

SOUTH AFRICA / JUDGMENT

Mthwethafa v S (C A & R 161/2019) [2021] ZAECHGC 28 (16 March 2021)

[2021] ZAECHGC 28

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, B R Tokota

CASE / FILE NUMBER

C A & R 161/2019

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

C A & R 161/2019

In the matter between:

ZOLISA MTHWETHAFA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Bloem J.

- [1] The appellant was charged and convicted in the regional court of nine counts of robbery with aggravating circumstances. He was sentenced to fifteen years' imprisonment on each count. The magistrate ordered the sentences on counts 1, 2, 3, 4 and 6 to run concurrently because the offences in those counts were committed at Pep Stores. He ordered the sentences on the remaining counts to run concurrently. Those orders amounted to an effective sentence of 30 years' imprisonment.
- [2] The magistrate refused the appellant's application for leave to appeal against conviction but granted him leave to appeal against sentence.

- [3] The appellant took the items from the complainants on the dates and from the venues set out hereunder:

Count Goods taken Date of offence Store robbed 1 The sum of R1 000.00 cash 11.9.2014 Pep Stores 2 DSTV decoder valued at R799.00; the sum of R6 000.00 cash and 3 DSTV Zappa decoders valued at R2 600.00 14.11.2014 Pep Stores 3 The sum of R5 000.00 cash 23.09.2015 Pep Stores 4 The sum of R3 000.00 cash 15.12.2015 Pep Stores 5 The sum of R4 900.00 cash; 1 cell phone valued at R100.00 and 1 cell phone valued at R2 000.00 27.01.2016 Legit Stores 6 The sum of R15 000.00 cash 04.02.2016 Pep Stores 7 The sum of R7 500.00 cash; 2 cell phones and a Vodafone tablet, with unknown value 15.06.2016 Shooz Zone 8 The sum of R3 190.00 cash and a cell phone with unknown value 15.12.2016 Franco Cellate 9 The sum of R3 600.00 cash and 30 cell phones valued at R50 000.00 13.01.2017 Exact Stores

- [4] The appellant's modus operandi were to first visit a store under the pretext that he wanted to buy an item, like shoes, but could not find a size that would fit him, or he wanted to open an account to buy clothing or shoes on credit. He would not make a purchase, but would return to the store in question a day or two thereafter, shortly before the store would close for the day. There would be few or no other customers in the store at that time. In each case the appellant wielded a firearm. He would then forcibly take money in the cash register, cell phones on sale and cell phones from members of staff and customers. No person was injured during any of the robberies. Not a single item taken by the appellant during the robberies has been recovered.
- [5] When he was sentenced during 2019 the appellant was 27 years old and the father of a 2-year old child who was living with his biological mother. He was single. He completed his secondary education. Prior to his arrest the appellant was employed at an automotive company earning an income of between R800.00 and R1 000.00 per week. On 29 June 2017 he was convicted of attempted robbery committed during August 2016 and sentenced to 18 months' imprisonment, wholly suspended for five years on condition that he would not be convicted of attempted robbery committed during the period of suspension. He was in custody for two and a half years awaiting trial in the present matter.
- [6] Robbery is a very serious offence. The victim of such a crime is unlawfully and intentionally deprived of his or her property by the perpetrator who uses violence or a threat thereof to take the property from the victim. Robbery with aggravating circumstances is not a new offence. It remains robbery,[1] but has more serious consequences for sentencing.[2] For instance, in terms of section 51(2)(c)(i) of the Criminal Law Amendment Act[3] a regional court or a High Court shall sentence a first offender who has been convicted of robbery to imprisonment for a period of not less than 5 years whereas in terms of section 51(2)(a)(i) of that Act a first offender who has been convicted of robbery with aggravating circumstances shall be sentenced to imprisonment for a period of not less than 15 years. The above minimum prescribed sentences shall be imposed unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum prescribed sentence.

