

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A55/2010

In the appeal between:-

JANTJIE LESOLE

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J. *et* MTHEMBU, AJ

HEARD ON: 3 MAY 2010

JUDGMENT BY: MTHEMBU, AJ

DELIVERED ON: 8 JULY 2010

JUDGMENT

- [1] The appellant (accused 2) and accused 1 were found guilty of robbery with aggravating circumstances in the Kroonstad Regional Court on 29 September 2009. The appellant was sentenced to fifteen years imprisonment in terms of the

Criminal Amendment Act, 105 of 1997. The court *a quo* found that there were no substantial and compelling circumstances present.

[2] The appeal is against the imposed sentence only with leave of the *court a quo*.

[3] The circumstances surrounding the commission of the offence are that the appellant and accused 1, using a knife, robbed two school children of two cellphones and R60, 00 cash in broad daylight. The value of the cellphones is R1 899, 00.

[4] The appellant's personal and mitigating circumstances are the following:

- 4.1 He was 24 years of age when he committed this offence;
- 4.2 He was single and had a one year old dependant;
- 4.3 He was a hawker earning R900,00 per month;
- 4.4 He passed Grade 12 at school;
- 4.5 He was a first offender;

4.6 The knife was not used and the victim did not sustain any bodily injuries.

[5] The aggravating circumstances are the following:

5.1 Robberies of cellphones where a knife is used are prevalent in the jurisdiction of the court *a quo*;

5.2 The offence was committed at twelve o' clock during the day;

5.3 The victim/s were school children who may have been younger than the appellant, these were easy victim/s

[6] Mr. Van Rensburg, for the appellant, argued that a sentence of fifteen years imprisonment is unjust as it is disproportionate to the offence, the appellant and the interest of the community. The presiding officer over-emphasised the seriousness of the offence and the interest of the community over the personal circumstances of the appellant. He submitted that this case is distinguishable from the robbery that the legislature had in mind for purposes of minimum sentence legislation. Usually where the victim

sustained no injuries and the appellant was young; the sentence will be less than fifteen years.

[7] Mr Van Rensburg referred to **S v ISAACS AND ANOTHER** 2007 (1) SACR 43 (C) where a knife was used to threaten the victim and the accused was a first offender, the court found that substantial and compelling circumstances were present and departed from the prescribed minimum sentence. See also **S v NDLOVU** 2007 (1) SACR 535 (SCA).

[8] The approach to be adopted in an appeal against sentence is reflected in the following passage in the judgment of Nicholas AJA in **S v SHAPIRO** 1994 (1) SACR 112 (A) at 119 j – 120 C:

“It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

'1. 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".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.' "

See **S v SADLER** 2000 (1) SACR 331 (SCA) at 334 d – g, where it was also been held that:

"The overemphasis of the effect of the appellant's crimes, and the underestimation of the person of the appellant, constitutes ... a misdirection and in result the sentence should be set aside."

See also **S v ZINN** 1969 (2) SA 537 (A) at 540 f – g. This must be equally true when there is an over-emphasis of the

personal circumstances of the accused and an underestimation of the gravity of the offence. See **S v SALZWEDEL AND OTHERS** 1999 (2) SACR 586 (SCA) at 591.

- [9] In **R v DHLUMAYO AND ANOTHER** 1948 (2) 677 (A) at 706, the court *inter alia* held that:

“... in order to succeed, the appellant has not to satisfy an appellate court that there has been ‘some miscarriage of justice or violation of some principle of law or procedure.’”

In respect of an appeal against the sentence the appellant must show that the sentence is disturbingly inappropriate or wholly inadequate that the inference should be drawn that the trial court had not properly and judiciously exercised its discretion.

- [10] There is no doubt that the offence committed by the appellant is one of the most prevalent in the country. However, when a court imposes a sentence it must arrive at a balanced sentence taking into account the seriousness of

the offence, its prevalence, the personal circumstances of the appellant and the interests of the community.

[11] In **S v SADLER** *supra* the court had this to say at 332 b – d:

“The court considered firstly whether it was entitled to intervene in the sentence. The Court remarked that the traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive leniency where there has been a misdirection on the part of the court which imposed the sentence was easy enough to state. It was less easy to apply. Account had to be taken of the admonition that the imposition of sentence was the prerogative of the trial court and that the exercise of its discretion in that regard was not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. At the same time it had to be recognised that the admission could not be taken too literally and required substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it was intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate Court would have imposed, interference was justified. In such situations the

trial court's discretion was regarded as having been unreasonably exercised.”

[12] The trial court should have found that the fact that the appellant was 24 years of age when he committed the offence, he was a first offender, the knife was not used and the victim did not sustain bodily injuries constitute substantial and compelling circumstances.

[13] Considering the above cases, this court is of the view that it should interfere with the sentence imposed and arrive at a balanced sentence taking into account the seriousness of the offence, its prevalence, the personal circumstances of the appellant and the interest of the community. This court accordingly finds that substantial and compelling circumstances in terms of section 51 of the Criminal Law Amendment Act, 105 of 1997, are present in this case.

[14] In the result I make the following order:

- 1. The appeal against the sentence imposed on 29 September 2009 succeeds.**

2. The sentence imposed on 29 September 2009 is substituted with a sentence of 10 (ten) years imprisonment.
3. This sentence is deemed to have been imposed on 29 September 2009.

J.B. MTHEMBU, AJ

I concur.

B.C. MOCUMIE, J

On behalf of appellant:

Adv. T.B. van Rensburg
Instructed by:
Legal Aid Board
KROONSTAD

On behalf of respondent:

Adv. M.A. Lencoe
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN