

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A267/2021

DATE: 2022.02.04

In the matter between

ZAKHELE DYANI

Applicant

and

THE STATE

Respondent

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JUDGMENT

SALDANHA, J:

The appellant, Mr Zakhele Dyani was convicted in the regional court in Somerset West on one count of robbery with aggravating circumstances and sentenced to a period of imprisonment of 15 years. The provisions of the Minimum Sentence legislation (the Criminal Law Amendment Act 105 of 20 1997) was applicable to the charge. Leave to appeal on both the conviction and the sentence was refused by the court *a quo* but leave on sentence only was granted on petition in this division of the High Court. This appeal relates only to the sentence.

The charge arises out of an incident on 9 June where at or near Rocky's shop in Sir Lowry's Pass the appellant wrongfully and unlawfully robbed Mr Hassan Alason and assaulted him by having threatened him with a firearm and robbed him of seven packets of cigarettes, airtime to the value of R1 500, R1 200 in cash and a Huawei cell phone, all of which was valued at R6 050.

The appellant was legally represented at his trial, pleaded not
10 guilty to the charge and tendered no plea explanation.

The state tendered the evidence of the complainant Mr Hassan and his brother Mr Mohammed Hussein, both Somalian nationals who were employed as shop assistants at Rocky's store.

Briefly stated, they testified that on the evening of 9 June 2016 the appellant entered the shop and shortly thereafter left after having looked around. It appeared that he merely checked out
20 the shop as he did not buy anything. Only the complainant, his brother and one other person from the community was present in the shop. Shortly thereafter the appellant returned followed by a second person who was only referred to as a "Rasta" (presumably because of his hairstyle) and who appeared to be inebriated. Mr Mohamed Hussain was positioned at the

doorway whilst Mr Hassan Alason was behind the counter from which he served customers.

Mr Hussein testified that the person who was referred to as “Rasta” was armed with a knife and gestured to him to keep quiet and not do anything while the appellant proceeded to where Mr Alason was behind the counter.

Mr Alason testified that the appellant pointed a firearm at him
10 and told him to pack cigarettes and airtime into a plastic milk crate. The other person in the shop at the time, a member of the community who had been ordered at gunpoint by the appellant to sit down fortunately bolted out of the shop.

Mr Alason proceeded to pack the cigarette packets and airtime into the crate but the appellant soon became impatient and grabbed the crate from him and proceeded to do so himself. In the meantime his brother Mr Hussein had plucked up the courage to overpower the “Rasta”, disarmed him of his knife
20 and wrestled with him. The “Rasta” thereupon fled the scene.

Mr Hussein then called out to Mr Alason that he should tackle the appellant, which Mr Alason, rather bravely did, and did so from behind. A struggle ensued between the appellant and Mr Alason who was then ably assisted by his brother

Mr Hussein and together they successfully overpowered the appellant.

They tied him up, closed the doors of the shop and thereupon summoned the police. The police arrived and the appellant was arrested.

The appellant for his part disputed the version of the complainant and his brother and claimed that he was merely an innocent bystander in the shop when three men entered to
10 rob it. Upon them fleeing he claimed that the complainant and his brother turned on him, violently assaulted him and tied him up and then summoned the police. He claimed not to have played any role in the attempted robbery by the three would be robbers who had fled the scene. His version was in my view correctly rejected by the court *a quo* as not being reasonably possibly true and the Court accepted the evidence of the complainant and his brother and found that both of them were credible witnesses.

20 The appellant was thereupon convicted of robbery with aggravating circumstances.

In aggravation of sentence the state proved a previous conviction of theft against the appellant committed on 22 December 2012. He was sentenced to a term of

five (5) years imprisonment of which two (2) years were conditionally suspended.

The present incident in which the appellant was convicted had occurred while he was out on parole for the earlier conviction. It therefore appeared that he was not able to have secured bail as he had breached the conditions of his parole. His legal representative informed the court that the appellant never even attempted to apply for bail. The appellant remained in custody prior to the matter being finalised for a period of one and a
10 half years.

In consideration as to whether the provisions of the Minimum Sentence legislation was indeed applicable in the matter counsel for the state correctly pointed out that although the magistrate had not confirmed with the appellant after he had pleaded that he understood that the Minimum Sentence legislation was applicable, the magistrate did prior to handing down her judgment confirm with the appellant's legal representative that he had in fact explained the application
20 and the provisions of the Minimum Sentence legislation to the appellant prior to him pleading.

In the circumstances the provisions of the minimum sentence was, in my view, correctly applicable in the sentencing of the appellant in the court *a quo*, (in this regard see *CMT v SA*,

ASD v September, September v S (CCT122/17, CCT200/17, CCT220/17, CCT298/17 2018, ZACC27 2018, SACR 592 CC 2018 11, BCLRA 1397 CC) [3 December in paragraphs 38 to 40).

