FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A193/10

In the matter between:-

GODFREY MOLEFI KAU	First Appellant
ERNEST LEHLOHONOLO MPHASA	Second Appellant

and

THE STATE	Respondent

CORAM: RAMPAI, J *et* VAN ZYL, J

HEARD ON: 30 AUGUST 2010

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 9 SEPTEMBER 2010

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[1] These proceedings were about two appeals. The two appellants were convicted on a charge of robbery with aggravating circumstances in the Kroonstad Regional Court on 24 February 2010. On the same day each of them was sentenced to fifteen years imprisonment. They now come on appeal only against the sentence with the leave of the court *a quo*, which was granted on 6 May 2010.

[2] The appellants were tried in connection with a charge of

robbery with aggravating circumstances (section 1, Act No. 51 of 1997 read with section 51 Act No. 105 of 1977). The charge was that they robbed a certain Ms C J le Grange at Mega Drankwinkel at Steynsrus on Friday, 24 July 2009. The amount involved was R1 691,50. Notwithstanding their plea of not guilty they were convicted on evidence.

[3] The grounds of their appeals were, firstly, that the sentences imposed were unjust in that such sentences were disproportionate to the crime, the offender and the interest of society. Secondly, they contended that the court *a quo* had overemphasised the seriousness of the crime and the interests of society at the expense of their personal circumstances as individual offenders.

[4] The issue on appeal was whether there were substantial and compelling circumstances present in the case to justify a lighter sentence than the prescribed minimum sentence imposed on each of the appellants. **S v MALGAS** 2001 (1) SACR 469 (SCA) and **S v NDLOVU** 2007 (1) SACR 535 (SCA) at p. 538

[5] Mr. Van Rensburg, counsel for the appellant, submitted that

there were substantial and compelling circumstances in favour of each of the appellants to warrant deviation from the prescribed minimum sentences. He further submitted that the court below erred in finding otherwise.

[6] On behalf of the respondent, Mr. Strauss, conceded that substantial and compelling circumstances were present in favour of the appellants. Therefore, counsel further submitted that the contrary finding by the court below, as well as the minimum sentences imposed pursuant to such a finding, were not supported by the respondent.

[7] In sentencing the appellants the court *a quo* commented as follows:

> On p. 86: 24 – p. 87: 3
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> "Die erns is soos wat sy getuig het dit kon netsowel haar keel gewees het wat gesny was. 'n Mens se keel is sag, so die gevaar was werklik daar dat sy keelaf kon gesny gewees het. Sy was gelukkig haar keel is nie raak gesny nie."
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> On p. 88: 5 - 7
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> "Daar moet wesenlike en dwingende omstandighede vir die Hof om af te wyk. Daar is behalwe dat u betreklik jonk is geen sodanige omstandighede voor die Hof nie."

[8] It is clear and obvious from the first passage, quoted above,

and a few other passages that I deem unnecessary to refer to, that undue influence was placed on the potentially dangerous manner in which the second appellant was brandishing the knife and also on the gravity of the crime itself. But no matter what devices and offensive posturing these appellants employed in order to get their own way, in other words, to rob the victim, they were mere tactical devices designed to threaten the victim and to force her into submission. They had ample opportunity of seriously harming the victim if they really wanted to, but they did not. In my view, the criminal enterprise of the appellants, serious though it was, was not as dangerous as it was made out to be. Therefore, I am persuaded that the court *a quo* placed rather excessive stress on the gravity of the crime.

[9] The second passage, quoted above, excluded from consideration all but one mitigating factor in determining the question as to whether substantial and compelling circumstances existed or not. Besides the relative youth of the appellants, the trial court eliminated the rest of their personal circumstances from the equation. To the extent that the court *a quo*, right from the outset, disregarded such traditional mitigating factors, it erred in my view. It has been

authoritatively held that during the enquiry to determine whether or not substantial and compelling circumstances exist, such traditional factors continue to play an important role - **S v MALGAS**, *supra*, par. [25]. The courts are enjoined to consider all factors traditionally taken into account in sentencing.

[10] As regards the first appellant, the following were mitigating factors: He was 20 years of age at the time he committed the crime. He had passed matric. He had no fixed employment, but he occasionally did some casual jobs. He stayed with and looked after his sickly mother. He was married with one minor child. His wife was unemployed. Although he had one previous conviction of theft, he had no previous conviction of robbery. In that sense, he was a first offender. The victim sustained no serious, permanent, physical injuries. He was incarcerated for almost seven months before he was sentenced.

[11] As regards the second appellant, the mitigating factors were as follows: He was 19 years of age at the time he committed the crime. He was a grade 9 learner at the time of his arrest. He was still single. He had no dependent children. He

stayed with his grandmother. He was a first offender in every sense of the word. He was incarcerated for almost seven months before he was sentenced. The victim sustained no serious physical injuries of a permanent nature.

[12] The aggravating factors were as follows: They committed armed robbery, one of the scheduled offences and therefore a serious crime. The second appellant was armed with a knife. Both of them were arrested with knives in their possessions. The victim was an elderly lady of 54 years of age. She sustained two scratch wounds on her left hand. She was severely traumatised. She was unable to continue working at the bottle store any longer. At the time of the trial she was training someone to replace her. She was on the verge of becoming unemployed for the first time in sixteen years. The victim's employer suffered a real loss of over R1 600,00. The appellants were remorseless.

[13] The relative youth of the appellants was correctly taken into account by the trial court. However, that was not the only relevant factor to be taken into account in the process of determining whether or not substantial and compelling circumstances existed in favour of any of the appellants.

Certainly the relative youth of the appellants, their status as first offenders cumulatively considered together with the rest of the mitigating factors relative to their respective individual profiles, as earlier particularised, in my view, are substantial factors which compellingly call for a different response to the prescribed minimum sentence regard been had to the circumstances of this particular case. To the extent that the court *a quo* regarded these factors as unsubstantial and uncompelling to justify a lighter sentence, it misdirected itself in my respectful view. Since the misdirection was material, it vitiated the sentence imposed. Therefore, we are at liberty to interfere.

[14] In my view a decremental deviation of five years would render the sentences just and balanced punishment for each of the appellants. It will appropriately satisfy the legitimate interest of society, the gravity of the crime and the individual profile of each of the appellants. In my opinion any appellate interference greater or lesser than this would disturb the balance.

[1 5] In the circumstances I make the following order:

15.1 The appeals succeed.

15.2 The convictions stand.

15.3 The sentences of fifteen years imprisonment are set aside and substituted with one of ten years imprisonment in respect of each of the appellants.

15.4 The substitute sentences are antedated to 24 February 2010, a date on which the original sentences were imposed.

M.H. RAMPAI, J

I concur.

C. VAN ZYL, J

On behalf of appellants:	Adv. T.B. van Rensburg Instructed by: Legal Board Aid KROONSTAD
On behalf of respondent:	Adv. M. Strauss Instructed by: Director Public Prosecutions BLOEMFONTEIN

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