

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: CA&R 187/2014
Date Heard: 11 March 2015
Date Delivered: 19 March 2015**

In the matter between

MELISIZWE DYINI

Appellant

And

THE STATE

Respondent

Appeal on conviction on charge of robbery with aggravating circumstances – whether state proved close connection between theft of goods and subsequent violence – principles restated – found on accepted evidence of state witness that appellant attempting to avoid being apprehended – no intention to commit robbery – conviction and sentence set aside.

JUDGMENT

GOOSEN, J.

[1] The appellant was charged in the Regional Court, Port Elizabeth on a charge of housebreaking with intent to commit an offence unknown to the state and on a charge of robbery with aggravating circumstances. He pleaded not guilty to the charges. He was convicted of housebreaking with intent to steal and of robbery with aggravating circumstances. He was sentenced to 5 years imprisonment on the charge of housebreaking and 15 years imprisonment on the charge of robbery with aggravating circumstances. Leave to appeal was refused by the

Regional Court. On petition to this court he was granted leave to appeal against his conviction on the charge of robbery with aggravating circumstances. Accordingly, the only matter before this court is the question of the appellant's conviction on the charge of robbery with aggravating circumstances.

- [2] The trial court accepted the evidence led by the prosecution and rejected the evidence presented by the appellant. The basis upon which this appeal falls to be adjudicated, therefore, is upon the facts as determined by the trial court. In essence, therefore this court must determine whether, upon those facts as disclosed in the version accepted by the trial court, the trial court's finding in respect of the appellants guilt on a charge of robbery with aggravating circumstances is correct.
- [3] The facts as determined by the trial court are briefly as follows: In the early hours of the morning of 24 July, 2013 the complainant was asleep in his bedroom in his flat in Central, Port Elizabeth. The complainant was awoken by a sound alongside his bed. When he awoke he saw a person "fiddling" with a laptop which was alongside the bed. The room was dark. The complainant jumped out of bed and made his way to the door of the bedroom in order to block the person's escape from the room. The person came towards him and he grabbed hold of the person and they were wrestling near the door. The complainant stated that the person was running towards the door trying to get out. As this person approached him the complainant noticed that he had a knife. The complainant grabbed hold of his hand in order to get the knife out of his possession and whilst they were wrestling he called out to his sister, who was asleep in the room alongside. He shouted loudly to her that she should also call the police. According to the complainant the light was at some point switched on, apparently by his sister, and during the course of the wrestling with the intruder he managed to dispossess him of the knife and to subdue him to the point where he could be tied up.

- [4] The neighbours were called as were the police. When the police arrived the intruder, who was the appellant, was arrested. At some stage prior to the police arriving it was noticed that there were two handbags placed at or near the front entrance to the flat which contained a cell phone and other items, apparently removed from the bedroom in which the sister was asleep.
- [5] It is not necessary for present purposes to set out the version presented at trial by the appellant. That version was rejected by the trial court and that finding is not before us. In any event, the version presented by the appellant does not bear upon the essential facts relevant to the charge of robbery with aggravating circumstances.
- [6] The complainant's testimony was that he was injured on his hand during the course of wrestling with the appellant. A reading of the evidence indicates that the complainant suffered a cut to his hand, although the complainant's sister's evidence was merely that the hand was swollen. No medical evidence, in any event, was presented by the prosecution relating to the injuries allegedly suffered by the complainant. There was also no evidence presented regarding the knife that was allegedly taken from the possession of the appellant.
- [7] The magistrate found that although the taking of the property preceded the violence, that the handling of the laptop was closely linked to the violence and that the two actions were so closely related that the accused could properly be convicted of robbery.
- [8] Robbery consists in the theft of property by unlawfully and intentionally using violence to take the property from somebody else or by threats of violence used to induce the possessor of the property to submit to the taking of the property. It is trite that in order to establish the elements of the crime of robbery a causal link between the violence and the taking of the property must be established. Generally speaking, the violence or threat of violence must precede the taking of

the property (cf. Snyman *Criminal Law* 4th ed. p.508). This general proposition has however been qualified. In *S v Yolelo* 1981 (1) SA 1013 (A) the then Appellate Division, after an exhaustive consideration of the authorities in our law which deal with the relationship between the violence or threat of violence and the taking by theft, came to the conclusion that the violence or threat of violence need not, in every instance precede the taking by theft. It is sufficient if there is a close relationship between the two events. The court noted at page 1015G – H:

Ek meen derhalwe dat roof gepleeg kan word ook indien geweld volg op die voltooiing van diefstal in 'n juridiese sin. In elke geval sal nagegaan moet word of daar in die lig van al die omstandighede, en veral die tyd en plek van die handeling, so 'n noue verband tussen die diefstal en die geweldpleging bestaan dat dié as aaneenskakelende komponente van wesentlik een gedraging beskou kan word.

- [9] What is therefore required, as the passage indicates, is a careful assessment of the facts which bear upon the two events, namely the violence or threat of violence and the taking of possession by theft.
- [10] In this instance the accepted facts as set out in the evidence led by the state indicate that the appellant was surprised in carrying out the theft (particularly in relation to the laptop). According to the complainant the appellant immediately sought to escape. There is no evidence that he was then in possession of the laptop and that he attempted to make his escape with the laptop or indeed with any of the other goods that had been collected during the course of the preceding theft. The evidence of the complainant establishes that the complainant blocked the appellant's escape route and proceeded to wrestle him into submission for the purposes of apprehending him and effectively carrying out an arrest of the appellant. On this evidence, to the extent that the appellant directed violence at the complainant, it is clear on the accepted facts that that violence was directed to making his escape from the property. The complainant did not state in his evidence that the appellant attempted to stab him with a knife. The complainant's evidence was only that the appellant had a knife in his hand

and that the complainant disarmed him by grabbing hold of the knife and throwing it aside.

[11] The facts as found by the trial court do not, in my view, establish a sufficiently close causal connection between the alleged violence or threat of violence and the taking of possession of the goods.

[12] In this instance, unlike in *Yolelo*, the issue also arises as to whether on the facts found to be proved the state established that the appellant had the necessary intention to commit robbery. As already indicated the evidence was that the appellant was attempting to escape and that he was attempting to avoid being apprehended by the complainant. Although it was submitted in argument before us that the appellant deployed violence in order to enable him to escape with the stolen goods, that submission is based upon speculation and is not supported by the evidence. No evidence was presented to suggest that the appellant had either attempted to retain possession of the laptop or that he was attempting to take possession of the handbags with items which were left near the front door of the property.

[13] It follows from this that the state failed to prove all of elements of the charge of robbery with aggravating circumstances. In the circumstances the appeal must succeed.

[14] I therefore make the following order:

1. The appeal succeeds.
2. The appellant's conviction and sentence on count two, namely robbery with aggravating circumstances is hereby set aside.

