

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MAKHANDA**

CASE NO: CA&R 143/2021

Heard on: 3 August 2022

Judgment delivered on: 25 January 2023

In the matter between:

SINETHEMBA MAHLAHLA

Appellant

and

THE STATE

Respondent

JUDGMENT

MALUSI J:

[1] The appellant was charged with robbery with aggravating circumstances read with the provisions of *s51(2) of Act 105 of 1997 (minimum sentences Act)* in the regional court sitting in *Uitenhage*. He was convicted and sentenced to twelve (12) years' imprisonment. He appeals against his sentence with leave granted on petition.

[2] The charge put to the appellant and his since deceased accomplice was that on 31 January 2020 at or near *Shoprite Square* in *KwaNobuhle* they robbed the complainant of four (4) tyres valued at *R2 400.00*. It was alleged that aggravating circumstances were present in that a knife was used in the execution of the robbery.

[3] The evidence led in the court a quo disclosed that the complainant and his father delivered goods to a shop in the mall. Whilst the father attended at the shop, the complainant stood guard over the delivery bakkie. The appellant and his accomplice approached the complainant, demanding that he must open the canopy door. He pointedly refused and stood against the canopy door. The accomplice advanced towards him and uttered the words *'This is how we work, we are working here'*. The accomplice simultaneously placed his hand in his pocket when saying those words. The complainant retreated and escaped from the two men.

[4] The complainant stated that the accomplice's advance and placing of his hand in his pocket induced a fear in him that the accomplice would produce a knife. He thought the accomplice would stab him. He had not seen any knife before escaping. The moment the accomplice placed his hand in his pocket, the complainant turned around and ran away.

[5] The regional magistrate reasoned in his judgment that it is not necessary for a weapon to be wielded for aggravating circumstances to be established. A threat by conduct of the assailant to inflict grievous bodily harm is sufficient to establish aggravating circumstances. He concluded that the mere touching of a pocket was sufficient to establish aggravating circumstances.

[6] The order granting leave to appeal specifically raised the issue whether the elements of robbery were proved. In particular, the question was raised as to whether the touching of or placing a hand in the pocket by the deceased accomplice was sufficient to constitute a threat of violence.

[7] The elements of the crime of robbery are the following:

7.1 the theft of property;

- 7.2 through the use of either violence or threats of violence;
- 7.3 a causal link between the violence and the taking of the property;
- 7.4 unlawfulness; and
- 7.5 intention.¹

[8] The element at issue in this appeal is the threat of violence. It has been held that a threat of physical harm directed at the complainant if he does not acquiesce to the removal of property is sufficient.² The threat must be of immediate personal violence to the complainant. The subjective test is whether the complainant believed that the appellant intended to carry out the threat and was able to do so.³ The decisive factor is that the threat must induce a fear of violence in the complainant. The threat may be conveyed by conduct or words or both.

[9] On the facts of this case it is clear that the complainant had initially resisted the theft of the tyres. In order to overcome his resistance, the accomplice uttered the words in para [3] (supra) which in themselves are not a threat. However, his advance on the complainant and his placing his hand in the pocket induced a fear of an immediate personal attack in the complainant. The resultant state of fear satisfied the requirements for this element of robbery.

[10] The further enquiry relates to '*aggravating circumstances*' in relation to the offence of robbery. These are defined in s2(1)(b) of the *Criminal Procedure Act* to mean:

¹ Criminal Law, C R Snyman, 6th Edition, page 508.

² *S v Moloto* 1982 (1) SA 844 (A) at 850B-C; *S v Kgayane* 1982 (4) SA 133 (T).

³ *R v Sibanyone* 1940 JS 40 (T); *Mtimunye* 1994 (2) SACR 482 (T) at 485a-b.

- “(i) *the wielding of a fire-arm 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”.*

[11] Part of the charge put to the appellant was that *‘The aggravating circumstances is that a knife was used in the execution of this robbery’*. As indicated in para [4] *supra*, the complainant did not actually see any knife in possession of the accomplice nor in his pocket. Neither did the accomplice utter words that he was in possession of a knife. Thus, the threat to inflict grievous bodily harm could only materialize by the conduct of the accomplice. Such conduct was the placing of his hand in his pocket.

[12] On the facts of this case there is insufficient evidence to conclude that there was a threat to inflict *‘grievous bodily harm’*. In my view not every threat of violence amounts to a threat of grievous bodily harm. An objective assessment of the evidence clearly shows that there was no knife used nor threats to use one. The subjective assumption of the complainant that there was a knife in the pocket is sufficient to carry a robbery conviction solely focusing on the results of the conduct. However, viewed objectively there is no evidence that the same conduct proves the accomplice was in possession of a knife. The complainant was simply not asked for purposes of establishing a threat of grievous bodily harm the reasons he thought the accomplice was in possession of a knife. There is no evidence of a bulge in the pocket or any indication that the accomplice was in possession of a knife or any weapon whatsoever for that matter.

[13] An example would suffice. A robber who placed his hand in his pocket in such a way to subjectively induce fear in the mind of a bank-teller that he has a

fire-arm is guilty of robbery. However, the same robbery may not be with aggravating circumstances when viewed objectively because there may not be a threat of inflicting grievous bodily harm as the belief of a fire-arm in the pocket may simply be unreasonable.

[14] In my view, on the facts of this case the robbery was not with aggravating circumstances but was robbery *simpliciter*. This conclusion has an effect on the appropriate sentence as the provisions of the minimum sentences Act do not find application.

[15] The appellant was convicted of robbery with aggravating circumstances. For the reasons stated above, the conviction is wrong. This court must invoke its inherent power to review the proceedings of the lower court. It cannot allow a clearly wrong conviction to stand. In the circumstances the conviction must be set aside.

[16] This court has to consider afresh the appropriate sentence as all the relevant information is before us. The appellant was 26 years old at the time he committed the offence. He was single and did not have dependants. His highest education qualification was grade 10. He was employed as a seasonal general worker in the citrus industry earning R1 800.00 per fortnight. He had spent six (6) and a half months in custody awaiting trial. He had two (2) previous convictions for theft, one for contempt of court and another for a drug offence. No weapon was wielded and no injuries were inflicted on the complainant. The stolen tyres were recovered.

[17] The offence for which he was convicted is prevalent in the *Republic*. It is a serious offence which displays a lack of respect for the property of other persons. It was committed brazenly in broad daylight in front of many people.

[18] In my view an appropriate sentence is a period of five (5) years' imprisonment.

[19] In the result the following order will issue:

19.1 The conviction and sentence of the appellant are set aside;

19.2 It is replaced with the following:

"The accused is found guilty of robbery. The accused is sentenced to undergo five (5) years' imprisonment".

T MALUSI

JUDGE OF THE HIGH COURT

I agree:

J G A LAING

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Adv Geldenhuys
instructed by Legal Aid Board
MAKHANDA

For the Respondent: Adv Kgatwe *instructed by*
Director of Public Prosecutions
MAKHANDA