

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A187/2012

In the matter between:-

VUSI VITALIS SITHEBE

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* MOLOI, J

HEARD ON:

15 OCTOBER 2012

DELIVERED ON:

18 OCTOBER 2012

JUDGMENT

K.J. MOLOI, J

- [1] The appellant and one other were convicted of robbery with aggravating circumstances in the Regional Court held at Bethlehem. The appellant was granted leave to appeal against the sentence of 15 (fifteen) years imprisonment imposed on him on 25 November 2010 by this court on petition. The appellant is now before us appealing the said sentence.

- [2] The appellant submitted that the trial court erred in finding that there were no substantial and compelling circumstances present that would entitle the court to deviate from the imposition of the prescribed minimum sentence as provided for in section 51 of Act 105 of 1997. The appellant further submitted that the sentence imposed was out of proportion with the nature and seriousness of the offence, the interests of the community and the offender. This, it was submitted, was because the court overemphasised the seriousness of the offence at the expense of the interests of the community and the personal circumstances of the appellant.
- [3] The personal circumstances of the appellant were that he was only 23 years old when the offence was committed; the appellant was in gainful business as a scrap metal dealer and earned approximately R15 000,00 per month; the appellant was unmarried but had one minor child to support; the appellant was a first offender with prospects of being rehabilitated. It was further submitted that the trial court did not take into account that the appellant was in custody for a period of 17 (seventeen) months awaiting trial and that this period should be seen as twice as heavy than the sentenced

period: as per **S v STEPHEN AND ANOTHER** 1994 (2) SACR 163 (W) at 168F and **S v ENGELBRECHT** 2005 (2) SACR 163 (WLD) at 172 par [32] – [33]. It was submitted that all these factors above, cumulatively considered, comprised the substantial and compelling circumstances as envisaged in section 105 of Act 51 of 1997.

[4] It is trite that a court of appeal can only interfere with the sentencing discretion of a trial court if that discretion was improperly exercised: **S v ANDERSON** 1964 (3) SA 494 (A) or if the sentence “induces a sense of shock” - **S v DE JAGER AND ANOTHER** 1965 (2) SA 616 (A) - or if the trial court misdirected itself and exercised its discretion improperly or unreasonably: **S v KIBIDO** 1998 (2) SACR 213 (SCA).

[5] Generally when sentence is considered the factors to be considered and weighed, the one against the other, are the well-known triad, viz the nature and gravity of the offence committed, the interest of the community and the personal circumstances of the offender. A proper balancing of these factors has an outcome of imposition of an appropriate

sentence: **S v RABIE** 1975 (4) SA 855 (A) at 866A – C. In instances where minimum sentences are prescribed by the legislature a further dimension is added, namely that the court has a duty to enquire into the existence or not of substantial and compelling circumstances. It is only when and if the court reasonably finds that substantial and compelling circumstances were present that it can deviate from imposition of the prescribed minimum sentence without ignoring the triad referred to above.

- [6] It is true that the courts have been warned over and over that the determination of the existence of the substantial and compelling circumstances must not be done for flimsy and unsound considerations that cannot stand scrutiny: **S v MALGAS** 2001 (2) SA 1222 (SCA) at 1232A – E and **S v MATYITYI** 2011 (1) SACR 40 (SCA) par [23] where the duty of the courts to impose the prescribed minimum sentences was reiterated.

- [7] On proper analysis of the factors mentioned in paragraph [3] above and further consideration being had to the evidence that the complainants suffered no physical or material

damages the goods robbed having been recovered, I am of the view that the cumulative effect of all these factors justifies the finding that substantial and compelling circumstances were present in this matter. I am further of the view that the multiplicity of the occurrence of such robberies in the country led to the trial court misdirecting itself on this important issue and sought to punish the appellant for offences others have committed.

[8] In the result the appeal against the sentence imposed must succeed. The sentence of 15 (fifteen) years imprisonment is set aside and is substituted as follows:

8.1 The appellant is sentenced to 8 (eight) years imprisonment.

8.2 The sentence in 8.1 above is antedated to 25 November 2010.

K.J. MOLOI, J

I concur and it is so ordered:

C. VAN ZYL, J

On behalf of appellant: Adv T B van Rensburg
Instructed by:
Jacques Groenewald
KROONSTAD

On behalf of respondent: Adv F Pienaar
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp