
SOUTH AFRICA / JUDGMENT

Kleinbooï v S (CA&R159/13) [2014] ZAECHGC 84 (10 October 2014)

[2014] ZAECHGC 84

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, J Roberson

CASE / FILE NUMBER

CA&R159/13

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA&R159/13

DATE

HEARD: 8/10/2014

DATE

DELIVERED: 10/10/14

NOT

REPORTABLE

In

the matter between:

JEROME
KLEINBOOI
APPELLANT
and
THE
STATE
RESPONDENT
Appeal
against sentence – robbery with aggravating circumstances,
unlawful possession of semi-automatic firearm and unlawful
possession
of ammunition – no substantial and compelling circumstances
present in respect of robbery – no misdirection
concerning
sentences of five and three years imprisonment in respect of the
unlawful possession of the firearm and ammunition,
the latter
sentence running concurrently with the former – cumulative
effect of the sentences – no misdirection when
sentence for
robbery and sentences for unlawful possession of firearm and
ammunition not ordered to run concurrently – appeal
dismissed.

JUDGMENT

PLASKET J

- [1] The appellant was convicted in the Regional Court, Port Elizabeth of robbery with aggravating circumstances, the unlawful possession of a semi-automatic fire-arm and the unlawful possession of eight rounds of ammunition. He was sentenced to terms of imprisonment of 15 years, five years and three years for these offences. The three year sentence was ordered to run concurrently with the five year sentence. The effective sentence was therefore 20 years imprisonment.
- [2] The appellant appeals against sentence only, leave to appeal having been refused by the magistrate but having been granted on petition.
- [3] On the morning of 29 July 2009, Ms B. D. was walking in Stanford Road, Cleary Park, Port Elizabeth when she was accosted by the appellant and his co-accused, one Potgieter. The appellant drew a firearm which he trained on Ms D. Potgieter ripped her handbag from her. She began to run away. As she did so she screamed and begged the appellant not to harm her. He followed her, with the firearm still aimed at her, despite the fact that she had already been dispossessed of her handbag.
- [4] By chance, a taxi came past and stopped to assist Ms D. The appellant and Potgieter ran away. The taxi driver alerted two policemen,

Constables Daniël and Nxowa. They went in search of the robbers after Ms D. had provided a description and informed them that one of the men was armed with a firearm.

[5] They returned to Ms D. shortly thereafter having found the men who fitted the description given to them. One – the appellant – was indeed in possession of a firearm with was loaded with eight rounds of ammunition and the other – Potgieter – was in possession of Ms D.'s handbag.

[6] For purposes of sentence, the appellant was treated as a first offender because, although he had a previous conviction, it was not relevant to the offences of which he had been convicted. His personal circumstances were taken into account by the magistrate. They were that he was, at the time of the trial, [.....] years old. He was single and the father of two children. He had a standard five education. He was at the time of the incident employed and earned R120 per day.

[7] The magistrate also took into account the fact that robbery with aggravating circumstances 'kom veelvuldig in Port Elizabeth

voor en in hierdie hele streekafdeling'; that the victim was a defenceless woman; that she was traumatised and required counselling;

and that neither accused displayed any remorse. He concluded that no substantial and compelling circumstances were present to justify a departure from the prescribed sentence of 15 years imprisonment in respect of the robbery conviction.

[8] Since the Supreme Court of Appeal's judgment in *S v Malgas*[1] it has been trite that in cases in which a minimum sentence is prescribed by the legislature that sentence is ordinarily to be

imposed unless circumstances exist that render it disproportional to the crime, the personal circumstances of the accused and the

interests of society, and hence unfair. The term 'substantial and compelling' is used to describe those circumstances.

[9] There is, in my view, little to be said in favour of the appellant. His conduct was brazen and vicious. He wielded a firearm against a defenceless woman in order to dispossess her of her handbag and its contents. His and his co-accused's conduct was predatory. He was not satisfied with the fear that he inspired in the complainant in the act of robbing her but then chased her with the firearm still trained on her. I agree with the magistrate that no substantial and compelling circumstances were present to justify a deviation from the prescribed sentence of 15 years imprisonment.

[10] The magistrate imposed sentences of five and three years imprisonment respectively for the offences of unlawfully possessing the semi-automatic firearm and ammunition. Those sentences, it seems to me, are also in order. Both offences are serious.[2] The harm caused to society by the use of unlawfully possessed firearms and ammunition in the commission of

offences is apparent to any judicial officer who has spent any time in the criminal courts. In this case, the fact that the firearm was used in the commission of an offence is an aggravating factor.[3] In these circumstances, the sentences imposed by the magistrate display no misdirection and cannot be suggested to be shockingly

inappropriate.

[11] That leaves the cumulative effect of the sentences to deal with. The magistrate viewed the possession of the semi-automatic firearm and the ammunition as separate and distinct from the robbery, even though they were used in the commission of the robbery. I can see nothing wrong with that approach. It is undoubtedly correct because the possession of the semi-automatic firearm and the ammunition both preceded the robbery and endured after the robbery had been completed. In these circumstances, it is correct, in my view, to approach sentence in the way that the magistrate did and to make the sentences in respect of the robbery and the possession counts run consecutively. Given the seriousness of the latter offences, the cumulative effect of the sentences is not vitiated by any misdirection and does not induce a sense of shock.

[12] The appeal is accordingly dismissed.

C Plasket

Judge of the High Court

I agree.

J Roberson

APPEARANCES

Appellant: H McCallum of the Grahamstown Justice Centre

Respondent: MJ September of the office of the Director of Public Prosecutions, Grahamstown

[1] S v Malgas 2001

(1) SACR 469 (SCA).

[2] R v Kahn 1957

(4) SA 558 (N) at 559C; S v Madikane 2011 (2) SACR 11 (ECG) para 23.

[3] S v Khoza & others 2010

(2) SACR 207 (SCA) para 89; S v Madikane (note 2) para 28.

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