

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: CA&R 77/2016

Heard on: 31 August 2016

Delivered on: 21 September 2016

In the matter between:

BERNARD DAVIDS

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

MAKAULA J:

Introduction:

[1] The appellant is appealing against a sentence of fifteen (15) years imprisonment handed down after he pleaded guilty to and was convicted of robbery with aggravating circumstances by the regional court.

Facts:

[2] In his plea of guilty in terms of Section 112(2) of the Criminal Procedure Act¹, the appellant stated the facts under which the offence was committed. The state accepted the facts as correct. The facts as reflected in the statement read:

“ . . . on 20th of January 2009 at or near Extension 21 in the Regional Division of the Eastern Cape I unlawfully and intentionally assaulted Jacques Plaatjies and then with force take the following item from him, 1 cell phone, property in his lawful possession. The aggravating circumstances being that the complainant was threatened with a knife. On the day in question, Davie and myself was walking to Extension 21 whilst walking we came across the complainant and asked him what the time was. The complainant responded by saying that he did not know what the time was. Davie then told the complainant that he, (the complainant) had a cell phone and could look for the time on the cell phone. The complainant then took the cell phone out of his pocket and then I took a knife out of my pocket. I grabbed the cell phone from the complainant and told the complainant he should leave or I will hurt him. The complainant then left. We then also walked away. . . .” (sic)

¹ Act 51 of 1977

Grounds of Appeal:

[3] The grounds of appeal are that (a) the regional court magistrate erred in not having sufficient regard to the appellant's personal circumstances by imposing a sentence which induced a sense of shock and was strikingly "*inappropriate*"; and (b) that the court a quo overemphasized the seriousness of the offence at the expense of the personal circumstances of the appellant and placed emphasis on the retributive and deterrent aspect in total disregard of rehabilitation and restorative justice components.

[4] Mr Charles, on behalf of the appellant, submitted before us that there was no misdirection on the part of the court a quo except that the sentence is disproportional to the offence.

Court a quo:

[5] In sentencing the appellant, the court a *quo* took into account the following mitigating factors that; the appellant was 27 years old, he has two children who stay with their mother; he was employed and used his salary to support his children; he pleaded guilty and thus showed remorse, the complainant did not sustain serious injuries and the appellant had been in custody from the time of his arrest on 12 November 2010 until the day of his conviction and sentence i.e. being 6 March 2012.

The appellant has a previous conviction of robbery which dated back to 23 March 2004.

[6] The court *a quo* found no substantial and compelling circumstances and imposed the minimum sentence of fifteen (15) years.

Analysis:

[7] It is trite that the passing of sentence is pre-eminently a matter for the discretion of the trial court and a court of appeal can interfere only if the decision is vitiated by irregularity or misdirection². Mr Charles, correctly, in my view conceded that there is no misdirection by the court *a quo*. The disproportionality of the sentence imposed to the offence committed by the appellant was not amply dealt with by Mr Charles.

[8] In sentencing the appellant the court *a quo* had to strike a balance between the crime, the offender and the interest of society.³ Doing lip-service to the balancing of these interests is not permissible.

² *S v Letsoko & Others* 1964 (4) SA 768 (A) at 777D-E

³ *S v Zinn* 1969 (2) SA 537 (A) at 540G

[9] Robbery on its own is a serious offence let alone if aggravating factors are present. The complainant was threatened with a knife. The complainant did not offer any resistance and hence he was not injured. The mere production of a knife indicates that had he resisted he would have been probably injured.

[10] In a similar matter, in *S v Ivanisevic & Another*⁴ the complainant was an old frail lady of 80 years. She was robbed at her house while sleeping in her bedroom by the appellants in that matter. She woke up to the appellants standing in the doorway of her bedroom door. The appellants ordered her to keep quiet and that they would not hurt her if she complied. They put a piece of bandaging tape over her eyes. The appellants robbed her of her jewellery and other belongings. The appellants were convicted and sentenced to 10 and 12 years respectively. They appealed the sentences. In dismissing the appeal, Holmes JA reasoned as follows:

“These were determined men bent on a calculated outrage of avarice, the expected rewards were high; and they already resorted to such violence as was thought necessary by tying the victim’s wrists tightly and uttering the blunt threat, ‘keep quiet and nobody will get hurt.’ In view of their marauding purpose it seems to me at odds with realities to suppose that, had there been resistance, they would have refrained from matching it with further violence, and would tamely have departed with their tails between their legs, balked of their intended spoil. Moreover, this was a frail and elderly lady and further violence could easily have caused danger to life and limb.” (Emphasis added).

⁴ 1967 (4) SA 572 (A) at 574H-575A

[11] I find these sentiments equally apposite in this matter even though the complainant was young. Similarly, the appeal in this matter, in the absence of a misdirection stands to be dismissed.

Consequently, I make the following order:

1. The appeal is dismissed.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

J ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

Appellants: Mr Charles *instructed by*

Justice Centre

GRAHAMSTOWN

Respondent: Mr Els *instructed by*

Director of Public Prosecutions

GRAHAMSTOWN