- [7] The magistrate found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than 15 years' imprisonment in respect of each count. Mr Geldenhuys, counsel for the appellant, submitted that the magistrate erred in that regard. Counsel submitted that the appellant's personal circumstances and the fact that none of the complainants was physically harmed or injured cumulatively constitute substantial and compelling circumstances. The magistrate considered the appellant's personal circumstances, particularly that he was 27 years old, was in custody for two and a half years awaiting trial, was gainfully employed at the time of his arrest and the father of a small child, but came to the conclusion that "their cumulative effect does not have substantial weight that would justify the court to deviate from imposing the minimum prescribed sentence". In my view, the magistrate's reasoning in that regard cannot be faulted.
- [8] It is correct that none of the complainants was injured. The magistrate took into account that, when the appellant was arrested, a gas gun was found in his underwear. The complainants all testified that the appellant wielded a firearm when he robbed them. The fact that a gas gun was found in his possession when he was arrested, does not mean that he was in possession of such a gun during the robberies. He was convicted of having wielded a firearm during the robberies.
- [9] The appellant robbed clothing stores over a period of 28 months. The magistrate took into account that robbery is prevalent within the area of jurisdiction of this court. He also took into account the seriousness of the offences. The fact that no person was injured is fortuitous and cannot, under the circumstances, constitute a substantial or compelling circumstance.

That being the case, the factors relied upon by Mr Geldenhuys do not constitute substantial and compelling circumstances, individually or cumulatively. The magistrate's finding in that regard should accordingly not be disturbed.

- [10] The remaining question is whether the magistrate erred, as submitted by Mr Geldenhuys, by not ordering the sentences to run concurrently in such a way that the appellant serve a period of imprisonment substantially less than the effective period of 30 years' imprisonment that was imposed.
- [11] The cumulative effect of the magistrate's order is a sentence of 30 years' imprisonment. Ms Hendricks, counsel for the state, submitted that the sentence of 30 years' imprisonment was appropriate if regard is had to the facts that the appellant reconnoitred the various business premises where the offences were committed, the offences were committed on nine separate occasions and that vulnerable women were targeted by the appellant and traumatised by the offences. Despite all the factors highlighted by counsel, I disagree that the sentence was appropriate. Although substantial and compelling circumstances do not exist to justify the imposition of a lesser sentence than the minimum prescribed sentence on each count, the effective term of imprisonment is, in my view, unduly severe and

disturbingly inappropriate. The cumulative effect of two terms of 15 years' imprisonment neither fits the offences that the appellant committed nor is it fair to the appellant and society.[4] The sentence should accordingly be set aside. While I agree with the magistrate that, if the sentence in respect of all the other counts were ordered to run concurrently with the sentence imposed in respect of count 1, a term of 15 years' imprisonment would, in my view, be inappropriate, if regard is had to the nature of the offences and that they were committed over a period of 28 months. Such a sentence would not reflect the seriousness of the separate offences.[5]

[12] The effect of the sentence intended to be imposed is to make the appellant understand that he will be serving a sentence for each count. In my view, an appropriate sentence would be imprisonment of between 22 and 25 years. In the circumstances, a sentence of 23 years' imprisonment would be appropriate, calculated on the basis that 14 years' imprisonment

on each of counts 2 to 9 shall run concurrently with the sentence imposed in count 1. The appellant will effectively be sentenced

to 23 years' imprisonment.

[13] In the result, it is ordered that:

13.1. The appeal against sentence succeeds.

13.2. The sentence be and is hereby set aside and replaced with the following:

"1. The accused is sentenced to 15 years' imprisonment on each count.

2. 14 years' imprisonment on each of counts 2 to 9 shall run concurrently with the sentence imposed in count 1."

13.3. The sentence is antedated to 28 March 2019.

G H BLOEM

Judge of the High Court

Tokota J,

I agree

B R TOKOTA

For the appellant:

Mr D Geldenhuys, of the Grahamstown Justice Centre, Grahamstown.

For the state:

Ms S Hendricks of the Office of the Director of Public Prosecutions, Grahamstown.

Date heard:

10 March 2021.

Date of delivery of the judgment:

16 March 2021.

[1] S v Moloto 1982 (1) SA 844 (A) at 850C.

[2] Minister of Justice and Constitutional Development and another v Masingili and others (CCT 44/13) [2013] ZACC 41; 2014 (1) BCLR 101 (CC); 2014 (1) SACR 437 (CC) at 448d.

[3] Criminal Law Amendment Act, 1997 (Act 105 of 1997).

[4] S v Moswathupa 2012 (1) SACR 259 (SCA) at par 8 and S v Kruger 2012 (1) SA 369 (SCA) at 373b-c.

[5] DPP, Free State v Mashune (675/17)

[2018] ZASCA 60 918 May 2018) at par 20.

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