IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A217/2016

In the appeal between:-

KEKELETSO JOSEPH MOLISALIFE Appellant

and

THE STATE Respondent

CORAM: MUSI, AJP *et* VAN ZYL, J

HEARD ON: 6 MARCH 2017

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 16 MARCH 2017

Sentence: Minimum sentence applicable when accused convicted of housebreaking with the intent to commit an offence and robbery with aggravating circumstances – The fact that robbery with aggravating circumstances

coupled with housebreaking with intent to commit a crime aggravating factor. Exercise of sentencing discretion improper if insufficient information placed before presiding officer. Sentence may be antedated by trial court after its sentence was set aside on appeal and matter remitted to it for sentence.

Musi, AJP

[1] The appellant was charged with housebreaking with the intent to rob and robbery with aggravating circumstances in the regional court Viljoenskroon. He pleaded guilty to and was convicted of housebreaking with the intent to steal and robbery with aggravating circumstances. He was sentenced to 15 years' imprisonment. He successfully applied, in the court *a quo*, for leave to appeal against sentence only.

[2] In the written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (Act) the appellant stated that he was at Viljoenskroon on 30 November 2014. He decided to enter the house of the complainant. He broke a window and gained entry to the premises. Whilst he was gathering his loot in the house, the complainant woke and found him in her house. They wrestled. He freed himself and ran to the kitchen where he got a knife. He threatened the complainant with the knife and asked her for money. She told him that she does not have any on her person, but that she has in the bank. She proposed that they should go to an Automatic Teller Machine (ATM) so that she could withdraw money. They drove, with her car, to the nearest ATM. She withdrew R2400 and handed it over to the appellant. They went back to her house, where he took an iPhone valued at R7000, a camera worth R2000 and a multi pad (value unknown). He further admitted that he acted unlawfully and intentionally.

[3] It is trite that punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal must approach an appeal against sentence with due deference to the trial court. It may interfere when the discretion was improperly

exercised. The discretion would be wrongly exercised if the trial court committed an irregularity, misdirected itself or imposed a sentence that is disturbingly inappropriate.

[4] The regional magistrate held that the Criminal Law Amendment Act 105 of 1997 (Amendment Act) is not applicable in cases where an accused is convicted of housebreaking with the intent to commit an offence and robbery with aggravating circumstances. The regional magistrate, in his judgment on sentence, said that there is a High Court judgment supporting his holding. He could unfortunately not find the case reference. My efforts to find a case wherein that principle was established, unsurprisingly, did not yield any fruit.

[5] Mr. Simpson on behalf of the respondent, supported the regional magistrate's holding and referred us to **S v Maswetswa** 2014 (1) SACR 288 (GSJ) as authority for the proposition.

[6] In **Maswetswa** it is correctly pointed out that a charge of housebreaking with intent to commit an offence and the commission of another offence in the house consists of two substantive crimes. First, housebreaking with the intent to commit a crime. Second the substantive crime itself. Wepener J opined that the practice in terms of which accused are charged with one offence whereas two offences were committed should change. He suggested that the better practice would be that an accused person should be separately charged with the offence of housebreaking with intent to commit a crime and the crime itself, especially when the substantive crime is one mentioned in Schedule 2 of the Amendment Act. He put it thus, at para 16:

> "There now appears good reason why the offence of housebreaking with the intent to commit a crime and the crime should be charged as separate offences and not as a single offence in the case of robbery, murder and rape and any offence for which a minimum sentence is prescribed. In matters where the charges involve housebreaking with the intent to rob and robbery a first offender for robbery would attract a minimum sentence of 15

> years imprisonment, whilst the housebreaking charge would attract a different, albeit lesser, minimum sentence of 5 years imprisonment. The same would apply to housebreaking with the intent to murder or rape…"

[7] In **Maswetswa** the accused was, *inter alia,* charged with and convicted of housebreaking with the intent to rob and robbery with aggravating circumstances. The learned Judge correctly, in my view, concluded that the minimum sentence prescribed for robbery with aggravating circumstances is applicable. It would indeed be counterintuitive and illogical to reason that because the substantive crime of robbery with aggravating circumstances has been coupled with the offence of housebreaking with the intent to commit an offence therefore the offence of robbery with aggravating circumstances should not be visited with the prescribed minimum sentence that the legislature ordained for such crime. The crime of robbery with aggravating circumstances has been committed whether it is coupled with or separated from the offence of housebreaking with intent to commit a crime. It cannot be ignored. **Maswetswa** is not authority for the regional magistrate's holding.

