

SOUTH AFRICA / JUDGMENT

Meva v S (R194/2016) [2016] ZAECHGHC 155 (15 December 2016) [2016] ZAECHGHC 155

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, M J Lowe

CASE / FILE NUMBER

R194/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 194/2016

DATE HEARD: 14/12/2016

DATE DELIVERED: 15/12/2016

In the matter between

LULAMA MEVA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The appellant and a co-accused, one Sivuyile Stungu, were convicted by the Regional Court, Port Elizabeth, of robbery with aggravating

circumstances. The appellant was sentenced to 20 years' imprisonment. This appeal, with the leave of the trial court, lies against conviction and sentence.

[2] The appellant and Stungu were alleged to have robbed the complainant, Thabela Zalabe, of R50 cash. The alleged aggravating

circumstances were the wielding of knives and/or the infliction of grievous bodily harm.

- [3] Zalabe testified that on the night of 18 June 2012 he was walking home when he was approached by a person whom he identified in court as Stungu. Stungu told him that he wanted money, at which Zalabe picked up a stone and ran into someone's yard. Unfortunately the owner of the house closed the security gate. Stungu entered the yard, held Zalabe by the back of his neck, searched him, and took R50 from him. Stungu drew a knife and as he did so people next door told Stungu to leave Zalabe alone. Stungu then called the name "Msawawa". It was not in dispute that this was a nickname by which Stungu referred to the appellant. The appellant approached and also searched Zalabe. While he was doing so Stungu attempted to stab Zalabe with a knife on his chest. Zalabe managed to shield himself from the blow and sustained scratches to his hands and face.
- [4] Zalabe ran into the house next door, followed by the appellant and Stungu, who said that Zalabe had heard their names and that they wanted to "kill this dog". People at this house told the appellant and Stungu that they could not enter. The appellant and Stungu said that they would not move and would remain there until morning. The police arrived and Zalabe was told that the appellant and Stungu were arrested. The R50 was not recovered.
- [5] Zalabe had never seen the appellant or Stungu before. He denied that on that evening he had accused the appellant of robbing him on a previous occasion, that he had insulted the appellant and that they had fought. He further denied that there was a person wielding an axe on the scene, who was going to attack the appellant and Stungu. He denied that the appellant and Stungu were ready to fight with him because he was fighting them, and that is how he sustained his injuries.
- [6] Siyabonga Soka testified that on the night in question he heard a noise and when he went outside he saw the appellant and Stungu at the house next door, together with an old man whom he identified in court as Zalabe. He had never seen Zalabe before. The appellant was holding Zalabe, and Stungu held a knife to his neck. Zalabe, who was just standing there and not fighting, said that he was being robbed by the two men. Soka did not see anyone nearby wielding an axe. Community members arrived to rescue Zalabe, who was taken by Soka's sister into their home. The appellant and Stungu followed and Soka's sister told them not to enter her yard. Soka did not notice any injuries on Zalabe.
- [7] Tumeka Mali testified that on the night in question she was alerted by a noise and on investigating found Zalabe and Stungu. Stungu said that he was being robbed by Zalabe, and Zalabe said Stungu was lying, it was he who was being robbed by Stungu. Stungu had a knife and Zalabe had two stones. She took Zalabe into her house (she must have been Soka's sister) and noticed that he had blood on his hand. Stungu approached the house and Mali chased him away. Mali also saw the appellant but did not see him doing anything. She too did not see anyone with an axe.
- [8] The appellant testified that he met Zalabe that evening and Zalabe accused him of robbing him on a previous occasion. Zalabe did not want to listen to the appellant's denial and picked up stones, but did not attack him. Stungu arrived and asked Zalabe why he was carrying

stones. When Zalabe did not answer Stungu produced a knife. There was a person with an axe standing behind Zalabe and Stungu told the appellant to take out his knife because Zalabe and the person with the axe were going to kill them. The appellant happened to be carrying a knife for self-protection. A quarrel ensued and the person with the axe ran away. Zalabe ran into a yard, still accusing the appellant of having robbed him. The appellant and Stungu followed Zalabe into Mali's yard in order to prove to Zalabe that the appellant had not committed the offence. The appellant and Stungu invited Zalabe to call the police to confirm his accusation and ultimately the police arrived.

Stungu was arrested first, followed by the appellant.

[9] Stungu's testimony was more or less in accordance with that of the appellant.

