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

CASE NO. AR521/18

In the matter between:

SABELO STANLEY DLADLA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The following order is made:

1. The appeal against conviction and sentence is dismissed.

2. The conviction and sentence of the court a quo are confirmed.

APPEAL JUDGMENT

Henriques J (Lopes J concurring):

Introduction

[1] The appellant, together with his three co-accused was convicted on one count of theft in the regional court, Durban on 17 November 2014. He was sentenced to

five years' direct imprisonment without the option of a fine, whilst his three co-accused were sentenced to five years' imprisonment without the option of a fine wholly suspended for five years. The appellant's appeal against conviction and sentence is before this court by way of petition being granted.

Issues

[2] The issues to be decided are:

(a) Whether the appellant was correctly identified as one of the perpetrators who participated in the theft of shoes from the complainant's truck?

(b) Whether the sentence imposed is vitiated by misdirection, irregularity or is startlingly, shockingly and disturbingly inappropriate?

Ad conviction

[3] In convicting the appellant the court a quo relied on the evidence of the two arresting officers, Sergeant Musawenkosi Magwaza (Magwaza) and Constable Sifiso Mthembu (Mthembu), as well as the evidence of the appellant's co-accused, accused 2, 3 and 4, the appellant being accused 1 in the court a quo.

[4] In his grounds of appeal, the appellant contends that the evidence of Magwaza and Mthembu is unreliable, as they did not have sufficient opportunity to observe him and their evidence is contradictory of the other. The appellant further contends that he was falsely implicated by his erstwhile co-accused, as at the time of the offence, he was at the Bayhead Road garage purchasing airtime. In addition, he denies participating in the offence.

[5] In consequence of the defence raised, it is essential to consider the evidence of the State witnesses, their credibility as well as the evidence of the appellant and his co-accused. Arising from the record of proceedings and the evidence presented, the following facts are common cause, alternatively, undisputed:

(a) In the early hours of the morning of 20 July 2011, the complainant's truck was broken into and the contents of the container/trailer, being shoes to the value of R150 000, were stolen.

(b) The appellant, his erstwhile co-accused, accused 2 and 3 were within a short distance of the truck when they were arrested.

(c) The appellant wore an orange jacket at the time.

(d) Accused 2, 3 and 4 all place the appellant on the scene as the central figure in the commission of the offence.

[6] Evidence of identification is always treated with caution, especially in circumstances where one is dealing with a single witness, as even an honest witness may identify the wrong person. The locus classicus in regard to identification is the judgment of Holmes JA in *S v Mthetwa*[1] wherein the following was said regarding identification:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eye sight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light or the totality of the evidence, and the probabilities. . . .'

[7] It is against these principles that the reliability of the evidence of both arresting officers regarding the identification of the appellant to secure his conviction must be considered.

The evidence

[8] Sergeant Magwaza, employed by the South African Police Service (SAPS), testified that on 20 July 2011 he was on duty in uniform together with his crew Constable Mthembu, performing duties in their marked patrol van. During the patrol, he received a telephone call informing him that people had broken into a container at Bayhead Park. On their arrival at the scene, he and Mthembu noticed a stationary motor vehicle as well as five males on top of a container who appeared to be offloading goods. They also noticed a Kia van and a few metres away an Isuzu bakkie together with another motor vehicle, the description of which he could not recall. The goods were being offloaded from the container attached to the truck, into

[1] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-D.

the Isuzu, which had been reversed toward the rear of the container. The truck had been parked next to the road.

[9] The Isuzu bakkie and the unidentified vehicle left the scene upon their arrival. When he alighted from his vehicle, Magwaza identified himself and Mthembu as police officers and warned the persons at the scene to stop. At this the persons he observed fled on foot. One of the male persons who had attempted to flee, accused 3, was approximately two metres from the container, when he stopped and raised his hands. Magwaza arrested him and placed him inside the police van all the while keeping the others who ran away within his sight.

[10] He was able to keep them under observation as they were inside an industrial park, which only had one exit. The suspects were fleeing up the road towards the lights as both sides of the road were fenced. Accused 2, Sibusiso Mbhele was approximately 100 metres away from them when they apprehended him. The appellant was apprehended approximately 200 metres from the scene at the garage. At the time the appellant was about to enter the garage.

