

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

Case No.: A19/2006

In the appeal between:

E MOHAPI

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et*
MOLEMELA, AJ

JUDGMENT:

MOLEMELA, AJ

HEARD ON:

6 NOVEMBER 2006

DELIVERED ON:

9 NOVEMBER 2006

[1] This is an appeal against sentence only. The appellant appeared at the Bloemfontein Regional Court on a charge of robbery with aggravating circumstances. On the 8th July 2003 he was found guilty and sentenced to fifteen years imprisonment, the court *a quo* having found that there were no substantial and compelling circumstances justifying

deviation from the imposition of the prescribed minimum sentence in terms of the Criminal Law Amendment Act, Act 105 of 1997.

[2] Although the proceedings at the court *a quo* were mechanically recorded, a transcript of the record is not available due to technical problems encountered during the recording. The record was therefore reconstructed by the magistrate who had presided over the proceedings, viz Ms. N. Gela. Both parties have agreed that the appeal be decided on the basis of the reconstructed record.

[3] It has been argued on behalf of the appellant that the sentence imposed on the complainant is not an appropriate one on the following grounds:-

- (i) The learned magistrate erred in finding that there were no substantial and compelling circumstances justifying deviation from the minimum sentence as prescribed by the Criminal Law Amendment Act, Act

No. 105 of 1997;

- (ii) That the learned magistrate erred in finding that the only mitigating factors in favor of the appellant were the fact that the appellant was a first offender and that he had been in custody since February 2002;
- (iii) That the imposed sentence was shockingly harsh and was inappropriate.

[4] It appeared from the reconstructed record that the following mitigating factors were presented on behalf of the appellant at the trial court:-

4.1 Appellant was a first offender;

4.2 Appellant was 23 years old at the time of the commission of the offence;

4.3 That the appellant only passed Standard 6 and was still at school when the incident happened;

4.4 That he was unmarried and had a two-year old child;

4.5 That he pleaded guilty to the charge which was a sign of remorse;

4.6 That he was intoxicated at the time of when he committed the offence;

4.7 That he had been in custody since February 2002.

[5] It further appeared from the reconstructed record that the following were the aggravating circumstances that were

considered by the trial court:

5.1 That the complainant was shot twice during the commission of the offence;

5.2 That the complainant's service pistol was taken from him;

5.3 That there were no substantial and compelling circumstances.

[6] It was further argued on behalf of the appellant that the learned magistrate had misdirected herself with regards to the proven facts as there was nothing that justified a factual finding to the effect that the appellant was shot twice and forcefully thrown out of his vehicle. It was contended that the only proven facts regarding the circumstances surrounding the commission of the offence were as set out in Exhibit "A" which was the appellant's statement in terms of section 112 of the Criminal Procedure Act, Act No. 51 of 1977.

[7] It was further contended on behalf of the appellant that the learned magistrate had not taken all mitigating factors into

account and had over-emphasized the seriousness of the offence as against the appellant's personal circumstances. In particular it was argued that the learned magistrate had not taken into account that the complainant's motor vehicle was recovered by the police a short distance from the crime scene.

[8] It was further contended on behalf of the appellant that the accused's circumstances cumulatively considered constituted substantial and compelling circumstances justifying deviation from the prescribed minimum sentence.

[9] It is indeed so that the Criminal Law Amendment Act, Act No. 105 of 1997, provides that when an offender has been convicted of robbery with aggravating circumstances, such an offender shall, if he is a first offender, be sentenced to imprisonment for not less than 15 years unless it is found that there are substantial and compelling circumstances that justify deviation from such a minimum sentence.

[10] In **S v BLAAUW** 1999 (2) SACR at 295 Borchers, J carried out an examination of the divergent views expressed by different judges in their assessment of what could constitute “substantial and compelling circumstances” as contemplated in the Criminal Law Amendment Act, 1997. She expressed the view that in enacting this Act, the legislature intended that “all the circumstances found to be present in a particular case be viewed cumulatively and that the aggravating circumstances be weighed against mitigating circumstances”.

[11] The views expressed in **S v BLAAUW** (*supra*) were endorsed in **S v MALGAS** 2001 (2) SA 1222 at 1231 where it was stated as follows:

“But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial'

and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable."

- [12] The appellant's statement in terms of section 112 of the Criminal Procedure Act, Act No. 51 of 1977 forms part of the reconstructed record as exhibit "A". The learned magistrate has further confirmed that no evidence was adduced at the proceedings. I accordingly find that there was indeed no basis for the learned magistrate to make a factual finding that the complainant was shot twice and forcibly thrown out of his vehicle in the absence of such an admission in exhibit "A". The learned magistrate therefore misdirected herself in considering this aspect as an aggravating factor.

[13] I am of the view that the mitigating factors that were presented before the court *a quo*, cumulatively viewed outweigh the aggravating factors to such an extent that they constitute substantial and compelling circumstances justifying a deviation from the relevant sentence. I therefore find that the learned magistrate erred in finding that there were no such substantial and compelling circumstances.

[15] In **S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 I – J Olivier JA remarked as follows:

“...a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.”

[16] In my view the misdirection of the court *a quo* in respect of the circumstances of the shooting is of such a serious

nature that it justifies interference with its sentence.

[17] Having found that there exists substantial and compelling circumstances justifying a departure from the minimum sentence, I must now determine an appropriate sentence.

[18] It is trite law that in considering an appropriate sentence the court that is imposing sentence must, on a balanced basis, take account of the well-known triad of factors into consideration, viz the nature of the offence, the interests of the community as well as the personal circumstances of the offender. Having considered all these factors I find that the appropriate sentence is 10 years' imprisonment.

[19] The appeal succeeds. The sentence of 15 (fifteen) years imprisonment is set aside and substituted with a sentence of imprisonment for 10 (ten) years which must be deemed to have been imposed on 8 July 2003.

M. MOLEMELA, AJ

I concur.

C. H. G. VAN DER MERWE, J

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