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**

Case No: A204/2018

In the matter between:-

TEFO ZAKARIA MONTSE Appellant

and

THE STATE Respondent

CORAM: RAMPAI, J *et* MBHELE, J

JUDGMENT BY: MBHELE, J

HEARD ON: 29 OCTOBER 2018

DELIVERED ON: 29 JANUARY 2019

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[1] The appellant was convicted on one count of housebreaking with intent to steal and attempted theft by a magistrate in the Welkom District Court and was sentenced to imprisonment for 3 years on 25 October 2017.

[2] The appellant, aggrieved by the conviction and sentence, approached this court on appeal against both with the leave of the trial court. In the notice of appeal, heads of argument as well as submissions before us, the appellant assails the conviction on the basis that the trial court erred in finding that the state managed to prove its case beyond a reasonable doubt; that it erred by relying on the evidence of the state's single witness that was marred by contradictions and further that it erred by rejecting his version which was reasonably true or reasonably possible.

[3] The state called one witness, the complainant, in support of its case. The complainant testified, *inter alia,* that on 15 December 2016 she went to a shopping centre called Mannys; that she left her place of residence at or about 08h00; that she closed all the windows, locked her house and her gate before she left.

[4] On her return home at or about 11h00 she noticed a pole lying on the ground below the window of her daughter's bedroom. At once she rushed into the house. Upon inspecting the house, she discovered that the window of her daughter's bedroom was broken, its burglar bars damaged and bent upwards. She then realised that someone must have gained entry into the house through the same window.

[5] While she was still inspecting the house further, she saw the appellant, her former employee, running off her property and jumping over the wall onto the adjacent property. She continued to inspect her house. She further found three pairs of her sports

shoes in the outside room. They, together with her radio speakers, were packed in a plastic bag. But when she earlier went away, she had left the shoes hanging on the washing line outside to dry up because she had washed them.

[6] She had employed the appellant as a gardener from March 2016 until October of the same year when she terminated his services. He worked twice a week on Tuesdays and Thursdays. She knew where he lived. She went with the police to the appellant's house at Kutlwanong Odendaalsrus on Saturday the following week, about 9 days after her house was broken into. She pointed him out to the police. He was arrested.

[7] The appellant denied ever having broken into the house of the complainant. He was adamant that he was still employed by the complainant on 15th December 2016 and that his presence at the complainant's house on the relevant date was as a result of his fulfilment of his obligations in terms of the employment contract. The complainant had left him at her house and gave her instructions to mow the lawn. He admits that he removed the complainant's sports shoes from the washing line because it was raining. He added that, besides the shoes, he also removed the complainant's underwear from the washing line. He explained that he did so because he did not want them to be rained on. He was surprised when the complainant arrived at his place of abode in company of the police where she accused him of breaking into her house with intent to steal.

[8] Mr. Modise submitted that the uncorroborated evidence of the complainant, who was a single witness, failed to prove the appellant's guilt beyond reasonable doubt.

[9] Section 208 of The Criminal Procedure Act provides as follows:

> *"An accused may be convicted of any offence on the single evidence of any competent witness."*

In **S v SAULS AND ANOTHER 1981 (3) SA 172 at 180 F-G the court** held as follows:

> *"The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.*
>
> *…… the exercise of caution must not be allowed to displace the exercise of common sense."*

[10] The evidence of the complainant was clear and not successfully challenged during cross examination. It was not disputed, during complainant's testimony, that she arrived home at 11h00 and not after 16h00 as the appellant would have liked the trial court to have believed.

[11] The trial court evaluated the evidence. Having done so, the trial magistrate came to the conclusion that the evidence of the single prosecution witness was truthful and satisfactory in all material respects. The trial magistrate was not impressed by the version of

the appellant. Consequently the court a quo rejected the version of the appellant, not only because it was improbable, but also because it was not reasonably possible.

[12] It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusion thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.):

> *"A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong."* (See ***R v* Dhlumayo** *&* **another** 1948 (2) SA 677 (A) at 705-706):

It is so that the powers to evaluate and appraise evidence belong to a trial court which had an opportunity to see and hear witnesses and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion.

[13] I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellant's version is inherently improbable and that it is not reasonably possible. On the strength of those findings it was correctly rejected, in my view.

[14] The trial court correctly found that the evidence of the complainant shows that the appellant was the person who broke into the complainant's house and attempted to steal the items mentioned in the charge sheet. The complainant was truthful, honest and reliable. The appellant did not proffer any reasonably innocent explanation as to why he placed the complainant's sneakers in a plastic bag if his sole and good intention was merely to keep them from rain. It is inconceivable how the appellant, who left the complainant's house, having done nothing wrong, would stay away from work for two days during the week immediately following the incident if he was still in the complainant's employ. His unexplained absence shortly after the incident and before his arrest, fortified the complainant's evidence that she had already terminated the contract of employment at the time of the incident. The argument that the appellant was still in the employ of the complainant; that he was lawfully on her property on the day of the incident; that he did not intend stealing anything from her on that day; that he did not break into her house; that he left before her return and that he was, therefore, not the fugitive intruder the complainant saw fleeing the scene - falls to be rejected.

