IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: A245/2018

In the matter between:

THEMBA FILDA
Appellant

and

THE STATE
Respondent

CORAM: CHESIWE, J *et* OPPERMAN, J

HEARD ON: 11 FEBRUARY 2019

JUDGMENT BY: CHESIWE, J

DELIVERED ON: 31 MAY 2019

Summary: Appeal - Conviction and Sentence - Housebreaking with intent to steal and theft

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[1] The Appellant was charge in the Regional Court, Zastron on two counts. Count 1 - charge of housebreaking with intent to steal and theft; Count 2 - charge of possession of suspected stolen goods in terms of section 36 of the General Law Amendment Act 62 of 1995. He pleaded not guilty. He was convicted on Count 1 and was sentenced to 12 years imprisonment, and on count 2 he was found not guilty and discharged.

[2] The trial court granted leave to appeal against both conviction and sentence. Therefore, the appeal lies against conviction and sentence.

[3] The Appellant's grounds of appeal are that the trial court erred in drawing the inference that the Appellant was part of the people who robbed the Complainant; that the trial court erred in finding that the State had proven its case beyond reasonable doubt and that the pointing out was made freely and voluntarily.

[4] The Appellant was in person at the trial court.[1] The Presiding Officer made the Appellant aware of his rights to legal representation, however, the Appellant chose and insisted to conduct his own defence. The trial court explained to the Appellant his rights throughout the trial as well as his rights to cross-examine the state witnesses. The Appellant was satisfied with the court's explanation in respect to his rights to

[1] Page 1 line 10 – 20 of the transcribed record.

a fair trial and proceeded to conduct his own defence. The Presiding Officer thoroughly and in detail assisted the Appellant. The Appellant was assisted throughout the trial and the Presiding Officer explained each and every procedure, in spite of the fact that the Appellant had a history of appearances before the courts. The Presiding Officer ensured that he was not prejudiced.[2]

[5] The background on this matter is briefly that the Complainant left for Johannesburg on 1 July 2016. On 9 July 2016 he received a phone call from his employee who informed him that there has been a break-in at his house. The Complainant came back to Zastron to report the matter at the South African Police Services and simultaneously notified his friends and asked them to assist him to find his stolen items. The value of the stolen items was R41 400. The Complainant received a phone call that informed him that some of the stolen liquor was recovered at Elizabeth Lekhula's house (Mother of a friend of the Complainant). The Complainant followed up on this information and found two bottles of Champagne at Lekhula's house where he was informed that the Appellant brought the Champagne to Lekhula's house. On further investigation by the SAPS and the Complainant, the rest of the items were found in the veld next to the dam as pointed out by the Appellant in the presence of the police.

[2] This is noted from the transcribed record from the plea stage, sentencing stage and the application for leave to appeal. Page 1 to 226.

[6] Counsel on behalf of the Appellant submitted that State's case was based on circumstantial evidence as there was no direct evidence that linked the Appellant. However, he said it was clear that the items were found and the places where it was found was pointed out by the Appellant. He further submitted that only a person who had knowledge of where these items were hidden, would be able to point them out. He mentioned that the trial court found the State's witnesses to be credible and did not falsely implicate the accused, thus the trial court's finding cannot be faulted.

[7] Counsel on behalf of the Respondent submitted that there is no misdirection on the part of the trial court. He indicated that the Appellant's aggravating factors far outweighs the mitigating factors and submitted that the conviction and sentence be confirmed.

[8] It is trite that the onus rests on the State to prove its case beyond reasonable doubt and the Appellant is only expected to give a version which is reasonably possibly true, and if he has done so, he is entitled to an acquittal.

[9] Indeed it is so that the State's case was entirely based on circumstantial evidence[3]. It was stated in **S v Cooper,[4]** that: "Adjudicators of fact must be careful when dealing with circumstantial evidence and inferences must be drawn from it. They must be careful to distinguish between inferences and conjecture or speculation. There can

[3] S v Reddy 1996 (2) SACR (1) (A) 8c-g.
[4] 1996 (2) SA 875 (T).

be no inferences unless there are objective facts from which to infer the other facts which are sought to be established."

[10] In **State v Reddy,**[5] the court stated that: "In assessing circumstantial evidence one needs to be careful not to approach such evidence upon piece-meal basis and to subject each individual to consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in totality. It is only then that one can apply the often-quoted dictum in **R v Blom** 1939 A 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are firstly, that the inferences sought to be drawn must be consistent with all the proven facts; and secondly, the provided facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."

[11] The Complainant did not know the Appellant, was it not for Lekhula who called the Complainant to inform him that the Appellant brought Champagne to her house.[6] Lekhula could not have mistaken the Appellant's identity, as she knew the Appellant very well, he was a regular visitor at Lekhula's house and used to drink alcohol at Lekhula's house. This is noted on her testimony on page 92 line 17 to 24 of the transcribed record:

"Prosecutor: Who brought the alcohol? Accused 2, did your worship Prosecutor: Do you know accused 2…… Yes, Your Worship, I know him.

[5] 1996 (2) SACR (1) (A) 8 c-g.
[6] Page 92 line 10 – 20 of the transcribe record.