[8] I agree with the view espoused in **S v Maunye** 2002 (1) SACR 266 (T) at 277F - 278B to the effect that:

> "An incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with the housebreaking as a factor that tends to aggravate the seriousness of the offence and therefore the severity of the sentence."

So too should the housebreaking with the intent to commit a crime be seen as an aggravating factor when it is coupled with robbery with aggravating circumstances. In practice this would mean a sentence higher than the minimum sentence may, depending on the facts, be imposed when the crimes are coupled. Fifteen years is the minimum sentence and not the maximum sentence.

[9] The regional magistrate erred by irregularly holding that the prescribed minimum sentence for robbery with aggravating circumstances is not applicable when the robbery with aggravating circumstances is coupled with housebreaking with the intent to commit an offence. He came to the conclusion that the Amendment Act was not applicable without a proper foundation for such holding. It is not clear why he could not look for the case that he relied upon before sentencing the appellant. He said the following:

> "Voordat ek verder gaan, u regsverteenwoordiger het melding gemaak van die Wet op Minimum Vonnisse, die Hof het dit betwyfel, aangesien ek van oordeel is dat daar onlangs 'n beslissing was tot die effek dat waar 'n persoon nie net suiwer aangekla is van roof met verswarende omstandighede nie maar dit gekoppel is aan huisbraak met die opset om 'n misdryf te pleeg dan is die Wet op Minimum Vonnisse nie van toepassing nie. Ek kon ongelukkig nie die betrokke saak aan die hande kry nie, maar ek het bevestiging dat ek korrek is dat onder hierdie omstandighede die Wet op Minimum Vonnisse nie van toepassing is nie."

[10] When the appellant's attorney wanted to address the regional magistrate on the issue of substantial and compelling circumstances he interrupted him and informed him that he is of the view that the Amendment Act is not applicable. The appellant's attorney accepted the regional magistrate's contention and thereafter only asked that the regional magistrate should show mercy. The record reads as follows:

> "MNR CAMPHER: …Wat die Wet op Minimum Vonnisse aanbetref, of dan 'n spesifieke vonnis is dit so dat hierdie een van daardie misdrywe is wat dan nou 'n spesifieke vonnis is wat die Hof moet oplê.
>
> HOF: Ekskuus net, ek is van oordeel dat hier nie, omdat hy gekoppel is saam met 'n ander klagte is ek van oordeel geld die Wet op Minimum Vonnisse nie.
>
> MNR CAMPHER: Ek gaan nie met u stry oor dit nie, ek sal dit aanvaar.
>
> HOF: Ek sal dat die Aanklaer vir my daardie aspek opklaar.
>
> MNR CAMPHER: Ek sal u woord daarvoor vat Edelagbare, ek gaan nie met u stry daaroor nie, nie onder hierdie omstandighede nie. Wat die vonnis aanbetref sal ek vra dat u die beskuldigde genadig sal wees. Wat artikel 103 van die Wet op Beheer van

Vuurwapens aanbetref, ek het nie betoog daar nie, ek sal dit in die hande van die Hof laat.

HOF: Voordat die Aanklaer my toespreek sal ek vra dat die Aanklaer net daardie aspek vir my opklaar, maar ek is van oordeel dat die Wet op Minimum Vonnisse nie hier van toepassing is nie, gesien in die lig daarvan dat dit gekoppel is aan 'n verdere misdaad, ek is seker daar is gesag tot daardie effek, ek dink as u Mnr Wiegand kontak sal hy u dadelik kan sê, die Hof verdaag vir 'n wyle.

HOF VERDAAG"

[11] When the court reconvened the regional magistrate commenced with his judgment without giving the prosecutor an opportunity to address him or to call witnesses. Section 274 of the Act reads as follows:

"**Evidence on sentence**

274 (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and there after the prosecution may likewise address the court."

