

SOUTH AFRICA / JUDGMENT

S v Swarts (20170042) [2018] ZAECGHC 67 (14 August 2018)

[2018] ZAECGHC 67**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

C. Plasket, G. H. Bloem

CASE / FILE NUMBER

20170042

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****REVIEW****CASE NO: 20170042****DATE****DELIVERED: 14/8/18****NOT****REPORTABLE****In**

the matter between:

THE
STATE
and
RIVALDO
KEANON SWARTS**JUDGMENT****PLASKET J**

- [1] The accused pleaded guilty to, and was convicted of, three counts in the Regional Court, Grahamstown. They were robbery with aggravating circumstances (count 1); the pointing of anything likely to lead a person to believe it is a firearm, an offence created by s 120(6)(b) of the Firearms Control Act 60 of 2000 (count 2); and robbery. He was convicted on the basis of his plea and sentenced to five years imprisonment each in respect of counts 1 and 3 and 12

months imprisonment, suspended for five years, in respect of count 2. In the body of the magistrate's judgment on sentence, the sentences in respect of counts 1 and 3 were ordered to run concurrently and were made subject to s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA).

- [2] The matter was referred to this court on special review by the trial magistrate who had concerns about the correctness of the conviction in respect of count 2. He was also concerned that the J15 did not reflect the sentences he imposed in respect of counts 1 and 3.
- [3] Bloem J sought an opinion from the Director of Public Prosecutions, Grahamstown and the further comments of the trial magistrate in respect of issues that arose from the opinion. Two issues require decision. They are whether the accused was correctly convicted in respect of counts 1 and 2. In addition, the J15 requires amendment to reflect the terms of the magistrate's judgment on sentence.

The charges

- [4] Count 1 was to the effect that the accused was guilty of robbery with aggravating circumstances in that on 7 January 2017, he had unlawfully and intentionally assaulted the complainant 'and did then and with force' take a mobile phone. The aggravating

circumstance relied on was that 'a firearm and/or similar object was used during the execution of the said offence'.

- [5] Count 2 was to the effect that at the time, date and place described in count 1, the accused 'did unlawfully point anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun, at another person, to wit, the said complainant, without a good reason to do so'.
- [6] It is unnecessary to deal with the charge in respect of count 3.

Count 1

- [7] In his statement in terms of s 112(2) of the CPA, the accused said of count 1 that on the day in question he was in possession of a toy replica firearm when he came upon the complainant. On the spur of the moment he unlawfully and intentionally assaulted the complainant and 'did then and with force take the said complainant's one mobile phone'. He admitted that the aggravating circumstance present was that 'a similar object to a firearm was used during the execution of the said offence'. After having robbed the complainant, the accused was later stopped by the police who, on searching him, found the toy firearm and the stolen cellphone.
- [8] 'Aggravating circumstances' in relation to the offence of robbery are defined in s 1(1)(b) of the CPA to mean:

'(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm'; or

(iii) a threat to inflict grievous bodily harm;

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.'

[9] The charge sheet was framed along the lines of sub-section (i) of the definition of aggravating circumstances – that the accused had wielded a firearm. The prosecutor, however, did not use the word 'wielded' but rather 'used' in relation to the firearm. He also added a gloss of his own that does not appear in the definition: after referring to the firearm, he added 'and/or a similar object'.

[10] In his plea, when all is said and done, the accused admitted that, with the aid of the toy firearm, he assaulted the complainant and, 'with force' stole his cellphone.

[11] In order for aggravating circumstances as envisage by sub-section (i) to be present, the firearm had to be a real firearm: a toy firearm does not suffice.[1] That does not end the enquiry. A toy firearm (or a real firearm that does not work) can still be used as a means of threatening to inflict grievous bodily harm, for purposes of sub-section (iii) of the definition.

