

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A169/2009

In the case between:

LEHLOHONOLO THIPE
MOSA MOSALA
MOEKETSI MARAKA

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

Respondent

CORAM:

C J MUSI, *et* MOCUMIE, JJ

JUDGEMENT:

MOCUMIE, J

HEARD ON:

2 NOVEMBER 2009

DELIVERED ON:

26 NOVEMBER 2009

MOCUMIE, J

- [1] The three appellants appeared in the Regional Court, Welkom on two counts of robbery with aggravating circumstances. They were convicted as charged and sentenced to ten years imprisonment on each count. They now appeal against their sentences with leave of the trial court.

- [2] Mr T B van Rensburg in his heads of argument and in his oral arguments, on behalf of the first and second appellant, submitted that the trial court overemphasized the seriousness of the offence at the expense of the favourable personal circumstances of the appellants. He submitted that strictly speaking the evidence led did not show that the robberies were committed as part of a plan and or common purpose or that aggravating circumstances as contemplated in section of the Criminal Procedure Act 51 of 1977 ("the CPA") existed.
- [3] He submitted further that the first appellant was 21 years at the time of the commission of the offence. He was a student at Free State University; he was not married and had no dependants; and he was a first offender. The second appellant was 17 years old at the time of the commission of these offences; he was still doing Grade 11 at Edu College in Welkom; and had no previous convictions.
- [4] Mr Pretorius, on behalf of accused 3 submitted that the accused was 21 years of age at the time of the commission of these offences; he was not attending school or working; he

had a minor child that was staying with its mother; he had been in custody since his arrest on 23 December 2006, i.e. a year and eight months; and that he had no previous convictions.

- [5] Mr Pretorius requested this Court to exercise its powers in terms of section 309(3) of the CPA in so far as the conviction in respect of count two is concerned as the evidence did not prove aggravating circumstances as contemplated in s1 of the CPA. To put his submission in context after the appellants were convicted as charged in the trial court they applied for leave to appeal against both conviction and sentence in the same court. After considering their application, the trial court, dismissed the application with regard to the conviction and granted leave to appeal to this Court on sentence only. That is the basis on which this matter came before this court on appeal. Section 309(3) of the CPA provides:

“(3) The provincial or local division concerned shall thereupon have the powers referred to in section 304 (2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to

increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.”

- [6] The proven facts of this case can be summarised as follows. On 23 December 2006 at about 2h00 am, in Bedelia, Welkom, the appellants robbed the two complainants minutes apart. The first complainant went into a tavern to buy liquor and left his father-in-law and sister-in-law inside his bakkie. He was pelted with beer bottles whilst inside the tavern and robbed of his Nokia cellular phone and R400, 00 cash. When his assailants went out of the tavern they went to the bakkie and robbed his father-in-law of his Samsung cellphone. Apart from being hit with bottles the first complainant did not sustain serious injuries. His father-in-law also although assaulted did not sustain serious injuries. The appellants' defence that they

did not rob the complainants in both counts was on a conspectus of all the evidence correctly rejected.

- [7] Mr Pretorius submissions must be seen in the light of the state's evidence as a whole and definitely not selectively to suit the appellant's case. If one looks at the evidence of Ms van Niekerk who said she had seen a knife in the third appellant's possession at the time the complainant in the second count was accosted there is indeed no evidence that showed that the complainant in the second count was threatened with the knife or even saw it. But that is not the end of the story because the second complainant's answers to the prosecutor on this aspect are also relevant. For this reason I quote directly what he said on page 24 of the transcribed record:

“... toe Gerhard binne-in die winkel ingegaan het daar 'n paar mans gekom en hulle het my uitgehaal en hulle het my aangerand, my selfoon gevat.”

This evidence was not challenged by any of the appellants

and remained uncontroverted to the end of this case.

[8] In terms of section 1 of the CPA,

“aggravating circumstance” in relation to robbery, or attempted robbery, means –

- (a) the wielding of a firearm or any other dangerous weapon;
- (b) the infliction of bodily harm; or
- (c) a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence. **(My emphasis)**

[9] In this case as is clearly evidenced there was “the infliction of bodily harm” on both the complainants in count 1 and 2 so that this leg of requirement, s1 (b) of the CPA, is satisfied. This case is on that basis distinguishable from the facts of **S v Isaacs and Another** 2007 (1) SACR 43 (CPD) on which the appellant relied heavily for a substitution of the conviction on robbery with aggravating circumstances with robbery simpliciter.