Prosecutor: How so? We are used to each other at the township, he was also use to visit my place. So, accused 2 brought the two bottles of wine to your house? He was there with a blue bag."

[12] The transcribed record further shows that Lekhula did not know the Complainant,[7] thus it cannot be said that she and the Complainant colluded with each other to implicate the Appellant.[8] Lekhula and her son had no time to conspire against the Appellant, as they did not know who broke into the Complainant's house.

[13] The stolen items were well hidden in the veld, to the extent that when the Appellant went with the police to point out, he sat in the front seat of the police vehicle in order to provide them with directions to the specific areas. Indeed, it is only a person with knowledge who will know where these items were hidden. The Appellant knew very well were the items were hidden and took the police and the complainant to the first scene, which was closer to the complainant's house and the following items were found: two TV's, a Red Bull touring bag, Russians, watches, Jameson, chicken and an amplifier. Then Appellant took the complainant and the police to another area, this time next to the dam to point out a travelling bag, amplifier, DVD and remotes.

[7] Page 92, Lekhula's son called her that his friend's place has been broken in, that if someone comes to sell any stuff, she must call her son.
[8] Page 94 line 2, she said; "the owner of the staff arrived…. The very same one who was looking for my child."

[14] According to Constable Veldsman, the investigating officer, the Appellant was informed of his rights before the pointing out,[9] as the Appellant wanted to impressed on the trial court that the pointing out was not done freely and voluntarily. I am indeed satisfied that the pointing out was done in accordance with justice, and the Appellant was informed of his rights.

[15] The trial court's evaluation of the evidence demonstrates that it was alive to the fact that the State witnesses were reliable, truthful and had no reason to falsely implicate the Appellant. The Appellant exercised his right to remain silent and did not testify at the trial court therefore the court only had the evidence of the State before it.

[16] It is trite that an appeal court will only tamper with the trial court's findings if it is shown that the findings made by the trial court were clearly wrong. It has not been submitted that the trial court committed any misdirection of fact. Furthermore, when consideration is paid to all inconsistencies and improbabilities, there is no reason to doubt the correctness of the credibility findings made by the trial court. I am satisfied that the state at the trial court proved its case beyond reasonable doubt. In my view the trial court correctly convicted the appellant and there is no reason to tamper with the trial court's findings on the conviction.

[9] Page 141 line 10 – 24 of the transcribed record.

[17] Counsel on behalf of the Appellant submitted that a sentence of seven (7) years would be appropriate, and counsel on behalf of the Respondent submitted that the 12 years imposed on the Appellant is appropriate and is supported.

[18] It is trite that the sentence of an accused person must be balanced between the interest of society, the offence and the personal circumstances of the accused. The Appellant's personal circumstances are that he is 50 years of age; has two minor children who are staying with the paternal grandmother. He does not know the whereabouts of the children's mother. In respect of mitigating factors, the property was recovered and that nobody was injured. However, the aggravating factors are that the Appellant has been classified a habitual criminal and was on parole when he committed the offence. Thus, the aggravating factors far outweighs the mitigating factors.

[19] The Appellant's previous convictions reads like a book. It seems that the Appellant has not learnt from the previous sentences that were imposed on him. Nor has the previous sentences deterred him from committing further crimes. The Appellant in spite of being declared a habitual criminal continued unabated to commit new offences. The previous sentences that were imposed on the Appellant seemed not to have rehabilitated him. The Appellant seemed not to have respect for the law or the courts, the fact that the offence *in casu* was committed while he was on parole.

[20] It is trite that a court of appeal should not interfere with a sentence imposed by the trial court. The court of appeal will only interfere with sentence in limited circumstances.[10] This will be in situations whereby the trial court misdirected itself or committed an irregularity or the sentence is shockingly inappropriate. This means the discretion of the court was executed wrongly.

[21] The trial court had regarded as aggravating factors that the Appellant has several previous convictions and was declared a habitual criminal in 2001. The Appellant committed his first offence when he was 15 years, and continued to commit offences, whereby different sentences were imposed on him. The Appellant has shown no remorse.

[22] Housebreaking is the invasion of another person's privacy and removing that person's property. Though food was also stolen, there were also items of high value stolen that is the expensive watches and Champagne. The Appellant committed all these offences within the district of Zastron. The trial court took into consideration the interests of the community in sentencing the Appellant, that the sentence is not to satisfy public opinion, but to serve the public interests and considered that the sentence should not be harsh and simultaneously not too lenient.

[10] S v Pillay 1997 (4) SA 531 A at 535 e-g and S v Peters 1987 (3) SA 717 (A) at 728 B-C.

[23] It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so.[11]

[24] In view of the aforesaid, I am persuaded that the trial court did not misdirected itself nor committed any irregularity for this court to tamper with the imposed 12 years sentence.

[25] I accordingly make the following order.

1. The appeal against conviction and sentence is dismissed.
2. The sentence of 12 years imposed by the trial court is confirmed.

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S. CHESIWE, J

I concur.

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M. OPPERMAN, J

[11] S v Obisi 2015 (2) SACR 35 W at 35i-j.

On behalf of Appellant:	Adv. P.L. Van Der Merwe Instructed by: Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of Respondent:	Adv. Shale Instructed by: The Director of Public Prosecution BLOEMFONTEIN