



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 42/09

In the matter between:

BENJAMIN KEORAPETSE KANYANE

Appellant

and

THE STATE

Respondent

CRIMINAL APPEAL

HENDRICKS J; LANDMAN J

DATE OF HEARING : 10 AUGUST 2012

DATE OF JUDGMENT : 24 AUGUST 2012

COUNSEL FOR THE APPELLANT : ADV NKOSI

COUNSEL FOR THE RESPONDENT : ADV MUNYAI

JUDGMENT

HENDRICKS J

Introduction:-

- [1] The Appellant Benjamin Keorapetse Kanyane and his co-accused Kopano Patrick Matsheka (Matsheka) were convicted on a charge of robbery with aggravating circumstances on the 31st January 2006 in the Regional Court Lichtenburg. They were each sentenced to an effective term of imprisonment of eighteen (18) years on the same date.
- [2] Leave to appeal was granted to Matsheka on 29th July 2008 and he was released on 01st September 2008 on bail pending appeal. His appeal is not before us.
- [3] On 27th February 2009 leave to appeal was granted to the Appellant against both the conviction and the sentence. His appeal was enrolled for 21st August 2009. Due to non-prosecution, the appeal was struck off the roll.
- [4] An application was made for the re-enrollment of the appeal accompanied by an affidavit filed by the Appellant in which he explains that the non-prosecution of his appeal on 21st August 2009 was not due to any wilful default on his part. In fact he does not know why his erstwhile attorney, appointed by the Legal Aid Board, did not prosecute his appeal when it was enrolled for 21st August 2009.

- [5] Being satisfied about the explanation tendered, we granted the required condonation for the late prosecution of the appeal and allowed the appeal to be re-enrolled accordingly.

Ad Conviction:-

- [6] The Appellant in his heads of argument conceded that the conviction is in order. This concession is in my view well made and I need not say anything further.

Ad Sentence:-

- [7] The prescribed minimum sentence in terms of section 51 (2)(a) of Act 105 of 1997 is fifteen (15) years imprisonment unless there are substantial and compelling circumstances present that justify the impositioning of a lesser sentence. The court ***a quo*** found no compelling and substantial circumstances present in the case of the Appellant and found that because of “... *the seriousness of the offence, the prevalence of the offence, interest of society, that a sentence of more than 15 years will be appropriate*” and imposed eighteen (18) years imprisonment.
- [8] Mr Munyai on behalf of the Respondent, quite correctly in my view, conceded that the imposition of a sentence exceeding the prescribed minimum sentence was a misdirection on the part of the trial court which justifies this Court (as court of appeal) to interfere with the sentence.
- [9] He contended however that the learned Regional Magistrate was

correct in founding that there are no substantial and compelling circumstances and should have imposed the minimum sentence of fifteen (15) years imprisonment.

[10] With the greatest of respect, I do not agree. The following personal circumstances of the Appellant were placed on record:-

- he is a first offender;
- he was 29 years of age at the time of commission of the offence;
- he is the owner of two businesses;
- he is the father of a minor child who he maintains;
- the motor vehicle that was robbed was recovered;
- the complainant did not sustain any serious injuries;
- he is single;
- he was incarcerated since January 2005.

[11] Taken cummatively, the aforementioned facts and circumstances does in my view constitute substantial and compelling circumstances. A finding to the contrary is in my view a misdirection. This Court, as court of appeal, is therefore at liberty to intervene and impose an appropriate sentence. A sentence of twelve (12) years imprisonment is in my view an appropriate sentence.

[12] Due to the passage of time and especially because of the fact that the Appellant is not solely to blame for the delay in this matter, it will be just and fair if the sentence is antedated to 31st January

2006.

[13] As already mentioned, the appeal of accused 2, Kopano Patrick Matsheka, is not before us and there is no indication on record what happened to his appeal and whether or not he is still desirous to prosecute his appeal. This Court does have an inherent power of review which it can exercise with regard to the sentence imposed on him. However, it will not be feasible to do so without any degree of certainty what the current position with regard to Matsheka is. Perhaps counsel for the Respondent, through his office (office of the Director of Public Prosecutions) can investigate what the position is.

Order:-

[14] Consequently, the following order is made:-

- [i] Condonation for the late prosecution of the appeal is granted.
- [ii] The re-enrollment of the appeal is granted.
- [iii] The appeal against conviction is dismissed.
- [iv] The appeal against sentence is upheld.
- [v] The sentence of 18 years imprisonment imposed by the Regional Court on 31 January 2006 is set aside and is replaced with the following:-

“Twelve (12) years imprisonment.”

[vi] The sentence is antedated to 31 January 2006.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

A A LANDMAN
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPELLANT: MAFIKENG JUSTICE
CENTRE, LEGAL AID SOUTH AFRICA