



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO.: CA&R130/2022

In the matter between:-

JONATHAN WHITEBOOI

1ST APPELLANT

ELROY CAMPBELL

2ND APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

ROBERSON J:

- [1] The appellants in this matter were both convicted in the Regional Court, Gqeberha, of robbery with aggravating circumstances and were each sentenced to twelve years' imprisonment. The first appellant was also convicted of murder and was sentenced to twelve years' imprisonment. Seven years of the murder sentence were to run concurrently with the robbery sentence, resulting in an effective sentence of seventeen years' imprisonment. The court a quo granted leave to appeal against sentence. A petition to the Judge President of this court for leave to appeal against the convictions was refused. In the result, this is an appeal against sentence only.

- [2] The victim in both offences was Mr Ricardo Peres, a twenty-eight year old man (the deceased). He was on his way to work on the morning of 17 May 2017 in the Central area of Gqeberha, while it was still dark, when he was accosted by the two appellants and a Ms Candice Davids, the girlfriend of the first appellant. Ms Davids was a State witness at the trial, having pleaded guilty in a separate trial to robbery of the deceased. She testified about how the robbery took place. The first appellant suggested that they should rob the deceased. The first appellant grabbed the deceased and the second appellant took the deceased's cellphone, thereafter running away. While the first appellant was holding the deceased, Ms Davids took the deceased's wallet, a packet of cigarettes and a cigarette lighter. There was R250.00 in the wallet and the deceased handed over a further R70.00. Ms Davids and the first appellant then ran off, as did the deceased.
- [3] Ms Davids observed the deceased asking for help from a security officer. When confronted by the security officer, Ms Davids sprayed him with pepper spray. She then saw the first appellant and the deceased wrestling and heard the deceased say "Oh Jesus". He was holding his chest. The first appellant was holding an okapi knife. Ms Davids and the first appellant then returned home.
- [4] The security officer involved, Mr Thembikhaya Koko, testified that he initially saw three people wrestling and realised that one of them (the deceased) was being robbed. (This must have been after the second appellant ran away.) The deceased was resisting the robbery. As Mr Koko approached, the other two people ran away. The deceased was angry and chased after the two people. After Mr Koko gave him a baton, the deceased continued to chase after the two people. Mr Koko also gave chase. One of the two people had a knife in his hand. The deceased beat him, asking for the return of his laptop which was in a bag. The person with the knife threatened to stab the deceased. Mr Koko chose to chase after the other person, whom he found to be a woman. When he returned to the scene of the altercation involving the knife, the deceased was lying on the ground.

- [5] The deceased was admitted to hospital and died on 4 June 2017. The doctor who performed the post mortem examination on the deceased, Dr Celeste Herbst, recorded in the J88 medico-legal form that the cause of death was a stab wound to the chest and the consequences thereof. Dr Herbst testified that the stab wound entered the chest cavity, and the terminal part of the wound was the left part of the heart. The consequences were pneumonia and a hypoxic brain injury. The brain injury was caused by the loss of blood from the stab wound which resulted in less oxygenated blood going to the brain. Dr Herbst said that if the deceased had not been stabbed, he would not have died.
- [6] When this matter was called, we were informed by Mr Geldenhuys of Legal Aid South Africa, who appeared for the first appellant, that the second appellant had not provided instructions for the appeal, and apparently was content not to proceed with the appeal.
- [7] The first point to raise in this judgment is the correctness or otherwise of the convictions for robbery with aggravating circumstances. Mr Geldenhuys dealt with this in the first appellant's heads of argument. Aggravating circumstances are defined in s 1 of the Criminal Procedure Act 51 of 1977 as follows:

“(1) In this Act, unless the context otherwise indicates-

'aggravating circumstances', in relation to-

(a)

(b) robbery or attempted robbery, means-

- (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.”

- [8] It was alleged in the charge sheet that the aggravating circumstances were that a knife was used to threaten the victim. There was no such evidence. The evidence of Ms Davids and Mr Koko did not demonstrate that aggravating circumstances, as defined, were present. In view of the fact that no leave to appeal was granted against convictions, this court may exercise its inherent review jurisdiction and set aside the convictions for robbery with aggravating circumstances and substitute them with convictions for robbery *simpliciter*.
- [9] A first conviction for robbery with aggravating circumstances attracts a prescribed minimum sentence of fifteen years’ imprisonment (Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2). Although the magistrate found no substantial and compelling circumstances to be present, he imposed a lesser sentence on the ground that the appellants had spent three years in custody awaiting trial. A conviction of robbery *simpliciter* involves a different approach to sentencing because there is no prescribed minimum sentence.
- [10] The prescribed minimum sentence for the murder was similarly fifteen years’ imprisonment (s 51 (2) of Act 105 of 1997 read with Part II of Schedule 2). The magistrate imposed a lesser sentence for the same reasons as he did for the robbery.
- [11] The social worker who was requested to compile a pre-sentence report for the first appellant was unable to do so because when she interviewed him he denied that Jonathan Whitebooi was his real name and declined to furnish any personal information. The first appellant was treated as a first offender. He disputed the list of previous convictions reflected in the SAP69 record, and the State, for reasons unknown, did not prove them. At the time of the trial he was forty years old. He had four minor children who lived with his

grandmother and who received child support grants. He left school in Grade 4 following the death of his mother. Prior to his arrest he performed occasional work as a painter, a glazier and a car guard, and his earnings were used to support his children.

