

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A547/2007

DATE:

11 APRIL 2008

5 In the matter between:

SISEKO BHATYI

Appellant

and

THE STATE

Respondent

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J U D G M E N T

(Appeal against Sentence)

ZONDL, J:

15 [1] The appellant appeared in the Wynberg Regional Court
on 8 March 2007 on a charge of robbery with aggravating
circumstances. The charge was subject to the provisions
of section 51 of Act 105 of 1997. The charge sheet
alleges that the appellant robbed one Elvis Jameni of his
20 cellphone, namely a Samsung EH60V. The appellant,
who was legally represented, pleaded not guilty to the
charge but after a lengthy trial he was convicted and
sentenced to 15 years' imprisonment. The appellant,
with the leave of the Court *a quo*, now appeals to this
25 Court against sentence only.

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[2] Counsel for the appellant, while accepting that the interest of society is an important factor, in his heads of argument argued that it should not, however, be over-emphasised at the expense of the accused's personal circumstances.

[3] It is trite law that the imposition of an appropriate sentence is a matter pre-eminently for the discretion of the trial Court and that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test on whether the sentence should be altered is whether it is vitiated by irregularity or misdirection or is disturbingly inappropriate. However, not every misdirection warrants interference with the sentence imposed by the trial Court. It has to be a material one, that is to say the one which according to the dictates of justice engenders a clear conviction that an error of such a nature, degree or seriousness, has been committed that it shows directly or indirectly that the trial Court failed to properly or reasonably exercise its discretion as regards the sentencing.

[4] It appears to be trite that a misdirection is material when the trial Court has misconstrued the facts, has failed to take cognisance of factors that should have been taken

into account or has over or under-emphasised an accused's personal circumstances in relation to other relevant factors.

5 [5] In this matter the magistrate, before deciding on a sentence of 15 years' imprisonment, had this to say:

“There are indeed mitigating factors in this particular matter in the form of the accused's personal circumstances, to a certain extent his age, but the question is whether this also qualifies as compelling and substantial circumstances or not. I am afraid from what has been said in mitigation of sentence the circumstances do not constitute compelling and substantial circumstances as envisaged by the Act, instead this has been robbery which was committed by the accused with brazenness as well as violence. The complainant was severely hit with a bottle and also threatened during the process. I mean this is an example of the kind of mischief and cancer that the courts are trying to clean and the Legislature had in mind when promulgating the Minimum Sentence Act”.

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[6] In other words, the trial Court before sentencing the appellant, enquired whether there were substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum sentence of 5 15 years.

[7] In the process of assessing an appropriate sentence, the trial Court does not seem to have had regard to the fact 10 that the appellant was a 21 year old first offender who has a minor child. In my view, these are the factors which should have persuaded the Court to find that there were indeed substantial and compelling circumstances. Substantial and compelling circumstances do not mean 15 exceptional circumstances.

[8] In my view, the trial Court misdirected itself in finding that the appellant's personal circumstances did not constitute substantial and compelling circumstances. 20 This misdirection influenced the trial Court's assessment of an appropriate sentence. This Court is accordingly entitled to interfere with the sentence imposed by the trial Court because of the misdirection.

[9] The sentence of 15 years' imprisonment on a first offender is, in my view, unjust. Having regard to the seriousness of the offence and the interests of the community there is no doubt that the offence calls for long term imprisonment. Society needs to be protected against the offenders committing violent crimes. The only question is what the duration thereof should be, bearing in mind the provisions of section 51 of Act 105 of 1997. A sentence must, as far as possible, attempt to achieve the objectives of punishment, namely deterrence, prevention, retribution and rehabilitation.

[10] The sentence which, in my view, will be appropriate in the circumstances is the one that will meet the deterrent and preventative aspects of punishment while at the same time give the offender an opportunity to rehabilitate himself. In the circumstances, I am of the view that 12 years' imprisonment coupled with a suspended portion of the sentence will be an appropriate sentence which would ensure that in the future the appellant will think twice before committing the offence of robbery.

[11] Accordingly, the appeal against the sentence imposed on the appellant succeeds and the following order is made in substitution of the sentence imposed by the trial Court:

suspended for three years on condition that the appellant is not convicted of robbery with aggravating circumstances committed during the period of suspension.

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ZONDI, J

10 LOUW, J: I agree. It is so ordered.

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LOUW, J