

SOUTH AFRICA / JUDGMENT

Mcatshukelwa v S (CA&R290/2016)

[2017] ZAECHGHC 34 (16 March 2017)

[2017] ZAECHGHC 34**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, GH Bloem

CASE / FILE NUMBER

CA&R290/2016

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Source record**IN THE HIGH****COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GRAHAMSTOWN)****CASE****NO.: CA&R290/2016****In**

the matter between:

LUZUKO

MCATSHUKELWA

Appellant

And

THE

STATE

Respondent

JUDGMENT**BESHE J:**

- [1] The appellant was convicted of robbery with aggravating circumstances as defined in Section 1 (1) (b) of the Criminal Procedure Act 51 of 1977 (the Act) and sentenced to ten (10) years' imprisonment. He is now appealing against the sentence leave to do so having been granted by this court on petition.

- [2] The conviction was based on the evidence that appellant along with four others robbed the complainant in this matter of a weed-eater. It is however the appellant and one other person that were charged. The appellant and his co-accused were liable to a prescribed minimum sentence of fifteen (15) years' imprisonment.[1] This was in view of the fact that appellant had wielded a firearm during the commission of the offence. The Magistrate found that the following amounted to substantial and compelling circumstances:

Accused persons' youthfulness. Their ages were given as twenty one (21) years and twenty two (22) years respectively in the charge sheet. The fact that appellant's record of previous conviction does not state that the robbery in respect of which he was previously convicted was one where aggravating circumstances were present. The weed-eater was recovered. Complainant did not sustain any physical injuries. The appellant had been in custody since 2014. (According to the record they were arrested on the 27 November 2014 and sentenced on the 14 May 2015).

- [3] Appellant had a previous conviction for robbery. This prompted the Magistrate to exercise his discretion in favour of differentiating

between the appellant and his co-accused who was a first offender for sentencing purposes. Appellant was sentenced to ten (10) years' imprisonment. His co-accused was sentenced to five (5) years' imprisonment in terms of Section 276 (1) (i) of the Criminal Procedure Act.

- [4] The sentence that was imposed by the Magistrate in respect of the appellant is assailed on the following grounds:

The sentence is so severe that interference by this court is justified. Appellant's previous conviction does not justify the degree to which his sentence differs from that of his co-accused whose personal circumstances are identical to those of the appellant. The court erred in not imposing uniform sentences in respect of the two accused.

- [5] It is trite that the inquiry in an appeal against sentence boils down to whether there was a proper and reasonable exercise of discretion by the sentencing court. If the discretion was properly exercised, the appeal court has no power to interfere.[2]
- [6] The question therefore is whether the court a quo exercised the discretion resting on it properly and reasonably by differentiating between the appellant and his co-accused in sentencing them.
- [7] It is trite that it is desirable that there should be uniformity in sentence imposed in respect of the same offence. Trite also is the principle that such desire should not be allowed to interfere with the exercise of the sentencing discretion. In *S v Giannoulis*[3], summarising the principles applicable to considerations of uniformity and disparity in sentences, Holmes JA had this to say at page 873 E – H:

“Reviewing all of the foregoing judicial pronouncements over the past 60 years, there seems to me to be discernible a fairly consistent thread running in the same general direction. It may be expressed thus:

In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.

In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers

appropriate in the circumstances.”

[8] The reason the Magistrate in the court a quo exercised his discretion in favour of disparity in sentences between the appellant and his co-accused was that appellant had a previous conviction. It is noteworthy that appellant was sentenced in respect of earlier robbery on the 25 April 2013. On the 26 November of the following year he committed yet another robbery, this time with aggravating circumstances being present in that he was wielding a firearm. Would there have been any purpose served by the imposition of the same sentence that was imposed on appellant’s co-accused. The sentence imposed in respect of the earlier robbery was five (5) years’ imprisonment in terms of Section 276 (1) (2) of the Criminal Procedure Act². I am not certain what was envisaged by the reference to subsection 2 of Section 276 though. Be that as it may, I am inclined to agree with the submission made by respondent’s representative that the previous sentence did not serve the purpose of deterring him from committing offences of this nature. In my view such a sentence would not have been appropriate. See in this regard the headnote in *S v Marx* 1989 (1) SA 222 (A) at 223:

“In an appeal against a sentence on the ground that the sentence imposed on the appellant was disturbingly inappropriate when compared with the sentence imposed in a later trial on another accused for the same crime, the question whether the sentence appealed against is disturbingly inappropriate has obviously to be answered on the basis of a comparison between that sentence and the lesser sentence which was imposed on a convicted accused who played an equal part in the commission of the same crime, and who has comparable personal

circumstances. Even if there is a striking difference between the two sentences when they are compared, it does not necessarily mean that interference is justified. There is a further requirement. Interference is only justified if the lighter sentence is a reasonable or commonly imposed sentence. Only then, by reason of the sentences being disproportionate, can the heavier sentence be ameliorated on the ground of its being disturbingly inappropriate. Were, however, the lighter sentence can be characterised as being unreasonable or clearly inappropriate, and the heavier sentence is in all the circumstances an appropriate one, interference with, and amelioration of, the latter sentence would not be proper, notwithstanding that the sentences

were disproportionate. Justice

requires the imposition of appropriate sentences.”

[9] In my view the Magistrate gave proper consideration to all the factors pertaining to sentencing in this matter, and gave due weight to all such factors, having done so decided to exercise his discretion by treating the appellant differently when it comes to sentencing. I am not persuaded that he misdirected himself or that he did not properly or reasonably exercised his discretion.

[10] In the result I would dismiss the appeal and confirm the sentence. It is so ordered.

NG BESHE

JUDGE OF THE HIGH COURT

BLOEM J

I agree.

GH BLOEM

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

[2] S v Kgosimore 1999 (2) SACR 238 SCA at 241 [10].

[3] 1975 (4) SA 867 (A).

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