- [10] The test for the court of appeal to invoke its review powers in terms of s309 (3) is set out clearly in the section: The irregularity complained of must be such that if not removed by the court of appeal justice would not be served (the principle of failure of justice). See R v Rose 1937 AD 467 – 477; S v Mushimba en Andere 1977 (2) SA 829 (A) at 844H; S v Lubbe 1981 (2) SA 854 (C) 860F - G; S v Kok 2005 (2) SACR 240 (NC). In essence the appellant must not only show a possibility of prejudicial consequences of an irregularity but must prove actual prejudice which led to him or her not having received a fair trial.
- [11] Courts are loathe to allow appellants who once granted leave to appeal on one leg then on appeal seek indulgence of the court of appeal to address the other leg as well. Section 309(C) of the CPA specifically provides for a route which an appellant in such circumstances ought to follow. i.e to petition the Judge President of the Provincial Division (s)he was convicted in. The facts of this case do not justify a departure from this procedure. Whatever injustice the appellants believe was meted out against them is not supported by the evidence. The fact of the

matter is that the complainants were assaulted and robbed. That amounts to, in my view, "the infliction of bodily harm" contemplated in s1 of the CPA justifying a heavier sentence than with robbery simpliciter. The case may not be a clear cut case or not prosecuted as best as it could have been but I desist from invoking s309(3) at all in these circumstances lest we open the flood gates unnecessarily.

[12] The last aspect that Mr Pretorius raised that warrants attention is that the third appellant did not receive a fair trial in that:

- (a) The presiding officer did not assist him, on an undefended accused, during the trial whenever he could have. For instance when the appellant did not cross examine the witnesses on aspects of their evidence that linked him to the commission of the crimes;
- (b) By not insisting on the appellants seeking and or engaging a legal representative when he faced prescribed minimum sentence.

[13] Mr Pretorius however was constrained to concede that despite

the presiding officer's lack of going an extra mile as he ought to have done during the relevant stages of the trial, taking into account the objective facts of the case and the admissions (direct and indirectly) made by the third appellant, the trial was overall fair.

[14] Coming to the real issue before us, the sentence, the trial court described these offences as very serious and thus carrying the prescribed minimum sentence of 15 to 25 years imprisonment in terms of the Criminal Law Amendment Act 105 of 1997 as amended. The trial court correctly found that there were compelling and substantial circumstances in respect of each of the appellants to deviate from imposing the prescribed sentences.

[15] I agree entirely with the trial court that these offences are serious and in addition I may say that these offences are escalating at a high rate. They are repeatedly committed by offenders in the age groups of the appellants before us. That the appellants should be punished heavily is clear from the facts of this case. The first and second complainants did not

bother or provoke anyone. When they were attacked nobody came to their rescue. They lost valuable items and money.

[16] The appellants were not as youthful as portrayed. Their conduct on the day in question distinguished them from their peers who should be dealt with more leniently. At that time of the morning they were at a tavern; they had been drinking; they engaged themselves in criminal activities of serious nature that can hardly be committed by law-abiding and respectful youth. In my view correctional supervision would not have been appropriate in these circumstances. At the same time it seems to me that the cumulative effect of the sentence the trial court imposed is shockingly excessive.

[17] The minimum sentence prescribed is fifteen years in respect of a first offender. If the trial court truly deviated from imposing the prescribed sentence of fifteen years then I do not see any justification to have imposed twenty years which is far in excess of the prescribed sentence of fifteen years for first offenders. 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 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 Mate** 2000 (1) SACR 552 (T); **S v Senatsi and Another** 2006 (2) SACR 291 (SCA).

[18] 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 seven years imprisonment in the present case would be appropriate. Such sentence can be attained by ordering that the sentences imposed run concurrently.

In the circumstances, I make the following order:

ORDER:

1. The convictions are confirmed.
2. The appeal on the sentences is upheld.
3. The sentences imposed on 4 September 2008 by the Regional Court, Welkom are set aside and substituted by the following:

“All the appellants are sentenced to:

1. Count 1: 10 (ten) years imprisonment of which 3 (three) years are suspended for 5 (five) years on condition that the appellants are not convicted of robbery or attempt thereto committed during the period of suspension.
2. Count 2: 5 (five) years imprisonment.
3. In terms of section 280 of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed in count 2 should run concurrently with the sentence in count 1.
4. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence imposed is antedated to 4 September 2008.”



B. C. MOCUMIE, J

I concur.



C.J. MUSI, J

On behalf of 1st and 2nd appellant: Mr. T. B. van Rensburg
Instructed by: Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the 3rd appellant: Mr K. Pretorius
Instructed by: Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. Ferreira
Instructed by: The Director: Public Prosecutions
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BCM/em