

SOUTH AFRICA / JUDGMENT

Moremoholo v S (577/2013) [2014] ZAGPJHC 443 (25 April 2014) [2014] ZAGPJHC 443

COURT

South Gauteng High Court, Johannesburg

BEFORE

B Mahalelo, L Windell

CASE / FILE NUMBER

577/2013

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
No: 577/2013

Reportable:	No
	Of
	interest to other judges: No
	Revised.
	25
	April 2014
	In
	the matter between
	LEPHOI
	MOREMOHOLO APPELLANT
	and
	THE
	STATE RESPONDENT

JUDGMENT

MAHALELO AJ

- [1] The appellant was arraigned in the Johannesburg Regional Court on a charge of robbery with aggravating circumstances, as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA) .
- [2] On 8 June 2006 he was convicted as charged and sentenced to 15 years imprisonment in terms of the provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997.
- [3] The appellant appealed his conviction and sentence and on 26 August 2011 the appeal was upheld, the conviction and sentence set aside and the matter remitted back to the trial court in order to allow the State an opportunity to prove the content of the record of bail proceedings subject to the appellant's further cross-examination.
- [4] Upon the rehearing of the matter the original bail record which had been found, was accepted as evidence by the trial court. The appellant was again convicted as charged. Counsel for the appellant in mitigation of sentence submitted that the peculiar circumstances of the appellant justified ante-dating of the sentence. The State conceded that it would be desirable and just in these particular

circumstances, but submitted that the court was not empowered to do so. The Regional Magistrate in sentencing the appellant took into consideration the period of five years and five months that the appellant had by then already served in custody. He was also alive to the fact that he was not empowered by the CPA to antedate the sentence. The sentence imposed on 16 November 2011 was 9 years and 7 months imprisonment.

- [5] The appeal before us is against sentence and is with leave of the trial court.
- [6] Counsel for the appellant submitted that had the sentence of 15 years imprisonment, imposed on 8 June 2006, not been set aside, he would have been eligible for release on parole on 18 December 2013. As a result of the original successful appeal, he will now be required to serve an additional 2 years and 5 months period of imprisonment before he can be considered for release on parole. It was further submitted that the appellant will be prejudiced if he is required to continue serving the present sentence in full.
- [7] The imposition of sentence is pre-eminently a matter falling within the discretion of the trial court and a court of appeal can interfere only where such discretion was not properly or judicially exercised. The court on appeal can interfere only if the trial court misdirected itself or if the sentence is startlingly inappropriate or so totally disproportionate to the magnitude of the offence that no reasonable court would have imposed it or where the interests of justice requires interference.

[8] The court a quo duly took into account the personal circumstances of the appellant, the seriousness of the offence and the fact that appellant had already served a period of 5 years and 5 months imprisonment.

[9] Section 282 of the Act provides:-

“Whenever any sentence of imprisonment, imposed on any person on conviction for offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.”

[10] It is therefore clear that the court a quo was not empowered to antedate the sentence imposed on 16 November 2011. In my view no misdirections were committed which would warrant interference on appeal.

[11] However, the circumstances of the appellant are exceptional and it is necessary, in the interests of justice that the date of the appellant’s eligibility to parole be advanced.

[12] The appellant’s initial conviction and sentence were set aside after he had already served 5 years and 5 months imprisonment. He remained in custody after the conviction and sentence were set aside in 2011. To date he has already served 8 years in custody. Had it not been for the appeal the appellant would have become eligible for parole in December 2013. Now that the reduced sentence has been imposed the date of eligibility has been moved forward to 2016. The appellant therefore is required to wait an additional two years for parole consideration. This is clearly an unfortunate and seemingly prejudicial consequence of the events that ought to be rectified. The only way in which this anomaly can be overcome is for this court to ensure, in the order I propose to make, that the appellant now be considered for parole.

[13] In the result the following order is made:

1. The appeal against sentence is dismissed.
2. A copy of this judgment must forthwith be submitted to the Parole Board of the Department of Correctional Services.
3. The said Parole Board is hereby directed to entertain, consider and decide upon an application for parole by the appellant with particular reference and having regard to paragraphs 11 and 12 of the judgment in this appeal, within 60 days of the date of this order.

B MAHALELO

ACTING JUDGE OF THE HIGH COURT

I agree.

L WINDELL

JUDGE OF THE HIGH COURT

Counsel for appellant

Adv C Van As

Counsel for respondent

Adv SH Rubin

Date of hearing

24 April 2014

Date of judgment 25

April 2014

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