

SOUTH AFRICA / JUDGMENT

Fills v S (CA&R49/2017) [2017] ZAECHGC 96 (1 September 2017)

[2017] ZAECHGC 96

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, N Conjwa

CASE / FILE NUMBER

CA&R49/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: CA&R49/2017

In

the matter between:

KEVIN

FILLIS

Applicant

And

THE

STATE

Respondent

JUDGMENT

BESHE J:

- [1] The appellant was arraigned on a charge of robbery with aggravating circumstances in the Regional Court, Uitenhage. It was alleged that on or about the 1 September 2016 at or near Middle Street, Kaba, Uitenhage, he did unlawfully and intentionally assault Solomon Hendricks and forcefully took from him cash in the amount of R1500.00. It was further alleged that aggravating circumstances were present, in that complainant was threatened with a knife during the robbery.

- [2] The appellant who was represented by Mr Mtengwana during the trial, pleaded guilty to the charge. The following transpired from his plea explanation:

On the 1 September 2016, whilst walking to the shop with an accomplice, they came across the complainant who was in the company of another male person. When they were close to them, appellant took out a knife and both insisted on searching the complainant. His companion searched the complainant, took out his wallet from which he took R1500.00 and thereafter threw complainant's wallet on the ground. The appellant and his companion fled the scene of crime. They were however arrested shortly thereafter. He acknowledged that even though it is his companion who searched the complainant, he did so in common purpose with him.

- [3] The appellant was convicted of robbery with aggravating circumstances on the basis of the abovementioned plea and explanation thereof and sentenced to imprisonment for fifteen (15) years which is the minimum sentence prescribed for the offence under consideration.

[1]

- [4] This appeal is directed at the abovementioned sentence, leave to do so having been granted by the court a quo.

- [5] The basis upon which the sentence is assailed is that the court a quo did not attach proper weight to factors that are relevant to the imposition of a sentence, and that amounts to a misdirection on the part of the court a quo. Further, that the court a quo erred in not finding that the cumulative effect of appellant's personal circumstances as well as other factors that are in his favour that were placed on record, constitute substantial and compelling circumstances.

- [6] It was submitted on behalf of the appellant that the following factors should have been considered as constituting substantial and compelling circumstances justifying a deviation from imposing the prescribed sentence:

Appellant was twenty three (23) years old at the time of sentencing.

He was staying at home with his parents.

He was unemployed but would do odd jobs and earn R50.00 per day when he could secure a job.

He had been in custody for four (4) months awaiting the finalization of the trial.

He pleaded guilty to the charge thereby, so it was submitted, displaying remorse.

Complainant did not suffer any physical injuries as the knife was only used to threaten him.

There were discussions afoot for appellant's family to re-imburse the complainant.

- [7] The following factors appear to have been common cause between the parties:

The complainant is a sixty seven (67) year old male person. The amount of R1500.00 he was robbed of was money paid to him by way of a grant that he receives monthly. He had just withdrawn the money. The money was not recovered. The appellant had the following previous convictions:

On the 14 September 2012 he was convicted of possession of drugs and sentenced to thirty (30) days imprisonment or to pay a fine of R100.00. On the 12 March 2013 he was convicted of robbery and sentenced to thirty (30) months imprisonment in terms of Section 276 (1) (i) of Criminal Procedure Act 51 of 1977. On the 23 March 2015 he was convicted of theft and sentenced to pay a fine of R900.00 or to undergo three (3) months imprisonment with the sentence suspended for five (5) years conditionally.

On the 13 August 2015 he was once again convicted of possession of drugs and sentenced to pay a fine of R2000.00 or to undergo one hundred and eighty (180) days imprisonment.

- [8] Both Ms Baatjies who acted on behalf of the state and Mr Mntengwana for the accused were in agreement that appellant had been convicted of a very serious offence. The complainant was deprived of what, in all probability was his only means for his upkeep for the whole month.
- [9] In his judgment on sentence, the Magistrate pointed out that the robbery in respect of which the appellant was sentenced carried a mandatory sentence of a minimum of fifteen (15) years imprisonment. Beyond that the Magistrate did not deal with the question whether or not substantial and compelling circumstances existed. There is no indication that he applied his mind with a view to determine whether there was reason to deviate from the prescribed sentence or not. In the absence of a finding in this regard, it will not be appropriate to assume that the Magistrate applied his mind and found that no such circumstances existed. There is no indication that the Magistrate exercised the discretion he is expected to exercise in terms of Section 51 (3) (a) of Act 105 of 1997. This section provides that:

“51 Discretionary minimum sentences for certain serious offences

(3)

- (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

- [10] The need for a court to consider the proportionality of the prescribed sentences to the crime, the criminal and the needs of the society, notwithstanding the existence of the minimum sentence was emphasized in *S v Vilakazi*[2] where the following was said:

- [15] “It is clear from the terms in which the test is framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed

sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the “offence” in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and culpability of the offender.”

[11] As I indicated earlier, the Magistrate did not make this assessment.

[12] Granted, the appellant was convicted of a very serious offence. This is also not appellant’s first brush with the law. In particular, this is not his first conviction for robbery. In my view however, the fact that he pleaded guilty, is relatively young, had been in custody for four (4) months, the knife was not used to inflict any physical / bodily injuries on the complainant, render the imposition of the prescribed minimum sentence disproportionate.

[13] Be that as it may, the nature of the offence and the circumstances under which it was committed calls for a substantial period of imprisonment. In my view a sentence of ten (10) years imprisonment will fit the offender, the crime and needs of the society.

[14] In the result the following order will issue:

The appeal against sentence succeeds.

The sentence of fifteen (15) years imprisonment is set aside and substituted with a sentence of imprisonment for ten (10) years.

The sentence is antedated to 13 December 2016.

NG BESHE

JUDGE OF THE HIGH COURT

CONJWA AJ

I agree.

N CONJWA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 30 August 2017

Date Reserved : 30 August 2017

Date Delivered : 1 September 2017

[1] Section 51 (2) of the Criminal Law Amendment Act 105 of 1997.

[2] 2009 (1) SACR 552 SCA at 560.

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