A526/12

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

12/12/2013

DATE SIGNATURE

10/12/2013

CASE NO: 83/13

In the matter between:

MACBETH MATLAOPANE APPELLANT

and

THE STATE RESPONDENT

Date of hearing: 22 August 2013

Date of ruling: 12 December 2013

JUDGMENT

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[1] This is an appeal against sentence only; leave to appeal having been granted by the court a quo on 5th December 2011. Appellant was charged with his co-accused and was represented by Ms Mofokeng.

[2] Appellant was convicted on the 29th August 2011 on two counts, namely, one count of robbery with aggravating circumstances (read with the provisions of section 52(2) of the Criminal Law Amendment Act 105 of 1997 and one count of attempted robbery with aggravating circumstances.

[3] The count of robbery with aggravating circumstances (read with the provision of section 51(2) of the Criminal law Amendment Act 105 of 1997, relates to an incident which took place on 15 November 2010. The complainant, Mr Morgan Ngwenya, was confronted by three people while walking one of whom was armed with a firearm and another who was armed with a knife. Appellant was part of this group but was not armed. The armed man pointed his firearm at Mr Ngwena and threatened to shoot his head off if Mr Ngwenya did not keep quiet. He was robbed of his cell phone and the R20.00 he had in his wallet.

[4] The second count related to an incident which took place on the same date when the complainant, Mr Aaron Nkosi, was similarly confronted by 3 persons, including the two accused in the present matter. One of the 3 persons was armed with a firearm and another was armed with a knife. Mr Nkosi did not have any money on him and the 3 persons did not take anything from him.

[5] Appellant was sentenced to 15 years imprisonment on count one and to 6 years imprisonments on count two. The court a quo ordered that the sentence on count two to run concurrently with the sentence imposed on count one.

[6] The approach to be adopted by a court of appeal when dealing with sentence was reiterated by Mthiyane AJ in the matter of *S v Packerysammy* 2004 (2) SACR 169 SCA at 171 f-g:

> "Punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal is not to erode such discretion; on appeal no general right exists to interfere with a sentence imposed by the trial court. It will interfere with the sentence only if the discretion has not been judicially and properly exercised. This will only be so where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate"

The grounds for appeal

[7] It was submitted that substantial and compelling reasons exist that are sufficient to have allowed the court a quo to have deviated from the prescribed minimum sentence of 15 years imprisonment. The first being the appellant's age. He was 21 years old at the time of the commission of the offence. He does not have any previous convictions. The case of *S v Dyanti* 2011(1) SACR 540 (ECG) dealt with similar circumstances in that the appellant was 'a relatively young' man and a first offender. It was argued that one must accept that there are prospects of him being rehabilitated. The court however held at pg 522 paragraphs 25-26 that

> *".....in dealing with this submission, I should start off by saying that it has often been stressed in some circles that, when it comes to the element of rehabilitation one ought to move from the premise that every human being is capable of change and transformation, if offered the opportunity and resources. But is, however, my view that seeds of rehabilitation can, in a matter of speaking, germinate only if the convicted person him/herself has, first and foremost, expressed contrition wrongdoing, there accepting the gravity of the criminal act of which she/he has been convicted, and commits to return to the path of rectitude. Without expression of contrition any hope of rehabilitation becomes an illusion and thus an unrealistic expectation, and not merely a speculative hypothesis".*

[8] I agree with the learned judge's interpretation and consequently I find that his youth and status as a first offender on the facts of the matter before me do not constitute substantial and compelling reasons for interfering with the sentence. It is clear from reading the judgment, that the court a quo considered

appellants personal circumstances and correctly balanced them against the interests of the community.

[9] The second ground of appeal that was emphasized is the period the accused spent in custody while awaiting trial. This submission is based on the dictum in the case of *S v Brophy and Another* 2007 (2) SACR 56 (WLD) at 596.

[10] However the Supreme Court of Appeal in the more recent case of *Radebe v S* 2013 ZASCA 341 at paragraph 14 held that:

> *"The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: Whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for prolonged periods of detention. And accordingly, in determining , in respect of the charge of robbery with aggravating circumstances whether substantial and compelling circumstances warrant a lesser sentence that that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years imprisonment for robbery), the test is not whether the effective sentence is proposed is proportionate to the crime or crimes committed but whether the effective sentence proposed is proportional to the crime or crimes committed: whether the sentence in all the circumstance, including the period spent in detention prior to conviction and sentencing is a just one".*

The learned Magistrate repeatedly referred to the time the appellant had spent in custody awaiting trial, conviction and sentence and he clearly weighed this mitigating factor in the mix in exercising his discretion when assessing an appropriate sentence. This ground of appeal is unsustainable and is thus rejected.

[11] The court a quo also referred to the case of *S v Nthimkulu* 1971 (4) SA 141 TPD and quoted the following passage:

"Those who intended to embark on this apparently profitable business must know that if they should be caught they are not going to be let off lightly however much they be first offenders and however small the amount of money might be which they find in the purse'.

[12] It appears from the facts that the appellant and his accomplices preyed on the complainants on the same day. I agree that they did not intend to rob people of small amounts of money. It just so happened that their targets were carrying small amounts of money or no money at all. It may appear that the sentence is disproportionate to the amount of money robbed. This is not true. Firstly because the amounts stolen might be insignificant in some circles of society but not to Mr Ngwenya, the first complainant. Secondly because in robbing the complainants, each had a gun pointed at them as well as a knife with which to threaten them. The element of violence is significant in deciding sentence.

[13] In the circumstances I do not find the sentences imposed to induce a sense of shock or to be starling inappropriate to the extent that this court should intervene.

Order

I propose the following order:

1. The appeal is dismissed

C Cambanis
Acting Judge of the High Court

A van Niekerk
Acting Judge of the High Court