THE STATE v. IMMANUEL PAULUS

CASE NO. CA 114/98

2000/03/27

Hannah, J. et Maritz, J.

CRIMMINAL PROCEDURE

Appeal – Sentence – robbery – seriousness nature of the crime discussed – peculiar interest of society that Courts should impose deterrent sentences – custodial sentences to be imposed for robbery involving assault or threat with a dangerous weapon.

THE HIGH COURT OF NAMIBIA

THE STATE **Appellant**

and

IMMANUEL PAULUS **Respondent**

CORAM: Hannah, J. et Maritz, J.

Heard on: 2000-03-24
Delivered on: 2000-03-28

APPEAL JUDGMENT

MARITZ, J.: Noting his disapproval about the lenient sentences imposed on convicted robbers by magistrates, De Wet, C.J., remarked in *S v Myute and Others; S v Baby*, 1985 (2) SA 61 (CkS) at 62D–G:

"Magistrates should never lose sight of the fact that robbery is a most serious crime. The offence consists of the two elements of violence and dishonesty. Normally an individual can avoid situations which lead to violence and the danger of his being assaulted by taking the necessary precautionary measures. Similarly he can take steps to guard against his property being stolen. It is, however, a different matter when it comes to robbery. The victim cannot take precautions against robbery. In his day to day living he visits friends, goes to work and goes shopping. This is usually

when robbers strike. Robbers often roam the townships in gangs, attacking innocent people, depriving them of their property and almost invariably injuring the victims, sometimes seriously. The persons robbed are more often than not women or elderly people who cannot defend themselves. It must also be remembered that robbery is always a deliberately planned crime."

Since then, the significant escalation in the commission of crimes of that and a similar nature in South Africa has placed even more pressure on the criminal justice system to protect society by the imposition of heavier sentences. The determination of those Courts to do just that is apparent from the judgment of Lombard, J., in *S v Matolo en 'n Ander,* 1998 (1) SACR 206 (O):

"In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct."

Although the remarks were made in another jurisdiction in somewhat different circumstances, they are not altogether out of place in the Namibian context. This Court too has frequently

expressed its concern about the “the rising wave of crime” and its determination to combat it by the imposition of deterrent sentences.

It is against that background that I queried on review the adequacy of the respondent’s sentence of N$1000.00 or 12 months imprisonment after his conviction on a charge of robbery. He admitted during the section 112 questioning by the magistrate that he had robbed his victim, one Paulus Tujapeni, on 18 August 1998 near the Standard Bank at Oshakati of N$274.00 by threatening him with a knife and removing the money from his victim’s pocket.

The matter was brought to the attention of the Prosecutor-General, who, with leave of the Court, appealed against the respondent’s sentence in terms of section 310 of the Criminal Procedure Act, 1977. The main thrust of the appeal and the arguments advanced by the State, represented by Ms. Lategan, are that the sentence is disturbingly inadequate, given the serious nature of the offence and the interest of society that deterrent sentences should be imposed.

Robbery is indeed a serious crime. The perpetrators prey on the innocent and industrious in society. Like parasites of society they forcibly satisfy their needs and greed by living off the hard-earned income and assets of others. Like cowards, they, more often than not, use dangerous weapons to threaten or assault their unarmed and unsuspecting victims into submission. All too frequently the

result is fatal, especially when the victim resists or the robber fears later identification. Profiting by their violence and dishonesty at the expense of those who peacefully and honestly endeavour to improve their quality of life as contributing members of society, robbers strike at the heart of the work ethics that characterise an industrious society. Our society, therefor, has a peculiar interest that its Courts should combat this crime by imposing sentences that not only adequately address the retributive, preventative and rehabilitative objectives of punishment to be meted out to such criminals, but that will also convey to prospective robbers society's condemnation of the crime and its determination to protect itself in no uncertain terms.

Of course, punishment should be individualised. The background, character, capacity to be rehabilitated, motives and other personal circumstances of the offender deserve careful consideration and will always remain an important factor in the formulation an appropriate sentence. Our penal system is, however, not only offender orientated. It also requires an assessment of the specific nature and the seriousness of the offence; of how to best serve the interest of the community and of other considerations such as mercy, consistency of punishment, prevalence of the offence, compensation of the victim and, in general, the objectives of punishment in a modern society.

Having said that, I must remark that, unless exceptional mitigating circumstances are present, custodial sentences appear to be the only adequate punishment for robbery where violence or the threat of violence involves the use of a dangerous weapon.

There are no such exceptional circumstances present in this case. The respondent was 23 years of age at the time, unmarried and did not have any dependants. Although he was employed, he indicated that he would find it difficult to get money together to pay a fine. An important mitigating factor is that he was a first offender.

Whilst bearing in mind the limited circumstances under which a Court of appeal would be at liberty to interfere with the sentence imposed by the presiding Magistrate, it appears to me that the Magistrate failed to adequately appreciate the seriousness and prevalence of the crime and the peculiar interest of society in combating incidents of robbery. The sentence as a whole, but in particular the option given to the respondent to pay a fine, is disturbingly lenient. I am satisfied that the magistrate failed to exercise his sentencing discretion judicially. The sentence should, therefore be set aside and be substituted for an appropriate one.

The court was informed that the respondent had been unable to pay the fine. He was incarcerated on 24 September 1998 and paroled on

8 April 1999 – some months before this appeal was eventually heard.

Although I would have proposed a heavier sentence had this appeal been heard whilst the respondent was still in jail, it will be rather harsh to require of the respondent to go back to jail so shortly after he has begun his life afresh outside prison. The delay in prosecuting this appeal was of an administrative nature and the respondent is not to be blamed for it.

In the circumstances, I would propose the following order:

> *The respondent's sentence of N$1 000.00 or 12 months imprisonment is set aside and is substituted for the following: "Three years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that the accused is not convicted of the crimes of assault with the intend to do grievous bodily harm, common assault or theft committed during the period of suspension and for which imprisonment without the option of a fine is imposed."*

The sentence is ante-dated to 24 September 1998.

Maritz, J.

I agree. It is so ordered.

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Hannah, J.