

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A203/2004

In the appeal between:

LEFU ISAK MOKONE AND ANOTHER

Appellants

and

THE STATE

Respondent

CORAM:

C.J. MUSI, J et MATHEBULA, AJ

HEARD ON:

20 FEBRUARY 2006

JUDGEMENT BY:

MATHEBULA, AJ

DELIVERED ON:

14 SEPTEMBER 2006

- [1] The appellant, accused number one, was convicted in the Senekal Regional Court of housebreaking with intent to steal and theft (count 2) and attempted murder (count 3). He was sentenced to 7 years imprisonment on count 2 and 10 years imprisonment on count 3. The regional magistrate ordered that 2 years of the sentence on count 2 should be served

concurrently with the sentence on count 3. He is now appealing against the sentences.

[2] The version of the state was narrated by the complainants viz Pieter Cornelius de Koning and Clavina Johanna Heydenrych. On the 5th February 2000 they arrived at their farm from church. Before leaving for church they had ensured that all the windows and doors were properly locked.

[3] On their arrival their small dog began barking in the house. While they were in the corridor of the house, a man appeared from the bedroom. He had a firearm in his hand and fired one shot at them. They were only approximately 2,5 metres from him. The husband pulled the wife out of danger and the bullet missed both of them. Thereafter they fled the house to their motor vehicle. They turned and saw a man standing at the kitchen door. They drove away from the farm and summoned the police.

[4] They returned with the police to the farm. They found one of the windows broken. They also found a spent cartridge and half a bottle of wine on the floor. Mr Heydenrych's firearm, which was in a cabinet, was missing. The police found fingerprints on the bottle of wine which matched those of the appellant.

[5] In matters of this nature, the court of appeal is circumscribed to interfere with the findings of the trial court. In **Rex v Dhlumayo and another** 1948 (2) SA 677 (A) at 705, the court held that there must inter alia be a cognisable misdirection by the trial court to necessitate such interference. Although the appeal is against sentence, it is important to ensure that the convictions were in order to

warrant the sanction imposed.

[6] Mrs Liebenberg submitted that the accused was correctly convicted because there was overwhelming evidence that he was in the house. His fingerprints were found on the bottle of wine in one of the rooms and he made some pointing out. She argued that the court a quo was correct to make an inference that the appellant is the one who removed the firearm from the safe and shot at the complainants.

[7] In her submission, on sentence, she argued that the sentence viewed in isolation is unreasonable but on this occasion the court a quo ordered that of the sentence of charge number 2 must run concurrently with charge number 3. Her view was that the sentence was not shockingly inappropriate. She stated that aggravating factors were that the appellant must have thoroughly planned the crime by monitoring the complainants' movements, a firearm was stolen which was used against the complainants which could have resulted in devastating effects. She urged us to dismiss the appeal.

[8] Mr Pretorius submitted that the sentence was both harsh and inappropriate. The court a quo over-emphasized the seriousness of the offence over the personal circumstances of the appellant. The court a quo did not take into account that the appellant was a 20 year old first offender who has been incarcerated for seventeen (17) months before he was sentenced. Further that there were no injuries sustained by the complainants and the minimal value of the stolen goods. He urged us that the effective terms of fifteen (15) years imprisonment be reduced to twelve (12) years.

[9] I cannot agree with Mrs Liebenberg that the conviction on charge number 3 i.e. attempted murder was in order. The court a quo correctly found that the appellant was in the house of the complainants on the 6th February. He was

properly convicted of housebreaking with intent to steal and theft. The complainants' cell phone and firearm were found in possession of accused number 2. The cellphone was stolen from the house on the 30th January. The firearm was stolen from the house on the 6th February. I respectfully differ from the regional magistrate in finding that accused number 2 is only guilty of receiving stolen property knowing it to be stolen on count 2. It is highly improbable that a thief will on different occasions steal goods from the complainants' house and they end up in the possession of accused number. 2. The probabilities point to the fact that accused number 2 broke into the complainants' house. It is not an unreasonable inference that accused number 1 and 2 were in the complainants' house on the 6th February. The fact that the appellant was in the house does not necessarily follow that he is the one who fired a shot on that day. The complainants saw a man whom they cannot identify and it will be dangerous to make the only inference that it was the appellant. It could have been another person who was him

and acted as such without his knowledge and blessing. I am of the view that the court a quo misdirected itself and therefore I shall use my inherent review powers to review the conviction on count 3.

- [10] It is trite that the court of appeal should not lightly interfere with a sentence imposed by the trial court. See **S v Pillay** 1977 (4) SA 531 (A) at 535 E –F and **S v Pieters** 1987 (3) SA 717 (A) at 728 B – C. The court may interfere if the trial court misdirected itself or the sentence is shockingly inappropriate. I have painstakingly considered the sentence imposed on charge number 2. It is shockingly severe and therefore inappropriate. The appellant was a young man of twenty years who was a first offender and had been incarcerated for seventeen (17) months before his sentence. The items stolen were returned to their rightful owners and were of minimal value. The wide disparity in the crime and sentence suggests that the court a quo exercised its discretion to the detriment of the appellant. I am of the view that three (3) years imprisonment will be appropriate. I am at

liberty to interfere with the sentence imposed by the regional magistrate.

[11] Accordingly I make the following order:-

11.1 Conviction and sentence on charge number 3 of attempted murder is reviewed and set aside.

11.2 Conviction on charge number 2 of housebreaking with the intent to steal and theft is confirmed.

11.3 Sentence on charge number 2 is set aside and substituted with three years imprisonment.

11.4 I direct that in terms of Section 280 (2) Act No 51/1977 that one year of this sentence run concurrently with any other sentence he may be serving at the moment.

11.5 The foregoing sentence shall be deemed to have

been imposed on 25th July 2001.

M.A. MATHEBULA, AJ

I concur

C.J. MUSI, J

On behalf of Appellant:

Mr. K. Pretorius
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of the Respondent:

Adv. I. Liebenberg
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN