

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A521/2010

5 **DATE:**

12 NOVEMBER 2010

In the matter between:

XOLA YALESO

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T**GERBER, AJ:**

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The appellant ("the accused"), was arraigned in the Regional Court of the Western Cape, held at Cape Town, on a count of robbery with aggravating circumstances as referred to in section 1 of the Criminal Procedure Act, Act 51 of 1977 ("the Act"). It was alleged that on or about 10 March 2009 and at 34 Upper Park Road, Walmer Estate, the accused unlawfully and intentionally assaulted the two complainants in that he threatened them with knives and tied their hands and feet with cables and with force removed from them a safe containing a firearm and R19 100,00 in cash. The accused was convicted

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on the charge and sentenced to 15 years imprisonment. With leave of the court *a quo*, he now appeals against the sentence only.

5 The accused was legally represented in the court *a quo*. The accused pleaded guilty to the charge and a written statement in terms of section 112(2) of the Act was duly handed in. In his aforesaid statement, the accused admitted guilt to robbery with aggravating circumstances. The accused stated that he
10 owed a certain Nigerian, who was not identified by name by the accused, money. He declared that the said Nigerian requested him to assist with the robbery of the two complainants as, according to the Nigerian, they had a lot of money. The accused stated that on the day in question he
15 accompanied the Nigerian into a house. The Nigerian had a knife in his possession. Whilst the Nigerian threatened the complainants with a knife, he searched them. He admitted that they had threatened the complainants and thus forced them to relinquish their property.

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He admitted that after the complainants had shown them where the safe was, he tied them up with cables. They took a safe, containing a firearm and cash in a total value of R19 100,00. He thereafter assisted the Nigerian to put the safe in a vehicle
25 and they left. He stated that the Nigerian kept the loot and he

received no part thereof. He was later arrested. Upon enquiry from the magistrate, the accused admitted the section 112(2) statement. The magistrate thereafter convicted the accused on the charge.

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Prior to sentence, the accused admitted that between 2001 and 2003 he had been convicted on three counts of housebreaking with the intent to steal and theft. For the first offence the accused had been sentenced to 18 months
10 imprisonment, of which half was suspended. For the second offence he was sentenced to 30 months imprisonment in terms of section 276(1)(i) of the Act, plus a further two years imprisonment which was suspended. For the third offence he was sentenced to 24 months imprisonment. Prior to him
15 committing the offence at hand, the accused had, therefore, already spent considerable time in prison for offences relating to dishonesty.

The accused's personal circumstances, as put before the court
20 *a quo* by his legal representative were: he was 29 years old and he resided with his grandmother in Nyanga. Scholastically he had completed Grade 12. Although he was unmarried, he had a two year old child whom he cared for. He was employed as a shelf-packer for approximately three years and earned a
25 salary of approximately R650,00 per week. He had been in

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custody for approximately three months. It was furthermore submitted that the accused had remorse for his actions, as was evident from his plea of guilty.

5 The particular offence is included in Part II of Schedule 2 of section 51 of Act 105 of 1997, which prescribes a minimum sentence of 15 years imprisonment for this offence, except if the Court finds that there are substantial and compelling circumstances to justify a lesser sentence. The magistrate
10 held that there were no such substantial and compelling circumstances in this matter and imposed the minimum prescribed sentence. In S v Malgas 2001 (1) SACR 469 (SCA) at 481j-482b, Marais, JA, *inter alia* stated the following in regard to prescribed sentences:

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“The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders,
20 personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.”

25 See also S v Vilakazi 2009 (1) SACR 552 (SCA).

Robbery, especially if there are aggravating circumstances present, is a serious crime. All relevant factors pertaining to sentence must, however, be taken into account to ensure that the sentence imposed is justified. See S v Ntsheno; S v Dlamini; S v R 2010 (1) SACR 295 (GSJ) and S v Chowe 2010 (1) SACR 141 (GNP) at 149h-150a.

It is, of course, important that proper consideration be given to the accused's personal circumstances when sentence is considered. It can also be accepted that the accused showed remorse for his actions. From the section 112(2) statement, it would appear that the Nigerian was the initiator of the crime and the accused followed suit. It also does not appear as if the complainants suffered any serious physical harm. The accused also did not share in the spoils of the crime.

On the other hand, there are a number of aggravating factors which must also be taken into consideration. The robbery took place in a home, a place where the occupants were entitled to feel safe and secure. Although the accused might have played a lesser role in the commission of the offence than the Nigerian, he was nonetheless a very active participant. He was aware of the fact that the complainants were threatened with a knife. He searched them, tied them up and assisted the Nigerian to remove the items from the house. Valuable items

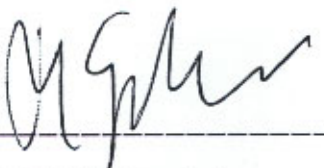
were stolen, including a firearm.

The criminal record of the accused is also a very important aggravating factor. Despite his fairly young age, this was the
5 fourth time that the accused had been convicted of a crime relating to dishonesty. The shorter terms of imprisonment imposed on the previous occasions, has apparently not had the desired effect. In the premises, I am not persuaded that the magistrate was wrong and/or committed any misdirection when
10 she concluded that there were not substantial and compelling circumstances which justified a lesser sentence than the minimum sentence prescribed by the legislature.

In the circumstances, I am satisfied that the appeal against the
15 sentence should be dismissed.

The appeal against the sentence is dismissed.

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GERBER, AJ

SALDANHA, J: I agree. It is so ordered.

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SALDANHA, J

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