IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU- NATAL DIVISION, DURBAN

Case No: AR40/17

In the matter between:

JAMES DLODLO APPELLANT

and

THE STATE RESPONDENT

Coram : Mbatha et Poyo Dlwati JJ
Heard : 01 June 2018
Delivered : 01 June 2018

JUDGMENT

Poyo Dlwati J:

[1] The appellant was convicted of one count of housebreaking with intent to steal and theft by the Regional Court sitting in Richards Bay on 28 June 2016. On the same date, he was sentenced to eight years' imprisonment. The appellant applied for leave to appeal against his sentence but same was refused by the

learned magistrate. After petitioning the Judge President of this division for leave to appeal against his sentence, same was granted on 20 February 2017.

[2] The facts upon which the appellant was convicted were as follows: On 4 July 2014 Ms Jabulile Julia Malinga, who was employed as a domestic worker at the home of Mr Matthew Neil Strydom situated at [...] D. D. Road, Meerensee in Richards Bay testified that she was on duty on that day. Whilst she was busy with her duties, having commenced working at 07H00, she spotted a male person outside the house but within the yard of Mr Strydom. She telephoned Mrs Strydom and advised her about what she had seen. After talking to Mrs Strydom, she saw that person walking out through the gate.

[3] She continued working. Later at about 09H00, she again looked through the window. This time she saw two persons entering through the gate proceeding towards the garage. She again telephoned Mrs Strydom and advised her of what she had seen. She noticed the handle of the door that leads to the garage moving. That door had been locked and Mr Strydom usually locked it. Soon thereafter the door was opened and the two males were inside the house. She ran away and hid herself in the bathroom.

[4] Mrs Strydom phoned Ms Malinga and enquired where the people were. She told her that the people were inside the house. A few minutes later, whilst still shocked inside the bathroom, Mr Strydom arrived in the house and called her out. Mr Strydom thereafter conducted an inspection of the house in the presence of Ms Malinga. Ms Malinga noticed that the cabinets in Mr Strydom's bedroom were opened. A jewellery box and some cellular phones were found to be missing. She was not able to identify those two males as they had been facing away from her.

[5] Mr Donovan Demuny, Mr Strydom's neighbour, testified that he and Mr Rodney Laurens had just returned from fishing on the day in question. One of his neighbours had received a message on her mobile group whatsapp that there were some people in Mr Strydom's yard. They proceeded to Mr Strydom's home. As they were approaching Mr Strydom's home they saw one male person on top of the wall with a Checkers bag in his hand. Thereafter Mr Demuny saw the appellant standing on top of the running board (being the flat section in front of the cab) of a truck that was stationary in Mr Strydom's home. The appellant was trying to climb the wall. When the appellant saw Mr Demuny he jumped off the truck and ran away. Mr Demuny gave chase. Mr Demuny saw that the appellant was carrying an electric device which was later identified as Mr Strydom's weather station. As the appellant was running away he threw the weather station on the ground. He continued to run down the road as Mr Demuny was chasing him.

[6] Mr Demuny managed to grab hold of the appellant. They wrestled and Mr Demuny managed to push the appellant to the ground. On the other hand the person that was on top of the wall jumped off to another neighbour's property and ran away. Mr Laurens went and joined Mr Demuny and assisted him in tying the appellant with a tow rope to keep him from running away. Some security officers came along and lent them handcuffs which they used to handcuff the appellant. They then saw a blackberry cellular phone lying on the ground not far from where the appellant was. The police arrived at the scene and the appellant was arrested.

[7] Mr Laurens corroborated Mr Demuny's evidence in all material respects. Mr Strydom confirmed that after he received information from his wife, he proceeded to his home. On his way, he met his neighbour Mr Demuny on the street with Mr Laurens. They had apprehended the appellant. Mr Demuny

showed him the weather station and the blackberry cell phone that had been thrown away by the appellant. He identified those as his. Inside his house he found that their jewellery box and its contents were missing. The value of the missing jewellery ranged between R50 and R60 000. He also found that his worker's wages, being cash of about R50 000, which he had left in his bedroom was also missing together with about five cellular phones which were valued at about R6 000 each.