It is clear that the court has a discretion to receive any evidence which it thinks may assist it in arriving at a proper sentence. The prosecutor may address the court before sentence is passed. The regional magistrate did not allow the appellant's legal representative to fully address him on sentence. He did not allow the prosecutor to address him. It is an irregularity but not necessarily of the kind that vitiates the proceedings. Although the respondent has not taken that omission on review or appeal it is indicative of the fact that the regional magistrate just did not have enough information at his disposal to embark on the important process of sentencing.

[12] In **S v Malgas** 2001 (1) SACR 469 (SCA) paras [7] - [9] the proper approach to the sentencing regime in the Amendment Act was set out as follows:

"[7] First, some preliminary observations. The provisions are to be read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner which respects those values. Due weight must be given to the fact that these provisions were not intended to be permanent fixtures on the legislative scene and were to lapse after two years unless extended annually. (They were put into operation on 1 May 1998 and were extended for 12 months with effect from 1 May 2000.) That shows that when conceived they were intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely. That situation was and remains notorious: an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be 'business as usual' when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* ([200] 1 WLR 377 at 381H) by the

> Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."

[13] The regional magistrate took a less onerous route in order to impose the sentence of 15 years' imprisonment. He preferred a clean slate on which to inscribe whatever sentence, within his sentencing jurisdiction, he thought fit. Section 51(3) of the Amendment Act requires the court to be satisfied that substantial and compelling circumstances exist which justifies a deviation from the prescribed minimum sentence and it must state on the record what those circumstances are. The converse is also demanding. Before finding that there are no substantial and compelling circumstances the court is enjoined to have

regard to all the circumstances touted to be substantial and compelling. It must give reasons why it is satisfied that the circumstances claimed to be substantial and compelling are not. The reason why an accused does not receive the benefit of a lesser sentence would probably be equally if not more important to him or her than the reason why he or she gets it. The task is equally onerous, the only difference being that the court need not record the circumstances that it finds not to be substantial and compelling. It must, however, be remembered that a regional court is, in any case, a court of record. The appellant's legal representative accepted the regional magistrate's proposition, without reservation, to the extent that he abandoned any effort to endeavor to argue that there are substantial and compelling circumstances.

[14] Neither the respondent nor the appellant placed any further evidence, with regard to the detail to complete the picture, on record. There was no evidence as to where and how the appellant was arrested. There was no evidence with regard to where and how some of the complainant's property was recovered. Mr. Campher, who appeared on behalf of the appellant in the trial court, in his address before sentence, informed the court that all the goods except the cash were recovered. The trial court had scant information for the purposes of determining an appropriate sentence. Robbery with aggravating circumstances is a serious offence which, as a rule, warrants the imposition of long term imprisonment.

[15] This is a typical case where the provisions of section 112(3) of the Act could have been used. Section 112(3) provides:

> "Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence."

[16] Section 112(3) empowers the accused and the prosecutor to adduce evidence relevant to sentencing after conviction but before sentence. **S v Khumalo** 1978 (4) SA 516 (N) at 518D to 519H. Relevant evidence at this stage of the proceedings is very important. It assists the presiding officer in determining a fit sentence. In some cases, depending on the factual information contained in the section 112(2) statement, it would not be necessarily to adduce further evidence. In other cases, such as this one, it would be in the interests of justice to do so. The purpose of the evidence is to supplement the facts set out in the plea of guilty with evidence that adds more detail to the factual circumstances. Such evidence should, however, not contradict the factual basis on which the accused was convicted. **S v Swarts** 1983 (3) SA 261 (C) at 262H to 263 D; **S v Dzukuda**; **S v Tshilo** 2000 (4) SA 1078 (CC) at para [25]. The regional magistrate embarked on the sentencing exercise without being properly apprised of all the relevant factual circumstances.

[17] The regional magistrate said the following with regard to the fact that the appellant pleaded guilty: “U het graad nege op skool geslaag, u het skuldig gepleit op die betrokke misdryf.” Nothing else is said about the plea of guilty and its impact on the sentence. I am not surprised that the regional magistrate could not give proper weight to the plea of guilty under these circumstances. The weight to be given to a plea of guilty, as a sign of remorse is, inter alia, dependent on the reason why the accused pleaded guilty. The regional magistrate could not determine this factual issue because he did not have all or more of the facts before him. In **S v Matyityi** 2011 (1) SACR 40 (SCA) para [13] the importance of this factual enquiry is lucidly explained, as follows:

> “[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene,

> pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

[18] The regional magistrate misdirected himself by not ensuring that there was sufficient evidence on record before sentence. Sentencing is a very delicate process and should not be embarked upon without the necessary evidence required for the purposes of determining an appropriate sentence.

