IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A03/2017

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:NO

19
~~18~~ **APRIL 2017**

JS NYATHI

In the matter between

GOLIATH, KURT **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NYATHI AJ:

[1] On 27 June 2016 the regional magistrate at Boksburg convicted the appellant of one count of Robbery with aggravating circumstances and sentenced him to 20 years imprisonment.

The trial court refused him leave to appeal against sentence. He successfully petitioned the Gauteng local division of the high court for such leave.

His appeal is before this court today as a consequence.

[2] The court *a quo* found no substantial and compelling circumstances enabling it to deviate from the prescribed sentence. It further deemed it appropriate to invoke an extra 5 years imprisonment.

[3] In meting out sentence, the regional magistrate had placed reliance on the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 as amended, (hereinafter referred to as "the Act").[1]

Seemingly unbridled proliferation of serious and increasingly violent crime in South Africa at the time, was the undoubted antecedent to parliament's response of promulgating minimum sentencing legislation in 1997. The stated intention being to curb same, and demonstrate and ensure a firm, standardized and consistent response from all three spheres of government to the commission of such heinous crimes.

[4] Robbery with aggravating circumstances is singled out among other serious crimes for inclusion in schedule 2(c) (ii) of the 1997 Act as deserving severe punishment.

[5] Theft, the crime of which the appellant has an abundance of previous convictions, whilst closely related to robbery, is not listed in the schedule.
One cannot make light of the reprehensibility of theft in any way. Robbery however goes further in that violence or threats thereof are employed to facilitate the theft.

The unlawful expropriation of another's property remains the common thread running through the two offences. A court in deciding on an appropriate sentence on a conviction for a charge of robbery, is compelled to view previous convictions for theft in a dim light as aggravating factors.

[6] It needs mention that the offence of theft is a competent verdict on a charge of robbery in appropriate circumstances.[2] The offences of assault common[3] and assault with intent to do grievous bodily harm[4] are also in turn competent verdicts on a charge of robbery.

[7] The crux of the matter here is - whether a conviction on a charge of robbery does count as a second, or subsequent conviction in terms of the minimum sentences

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[1] Page
[2] Section 260(d) Act 51 of 1977
[3] Section 260(b) Act 51 of 1977

regime. That is, where the accused's previous conviction(s) relate to the substantive offence of theft and not that of robbery? Such as in this instant matter.

[8] In **Maswetsa v. The State**[5] Wepener J held that only a conviction of robbery would set the provisions of Part II of Schedule 2 of the Act in motion should an accused be found guilty of robbery. In **Maswetsa**, the earlier conviction had been that of housebreaking with intention to commit an offence, whilst the subsequent conviction was one of robbery.

[9] Having regards to the aforegoing, the question now arises whether there was a misapplication of section 51(2) of the Act in this matter.

The sentences imposed in all the previous convictions of theft have been very negligible in extent and duration.

The appellant has not been found guilty of robbery before, until the instant matter subject of this appeal. He should in the ordinary course of events be treated as a first offender in so far as the substantive offence of robbery with aggravating circumstances (read with section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997) as amended by Act 38 of 2007.

[10] If an accused person is convicted of a charge of robbery with aggravating circumstances, as mentioned in part 2 of schedule 2, section 51(2)(a); This

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[4] Section 260(a) Act 51 of 1977
[5] [2013] ZAGPJHC 122; 2014(1) SACR 288 (GSJ)

section makes provision for a mandatory minimum sentence of 15 years imprisonment in the case of a first offender.

[11] The appellant was in custody for 16 months until the date of sentence on the 27 June 2016. This period as well as the period already served pending this appeal should be reckoned to the appellant's credit when sentence is considered.

[12] In the result I suggest the following order:

1) The order of the court *a quo* is set aside and is replaced with the following:

   (a) The accused is sentenced to 15 years imprisonment

   (b) The sentence is antedated to the date of sentence

It is so ordered

J.S. Nyathi

Acting Judge of the High Court Gauteng, Johannesburg

I agree

C. Nicholls

Judge of the High Court Gauteng, Johannesburg

Counsel for the appellant: A.H. Lerm

Instructed by: Legal Aid Board

011 870 1480

For the respondents: Adv L Ngodwana

Instructed by: Office of the Director of public Prosecutions

Date of hearing: 18 April 2017

Date of Judgment: 19 April 2017