

SOUTH AFRICA / JUDGMENT

S v Kali [2010] ZAECHGC 113 (25 November 2010)

[2010] ZAECHGC 113**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Conjwa

CASE / FILE NUMBER

CA & R 212/2010

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Source record**NOT****REPORTABLE****IN THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE, GRAHAMSTOWN)****Case No: CA & R****212/2010**

In the matter between:

MELIKHAYA KALI

.....Appellant

And

THE STATE

.....Respondent

Coram: Chetty J and Conjwa AJ

Date Heard: 10 November 2010

Date Delivered: 25 November 2010

Summary: Criminal

Law – Sentence – Robbery – Unlawful possession of
semi automatic pistol – Minimum sentence provisions

– Act

105 of 1997 – Appellant sentenced to 15 years imprisonment on
each count – Such sentence manifestly unjust
given the

mitigating circumstances – Sentence set aside

JUDGMENT

Chetty, J

[1] The appellant, a 22 year old male, was arraigned for trial in the regional court, Port Elizabeth on charges of robbery with aggravating circumstances and the unlawful possession of a firearm in contravention of section 3 of the Firearms Control Act¹. Duly apprised that in the event of a conviction the state sought sentences in conformity with the minimum sentence provisions

encapsulated in the Criminal Law Amendment Act², the appellant nonetheless tendered a plea of guilty and was duly convicted.

[2] In a written plea explanation pursuant to the provisions of section 112 (2) of the Criminal Procedure Act³, the appellant stated:-

“I know and admit that my actions were wrongful, unlawful and intentional and I am pleading guilty to the charges against me, the

charge of robbery with aggravating circumstances.

Further, I did not have a licence to carry a firearm at the time of my arrest, and when the firearm was recovered from me.

I take full responsibility for my actions and even though I was under the influence of alcohol that day, I could still appreciate what I was doing.

I ask the Court for mercy. Further that the firearm which was recovered by the police was eventually sent for test ballistics and I admit the contents, correctness and findings of the report thereof.”

[3] The ballistics test adverted to in the plea explanation established that the firearm was a semi automatic pistol, its unlawful possession, an offence falling within the purview of Part II of Schedule 2 of the Criminal Law Amendment Act for which the legislature had ordained a mandatory minimum sentence of 15 years imprisonment absent a finding of substantial and compelling circumstances.

[4] In her judgment on sentence the magistrate commented that the appellant’s personal circumstances were “nothing surprising” and although she took cognisance of the fact that he was a young man aged 22 and a first offender, found that the mitigating factors relied upon were in themselves wholly insufficient to constitute substantial and compelling circumstances and sentenced the appellant to the prescribed minimum sentence of 15 years imprisonment on each count, the sentences to run concurrently. Leave to appeal against the sentences imposed was refused but granted on petition to the Judge President.

- [5] Robbery, committed with the use of a firearm, is undoubtedly a serious offence and ordinarily warrants a penal sanction. Similarly, the unlawful possession of a semi automatic firearm would, in itself, attract a custodial sentence. The question which falls for decision in this matter is whether, given the admitted factual background concerning the possession of the firearm and the robbery itself, the sentences imposed are proportionate to the gravity of the offences. This requirement of proportionality was affirmed by the Constitutional Court in *S v Dodo*⁴ where Ackermann J stated the following:-

“[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the

very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender’s humanity.”

- [6] In a recent unreported judgment in this division by Plasket J, (Pickering J, concurring) viz., *Bantu Vuyani Madikane v the State*, CA & R 145/2010, the learned judge, with reference to a plethora of judgments dealing with sentence in similar matters, concluded by saying the following at para [31]

“[31] I am mindful of the fact that at least in some of the cases the sentence imposed resulted from the erroneous interpretation of the relevant item of Part II of Schedule 2 of the Criminal Law Amendment Act that was adopted in Sukwazi and was applied in a number of other cases: as a result, a maximum sentence of three years’ imprisonment was held in these cases to apply. It seems to me that this incorrect interpretation was, however, resorted to because of a sense of disquiet as to the proportionality of a sentence of 15 years’ imprisonment for the unlawful possession of a pistol, albeit one that was a semi-automatic (as most pistols are). In any event, as the cases that I have listed above show, in most cases, the sentences imposed tended to be in the region of two years’ imprisonment. Even if allowance is made for the imposition of more severe sentences for the offence of the unlawful possession of a firearm that is automatic or semi-automatic as a result of the application of the Criminal Law Amendment Act, it seems to me that a sentence of 15 years’ imprisonment is unlikely to be proportional to the crime, the criminal and the legitimate needs of society in all but the most serious of cases.”

I agree. In my view a sentence of 15 years imprisonment, albeit that it was ordered to run concurrently with the sentence imposed in respect of the robbery conviction, is disproportionate to the crime and manifestly unjust.

[7] The appellant's evidence as to the circumstances in which he came into possession of the firearm was, as adumbrated hereinbefore, accepted by the State. Its erstwhile possessor's carelessness in dropping the firearm set in motion a chain of events which ultimately led to the robbery, the appellant's arrest and subsequent conviction. The robbery appears to have been carried out at the spur of the moment by the appellant who was to some extent inebriated. There is no evidence concerning the severity of the assault on the complainant's companion and the inference may legitimately be drawn that it was not serious. The appellant's youthfulness, coupled to his unblemished record and the uncontroverted factual background are in themselves sufficiently cogent to render the ordained sentence disproportionate to the gravity of the offence. In my view, the magistrate misdirected herself in failing to attach sufficient weight to the mitigating circumstances. We are therefore at liberty to interfere with the sentences imposed.

[8] In the result the following orders will issue:-

The appeal against sentence is upheld.

The sentences imposed on the appellant in the court below are set aside and replaced by the following:-

On count 1 the appellant is sentenced to 10 years imprisonment;

On count 2 he is sentenced to 5 years imprisonment;

It is ordered that the sentence imposed on count 2 shall run concurrently with that imposed on count 1;

The sentence is back dated to 7 August 2008.

D. CHETTY

JUDGE OF THE HIGH COURT

Conjwa AJ

I agree.

N. CONJWA

ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellants: Mrs. H.L McCullum

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1Act No 60 of 2000

2Act No 105 of 1997

3Act No 51 of 1977

4[2001] ZACC 16; 2001

(3) SA 382 (CC); 2001 (5) DCLR 423 (CC)

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