[15] Above all these, it must be borne in mind that the appellant confessed the crime to a certain prosecutor at one stage in the presence of the complainant. According to the undisputed evidence of the complainant, the appellant lamentably told the prosecutor that he was possessed by evil demons to do what he did to the complainant. It has to be stressed that he openly confessed within the hearing and presence of the complainant.

[16] In the light of all these considerations, I am not persuaded that the court *a quo* committed any material misdirection in finding the appellant guilty. In the absence of any such misdirection, there can be no sound reason for us to interfere on appeal. Therefore, I would dismiss the appeal as regards conviction.

[17] Now I proceed to consider the second leg of the appeal. It is trite law that the imposition of a sentence remains the domain of the trial court and this involves the exercise of discretion by the sentencing court. A court exercising appellate jurisdiction is not free to interfere with the exercise of that discretion unless it is tainted by a material misdirection or the sentence is disturbingly disproportionate to the crime, the personal circumstances of the appellant and the interest of society. In the case of **S** v **Jiminez 2003 (1) SACR 507 at 512** the court said:

> *"However, even where a sentence does not seem shockingly inappropriate, a court on appeal is entitled to interfere or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion"*

[18] It is so that a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with a sentence imposed by a trial court. In S **v Pillay** 1997 (4) SA 531 (A) at 531 the court said the following:

> *"It must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is*

usually and conveniently termed one that vitiates the Court's decision on sentence."

[19] The court a quo has set out in detail the factors it took into consideration as mitigating factors in order to come to the sentence it imposed.

The appellant was 37 years of age and had a 19 year old son as his sole dependent. His highest level of education is grade 12. Before his arrest he did odd jobs performing garden services.

[20] The court a quo also took into account the following as aggravating circumstances: The appellant was not a first offender. On 19 March 2002 he was sentenced to 3 years imprisonment in terms of section 276 (1) (B) for housebreaking with intent to steal and theft; 15 year imprisonment for armed robbery; 18 month imprisonment for indecent assault and 10 year imprisonment for rape. The regional court directed that those sentences should run concurrently in such a way that he serve an effective prison term of 18 years. On 20 October 2003 he was sentenced to a fine of R1000 or 60 days imprisonment for possession of dependence producing substance. He was also sentenced to 9 month imprisonment for trespass.

[21] The long list of the appellant's previous convictions shows that he has no respect for law. Just a year into his 18 years prison term he came into conflict with the law. Upon perusal of the record, it appears that he was a parolee when he was convicted in October

2014 and when he committed the present offence in December 2015 seeing that sentence of 18 years in prison was supposed to run until March 2020. He was afforded a chance to rehabilitate outside prison but he failed to use it to his advantage.

[22] The appellant has been convicted of a very serious offence which has an element of invading its victims' privacy to the extreme. He abused the trust the complainant had in him when she allowed him access to her house while he was still in her employ. The offence of housebreaking undermines the safety and security victims. This crime is not only prevalent in the area of jurisdiction of this court but throughout the country.

[23] In **S v Mahlatsi** 2013 (2) SACR 625 (GNP) at (???} where the court said the following about armed robbery:

> *"[9] Ordinary citizens cannot be blamed for constantly living in fear for their lives, never mind the safety of their possessions, so much so that they either spend thousands of rands to try and create safe havens to live in and vehicles to travel in; emigrate; take the law into their own hands; or simply cringe at the thought of venturing out onto the streets or even to stay at home, because it would appear that there is nowhere to hide and no way in which one can properly defend oneself……"*

The above dictum finds relevance in housebreaking matters where citizens are forced to incur huge expenses towards security to improve their safety.

[25] It is my view that the court *a quo* correctly balanced the personal circumstances of the appellant against the seriousness of the offence and the interest of society when imposing the sentence.

[26] I cannot, therefore, find that the court *a quo* committed any misdirection in imposing the sentence herein or even still, that the sentence imposed was disproportionate to the crime, the personal circumstances of the appellant and the interest of society. The appeal against the sentence must also fail.

[27] The following order is made:

[27.1] The appeal fails in toto;
[27.2] The conviction and sentence are confirmed.

N.M. MBHELE, J

I concur and it is so ordered

MH RAMPAI, J

On behalf of appellant: Attorney T.J. Modise
Instructed by: Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:	Adv. R Hoffman
Instructed by:	Director: Public Prosecutions BLOEMFONTEIN