime. It is both a physical and psychological assault on its victim.

[16] The application of s51 of the Criminal Amendment Act is warranted on the totality of the evidence and facts before the trial court and not per count. See **S v Johaars** 2010 (1) SACR 23 (SCA) at 29c-d where the Supreme Court of Appeal stated that where multiple offences need to be punished the court had to ask itself what the appropriate sentence was for all the offences together.

[17] From the facts of this case especially first appellant's conduct during the commission of these offences it is clear that he has no respect for other people's rights particularly women who are the most vulnerable of our society. He failed to use the opportunities that the courts gave him in the recent past to rehabilitate. The possibility that he will repeat these offences is high. It was thus necessary to remove him from the society for

a longer period than the second appellant. I am as a result satisfied that the sentences on both counts are appropriate. In **S v Dlamini** 2010 (1) SACR 295 (GSJ) the court on appeal set aside a sentence of life imprisonment and substituted it with twenty years. If the first appellant was given the necessary timeous notice in terms of s322 (b) of the Criminal Procedure Act 51 of 1977, I would not have hesitated to increase his sentence. See **S v Du Toit** 1979 (3) SA 846 (A) at 855; **S v Anderson** 1964 (3) SA 494 (A) at 495 and **S v Van Aardt** 1975 (2) SA 372 (RAD).

[18] In the circumstances the following order is made:

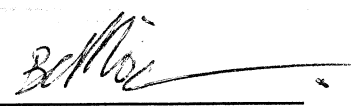
ORDER:

1. The appeal against sentence in respect of the first appellant (Boiki Esau Lehole) on both count 1 and 2 is dismissed.
2. The appeal against sentence in respect of the second appellant (Pakiso Bennet Makoko) on count 2 is

upheld and the sentence of 10 (ten) years imprisonment is substituted with the following:

"The accused 2 (Pakiso Bennet Makoko) is sentenced to 10 (ten) years imprisonment of which 4 (four) years is suspended for a period of 5 (five) years on condition that the accused is not convicted of robbery or attempted robbery or an offence involving violence to the person of another and for which he is sentenced to imprisonment without the option of a fine, committed during the period of suspension."

3. It is ordered that the sentence imposed in respect of the second appellant is, in terms of s282 of the Criminal Procedure Act, 51 of 1977, antedated to 19 October 2009.


B.C. MOCUMIE, J

I concur.



J. B. MTHEMBU, AJ

On behalf of the appellant:
Instructed by:

Adv. T.B. van Rensburg
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. M.A. Lencoe
Director of Public Prosecutions
BLOEMFONTEIN

BCM