

SOUTH AFRICA / JUDGMENT

Nogxaza v S (CA&R2/14) [2014] ZAECBHC 8 (6 June 2014)

[2014] ZAECBHC 8

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle, Van Zyl

CASE / FILE NUMBER

CA&R2/14

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: CA&R 2/14

NOT REPORTABLE

In the matter between

SIMAMKELE NOGXAZA Appellant versus THE STATE Respondent

REASONS

FOR JUDGMENT

HARTLE J

1. After we heard argument in the abovementioned appeal we reserved judgment, but promptly issued the following order:

1.1 The convictions and sentences imposed in respect of the Appellant and his co-accused namely, Xhamla Booi are hereby set aside and substituted with the following:

“(a) *The two accused are convicted of robbery simpliciter.*

- (b) They are both sentenced to undergo sixteen (16) months imprisonment.

1.2 The sentence is ante dated to 18 February 2013.”

2. The reasons for our order are set out below.
3. The appellant, together with his co-accused referred to in the order above, was convicted of robbery with aggravating circumstances on the basis of certain facts found proven by the regional court and sentenced to the prescribed minimum sentence of fifteen years imprisonment. He appealed, with the leave of the regional court, against both sentence and conviction.
4. The allegations in the charge sheet were that he and his co-accused robbed the complainant, Mr S., of R40.00 cash. Aggravating circumstances involving the “wielding of knives, ... kicking him (with) booted feet and hitting him (with) fist” were alleged to be present.
5. The accused pleaded not guilty to the charge. In a plea explanation tendered on their behalf it was conceded that they did indeed meet the complainant on the date in question; that they had quarreled over drugs and that they had forcefully taken the complainant’s drugs from him on this occasion.
6. The state called three witnesses, the complainant and his friend who were in each other’s company on the night in question, and a neighbor from the community who had witnessed an incident between the two of them and the accused.
7. The version of the complainant, Mr S., was that he and Mr O. N. were waylaid and attacked by the two accused who dispossessed him of a sum of R40.00 cash he was carrying on his person to purchase electricity for his grandmother. The motive for the robbery according to the witnesses was that the accused wanted money to buy drugs.
8. Accused no. 2 confronted him with a knife and threatened him with it. Accused no. 1 tried to hit Mr N. but he managed to run away. Accused no. 2 tried to trip Mr S. and they wrestled. He fell to the ground. Accused no. 1 had by now returned and they both tried to twist his hand to get the money from it. They were hitting or “stamping” him and also biting him. Eventually he let go of the money. While the accused were making their retreat from him a neighbor, Ms M. M., arrived on the scene. She shouted at them by their names and told them to stop. Accused no. 1 came back to attack him again with a fly kick as a result of which he fell down.
9. O. N. confirmed the complainant’s version of their being waylaid, but insisted that both accused were armed with knives. He made no reference to any attack upon himself. According to him he ran away from the scene at the outset to call for help, yet witnessed the attack upon the complainant. He related that the accused were kicking the complainant and also hitting “the hand that held the money in the palm”. Ms M. M. came and intervened and they walked away. Accused no. 1 came back and kicked the complainant.
10. Ms M. M., who is an independent witness, claimed that she co-incidentally came out of her house that night to attend to her

dust bin when she saw “these children” (the complainant, Mr N. and the two accused) fighting. They were kicking and hitting each other with fists. She went up to the road to intervene. She saw that the complainant was on the ground and that accused no. 1 was kicking him, but ventured that they were “all fighting”. After she shouted at them to stop they went home, O. already having freed himself from the fracas just as she arrived there. That is where the fight stopped. She denied seeing any weapons.

11. The appellant quite brazenly asserted that the fight was about drugs. He claimed that the four of them usually smoked

together. On this particular night, the complainant had bought a tablet but was trying to shake the accused off rather than share it with them. They quarreled over this and took it from him by force. Both he and his co-accused overpowered the complainant and twisted his hand until the tablet fell out. Ms M. arrived and that was the end of that. He denied that they were armed with or threatened the complainant or Mr N. with knives. In fact he added that if he had had a knife he would have used it both because the complainant is older than him, and because he was angry due to the fact that they did not invite them to smoke with them. He also denied taking any money from the complainant.

12. In his judgment the magistrate made light of the discrepancies in the evidence between the state witnesses regarding the presence of knives, attributing these differences rather to the peculiar circumstances:

“There was a fight in progress, you are suddenly confronted by somebody wielding a knife, wanting to rob you. One flees from the scene the other one takes the attack and somebody else comes out of their house because of the din, and sees people fighting and running towards them and checking what is going on, all at night time. That is really the only main criticism to the State case.”

13. After denouncing the appellant and his co-accused as poor witnesses he proceeded to find that they had robbed the complainant of his money, which finding in his view fitted in with the inherent probabilities of the matter.
14. Upon appeal Mr Van Breda on behalf of the appellant submitted that the trial court had erred in accepting the evidence of the

complainant and Mr N. because they had contradicted each other on material aspects. He also highlighted certain improbabilities

in their versions which I need not enumerate for present purposes. Their accounts were -more importantly so he submitted, contradicted by the evidence of the independent witness.

15. Although Ms Monis on behalf of the state insisted at first that the magistrate had correctly convicted the accused on the basis of the facts which he found proven, she conceded that the accounts of the complainant and Mr N. were substantially at variance with each other’s and with that of Ms M.’s who was an independent witness.

16. In our view the contradictions discounted by the magistrate were material and impacted on the reliability of the complainant and Mr N.'s evidence, justifying the factual foundation upon which they convicted being upset upon appeal. The trial court ought in the circumstances to have preferred the evidence of the independent witness and found that the fracas was in the nature of a fight and more consistent with the accused's version which in the premises was reasonably possibly true.
17. However, even on the appellant's and his co-accused's versions, their conduct in the circumstances, in line with their plea explanation, was that they forcefully removed a tablet from the complainant and made themselves guilty of at least robbery simpliciter.
18. Mr Van Breda conceded as much as well as the principle that a person can be convicted of robbery of drugs. (See in this regard *R v Twala*,^[1] *S v Ndaba & Another*^[2] and *S v Nkambula*^[3]).
19. This is a valid proposition and one which we agree with. On the question of whether the appellant should have been convicted of robbery with aggravating circumstances however, the evidence did not establish in our view that such aggravating circumstances were present in relation to the robbery. In the result it was necessary to set aside both the conviction and sentence imposed by the trial court.
20. Although accused no. 2 was not before us on appeal, the doubt expressed in the appellant's conviction must equally redound to his benefit.
21. We deemed it proper in the circumstances to exercise our review jurisdiction in his favour on the basis that the proceedings were self evidently - by virtue of our consideration that the trial court had erred in finding that there were aggravating circumstances shown to be present in relation to the robbery on the basis of the materially conflicting evidence of the complainant and Mr N., not in accordance with justice.
22. Concerning the issue of an appropriate sentence and having regard to all the circumstances, we were inclined of the view that a sentence of sixteen months imprisonment was adequate to meet all the objectives of sentencing.
23. In the result we issued the order which we did.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

D VAN ZYL

DATE OF APPEAL : 6 JUNE 2014

DATE OF REASONS : 6 JUNE 2014

Appearances:

For the appellant: Mr H Van Breda, Changfoot Van Breda Attorneys, East London. For the respondent: Ms C Monis, Director of Public Prosecutions, Bhisho

[1] 1952

(2) SA 599 (A).

[2] 1961

(2) SA 145 (N).

[3] 1980 (1) SA 189 (T).

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