[12] A pre-sentence report was obtained for the second appellant. It reflected that he was thirty one years old at the time of the trial and had one child who resided with his mother. The second appellant grew up in a stable home. He left school during Grade 8. Prior to his arrest he assisted his father in a panel beating business and was also self-employed as a panel beater and mechanic. According to his father, the second appellant assisted the family financially. The second appellant had two previous convictions: in May 2007 he was convicted of culpable homicide for which he was sentenced to seven years' imprisonment, and in September 2007 he was convicted of assault, for which he was sentenced to four years' imprisonment.

[13] The robbery of the deceased was a cowardly one. Although the violence was not excessive, he was at the mercy of three people who took whatever they could from him. He bravely tried to resist, to no avail. Violence of any sort is a violation of a person's bodily and emotional integrity and should be accorded the seriousness it deserves. People should feel free and safe to walk in public places without fear, whatever the time of day or night.

[14] The murder of the deceased was indeed vicious. The deceased had only a baton while the first appellant had a knife. The deceased was trying to recover his property. The first appellant could easily have run away, but not only did he threaten to stab the deceased, he carried out this threat and stabbed him in a most vulnerable part of his body. The image of the deceased holding his chest and saying "Oh Jesus" is most profound and tragic. This was the beginning of the end of his young life.

[15] A statement from the deceased's mother, Mrs Elsa Brandao, was admitted. In it she recounted her anguish at the news of the attack on her son. She was in the United Kingdom at the time and had to make travel arrangements. She

was shocked when she saw her son in hospital, connected as he was to a ventilator and other devices. She was told by the doctors that he would not survive and that it was just a matter of time before he died. She endured this situation for almost four weeks until the deceased's death. When someone is murdered, the families of the victim are also victims. They have to deal with lasting loss and grief.

[16] I did not understand Mr Geldenhuys seriously to suggest that the sentence for murder should be interfered with. Rather he submitted that a lesser sentence should be imposed for robbery and that such sentence should run wholly concurrently with the murder sentence. Mr Mgenge for the State fairly made the same submission. I am of the view that there are no grounds for interference with the twelve years' imprisonment imposed for murder. It was less than the prescribed minimum of fifteen years imprisonment and any further reduction would not have done justice to the seriousness of the offence.

[17] The sentence of twelve years' imprisonment for robbery clearly needs to be reconsidered, following the exercise of our review powers in the alteration of the convictions to robbery *simpliciter*. A sentence of imprisonment is the only appropriate sentence in the circumstances. The first appellant was clearly the ringleader while the second appellant played a lesser role in that he did not inflict the violence on the deceased and ran away after taking the cellphone. However, he had a previous conviction for assault, a crime of violence. (It is not known if the culpable homicide conviction involved negligence or an assault leading to death.) It would be appropriate to sentence them to the same period of imprisonment. The three years awaiting trial in custody is a substantial period and ought to be taken into account. I consider a sentence of seven years' imprisonment to be a suitable sentence. In the case of the first appellant it should run concurrently with the sentence of twelve years' imprisonment imposed for murder.

[18] **The following order will issue:**

First appellant Jonathan Whitebooi

1. The sentence of twelve years' imprisonment for murder is confirmed.
2. The conviction for robbery with aggravating circumstances is set aside and substituted with a conviction for robbery *simpliciter*.
3. The sentence of twelve years' imprisonment for robbery with aggravating circumstances is set aside and substituted with a sentence of seven years' imprisonment for robbery *simpliciter*.
4. The sentence of seven years' imprisonment for robbery *simpliciter* is to run concurrently with the sentence of twelve years' imprisonment imposed for murder.
5. The sentences are ante-dated to 8 December 2021.

Second appellant Elroy Campbell

1. The conviction for robbery with aggravating circumstances is set aside and substituted with a conviction for robbery *simpliciter*.
2. The sentence of twelve years' imprisonment imposed for robbery with aggravating circumstances is set aside and substituted with a sentence of seven years' imprisonment for robbery *simpliciter*.
3. The sentence is antedated to 8 December 2021.

J M ROBERSON
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 SA
MAKHANDA

For the RESPONDENT : MR MGENCE
DIRECTOR OF PUBLIC PROSECUTIONS
MAKHANDA

Matter heard on : 29 January 2025
Judgment delivered on : 06 February 2025