

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**DATE: 15/05/2009
CASE NO: A647/2008**

UNREPORTABLE

In the matter between:

TSHEPISO BENNET MAKOE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA. J.;

[1] The appellant an adult male aged 21 at the time of his arrest, was charged and sentenced at the regional court at Benoni on 2 April 2008 as follows:

Count one: robbery with aggravating circumstances, and sentenced to 15 years imprisonment;

[2] The leave to appeal against sentence was granted to the appellant.

- [3] The appellant was dully represented. He pleaded guilty to the court of robbery with aggravating circumstances read with the provision of of section 51(2) of the Criminal Amendment Act 105 OF 1997, in that on or about 01/ 02/ 07 in the division of Daveyton he did unlawfully and intentionally assault Themba Charles Tshemake and with force take the following, to wit money amounting to R30-00 his property in his lawful possession, aggravating circumstances being that the appellant and others made use of a knife.
- [4] In his plea explanation in terms of section 112 (2) of the Criminal Procedure Act, the appellant admitted that his attorney explained to him the proceedings, the nature of the charge, the consequences of his plea. He admitted that he plead guilty to the charge voluntary, without any undue influence. He admitted that on 1 December 2007 at 23:00 at Daveyton he forcefully took an amount of R30. 00 from the complainant, Mr. Temba The make, by stabbing him with a knife. He admitted that his action constituted aggravating circumstances as referred to in Section 1 of Act 51 of 1977. He admitted that he had intended to permanently appropriate the aforesaid amount for himself. He admitted that he knew that his action was unlawful and that he had neither legal excuse nor permission to take the money from the complainant as he did. He conceded that the complainant sustained injuries as the result of his attack. He was then duly found guilty on the strength of his plea, quite correctly so.
- [5] The prosecutor did not prove any previous convictions against the appellant. The prosecutor handed the J88 form as exhibit B, which showed that the complainant sustained multiple lacerations on right forearm, skull and on the back and received six stitches on the skull.

- [6] In mitigation, Mr. Temba Charles Tshemake was called to testify for the accused. (According to charge sheet, the appellant was 21 years old at the time of his arrest.) Mr. Tshemake testified that he was 20 years old. He testified that he and the complainant were friends for 20 years. He confirmed that the appellant robbed him on the date in question. He confirmed that he on the previous occasion had approached Ms Green the appellant's attorney of record, advising that he and the appellant are friends and that he does not want him to go to prison and that they have reconciled and wanted to have the charge against the appellant withdrawn. He stated that the reason that he was stabbed by the appellant is because he was cheeky on that day. He confirmed that the appellant apologised and gave him back his amount. Under cross examination the prosecutor pointed out that the complainant sustained 5 centimetre injury. The complaint merely said that he his listing. He said under cross examination that the appellant was drunk. He confirmed that he went to hospital as the result of the injury he sustained from being stabbed by the appellant. He received six stitches.
- [7] According to the charge sheet, the appellant was 20 years old at the time of the commission of the offence. The appellant was at a prime stage of his youth. Youth is an important consideration. It requires that there should be a balancing act done, the consideration of the youthfulness of the offender and the gravity of the offence he has committed. Vide S v N 2000(1) SACR 209 at page 225 in regard to minimum sentence. The age of the accused needs not to be ignored in the evaluation of factors to be taken into account when deciding whether or not the minimum sentence should be imposed.

- [8] It would seem that liquor had somehow played some roll. In *S v M* 1994 92) SACR 24 the question of youthfulness of the appellant and the effect of liquor on him prior to the commission of the offence were considered to be factors that weigh in favour of the accused. In casu it does not appear from the record that this factor was considered in determining whether there exist substantial and compelling circumstances warranting that the magistrate should exercise his discretion and depart from imposing the prescribed minimum sentence.
- [9] In *S v Blaauw* (supra) Van Heerden J was dealing with an appellant who was 18 years and six weeks old at the time when he committed a very serious offence. He was sentenced to life imprisonment, which was the prescribed sentence. Van Heerden J found that his youth at the time of the offence was relevant to the question whether there were substantial compelling circumstances which entitled the court to impose a lesser sentence than life imprisonment, particularly in the light of the provisions of section 51 (3) (b) of the Act. She accordingly upheld the appeal, and imposed a lesser sentence.
- [10] In the matter of *M v S*¹ the Court said that: “14] A factor which is relevant to the sentencing process, and which could have a mitigating effect on the punishment to be imposed, is the arbitrary result which would follow if a difference of (for example) one day in age of the accused determined whether he spent many years in prison. The otherwise arbitrary impact of section 51 (3) (b) is, however, mitigated by the fact that the court has a discretion in that it may choose not to impose the prescribed minimum sentence if it is of the view that substantial and compelling circumstances exist. To my mind, one of

¹ 2004 (2)ALL SA 56 (C) at 59c-i

those circumstances must be the arbitrary result which would follow if (for example an accused person who was 18 years old at the time of the commission of the offence, had to be sentenced to 15 years imprisonment (or for that matter life imprisonment), whereas if he or she had been two days younger at the time of the offence, the penalty would have been very substantially less.

[12] I am of the view that the magistrate has misdirected himself in finding that there are no substantial and compelling circumstances and imposed the sentence of 15 years in respect of the second count of robbery. I am of the view that an appropriate sentence, in the circumstances of this case, the following sentence will be appropriate.

[13] The following order is made:

1. That the appeal against sentence of 15 years imprisonment is upheld and set aside and substituted with the following sentence:
2. 'That the accused is sentenced to 8years imprisonment.
3. That the running of the sentence is backdated to 2 April 2008.

HEARD: 04 MAY 2009

DELIVERED: 15 MAY 2009

N. M. MAVUNDLA

JUDGE OF THE COURT

I AGREE

T. PHALANE

ACTING JUDGE OF THE COURT