

SOUTH AFRICA / JUDGMENT

Tamele v S (A421/2013) [2014] ZAGPJHC 81 (3 April 2014)

[2014] ZAGPJHC 81

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mashile, Opperman

CASE / FILE NUMBER

A421/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A421/2013

DATE: 3 APRIL 2014

In the matter between:

ANTONIO VASCO TAMELE.....Appellant

and

THE STATE.....Respondent

J U D G M E N T

MASHILE, J:

- [1] This is an appeal on a charge of robbery with aggravating circumstances. The appeal emanates from the regional court for the region of Gauteng held at Roodepoort.
- [2] The Appellant who was 41 years old at the time of the commission of the crime pleaded not guilty and chose to furnish the court with no plea explanation. He was represented throughout the proceedings in the court a quo.
- [3] On 17 April 2012 the court a quo found him guilty as charged and sentenced him to 15 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The Appellant was also declared unfit to possess a firearm in terms of Section 103 of The Firearm Controls Act No. 60 of 2000.

[4] The court a quo declined to grant the Appellant leave to appeal against both the conviction and sentence. Following the refusal for leave to appeal,

the Appellant petitioned this court, which subsequently granted him leave to appeal the sentence. The appeal is therefore against sentence only.

[5] The traditional approach that a trial court has an unfettered discretion on sentence was modified in respect view of the minimum

sentence legislation. The approach was formulated in *S v PB* by Bosielo JA as follows:

“[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

[6] In terms of Section 51(2) of the criminal Law Amendment Act No. 105 of 1997 the prescribed minimum sentence for a first offender of robbery with aggravating circumstances is 15 years direct imprisonment.

[10] That notwithstanding, a court can depart from the minimum imposable sentence on the condition that there exists substantial and compelling reasons for doing so. See in this regard, *S v Nkomo* 2007 (2) SACR 198 SCA.

[7] Having gone through the seriousness and the prevalence of the crime in the area, the interest of the society and the personal

circumstances of the Appellant, the court a quo found that no substantial and compelling circumstances existed justifying a deviation from the minimum sentence as prescribed by the Criminal Law Amendment Act No. 105 of 1997.

[8] The court a quo found instead that there were aggravating circumstances being that the Appellant used a knife for the commission of the robbery albeit that the complainant did not sustain any injuries. While that may be so, there is no question that the complainant was traumatised. The fact that the Appellant had previous convictions, even though they have nothing to do with the charge

presently under consideration by this court, did not assist the Appellant.

- [9] Counsel for the Appellant contended that since the Appellant's previous convictions are not related to the present conviction, the court a quo should have disregarded them when imposing the sentence and found that substantial and compelling circumstances existed in that the Appellant had spent approximately 10 months awaiting trial.
- [10] It is common cause that these previous convictions had nothing to do with a charge of robbery with aggravating circumstances. To the extent that they are serious and involve dishonesty, they should be taken into account when deciding whether or not to reduce the minimum sentence. The fact that an appellant has spent a certain period prior to sentence is not an automatic excuse to deviate from the prescribed minimum sentence. Each case is to be assessed on its own merits. See *S v Radebe* 2013 (2) SACR 165 (SCA).
- [11] The court a quo did consider the personal circumstances of the Appellant and these were:
- [11.1] The appellant is married and has six children;
- [11.2] His wife is temporarily employed;
- [15.3] He does temporary work;
- [11.4] He is 41 years old;
- [11.5] He spent about 10 months whilst awaiting trial.
- [12] The court a quo however contrasted the Appellant's personal circumstances against what it regarded as aggravating circumstances. Those circumstances as set out by the court a quo are:
- [12.1] The complainant was threatened with a knife;
- [12.2] He was intimidated and traumatised;
- [12.3] The complainant is a man of straw;
- [12.4] Robbery is a serious offence;
- [12.5] The crime is prevalent in South Africa as well as in Johannesburg;
- [12.6] Although the appellant is a guest in South Africa, he has been committing crimes since 1996;
- [12.7] The appellant has various previous convictions for housebreaking and theft;
- [12.8] He is not a candidate for rehabilitation;
- [12.9] He shows no remorse as he committed his previous offences whilst on parole.

[13] There is no question that a comparison of his aggravating and personal circumstances weighs in favour of the imposition or possibly even increasing, the minimum sentence. It is clear that the sentences imposed on him by previous courts have failed to deter him. Worst of all, he showed his maximum disregard and derision for the law by committing this current robbery while on parole.

[14] Counsel for the Appellant has also argued that the Appellant should have been treated as a first offender for purposes of sentence.

The fact that the court a quo imposed a minimum sentence of 15 years direct imprisonment means that he was treated as a first offender

otherwise he would have been sentenced to 20 years direct imprisonment as a second offender.

[15] I have already stated earlier that his personal circumstances seen against the aggravating circumstances do not warrant a reduction of the sentence. I agree with Counsel for the Respondent that the recovery of the items that he took from the complainant or the lack of use of unprovoked violence do not constitute sufficient reasons for the court to decrease the sentence.

[16] A society demands that people who repetitively commit crimes should be visited with harsh and unsympathetic sentences. This explains the enactment of the minimum sentence legislation. If courts fail to apply it under circumstances which deserve it, the society might start disrespecting our courts.

[17] In the premises the appeal on sentence fails and I make the following order:

The appeal is dismissed.

B MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

I OPPERMAN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing: 25 March 2014

Date of Judgment: 3 April 2014

Counsel for Appellant: Adv. E Tlake

Instructed by: Legal Aid Board South Africa

Counsel for Respondent: Adv. JG Wasserman

Instructed by: The Office of The Director Of Public Prosecution

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