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

Appeal No. : 79/2003

In the appeal between:-

PETRUS SAMPI MOFOKENG Appellant

versus

THE STATE Respondent

CORAM: VAN DER MERWE J *et* MATSEPE AJ

HEARD ON: 7 NOVEMBER 2005

JUDGEMENT BY: MATSEPE AJ

DELIVERED ON: 10 NOVEMBER 2005

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[1] The appellant was found guilty in the Regional Court, Virginia on 22 November 1999 on a count of housebreaking with intention to commit robbery and robbery with aggravating circumstances and was sentenced to a 15 (fifteen) year prison term.

[2] The appellant is appealing against sentence only.

[3] The sentence imposed was imposed on the basis of the provisions of section 51(2) and 51(3) of Act 105 of 1997. The court *a quo* had found that there were no substantial and compelling circumstances compelling the court to depart from the minimum sentence provided for. The question therefore that needs to be canvassed is whether the court *a quo* misdirected itself in finding that in the circumstances of this case there were no substantial and compelling circumstances. It is not for this Court to approach this issue as if it were the trial court itself and thereafter to substitute the sentence arrived at by the court *a quo* simply because it is preferred.

[4] Indeed it was the approach of the court *a quo* that if it had found the existence of circumstances amounting to substantial and compelling circumstances as provided for in section 51(3)(a), it would have been empowered to impose a lesser sentence than the one prescribed. In the matter of **STATE v MALGAS** 2001 (1) SACR 469 (SCA) p. 469 b – c the court states the following:-

> "the greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice."

A sense of unease can only rightly exist if there is weighty

justification for it.

[5] The court comes to the conclusion that the circumstances therein cumulatively regarded indicated that a sentence of life imprisonment would be unjust and that thus it qualified as one where substantial and compelling circumstances are present. In that case the appellant had a clean record, she was driven into the commission of the offence by a domineering personality, she gained nothing from the crime, she showed genuine remorse and further because of her youthfulness the prospects of her rehabilitation were real if she were to serve a long period of imprisonment.

[6] In this case the circumstances of the appellant were as follows:

1. He was nineteen years old at the commission of the crime.
2. He ultimately realised his error and changed his plea to a plea of guilty which shows acknowledgment of

wrongdoing on his part and remorse therefore.

3. He was a first offender.

4. He played a lesser role in the commission of the crime and it appears that the co-perpetrator of the crime was dominating him.

5. The prospects of rehabilitation are real as he pleaded guilty.

6. Though the value of the items stolen was R6 970,00 the appellant only took the TV set and duvets with a total value of ± R1 000.00 which items were recovered by the complainant.

[7] I am of the view that the cumulative effect of the facts noted above amounts to substantial and compelling circumstances that influence the imposition of the maximum sentence to be imposed in line with the provisions of section 51(2) and 51(3) of Act 105 of 1997.

[8] It is therefore ordered that the sentence imposed by the trial court be set aside and substituted with the following sentence:

1. Appellant is sentenced to 8 (eight) years imprisonment. The sentence must be deemed to have been imposed on 2 November 1999.

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T.V. MATSEPE, AJ

I agree.

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C.H.G. VAN DER MERWE, J

On behalf of appellant:	Mr. J van H Vorster Instructed by: Vorster Botha Bredenkamp Inc BLOEMFONTEIN
On behalf of respondent:	Adv. L. Faber Instructed by: Director: Public Prosecutions BLOEMFONTEIN

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