**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | ~~YES~~/NO |
| **Of Interest to other Judges:** | ~~YES~~/NO |
| **Circulate to Magistrates:** | ~~YES~~/NO |

Appeal No.: A119/2019

In the matter between:-

**LEBOHANG LEBAKENG** Appellant

And

**THE STATE** Respondent

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**JUDGMENT BY:** C. J. MUSI, JP *et* S. CHESIWE, J

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**HEARD ON:** 11 NOVEMBER 2019

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**DELIVERED ON:** 14 NOVEMBER 2019

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[1] The appellant was convicted by the Regional Magistrate Welkom on 4 counts *viz*, attempted murder, two counts of robbery with aggravating circumstances and attempted rape. He was sentenced to 15 years' imprisonment on each of the robbery counts, five years' imprisonment for the attempted murder and four years' imprisonment for the attempted rape. The Regional Magistrate ordered that the sentences in respect of counts two, three and four should run concurrently. The effective sentence was therefore 20 years' imprisonment. The appellant appeals against the sentences.

[2] On 5 October 2015, Mr. M M, complainant counts 1 and 2, and his girlfriend Ms F K, complainant counts 3 and 4, were sitting in the former's car, at Riebeeckstad. At approximately 14:00 they saw someone approaching the vehicle. The person was moving from the left rear side of the vehicle towards the front of the vehicle. The person was wielding a firearm. Mr M requested Ms K to close the left front window, where she was sitting and to lock the door. She did and he closed the right front window and locked the door.

[3] The person moved towards the right side of the vehicle. Mr M tried to start the vehicle but he could not find the keys. The person fired a shot through the right front window of the motor vehicle. The shot grazed Mr M's breastbone. He unlocked the car and the person ordered them to get out of the car. They complied. The person took Ms K's shoe laces and instructed her to help him to tie Mr M's hands and feet. She assisted. After his hands and feet were tied he was locked in the boot of the car.

[4] The person ordered Ms K to accompany him to the trees. She went with him. At the trees he ordered her to undress herself. She told him that she was menstruating and that they are waiting for other people who went to go and buy food. He told her if she is telling the truth he will let her go. He took her further into the bushes. He again ordered her to undress. She obliged. Whilst she was taking off her panty the person put the firearm on the ground. She grabbed the firearm. They wrestled over it. She tried unsuccessfully to pull the trigger. He disarmed her. She sat on the ground.

[5] He left and she ran to a nearby road and was assisted by two gentlemen in a vehicle. They drove back in the direction where the car was parked. On their way there, they saw Mr M. He got into the car and they were taken to the Welkom police station where charges were laid.

[6] The person took their four cellular phones, Ms K's purse, Mr M's wallet and their coins whilst they were still at the car. Mr M identified a BlackBerry cellular phone that the police recovered as his girlfriend's phone which was taken during the robbery. On 29 October 2015, at a properly held identification parade, he identified the appellant as the person who robbed them.

[7] On 13 October 2015, Warrant Officer Kgutsoane interviewed the appellant at the Odendaalsrus prison. As a result of what the appellant told him 8 cellular phones that the appellant had when he was admitted to the prison were brought to them. The appellant said all the phones belonged to him. He asked the appellant about the ninth cellular phone because the appellant had 9 cellular phones whilst he was detained at Virginia. The appellant informed him that he sent a taxi driver to give that cellular phone to his wife. He went to the appellant's house and recovered a Nokia Lumia cellular phone from the appellant's wife.

[8] He tested the phones on their system in order to ascertain whether any of them were linked to any registered cases. He found out that the BlackBerry's IMEI corresponded with the particulars of one of the cellular phones that were robbed in this case.

[9] Warrant Officer De Lange, the investigating officer of this case, testified that he arrested and charged the appellant. He also arranged for the identity parade to be held. He did not take photos of the appellant for purposes of the identity parade.

[10] The appellant denied that he was at the scene of the crimes. He testified that he bought the two cellular phones from an unknown person at G-Hostel, on 6

October 2015 between 09:00 and 10:00. He testified that he doubts that the identity parade was properly held because the police took photos of him and told him that they were going to show the photos to the witnesses.

[11] A portion of the cross-examination of the appellant was not transcribed and that part of the record could not be reconstructed.

[12] Ms Kruger, on behalf of the appellant, submitted that the appeal is not aimed against the conviction and that the appellant is satisfied with the conviction. It is aimed at the sentence only. She requested us to proceed with the appeal regardless of the incomplete record because there is more than sufficient evidence and information on record to enable us to properly adjudicate this appeal. The appellant also made plain that he desires to appeal against the sentence only. He said this in his failed application for leave to appeal before the Regional Magistrate and in his successful petition to the Judge President.

[13] That being the case, we decided to proceed with the appeal in the interest of justice because there was sufficient evidence about the commission of the crimes on record. There was also sufficient information with regard to the appellant's personal circumstances on record. We were satisfied that we have a record that is adequate for a proper consideration of the appeal. See **S v Chabedi** 2005 (1) SACR 415 (SCA) at para 5.

[14] It is trite that a court of appeal will not lightly interfere with the sentencing discretion exercised by the trial court. It will only do so in limited circumstances. These circumstances include, where the trial court has committed an irregularity, where it misdirected itself or where the sentence is shockingly inappropriate.