[19] The regional magistrate seems to have followed a tick box approach with regard to the personal circumstances of the appellant. There is no analysis of the other mitigating factors, such as the circumstances and facts of this particular crime. The absence of serious injuries, which is a factor that could arguably be mitigating, was immediately devalued by reference to an aggravating factor without a proper factual foundation. The regional magistrate said the following about this issue: "Ek neem in ag die feit dat die klaagster in hierdie geval nie ernstige beserings opgedoen het nie, ek kan my net indink die psigiese skade wat sy opgedoen het in hierdie hele proses." The objective fact of no physical injuries was immediately discounted by the speculative possibility or probability of psychological injuries. The prosecutor did not adduce any evidence in relation to the psychological

effect of this crime on the complainant. The regional magistrate misdirected himself by not giving proper weight to the personal circumstances of the appellant and the circumstances under which this crime was committed.

[20] The appellant was 25 years old, unmarried and had two minor children respectively two years old and one month old. He passed grade 9 at school. He was gainfully employed at Trompcon Construction and earned R970 every fortnight. The appellant admitted 3 previous convictions. On 29 September 2010 he was convicted of assault with intent to do grievous bodily harm and sentenced to 6 months' imprisonment which was wholly suspended for 5 years on certain conditions. On 3 October 2011 he was convicted of possession of dagga and paid a fine of R200. On 4 August 2014 he was convicted of housebreaking with intent to steal and theft; he was sentenced to 12 months' imprisonment in terms of section 276(1)(h) of the Act.

[21] There is no evidence as to where the children are and with whom they are staying. The regional magistrate assumed, without enquiring from the appellant, that the appellant was under correctional supervision when he committed the current offence. The sentence on the SAPS69c form was either incorrectly recorded or an incompetent sentence was imposed on 4 August 2014. The sentence should either be 12 months' imprisonment in terms of section 276(1)(b) or 12 months' correctional supervision in terms of section 276(1)(h). This issue was not clarified.

[22] There are just too many evidential gaps that have to be filled. The regional magistrate had insufficient evidential material to do justice to the sentencing process. We are in no better position. Trial courts have the latitude to use their discretion in imposing an appropriate sentence. The Amendment Act has limited that discretion but not taken it away. The discretion is further constrained by established principles, for example, it must be exercised judicially after considering all the relevant facts and circumstances. The court of appeal may

interfere where the discretion is wrongly exercised. In this case the regional magistrate exercised his discretion improperly and unreasonably because he did not have all the facts before him on which he could exercise his discretion properly. **S v P** 1989 (1) SA 760 (KPA) at 762E-F.

[23] In my view the sentence ought to be set aside and the matter remitted to the trial court so that the prosecutor and the appellant can put evidential material before him that would enable him to exercise his discretion judicially. He may also act in terms of section 274 (1) of the Act.

[24] The magistrate would, when imposing the new sentence, be able to order that the sentence be antedated to a date not earlier than 3 March 2016, the original date of sentencing. Section 282 of the Act provides:

> "Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified."

[25] Section 282 has been interpreted to allow the trial court to antedate a sentence when it imposes such sentence after its original sentence has been set aside. **S v Seekoei** [1997] 1 All SA 40 (NC) at 45B to 46B. **S v P** at 762J to 763A. I align myself with those judgments.

[26] I accordingly make the following order:

1. The conviction is confirmed.
2. The sentence is set aside.
3. The matter is remitted to the regional magistrate Viljoenskroon to deal with in accordance with this judgment.

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C.J. MUSI, AJP

I agree.

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C. VAN ZYL, J

On behalf of Applicant: Ms. S. Kruger
Instructed by
Legal Aid SA
BLOEMFONTEIN

On behalf of Respondent: Adv. A. Simpson
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