[12] In *R v Zonele & others*[2] a Mr and Mrs Roberts were waylaid by a group of men, one of whom fired a shot into the ground and announced that 'this is a hold-up'. Mr Roberts was bound and guarded by a man armed with a sheathed sword while Mrs Roberts was taken to their store by a man armed with a firearm that was not in working order. Money, firearms, ammunition and other property were stolen from the store. Mrs Roberts was taken back to her husband and was also bound. The men then rode off on their horses. In these circumstances, Holmes AJA held[3] that by their conduct:

'(a) the third appellant threatened Roberts with grievous bodily harm when he fired a shot into the ground, pressed the revolver into his neck, and said "This is a hold-up, I want your money". It amounted to the traditional threat of the highway man – "Your money or your life".

(b) the second appellant threatened Mrs. Roberts with grievous bodily harm when he pointed a fire-arm at her in the car. The fact that it was not in working order seems to me irrelevant.

(c) the first appellant threatened Roberts with grievous bodily harm by mounting guard over him with a sword. The fact that it was still in its scabbard seems to me irrelevant. In effect he was saying to Roberts "If you attempt to escape I shall draw and use this sword".'

[13] In *S v Mbele*,[4] Miller J was required to decide whether the use of an unloaded firearm in a robbery amounted to aggravating circumstances. He held:[5]

'The wording of the relevant enactment is clear and it says that aggravating circumstances in relation to robbery mean and include a threat to inflict grievous bodily harm. It is, to my mind, a question of fact whether the accused in any given case actually threatened to inflict grievous bodily harm. If he did, then the requirements of the section are complied with. There is no doubt

that threats can be made not only by words but also by conduct; a man who points a fire-arm at another and says – “Hand over your money” does not need to add – “. . . if you don't I shall shoot you”. The pointing of the fire-arm is as eloquent as any words could be. There can clearly be a threat by conduct and by implication for the purposes of the section.’

[14] More recently, it was found in *S v Anthony*[6] that the use of a toy firearm to affect a robbery rendered it a robbery with aggravating circumstances because it amounted to threatening the complainant with grievous bodily harm.[7]

[15] In my view, on the facts admitted by the accused – that he assaulted the complainant and stole property from him by force using the toy firearm – it can be inferred that he intended to, and in fact did, threaten the complainant with grievous bodily harm, if only by conduct. He was, as a result, correctly convicted of robbery with aggravating circumstances in respect of count 1.

Count 2

[16] The conviction in respect of count 2 – pointing the toy firearm at the complainant – is a duplication of convictions. The act of pointing the toy firearm was performed in order to commit the robbery referred to in count 1. The accused performed one act with a single intention. The conviction and sentence in respect of count 2 must accordingly be set aside.

Sentence

[17] The accused can probably consider himself lucky that this court may not increase sentence on special or automatic review or remit the matter to the trial court for that purpose.[8] That is especially so in relation to count 3 where despite the fact that a knife appears to have been wielded, the accused was not charged or convicted of robbery with aggravating circumstances as he should have been.

[18] It is clear from the magistrate’s judgment that he intended the sentences for counts 1 and 3 to run concurrently and for s 276(1)(i) of the CPA to apply to both. That intention is not reflected in the J15 form, which must be rectified.

The order

[19] It is ordered:

1 The conviction and sentence in respect of count 2 are set aside.

2 The J15, in respect of sentence, is amended with the addition of the following:

‘The sentences imposed in respect of counts 1 and 3 shall run concurrently and both shall be subject to section 276(1)(i), of the Criminal Procedure Act 51 of 1977.’

C. PLASKET

JUDGE OF THE HIGH COURT

I agree:

G. H. BLOEM

[1] S v Anthony 2002

(2) SACR 453 (C) at 454j-455a.

[2] R v Zonele & others 1959 (3) SA 319 (A).

[3] At 329F-G.

[4] S v Mbele 1963

(1) SA 257 (N).

[5] At 260A-C.

[6] Note 1 at 456c-d.

[7] See too S v Hlongwane 2014 (2) SACR 397 (GP) paras 32-35.

[8] S v Nkosi 2008

(1) SACR 87 (N) at 89i-90d.

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