SOUTH AFRICA / JUDGMENT

Khombelayo and Another v S (A110/2015) [2015] ZAFSHC 207 (15 October 2015)

[2015] ZAFSHC 207

COURT
Free State High Court, Bloemfontein

BEFORE
Molemela, Naidoo

CASE / FILE NUMBER
A 110/2015

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THE
HIGH COURT
OF SOUTH
AFRICA
FREE
STATE DIVISION,
BLOEMFONTEIN
Case
No. A 110/2015
In

the matter between:	LAZARUS KHOMBELAYO 1st Appellant MOEKETSI MOTLOKOA 2ndAppellant and THE STATE_ Respondent
CORAM:	MOLEMELA JP et NAIDOO, J

JUDGMENT

BY: NAIDOO,J

HEARD ON:

5 OCTOBER 2015

DELIVERED ON: 15 OCTOBER 2015

NAIDOO J

[1] The appellants were charged in the Regional Court, Petrus Steyn with one count of robbery. They pleaded not guilty but were convicted, as charged, on 12 September 2014 and sentenced on 17 October 2014 to Thirty Six (36) months' imprisonment, Eighteen

(18) months of which were suspended for Five (5) years on condition that they are not, during the period of suspension, convicted of robbery or any competent verdict thereon. The appellants are before us on appeal against their sentences, after the trial court granted them leave to appeal against sentence only. Ms L Smit appeared for the appellants and Mr FJ Pienaar appeared for the State

in this court.

[2] By way of background, the complainant left his mother's home after a birthday party in her honour and was walking alone to his sister's home at about 3h30 in the morning of 6 July 2014. He noticed two males approach him from behind and as he tried to jump over a fence they accosted him, assaulted him and robbed him of his money. He then used his cellular telephone to call his family and advise them of what had happened. A few minutes later the two males returned, threw the complainant to the ground and robbed him of his cellular telephone. He was stabbed three times with a sharp object during this incident. His money was not recovered but his cellular telephone was recovered some time later. The complainant was able to identify the two appellants as his assailants as the lighting in the area was good.

[3] The version of the appellants is that at the relevant time, they were returning from a tavern and were on their way to another tavern, when the first appellant insulted the second appellant. The complainant thought he was the target of the insults and attacked the first appellant. The second appellant then intervened and had to assault the complainant in order to stop him from assaulting the first appellant. The complainant then got up and ran away, dropping his cellular telephone in the process. At this stage the second appellant recognised the complainant as someone he knew. He picked up the complainant's cellular telephone for safekeeping and intended to return it to him. It seems that the cellular telephone was claimed before he could return it to the complainant. The complainant denied this version, asserting that he did not know the appellants and it was they who ran away when the owner of a nearby house switched on the lights of her

house to investigate the commotion. The version of the appellants was rejected, resulting in their conviction.

[4] I turn now to deal with the issue of sentence. Both appellants contend that the sentence in this matter is inappropriate and shocking, in that it was out of proportion to the accepted facts of the case and the personal circumstances of the appellants.

4.1 The personal circumstances of the first appellant are that:

- he was 20 years old at the time of the commission of the offence;
- he is single and has no children;
- he is unemployed and lives with his father
- he is a first offender

4.2 The second appellant's personal circumstances are that:

- he was 18 years old at the time of commission of the offence;
- he is a Grade 11 student at a secondary school;
- he lives with his grandmother

Both appellants were assessed by a Correctional Services Officer who compiled reports in respect of each appellant. The Correctional Officer recommended that a sentence of Correctional Supervision be imposed on both appellants for a period to be determined by the court, while acknowledging that this type of crime is very serious and that there is an outcry in the community against violent and aggressive crimes such as in the present matter. The Correctional Officer also acknowledged that the sentence must be in line with the seriousness of the crime.

[5] Ms Smit argued that the trial court erred in not accepting the recommendations of the Correctional Officer and in not imposing a sentence of Correctional Supervision. She asserted that this is an appropriate case for the imposition of Correctional Supervision, given the ages of the two appellants and that the second appellant was still attending school at the time of commission of the offence.

[6] The position regarding the ability of an appeal court to interfere in a sentence has been well settled through the cases over the years. It is generally accepted in our law that an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. Mr Pienaar, on behalf of the respondent, in his Heads of Argument, referred us to the case of S v Pillay 1977 (4) SA 531 (A) at p 535 E-F where principle in this regard 1s expressed as follows by Trollip JA

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or

wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court 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. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[7] In the case of S v Rabie 1975 (4) SA 855 (A), which we were also referred to by the respondent, Holmes JA set out on page 857 the following guiding principles with regard to interference with a sentence on appeal:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial

Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

This principle was followed by Holmes JA in S v Giannoulis 1975 (4) SA 867 (A).

[8] The trial court balanced the personal circumstances of the appellants against the aggravating circumstances that it considered were present in this matter, namely, that the offence is very serious, that the interests of society demanded stern sentences in such matters and that the appellants showed no remorse. It is apparent from the reasons for sentence that the trial court also took into account that the appellants were before it as first offenders and that they had spent approximately five weeks in custody from the day they were convicted to the day they were sentenced.

[9] The trial court correctly pointed out that the appellants ought to have been charged with two counts of robbery (with aggravating circumstances, given the injuries sustained by the complainant), which would have brought the matter within the jurisdiction of the Regional Court, where the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act) would have been applicable. The Minimum Sentences Act prescribes a minimum sentence of Fifteen (15) years' imprisonment for robbery with aggravating circumstances. The trial court stated that it had the option of referring the matter to the Regional Court for sentencing but refrained from doing so because the appellants were not, at the outset, informed of the impact of the Minimum Sentences Act or the option of referring the matter to the Regional Court for sentencing. I agree with Mr Pienaar's submission that the appellants should consider themselves fortunate that they were not charged with two counts

of robbery with aggravating circumstances because there were two separate incidents. Likewise, they are fortunate that the trial court did not refer the matter to the Regional Court for sentencing.

[10] To my mind, the trial court appropriately interrogated the mitigating as well as the aggravating factors relevant to this case. I cannot find that that the court over-emphasised the aggravating factors or attached too little weight to the personal circumstances

of the appellants, as argued by Ms Kruger. The trial court was required to perform a fine balancing act in considering the various

competing factors to determine an appropriate sentence.

[11] In my view, the court properly balanced the seriousness of the offence, the interests of society and the interests of the appellants. The court was not persuaded by the recommendations of the Correctional Officer, as it was of the view that the seriousness of the offence was watered down and underplayed in the pre-sentence reports compiled by the Correctional Officer. The court was also of the view that Correctional Supervision was not an appropriate sentencing option as it would have the effect of over-emphasising the personal circumstances of the appellants to the detriment of the other two relevant factors, namely the interests of society and the seriousness of the offence. I agree with this reasoning. It must also be borne in mind that it was the second appellant who stabbed the complainant, thus increasing the seriousness of the offence significantly. I cannot, therefore, find any misdirection on the part of the trial court which warrants the interference of this court in the sentences that it imposed.

[12] In the circumstances, the following order is made:

12.1 The appeal against sentence is dismissed.

12.2 The convictions and sentences of the appellants are confirmed

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NAIDOO, J

I agree

MOLEMELA, JP

On behalf of the Appellant: Ms L Smit

Instructed by:

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Ground Floor, Office No 11

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On behalf of the Respondent: Mr FJ Pienaar

Instructed by:

The State

Bloemfontein

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