[8] Mr Strydom confirmed that when he left his house that morning he had locked all the doors. He observed that the side wooden door had been broken open and that was where the assailants gained entry. The only items recovered were the weather station and the blackberry cellular phone. The insurance also refused to pay out their claim. It was upon this evidence that the appellant was convicted.

[9] The issue in this appeal is whether the sentence imposed on the appellant by the learned magistrate was excessive and induced a sense of shock, as argued by Mr *Marimuthu* on behalf of the appellant. Mr *Marimuthu* also submitted that the learned magistrate had erred in attaching too much weight to the appellant's previous convictions which were not related to the offence at hand. He also referred us to various cases where a term of seven years' imprisonment was imposed mainly on repeat offenders, the point being that the appellant ought to have been treated as a first offender in the circumstances of this case and received a lesser sentence.

[10] Furthermore, it was submitted that whilst the learned magistrate made reference to the fact that the appellant had been in custody for a while, this factor did not seem to have been considered and factored in when the sentence was imposed. It is also not clear from the record how long the appellant was in

custody for. It was submitted that the appellant's personal circumstances weighed favourably against the other factors and the appellant ought to have received a lesser sentence. Under the circumstances, so went the argument, our interference was warranted.

[11] Ms *Naidu*, on behalf of the State submitted that the appellant had failed to show any misdirection on the part of the learned magistrate and therefore the appeal had to fail as it had no merit. Furthermore, the learned magistrate had weighed all the factors traditionally taken into account during the sentencing and had arrived at a just sentence which was appropriate in this case.

[12] It is a trite principle of our law that imposition of sentence is the prerogative of the trial court.[1] An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. The appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree, and seriousness that shows that it did not exercise its sentencing discretion at all or exercise it improperly or unreasonably when imposing it.[2] Interference, therefore, is only justified where there exists a striking or startling or disturbing disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.[3]

[13] Taking the above principles into account and having regard to the triad referred to in *S v Zinn*,[4] I am of the view that there is a striking and startling

[1] *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8.
[2] *S v Pillay* 1977 (4) SA 531 (A) at 535E-F .
[3] *S v Birkenfield* 2000(1) SACR 325 (SCA) para 8.
[4] *S v Zinn* 1969 (2) SA 537 (A).

disparity between the trial court's sentence and that which this court would have imposed. As held in *S v Mthetwa & others*:[5]

'It is one thing to recite the personal circumstances of an accused. It is another to fuse those circumstances in the consideration of sentence'.

There is no doubt that housebreaking and theft are very serious and prevalent offences. In fact, the evidence was that Ms Malinga was traumatised by the events of that day. This was evident from the fact that she cried when she testified even though this was about two years after the incident. However, a period of eight years' imprisonment for a person who has no relevant previous convictions induces a sense shock. I agree with Leach JA's sentiments expressed in *S v Muller*[6] that:

'…while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, … that mercy, and not a sledgehammer, is the concomitant of justice'.

Nicholas JA observed in *S v Skenjana,*[7] that there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length.

[14] Furthermore, that the appellant had no relevant previous convictions at his age show that he is a good candidate for rehabilitation. Moreover, the injuction to be merciful when imposing sentence must not be overlooked. Furthermore, it is also trite now that the period that the appellant spent in prison awaiting trial must also be taken into account and factored in during sentence.[8] In the circumstance, I am of the view that a period of four years' imprisonment is appropriate and this will serve as a deterrent to the appellant and other would be offenders.

Order

[5] *S v Mthetwa & others* 2015 (1) SACR 302 (GP) para 15.
[6] *S v Muller* 2012 (2) SACR 545 (SCA) para 9.
[7] *S v Skenjana* 1985 (3) SA 51 (A) at 54-I-55E.
[8] *S v Radebe & another* 2013 (2) SACR 165 (SCA) para 13.

[15] I therefore propose the following order:

(a) The appeal against sentence is upheld. The sentence imposed by the learned magistrate is set aside and replaced with:

'The accused is sentenced to a period of four years' imprisonment'. The sentence is antedated to 28 June 2016.

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POYO DLWATI J

I agree and it is so ordered

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MBATHA J

APPEARANCES

Date of Hearing : 01 June 2018

Date of Judgment : 01 June 2018

Counsel for Appellant : Mr Marimuthu

Instructed by : Legal Aid Durban

Counsel Respondent : Adv Naidoo

Instructed by : Director of Public Prosecutions Durban