IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A195/2005

In the appeal between:-

JOHANNES TANKISO MOFOKENG Appellant

and

THE STATE Respondent

CORAM: RAMPAI J *et* C.J. MUSI J

HEARD ON: 26 JUNE 2006

JUDGMENT BY: RAMPAI J

DELIVERED ON: 29 JUNE 2006

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[1] The appellant was tried with two others in the Bethlehem Regional Court where they all pleaded guilty to four charges on the 14th January 2002. On the same day they were convicted on their pleas in respect of all four charges. Each

of them received an effective jail term of nine years. Now the appellant, accused number 1 in the court below, comes on appeal against the convictions and the sentences. His co-accused, Buti Samuel Tshabalala, accused number 2 and Laka Simon Mofokeng, accused number 3, are not before us in this appeal. Therefore I shall say no more about them, if possible.

[2] The appellant was charged with the following charges: Housebreaking with intent to steal and theft of goods worth R27 570,00; theft of a motor vehicle a Toyota Hilux LDV with registration number CFR 054 FS worth R37 900,00; unlawful possession of a fire-arm; a 30-06 rifle and again unlawful possession of a fire-arm .38 special luger. It was alleged that the accused committed the four crimes on the farm Vadersgift in the district of Bethlehem between the 2nd January 2002 and the 3rd January 2002.

[3] Since the appellant's plea of guilty was accepted by the

State, no evidence for the State was led. The appellant was thus convicted on his plea in connection with all four charges on the 14th January 2002.

[4] A month later on the 14th February 2002 the appellant was sentenced to six years imprisonment in respect of burglary and the theft of the motor vehicle, in other words the first and the second charges, were taken together for the purposes of sentence. Similarly the unlawful possession of 30-06 rifle and the unlawful possession of .38 special luger were taken as one for the purpose of sentence. The prison term of three years was imposed in respect of the third and the fourth charges.

[5] As regards the merits counsel for the respondent, Ms. Ferreira, submitted in her heads of argument and during the course of oral argument that the first charge and the second charge were species of one and the same criminal enterprise or conduct, namely stealing. The separation of the two into

two distinct charges amounted to a duplication of charges. In turn the duplication of charges led to the erroneous duplication of convictions. I am persuaded by Ms. Ferreira's submission. When the appellant set out to the farm in question, the overriding criminal intent on his mind was to steal and to steal at all costs. His mindset did not differentiate between the motor vehicle outside the house and the goods inside. Whether the goods he wanted to steal were outside or inside was subjectively not an issue to him. Housebreaking and theft, as I understand it, is basically stealing. It is an aggravated form of stealing. Therefore the appellant ought to have been convicted of the first charge only which would have embodied the second charge. Thus, there was only one crime committed. There is a tendency in the lower courts to treat cases involving theft of motor vehicles as if they were a special category of theft. The tendency is wrong and has to cease. *Vide* Hiemstra: **Suid Afrikaanse Strafproses**, sixth edition p. 235.

[6] The same considerations apply to the third and the fourth

charges. In my view, the appellant was supposed to have been found guilty of one count of unlawful possession of a fire-arm instead of two. Both fire-arms were simultaneously found in his possession and were stolen during the same criminal venture from the same complainant. There was a single intent to steal the fire-arms and a single intent to possess them. The possession of the two fire-arms therefore constituted one criminal act.

Hiemstra, *supra* p. 235;

S v GROBLER EN 'N ANDER 1966 (1) SA 507 (AD);
S v DIEDERICKS 1984 (3) SA 814 (C).

[7] In the circumstances I have come to the conclusion that the court below erred in convicting the appellant of the second and the fourth charges. Instead the appellant should have been convicted of the first and the third charges only. On account of these two misdirections, I would set aside the convictions in respect of the second and the fourth charges.

[8] It seems to me that the court below adopted a proper approach in the process of sentencing the appellant. It took

into account the customary triad of the relevant factors and considered them in an appropriate and a balanced manner. **S v RABIE** 1975 (4) SA 855 (AD) per Holmes JA.

[9] The sentencing of an offender or the determination of a proper sentence for an offender falls primarily in the discretion of a trial court. We cannot interfere with the exercise of a discretion merely because we would have exercised that discretion differently. **S v SALZWEDEL & OTHERS** 2000 (1) ALL SA 229 (AD) per Mahomed CJ.

On this appellate forum we are not at liberty to interfere with the exercise of a discretion unless we are satisfied that the discretion was not judicially exercised when the punishment was meted out.

S v MAKONDO 2002 (1) ALL SA 431 (SCA) at 431 e – f;
S v FOSE 1991 (1) SACR 426 (ECD);
S v DE JAGER 1965 (2) SA 612 (AD);
S v M 1976 (3) SA 644 (AD).

[10] The court below took into account the following mitigating factors: The appellant was 21 years old. He has passed standard 4 at school. He was gainfully employed and earned R300,00 per month at the time of his arrest. He was married. He was the father of one dependent minor child.

He pleaded guilty.

[11] The court below also took into account the following aggravating factors: The nature and the seriousness of the crimes of burglary and stealing and possessing unlicensed fire-arms; the interest of the community; the huge quantity of the stolen goods as well as their high value of approximately R65 470,00 when the vehicle and the fire-arms are also taken into consideration; the irreparable damage to the stolen motor vehicle; the number of the fire-arms; the appellant's record of previous convictions.

[12] The appellant's lawyer conceded that the sentence could hardly be described as shockingly inappropriate and therefore unbalanced. The concession was correctly made. The sentence was in no way shockingly severe or inappropriate in the circumstances where the aggravating factors eclipsed the mitigating factors by far. A very strong aggravating factor was the fact that the appellant was a member of a criminal gang. The court had to punish him

deterrently and preventatively. I am of the view that the trial court did not misdirect itself in sentencing the appellant in respect of the first and the third charges. The sentences of six years imprisonment in respect of the first charge alone and three years imprisonment in respect of the third charge alone appear to me in order. I am inclined to confirm them. The sentencing of the appellant in respect of the second charge and the fourth charge was a misdirection. I would therefore set aside the sentences relating to the second and the fourth charges.

[13] Accordingly I make the following order:

13.1 The appeal against the conviction in respect of the first and the third charges fails.

13.2 The conviction in respect of the first and the third charges is confirmed.

13.3 The appeal against the conviction and sentence in respect of the second and the fourth charges succeeds.

13.4 The conviction and sentence in respect of the second

and the fourth charges are set aside.

13.5 The appeal against the sentence imposed in respect of the first charge fails.

13.6 The sentence of six years imprisonment stands in respect of the first charge alone.

13.7 The appeal against the sentence imposed in respect of the third charge fails.

13.8 The sentence of three years imprisonment stands in respect of the third charge alone.

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M.H. RAMPAI, J

I concur.

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C.J. MUSI, J

On behalf of appellant: Adv I J Bezuidenhout
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent: Adv A Ferreira
Instructed by:
DOV
BLOEMFONTEIN

/sp