165/92

CASE NUMBER 176/91
H v N

IN THE SUPREME COURT OF SOUTH AFRICA

(APPèLATE DIVISION)

In the matter between

DOUGLAS NOYOSI SOBANDLA — Appellant

and

THE STATE — Respondent

CORAM: VAN HEERDEN, VIVIER, JJA, et HOWIE, AJA

HEARD: 14 SEPTEMBER 1992

DELIVERED: 22 SEPTEMBER 1992

J U D G E M E N T

HOWIE, AJA:

Appellant was convicted in a regional court, firstly, of housebreaking with intent to rob and robbery and, secondly, of common assault. The two counts being taken together for sentence purposes, he was ordered to

serve 8 years' imprisonment. Pursuant to the grant of a certificate in terms of sec 309 (4) (a) of the Criminal Procedure Act, 51 of 1977, appellant appealed against the sentence to the Eastern Cape Division. The appeal was dismissed but he was granted leave to appeal to this court.

Appellant, a man in his early forties, stood trial with three teenage youths. I shall refer to them as accused nos 2, 3 and 4 respectively. They were charged on the first count with breaking and entering the home of George Kaldis, a Sterkstroom shopkeeper, and robbing his wife, Irene, of R180 in cash. On the second count they were charged with attempting to rob George Kaldis in the course of the same raid. I have already indicated the result of the case as far as appellant is concerned. The other accused were convicted as charged on count one and accused nos 2 and 3 were convicted of assault on count two.

The break-in occurred after dark on a winter's evening at about half past six while Mr Kaldis was still at his shop. Appellant, who knew that Mr Kaldis was not yet home, assembled his young accomplices shortly beforehand. He provided everyone with balaclavas and handed accused no 3 a knife. Accused no 2 was also in possession of a knife. The gang, all wearing their balaclavas, then went to the front door of the house. The bell was rung. Mrs Kaldis had opened the door only slightly when it was pushed wider. The gang entered. Appellant and accused nos 2 and 3 proceeded to tie up Mrs Kaldis and her two young children with pieces of rope. Mrs Kaldis was gagged with a stocking. Accused no 4 went to a window and not long afterwards jumped out and ran away. Appellant and the remaining co-accused took the cash from Mrs Kaldis's handbag and proceeded to search the home for more money. While they were doing so Mr Kaldis returned home. He had just entered the

front door when his wife broke free and started screaming. At this, appellant and accused nos 2 and 3 made for the front door. One of them brushed against Mr Kaldis. He reached out and grabbed accused no 2 and detained him until help had arrived. Accused no 2 was then arrested. Appellant and accused no 3 escaped.

At about 4 o' clock the next morning appellant handed himself over to the police at Sterkstroom. Having been lodged in the police cells, he asked that Mr Kaldis be bought to see him so that he could apologise for what had happened. This was arranged. In tearful contrition, appellant apologised profusely and in doing so explained to Mr Kaldis, whom he knew well, that he had planned and carried out the robbery because he was in desperate financial straits, with insufficient money to buy food for his wife and children.

It appears from the evidence that appellant had himself been a shopkeeper and a regular customer of

Mr Kaldis. They had had many business dealings and were friendly towards one another. In the mid - 1980's unrest in the Sterkstroom black community, together with accompanying trade boycotts, ruined appellant's business. He tried to make money gambling but repeated losses only worsened his position. Illness in his family caused mounting medical bills which he was unable to pay. The prospects were that all his assets would be attached at the instance of his creditors.

The shock of the robbery had an adverse effect on the Kaldis family. Mrs Kaldis had to take sedatives and wanted to return to their native Greece. The elder child's school work slumped and the younger one had nightmares. As a result Mr Kaldis had put his business up for sale.

At the trial, contrary to appellant's initial attitude after the crime, he pleaded not guilty and contested the incriminating evidence against him until

late in the hearing. It was only during cross-examination by the prosecutor that he relented and in abject terms admitted his guilt in all respects.

Three previous convictions were proved against appellant. The first was rightly ignored. The second occurred in 1986. Appellant was sentenced to R400 or 100 days for the theft of cigarettes worth R136,32. His third conviction was for possession of a suspectedly stolen radio worth R200. For that offence he was sentenced in January 1989 (not much more than four months before the present incident) to a suspended sentence of R600 or 6 months.

