

SOUTH AFRICA / JUDGMENT

Sithole v S (CA&R16/2017) [2017] ZAECHGHC 93 (22 August 2017)

[2017] ZAECHGHC 93**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, A da Silva

CASE / FILE NUMBER

CA&R16/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE****NO. CA & R 16/2017****In**

the matter between:

VUKILE
SITHOLE
Appellant
and
THE
STATE
Respondent
APPEAL**JUDGMENT**

Bloem J.

- [1] The appellant was charged in the regional court at Port Elizabeth with murder, robbery with aggravating circumstances and escaping from lawful custody. He pleaded not guilty to the first two counts and guilty to escaping from lawful custody. He was ultimately convicted on all three counts. He was sentenced to fifteen years' imprisonment on count 1, twenty years'

imprisonment on count 2 and on count 3 to three years' imprisonment wholly suspended for five years "on condition you are not convicted of any offence relating to escape from lawful custody". I take it that the magistrate meant that the three years' imprisonment was wholly suspended on condition that the appellant not be convicted of escaping from lawful custody committed during the period of suspension. The sentence on

count 1 was ordered to run concurrently with the sentence imposed on count 2. With the leave of the court a quo the appellant now appeals against the sentence. The notice of appeal is not specific as to which sentence is appealed against. It is only in the appellant's heads of argument that it is specified that the appeal is against the sentence of twenty years'

imprisonment on count 2.

- [2] The facts upon which the appellant was convicted were that on 16 October 2009 the complainant in count two was walking along Russel Road when the appellant robbed her of her cellphone and plastic bags containing toys which she was selling to earn a living. After the robbery the complainant went to look for assistance. In the meantime and for no apparent reason the appellant, who was in the company of two other persons, confronted the deceased and his friend who were walking home from a pub after a few drinks. The deceased was stabbed and his friend, who testified at the hearing, fled. The deceased died of his injuries. Approximately 30 minutes after she was robbed the complainant pointed out the appellant to a private security guard. The appellant was in possession of the complainant's cellphone and the bags containing toys. He was arrested and taken to the Mount Road Police Station. The appellant admitted that before he was placed in a cell, he attempted to escape from custody.
- [3] It was submitted on behalf of the appellant that the magistrate erred when she imposed a sentence of twenty years' imprisonment in respect of the robbery with aggravating circumstances. The submission was that the appellant should have been treated as a first offender for purposes of count 2. It was furthermore submitted that the magistrate misdirected herself by not deviating from the minimum sentence.
- [4] If regard is had to the appellant's date of birth he was 22 years old at the time of the incident and 24 when he was sentenced on 3 June 2011. He is single and has 3 minor children, a twin who were six and another child who was seven years old in 2011. The children live with the appellant's stepmother and sister. His stepmother receives a social grant in respect of each child. Before his arrest the appellant washed vehicles to earn a living. The magistrate was not informed of the appellant's academic qualifications or his socio-economic circumstances. The accused has previous convictions. In 2000 he was convicted of theft and sentenced to a fine of R400.00 or four months' imprisonment wholly suspended for three years on certain conditions. During 2006 he was convicted of robbery which was committed on 23 December

2005. He was sentenced to three years' imprisonment. He was released after three years. Eight months after his release he committed robbery for which he was convicted on 16 July 2010 and sentenced to eight years' imprisonment. The offences committed in this matter were committed twelve days before the other robbery. The record is silent as to why the appellant

was convicted and sentenced only on 16 July 2010 for the robbery that was committed on 28 October 2009. Similarly it is also silent as to why he was sentenced only on 3 June 2011 for the offences in the present matter.

[5] In her judgment the magistrate had regard to the fact that the appellant had robbed a defenceless woman who was fortunate that she did not sustain bodily injuries and who received back her cellphone and bags containing toys. Robbery with aggravating circumstances is a serious offence, so serious that the Legislature has ordained a sentencing regime in terms whereof a first offender shall be sentenced to imprisonment for a period not less than 15 years, a second offender to imprisonment for a period not less than 20 years and a third or subsequent offender to imprisonment for a period not less than 25 years.[1]

[6] In this case, because the appellant was convicted and sentenced on 8 February 2006 for a robbery (not robbery with aggravating

circumstances) that was committed on 23 December 2005 and even if one were to take into account (which I do not) that on 16 July 2010 he was sentenced to eight years' imprisonment, it was once again for robbery and not robbery with aggravating circumstances.

[7] The magistrate stated that she "could not find any circumstance or any fact that would justify the imposition of a lesser sentence other than factors that are aggravating those circumstances." With that finding I agree. The magistrate then sentenced the appellant to twenty years' imprisonment. Although she did not state that she sentenced him in terms of section 51 (2) (a) (ii) of the Criminal Law Amendment Act, the conclusion is inescapable that she sentenced him in accordance with that section.[2] She misdirected herself by treating the appellant as if he had previously been convicted of robbery with aggravating circumstances.

The appellant was previously convicted of robbery, not robbery with aggravating circumstances. He was accordingly not a second

offender of robbery with aggravating circumstances. Part II of Schedule 2 refers specifically to robbery "when there are aggravating circumstances". The appellant was therefore wrongly treated as a second offender of robbery with aggravating circumstances. He was a first offender of that offence. That misdirection warrants interference by this court.

[8] I agree with the magistrate that there are no substantial and compelling circumstances justifying the imposition of a lesser

sentence than the fifteen years' imprisonment prescribed by section 51 (2) (a) (i) of the Criminal Law Amendment Act. I am of the view that a sentence of fifteen years' imprisonment will cause members of society to be protected from the appellant and it will send out a message to him and other would be robbers that the courts will treat such offences harshly. A term of twenty years' imprisonment was in any event disproportionate to the circumstances under which the offence was committed.

[9] In the result:

9.1. the appeal against the sentence imposed by the magistrate for robbery

with aggravating circumstances succeeds;

9.2. the sentence of twenty years' imprisonment is set aside and is replaced with a sentence of fifteen years' imprisonment;

9.3. the sentence on count 1 (murder) is to run concurrently with the sentence on count 2 (robbery with aggravating circumstances);

9.4. the sentence on count 3 (escape from lawful custody) should read:

"The accused is sentenced to three years' imprisonment, such imprisonment being wholly suspended on condition that the accused not be convicted of escaping from lawful custody committed during the period of suspension."

9.5. the above sentences are antedated to 3 June 2011.

G H BLOEM

Judge of the High Court

da Silva AJ,

I agree

A DA SILVA

Acting Judge of the High Court

For the appellant:

Adv H Charles of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

16 August 2017

Date of delivery of the judgment:

22 August 2017

[1] Section 51 (2) (a) as read with Part II of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

[2] For purposes of this appeal section 51 (2) (a) (ii) provides that a person who has been convicted of robbery when there are aggravating

circumstances, shall, in the case of a second offender of robbery with aggravating circumstances, be sentenced to imprisonment for a period not less than 20 years.

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