REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 01/2016

In the matter between

THE STATE

And

ELIAS AMUKOTO

HIGH COURT MD REVIEW CASE NO 1703/2015

Neutral citation: S v Amukoto (CR 01-2016) [2016] NAHCMD 6 (21 January 2016)

CORAM: NDAUENDAPO J *et* LIEBENBERG J

DELIVERED: 21 January 2016

Flynote: Criminal procedure – Review – Plea – Charge of robbery – Accused pleading guilty – Pleads guilty to attempted robbery – Convicted as charged – Conviction improper – Conviction corrected to one of attempted robbery – Sentence – Conviction of lesser offence leading to reduction in sentence.

ORDER

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1. The conviction is set aside and substituted with that of Attempted Robbery.
2. The sentence is set aside and substituted with the following: 3 (three) years' imprisonment of which 1 (one) year imprisonment suspended for 5 (five) years, on condition that the accused is not convicted of robbery, theft or assault, committed during the period of suspension.
3. The conviction and sentence are both antedated to 15 October 2015.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] This is a review matter in which the accused was convicted following a plea of guilty on a charge of robbery, and sentenced to 5 (five) years' imprisonment of which 2 (two) years suspended on condition of good conduct.

[2] On review a query was directed to the magistrate enquiring whether the conviction was proper in view of the circumstances in which the crime was committed, and whether the accused did not essentially plead guilty to attempted robbery. In response the learned magistrate concedes that the accused unsuccessfully attempted to steal cash, hence, he should not have been convicted of the (completed) offence of robbery.

[3] The particulars of the charge preferred against the accused are that he on 07 June 2013 unlawfully and intentionally forced into submission the complainant at her work place with intent to steal, and *attempted* to take cash in lawful possession of the complainant.

[4] Pursuant to the provisions of s 112 (1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) the court questioned the accused, who then admitted the following: Accused at the relevant time was employed as a security officer at Task Mobile, while the complainant was a supervisor and cashier at the same company. Whilst on duty at the said office the accused unexpectedly attacked the complainant by hitting her with fists, strangled her and covered her mouth and nose with his hands. During the scuffle she fell onto the floor but managed to run away. His actions were aimed at taking cash that had been kept in the safe, but was unable to find the key to the safe as the complainant did not have it on her. He was still present on the premises when the police arrived and got himself arrested. Accused's alleged denial of any knowledge of the wrongfulness of his actions was cleared up through further questioning during which he admitted his appreciation of the wrongfulness of his actions at the time of committing the offence.

[5] The elements of the crime of robbery are: (a) *theft* of property; (b) through the use of violence or threats; (c) a causal link between the violence and the taking of the property; (d) unlawfulness; and (e) intention.[1]

[1] *Snyman* Criminal Law (Six Ed.)

[6] The accused in the present instance intended through violent means, to take possession of cash under control of the complainant, but his endeavours were unsuccessful only because he could not obtain access to the safe where the money was kept. Thus, except for the act of appropriation, all the remaining elements were present. In *S v Agliotti*[2] the court as per Kgomo, J said the following on attempting to commit a crime:

> 'A person is guilty of attempting to commit a crime if he/she, intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of consummation. Once this stage is reached, 'attempt' at a crime is complete.'

(My emphasis)

[7] It is therefore evident that the accused was only guilty of attempted robbery, and not robbery itself. Although the heading of the charge reads 'Robbery', the particulars of the offence are that of attempted robbery, the elements of which the accused admitted. The accused should therefore have been convicted of the latter offence and the conviction cannot be permitted to stand.

[8] Section 312 (1) of the CPA directs that where any provision of subsection (1)*(b)* of s 112 was not complied with, *'or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the*

[2] 2011 (2) SACR 437 (GSJ) par 10.2

sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be'.

[9] As mentioned, the charge on which the accused pleaded guilty was essentially that of attempted robbery (despite the heading reading Robbery), in which it is alleged that he *attempted* to take cash from the complainant and which he admitted doing. He in fact admitted committing the offence of attempted robbery and, had the prosecution accepted the lesser plea, he would have been convicted of attempted robbery. This was likely to have happened (had the correct procedure been adopted), as it is common cause that the accused did not appropriate any cash he intended robbing. In the present circumstances it would thus not be necessary to invoke the provisions of s 312 as evidence to prove the offence of robbery is lacking; hence, the conviction can simply be corrected.

[10] As regards sentence, the magistrate was of the opinion that in view of the seriousness of the crime, the accused having been employed as a security officer at the complainant's business, and regard being had to the injuries inflicted to the person of the complainant, that the sentence imposed is still reasonable, despite him only being guilty of attempted robbery.

[11] That the accused committed a serious offence is unquestionable and one that usually attracts direct imprisonment. There are no exceptional circumstances present to find otherwise. The accused was a security officer on duty at the complainant's place of business and under a duty to protect the interests of the business and its staff. To this end he was in a position of trust, which he sadly misused to execute his plan of robbing the complainant only to satisfy his own greed. Another aggravating factor is the surprise assault perpetrated against the complainant during which she was strangled and stifled. During the ensuing scuffle she sustained injuries to her face (swelling of the nose bridge) and a laceration of 5cm on her right hand. Besides bleeding from these injuries

there is no indication of permanent scarring, and it seems fair to say that the injuries inflicted were not of serious nature.

[12] The accused on the other hand is a first offender and employed by the Ministry of Defence where he earns N$2 200 per month. Though single, he has two minor children who reside with his parents. He apologised to the complainant and told the court that he repented from his wrongdoings and asked for a sentence of community service.

[13] I endorse the magistrate's finding that a deterrent sentence in the circumstances of the case would be justified and that retribution as an objective of punishment should be emphasised. In view thereof a custodial sentence is inevitable. From a reading of the court's reasons on sentence it is evident that substantial weight was given to the seriousness of the offence of robbery which directly impacted on the sentence ultimately imposed. Though the court cannot be faulted on its application of principles to sentencing, I am of the view that, had the court initially convicted of attempted robbery (as it should have), a lesser sentence would have been imposed. In the present circumstances a custodial sentence of 5 years' imprisonment is unduly harsh and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by this court, had it sat as court of first instance.

[14] In the result, the following order is made:

1. The conviction is set aside and substituted with that of Attempted Robbery.
2. The sentence is set aside and substituted with the following: 3 (three) years' imprisonment of which 1 (one) year imprisonment suspended for 5 (five) years, on condition that the accused is not convicted of robbery, theft or assault, committed during the period of suspension.
3. The conviction and sentence are both antedated to 15 October 2015.

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J C LIEBENBERG

JUDGE

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N NDAUENDAPO

JUDGE