That record and the obvious aggravating features of the case were rightly emphasised by the trial court in assessing sentence. However the magistrate went on, despite the absence of evidence that knives were brandished, or even produced, at any stage of the events, to treat the case as one of armed

robbery. He also considered that the pursuit of a false defence until an advanced stage of the proceedings rendered appellant's professed remorse equivocal. Weighing up the aforegoing factors against the mitigation inherent in appellant's financial predicament, the trial Court was of the opinion that the prevalence of housebreaking and robbery in its area of jurisdiction warranted a gaol sentence of exemplary duration to deter others and to protect society.

It goes without saying that appellant was grossly misguided in seeking, by these reprehensible means, to try to ameliorate his financial position and, into the bargain, to embroil innocent and probably gullible youths in participation. (Accused nos 2 and 3 had no previous convictions.) It is also plain that the situation which appellant precipitated in raiding the Kaldis home carried the grave potential for very serious violence. Despite that, it seems to me that the

magistrate over-stated the nature of the case in viewing it as one of armed robbery. No weapon was used either to intimidate or to achieve, in any other respect the entry, the robbery or the getaway. And although the shock to the victims was considerable, the violence used was relatively slight.

The magistrate borrowed the quotation from the unreported Eastern Cape Division decision in D. B. Batchelor v The State CA and R 667/1987 that "robbery is the ultimate resort of desperate men". Robbery is indeed resorted to by desperate men but for purposes of sentence it will always require examination whether their desperation stemmed from innate criminality or, on the other hand, from circumstances beyond their control. The collapse of appellant's business was, by all accounts, certainly beyond his control. So were the medical problems. The desperation thus engendered prompted his futile, but possibly understandable,

gambling, and his despair only deepened.

The last of his previous convictions was sustained after appellant had already fallen on hard times. The preceding one occurred at about the stage that the unrest, which led to the demise of his fortunes, was at its height.

As to appellant's remorse, the matter is, of course, clouded by his ill-considered attempt at the trial to deny his guilt. However, there can be no gainsaying the genuineness of his attitude in giving himself up to the police on the night in question and immediately making a full apology to Mr Kaldis. These are strong pointers to the nature of the offender who stood before the magistrate for sentence. His later volte-face was at least consistent with the desperation already mentioned and the realisation that his crime had served only to aggravate it.

As to the magistrate's view of the need for a

strongly deterrent sentence, the peculiar circumstances of the present case do not, in my assessment, suggest the risk of a repeated robbery or housebreaking by appellant. Essentially what the trial Court had in mind was, in the interests of the community, a sentence which would deter others who might, given the prevalence referred to, contemplate similar serious criminal conduct. Having regard to all the facts of the present matter, however, it seems to me that appellant's counsel (who appeared at the court's request, and for whose assistance we are grateful) was right in contending, in effect, that appellant was sacrified on the altar of deterrence, thus resulting in his receiving an unduly severe sentence. Where this occurs in the quest for an exemplary sentence a trial court exercises its descretion improperly or unreasonably: S v Collett, 1990 (1) SACR 465 (A) at 470 i - 471 a.

It follows, in my view, that appellant ought

to have succeeded in the Court below.

It remains to consider an appropriate sentence in substitution for the one imposed. Had it not been for the particular mitigating circumstances present here, the magistrate's sentence might well have been appropiate. Once those circumstances are accorded due weight, however, I think that all the jurisprudential aims of punishment would be achieved by a sentence of 5 years of direct imprisonment and 3 years of suspended imprisonment. In the latter regard, although I do not consider that there is really a risk of appellants' future resort to robbery or other violence, his past and present resort to dishonesty is a factor justifying the imposition of a deterrent suspension.

The appeal is allowed. The order of the court a quo is set aside and replaced by the following:

"The appeal succeeds. The sentence imposed by the magistrate is altered to read as follows:

'8 years' imprisonment of which 3 years are suspended for 5 years on condition that during the period of suspension the accused commits no offence of which, intent to steal is an element and for which he is sentenced to unsuspended imprisonment without the option of a fine.'"

C T HOWIE

ACTING JUDGE OF APPEAL

VAN HEERDEN, JA) CONCUR

VIVIER, JA)