

SOUTH AFRICA / JUDGMENT

Kotwana v S (CA&R48/2014) [2014] ZAECGHC 92 (5 November 2014)

[2014] ZAECGHC 92

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, E Revelas

CASE / FILE NUMBER

CA&R48/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE, GRAHAMSTOWN

C.A. & R.:

48/2014

Date Heard: 29

October 2014

Date

Delivered: 5 November 2014

In

the matter between:

NDYEBO
KOTSWANA
Appellant
and
THE
STATE
Respondent

JUDGMENT

EKSTEEN J:

- [1] The appellant was convicted of housebreaking with intent to rob and robbery with aggravating circumstances. He was sentenced to 20 years imprisonment and he now appeals against the sentence imposed. There is no appeal against the conviction.
- [2] The facts material to the imposition of sentence are set out herein. The complainant and her husband were asleep in their bedroom on the night in issue and the television set in the room was on. At approximately midnight they were awoken to find that the appellant had opened the window and had climbed half into the bedroom with the upper part of his body inside the room and his feet extending to the outside. The appellant was well-known to the complainant and her husband. The window was situated next to the television and both the complainant and her husband could recognise the appellant in the light provided by the television set. At this stage he had already taken the DVD player, which had been on top of the television, and passed it on to an accomplice standing outside the window. The DVD player is valued at R180.
- [3] The accomplice standing outside had a firearm in his hand and was pointing it at the complainant and her husband. This person
- told them that if they look at him and the appellant he would shoot them. This prompted the appellant to admonish him. The appellant said: “No, don’t shoot man”.
- [4] After the event the complainant took the police to the house of the appellant. There the appellant was arrested. On this occasion the appellant told the complainant that he would come back. He apologised for what he had allegedly said and undertook to replace what he had taken. This undertaking was not honoured.
- [5] The appellant is [.....] years old and has a young child which is dependent on him. He has one previous conviction for robbery committed in 2007.
- [6] The magistrate committed a number of misdirections in the imposition of sentence. Section 51 of the Criminal Law Amendment Act, 105 of 1997 (hereinafter referred to as “the Act”) (as amended) prescribes certain discretionary minimum sentences for specified serious offences. In the case of robbery with aggravating circumstances the Act prescribes a discretionary minimum sentence of 15 years imprisonment in the case of a first offender and 20 years imprisonment in the case of a second offender, unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence.
- [7] As recorded earlier the appellant has a previous conviction for robbery but not for robbery with aggravating circumstances. The magistrate considered that the prescribed discretionary minimum sentence was 20 years by virtue of the appellant’s previous

conviction for robbery. In this respect the magistrate erred. The jurisdictional fact required in order to trigger the application

of the discretionary minimum sentence of 20 years is that the appellant should have a previous conviction of robbery with aggravating circumstances. (See *S v Mokela* 2012 (1) SACR 431 (SCA) at 434G-435D.) The prescribed discretionary minimum sentence in the case of a first conviction of robbery with aggravating circumstances is clearly 15 years. In this respect the magistrate has misdirected himself.

[8] The magistrate further found that the fact that a firearm had been used coupled with the fact that the appellant had a previous conviction made it impossible to deviate from the prescribed discretionary minimum sentence. In this respect too the magistrate clearly erred. I have dealt earlier herein with the previous conviction. The provisions relating to the prescribed

discretionary minimum sentence for robbery with aggravating circumstances only come into operation where an accused person has

been convicted of robbery with aggravating circumstances. The use of the firearm is the feature which brings the crime within the definition of “aggravating circumstances” as defined in section 1 of the Criminal Procedure Act, 51 of 1977. Had a firearm not been used this provision relating to the discretionary minimum sentence would not have come into operation at all.

[9] Once, however, it is determined that the prescribed discretionary minimum sentence for robbery with aggravating circumstances does apply, whether it be for a first offender or a second offender, then, section 51(3) of the Act provides that the court is at liberty to impose a lesser sentence provided there are substantial and compelling circumstances to justify the imposition of such a lesser

sentence. The magistrate did not embark at all on the exercise to determine whether or not such substantial and compelling

circumstances existed.

[10] I turn to consider whether substantial and compelling circumstances exist to impose a lesser sentence than the 15 years prescribed in the case of a first offender. The magistrate proceeded on the basis that the appellant carried a firearm. This is not borne out by the evidence. The appellant’s accomplice carried a firearm and threatened to shoot the complainant and her husband if they looked at him. The appellant, to his credit, admonished his accomplice not to shoot. This is a feature which must weigh in favour of the appellant as a mitigating feature. There is, however, little else in mitigation.

[11] On the facts I think that the appellant clearly knew that his accomplice was armed with a firearm. The magistrate correctly concluded that it was the intention, if necessary, to use the firearm to overcome any resistance which they might encounter. Although the appellant appeared to show a measure of remorse at the time of his arrest by tendering an apology

and undertaking to replace what they had taken the undertaking was not honoured. Moreover, the appellant thereafter pleaded not guilty and continued to protest his innocence to the very end in the face of overwhelming evidence against him. At the relatively young age of 23 years this is not his first brush with the law. His previous conviction is for robbery which is a serious offence and moreover an offence involving violence.

[12] On a consideration of all these features I do not think that there are substantial and compelling circumstances which justify the imposition of a lesser sentence than that prescribed. As earlier recorded the discretionary minimum sentence prescribed in the present case is 15 years.

[13] In the result the appeal succeeds. The sentence of twenty (20) years imprisonment imposed by the magistrate is set aside and is substituted by a sentence of fifteen (15) years imprisonment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

REVELAS J:

I agree. It is so ordered.

E REVELAS

Appearances:

For Appellant: Mr O Mtini instructed by Justice Centre, Grahamstown

For Respondent: Adv Zantsi instructed by National Director of Public Prosecution, Grahamstown

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