[10] The magistrate considered the state witnesses to be honest and credible and found that they corroborated one another. He found it improbable that Zalabe would have run away from a mere verbal altercation and found that he ran away because he was in danger. He rejected the appellant's and Stungu's versions as not reasonably possibly true.

[11] The magistrate's findings of fact are amply borne out by the record. The witnesses Soka and Mali were clearly unbiased and independent witnesses. They strongly corroborated Zalabe's evidence that he was the victim of a robbery. The injury on Zalabe's hand or hands was consistent with a protective gesture against a knife attack. It is highly improbable that Zalabe would have run into someone's yard if he was the instigator of an argument. The undisputed evidence that the appellant and Stungu, with knives drawn, followed Zalabe into the yard is far more consistent with them being the aggressors. The appellant's evidence that they followed him in order to prove that the appellant had not robbed him previously and were prepared to wait for the police, merely has to be stated to be rejected as grossly improbable. It is far more probable that they were prepared to wait because they were intent on pursuing their criminal conduct. The magistrate was correct in accepting the evidence of the State witnesses and rejecting that of the appellant.

[12] The appeal against conviction therefore cannot succeed.

Sentence

[13] Section 51 (2) (a) of the Criminal Law Amendment Act 105 of 1997 provides as follows:

"Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years;
and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;”

Robbery with aggravating circumstances is one of the offences listed in Part II of Schedule 2.

[14] The appellant has a previous conviction for robbery committed in May 2012, for which he was sentenced to one year’s correctional

supervision in terms of s 276 (1) (h) of the Criminal Procedure Act 51 of 1977, a condition of which was the performance of community service. A further one year’s imprisonment conditionally suspended for three years was imposed. This previous conviction was, according to the criminal record, for robbery simpliciter, and not robbery with aggravating circumstances.

[15] It appears that the magistrate was of the view that the appellant was a second offender as envisaged in s 51 (2) (a) (ii) of Act 105 of

1997. The magistrate began his judgment on sentence by referring to the minimum sentence of 15 years’ imprisonment for a first offender and 20 years’ imprisonment for a second offender. He remarked that the appellant was not a first offender and had a previous conviction for robbery. He considered whether or not there were substantial and compelling circumstances justifying a lesser sentence, and without expressly saying so, was apparently of the view that there were no substantial and compelling circumstances. He then sentenced the appellant to 20 years’ imprisonment.

[16] In *Mokela v S* 2012 (1) SACR 431 (SCA) at para [6] Bosiello JA said the following:

“It is a clear requirement of s 51(2)(a)(ii) that for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the State had to prove that he is a second offender of robbery with aggravating circumstances. This is the jurisdictional requirement necessary to trigger s 51(2)(a) (ii). All that the State proved in this case is that the appellant had previous convictions amongst others for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)(a)(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.”

[17] The magistrate therefore wrongly regarded the appellant as a second offender as envisaged in s 51 (2) (a) (ii) of Act 105 of 1997. For the purposes of the minimum sentencing legislation he should have been regarded as a first offender and the applicable prescribed minimum sentence was 15 years’ imprisonment. The magistrate therefore committed a material misdirection entitling this court to interfere.

[18] The appellant was 20 years old at the time he committed the offence. His legal representative at the trial did not place much information before the court with regard to his personal circumstances, other than to say that he had completed Grade 10, was unemployed, and was supported by his family. As already mentioned he had a previous conviction for robbery. The present offence was committed some six weeks after he had been sentenced to correctional supervision. This indicates that he was not prepared to utilise the opportunity

to reform, and is an aggravating factor. The offence was a cowardly one. Two persons armed with knives attacked an older and vulnerable person and if it had not been for the intervention of community members, they would have persisted in their attack.

[19] While the magistrate approached the imposition of sentence on the incorrect basis, as alluded to above, he was correct in my view in finding that there were no substantial and compelling circumstances. The seriousness of the offence and the appellant's recent previous conviction clearly outweighed his personal circumstances, including his relatively young age. The appeal against sentence should succeed on this limited ground.

[20] The following order will issue:

[20.1] The appeal against conviction is dismissed.

[20.2] The appeal against sentence is upheld. The sentence of 20 years' imprisonment is set aside substituted with a sentence of 15 years' imprisonment, ante-dated to 7 March 2013.

J M ROBERSON

JUDGE OF THE HIGH COURT

LOWE J:-

I agree

M J LOWE

Appearances:

For the Appellant: Ms N M Mazibukwana, Grahamstown Justice Centre

For the Respondent: Adv D Els, Director of Public Prosecutions, Grahamstown

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