We note though that neither the appellant or his counsel sought to suggest on appeal that the minimum sentence regime was not applicable.

- 10 The appellant therefore faced a minimum sentence of 15 years imprisonment unless he was able to demonstrate that there were substantial and compelling circumstances for the court *a quo* to have deviated therefrom.

In mitigation of sentence the appellant led no evidence and his legal representative addressed the Court *ex parte*. This notwithstanding the seriousness of the offence and the minimum term of sentence prescribed by the Minimum Sentence legislation.

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His personal circumstances were placed on record. He was 24 years old and prior to his arrest was employed as a driver in transporting school kids on a part time basis. He was married and supported their three children who were 8, 6 and 1 years old. He also supported his unemployed mother.

His wife was initially employed but had since lost her employment. It appears that she obtained financial support from her mother and from state grants.

The legal representative of the appellant at the trial claimed that inasmuch as the appellant had been in custody for a year and six months and that he had been severely “assaulted by the complainant and his brother” such constituted substantial and compelling circumstances.

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It was apparent though from the photographs handed in at the trial that the appellant had suffered an injury to his head during the altercation with the complainant and his brother as there was blood visible on his face. It appeared that those injuries would have been sustained while the appellant was being subdued by the complainant and his brother.

The complainant Mr Alason during his testimony claimed that when the gun, which later appeared to have been no more than
20 a toy gun, was pointed at him stated: “actually I thought it was my last time, I am going to die tonight”. Needless to say, and as correctly pointed out by the magistrate, that although it was no more than a toy gun, that realistically resembled a Glock automatic pistol, the complainant was severely traumatised by the appellant’s threat on him. In a detailed consideration of an

appropriate sentence the magistrate was mindful of the personal circumstances of the appellant contrary to the submissions made by counsel on appeal on behalf of the appellant and so too the interests of the community inasmuch as robberies of such a nature of vulnerable foreign nationals are routinely targeted and appear to be common occurrence in the Somerset West area. This regrettably appears also to be a countrywide phenomenon that is compounded by a growing tide of xenophobia.

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The magistrate correctly pointed out the vulnerability of Somalian nationals who provided their service to the local community as shop workers in a foreign country and in a language which was not familiar to them. The complainant and his brother had been employed at the shop for about four years and were both seriously traumatised by the incident.

Mr Hussein was also injured in the mouth in the scuffle with the “Rasta” who had clearly acted in cahoots with the
20 appellant. The “Rasta” unfortunately got away.

In consideration of the application of the Minimum Sentence legislation this Court is particularly mindful that it may not depart therefrom for flimsy reasons. In this regard the authorities are legion. There is nothing in the personal

circumstances of the appellant nor in the nature of the offence or the fact that the appellant was injured and in custody for more than a year that would have enabled the magistrate to have deviated from the prescribed minimum sentence.

The conduct of the appellant was premeditated and he acted with impunity and preyed upon what he thought would have been passive and helpless shop assistants of foreign nationality. To their credit they resisted this cowardly conduct of the appellant and his sidekick the "Rasta".

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Moreover the conduct of the appellant was aggravated by the fact that he had committed the offence while he was out on parole for a previous conviction and of which two years of the sentence imposed thereon had been suspended. He had therefore been given the benefit of a suspended sentence as a deterrent. It appears though that was of no deterrent to the conduct of the appellant, as was apparent in this matter.

The complainant testified that they had retrieved the airtime and the cigarettes which had not been removed but that the cell phone which the complainant observed the appellant remove from a charger was not retrieved. The cell phone belonged to Mr Hussein.

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I am more than satisfied that the magistrate committed no

irregularity in the imposition of the prescribed minimum sentence of 15 years direct imprisonment and even if the Minimum Sentence legislation was not applicable I am equally satisfied that the sentence of 15 years would have been an appropriate sentence in the circumstances.

We indicated to counsel for the appellant and the state that the appellant was indeed fortunate that we had not called upon them in these proceedings to make submissions as to why the
10 sentence should not have been increased on appeal. That was in consideration of the mercy which was shown to the appellant by the magistrate in the court *a quo*.

I therefore propose to confirm the sentence. In the result the following order is made:

- (i) The appeal against the sentence is DISMISSED.
- (ii) The sentence imposed of 15 years of direct
20 imprisonment by the magistrate is CONFIRMED.

LE ROUX, AJ: I agree.

LE ROUX, AJ

ACTING JUDGE OF THE HIGH COURT

SALDANHA, J: It is so ordered.

SALDANHA, J

10 **JUDGE OF THE HIGH COURT**