[15] The appellant was 22 years old at the time of the commission of the offences. He was married. He had four children and was gainfully employed in the construction industry. He was in custody awaiting the finalization of this case from 25 October 2015. He was not a first offender. He was convicted of contravening s 49 of the Immigration Act 13 of 2002 – entering, remaining or

departing from South Africa without the necessary documentation - and fined R1000 or 3 months' imprisonment.

[16] Robbery with aggravating circumstances is generally a very serious offence. Worse still when it is committed by means of a firearm. In this case, the appellant subdued the victims by firing a shot directly at Mr. M before he even announced the reason for his presence there. It is by sheer luck that the bullet only grazed his breastbone.

[17] The robbery was planned because the appellant approached the car with the firearm in his hand. After he executed the robbery, he decided to have sexual intercourse with the complainant, without her consent. He also threatened her with the firearm but complainant was fortunately a courageous person who would not go down without a fight. Her resistance saved her and the appellant could not succeed in executing the rape.

[18] The crimes were committed in brought daylight. The appellant showed no respect for the dignity, bodily integrity and property of the complainants. The community expects courts to impose harsh sentences on persons like the appellant. It is for that reason that the legislature, as an institution representing society, decided to enact the General Laws Amendment Act 105 of 1997 (Act). In terms of the Act the robbery with aggravating circumstances counts should be visited with 15 years' imprisonment unless there are substantial and compelling circumstances present which justify a lesser sentence.

[19] As a court of appeal we are enjoined to inquire whether the factors which were considered by the sentencing court together with those raised before us are substantial and compelling circumstances. We unfortunately do not have the benefit of the Regional Magistrate's judgment on sentence, because it too could not be reconstructed. This is, however, not a reason why we cannot consider an appropriate sentence afresh.

[20] Ms Kruger submitted the following factors, cumulatively, constitute substantial and compelling circumstances:

- the complainants were not injured during the incident;
- the value of the stolen property is relatively low and together with the damage to the vehicle amounted to R11 768.51;
- two cellular phones were recovered;
- the appellant should be regarded as a first offender; and
- the appellant was still very young.

[21] Mr M did not sustain a serious injury as a result of the gunshot. This is not because the appellant was a very adroit marksman, but rather due to luck or providence. In fact, the mere firing of a shot at two people in a car under these circumstances is an aggravating circumstance; regardless of whether they sustained serious injuries.

[22] The value of the property after the recovery of the two cell phones is in my view neither here nor there. The amount of R 11 768.51 might seem low to some members of society, but I doubt whether the average South African will perceive it to be such. Gone are the days where a cellular phone was just a device to make and receive calls and text messages. Cellular phones (all the phones were smart phones) contain so much information of the owner to the extent that its owner's life gets interrupted and disorganized by its theft. Nostalgic moments saved for posterity on the phone's photo files are gone forever. Likewise documents and other communication are also gone. The phones were recovered due to the police's detective work and not due to the appellant's efforts.

[23] I agree that the appellant should for all purposes be regarded as a first offender. However, it should not be forgotten that 15 years' imprisonment is the prescribed sentence for first offenders. That is how serious robbery with aggravating circumstances is regarded.

[24] Although the appellant was still young, he was married and had 4 children. In my judgment youthfulness, *per se*, without more should not be an immunizing factor against the imposition of the prescribed minimum sentence. The court must look at youthfulness relative to the facts and circumstances of each case. Where the crime was committed by a young person who was influenced by another or older person it should count in such youth's favour. Likewise where it is clear that the driving force behind the crime was youthful impetuousness, the court should consider that in favour of the accused. A lack of maturity and attraction to risky behavior by some youth can also point to an underdeveloped appreciation for responsibility.

[25] However, the reality is that it has become too common in our courts for young persons to be convicted of serious crimes. Such crimes are often times committed out of sheer criminality, for unfathomable reasons and greed. In these cases the courts should not be perceived to be tone-deaf to the loud plea of society, that courts should impose heavy sentences for serious crimes.

[26] The appellant was not an immature young man. He was married and had 4 children. He planned this attack. He discharged a firearm during the attack. He threatened Ms K with the firearm in order to subject her to his will. There is no evidence that he was influenced to commit the crimes.

[27] In my judgment the factors mentioned by Ms. Kruger separately or cumulatively do not constitute substantial and compelling circumstances.

[28] There is no reason why the 5 years' imprisonment on count 1 was also not ordered to run concurrently with the sentences on counts 2 and 3. All the crimes formed part of different diabolical acts committed at the same time and place. This amelioration should have been considered because the effective sentence of 20 years' imprisonment for this first offender is shockingly inappropriate. An effective sentence of 15 years' imprisonment will, in my view, send a clear message that the appellant's conduct was reprehensible and deserving of long term incarceration.

[29] I accordingly make the following order:

1. The appeal against sentence is upheld to the following extent:

   The Regional Magistrate's order in terms of s 280 (2) is set aside and replaced with the following order:

   a) All the sentences are ordered to run concurrently.
   b) The sentence is ante dated to 23 May 2016.

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**C.J. MUSI, JP**

I concur.

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**S. CHESIWE, J**

**Appearances:**

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| For the Appellant: | Ms S. Kruger<br>Legal Aid South Africa<br>Bloemfontein |
| For the Respondent: | Adv M.M.M. Moroka<br>Director Public Prosecutions<br>Bloemfontein |