[11] Magwaza confirmed that the first person they apprehended was accused 3. He further confirmed that although there were initially five people at the scene, they only managed to apprehend three in total. He testified that whilst arresting accused 3 and placing him inside the police van, he could still see the others who were running away. He then started the van and followed in the direction they were running. He arrested a second person, Nene, approximately 100 metres away on the road. He could still see the appellant fleeing toward the garage. He then drove towards the garage and he and his crew apprehended the appellant.

[12] Magwaza testified that when he spoke to accused 3 on the scene, accused 3 informed him that they had been hired by the driver of the Kia to offload the container but that it was the appellant who actually gave them the job. When he spoke to accused 2, he initially denied his involvement in the offence and mentioned that he was just walking in the area. Accused 3 however, mentioned that they were all together. When he spoke with the appellant, the appellant informed him that he was coming from Clairwood to the garage to buy tea. What was noticeable about the

appellant at the time was that he was dressed in indigo jeans and an orange jacket with 'Vusi' written on it.

[13] Magwaza confirmed that there was a delay of approximately an hour and 15 minutes between arresting the three accused and taking them to the police station to be charged, as they were performing patrol duties.

[14] During cross-examination, Magwaza testified that the appellant was talking on his cellphone when they arrested him and he mentioned to them that he was going to buy tea at the garage. He also informed Magwaza that he resided at Flamingo Court. Magwaza confirmed that he arrested accused 3 on the scene and accused 2 whilst walking on the road but did not arrest accused 4.

[15] Constable Mthembu confirmed he was on patrol duty in the Bayhead area with Magwaza when they received information that persons were offloading goods from a container in Bayhead Road. He corroborated Magwaza's evidence that five males were at the scene when they arrived. Three were on top of the container and two were standing on the floor. He also corroborated Magwaza's version in relation to the sequence of events and confirmed like Magwaza did, that three of the suspects were arrested, one at the scene and two close to the scene.

[16] In addition, Mthembu corroborated Magwaza's evidence that accused 3 was arrested a few metres from their position, that accused 2 was arrested approximately 100 metres away from them and that the appellant was arrested last, approximately 200 metres away from them. Similarly, Mthembu described the clothing which the appellant was wearing as an orange jacket.

[17] The investigating officer Percival Zandile Ndoli also served to corroborate the respondent's witnesses version in that he confirmed Magwaza and Mthembu's testimony that in addition to a Kia bakkie, an Isuzu and another unidentified vehicle were at the scene. Ndoli's investigations enabled him to confirm the registration numbers and letters of the Kia bakkie and resulted in the arrest of the driver of the Isuzu bakkie, namely accused 4. He obtained information from accused 4, who subsequently took him to a room at Glebelands Hostel where boxes of shoes were

recovered. At the time of his arrest, accused 4 confirmed that he was the driver of the bakkie. That then was the evidence for the respondent in the court a quo.

[18] The appellant testified that on or about 20 July 2011 at approximately 05h00 he was arrested by four uniformed police officers in a marked double-cab police van whilst near a garage in Bayhead Road. He had gone to the garage to buy airtime as he was having problems with the mother of his children who had left their premises. He also explained that from Flamingo Court where he stayed, to Bayhead Road, is the nearest place at night where he can buy airtime.

[19] Before arresting him, the police officers indicated to him that they were looking for a suspect who was wearing a red t-shirt. At the time of his arrest, the police seized his cellphone and placed him inside the police van. After placing him in the police van, the van drove a short distance, where after it came to a standstill. Another person whom he did not know was placed inside the back of the van. After the police van had driven away along Bayhead Road, it came to another standstill at the robot where he noticed a parked green motor vehicle.

[20] Accused 2 and 3 alighted from the green motor vehicle and got into the police van. There were now four of them in the police van. The appellant testified that he and the person who was arrested shortly after him were taken out of the police van and had a discussion with the police officers. He further testified that the police officers asked accused 3 who was inside the police van whether he knew any of them. Accused 3 identified the appellant. The second person who was arrested shortly after the appellant was then released.

[21] The appellant testified that following this, the police drove back toward the garage but stopped a short distance before the garage where they assaulted him, Magwaza being one of the persons who assaulted him. After the assault, the van drove off again and after a short distance came to a standstill next to a truck in Bayhead Road. The police officers knocked at the truck and he assumed that the driver of the truck was sleeping. After the police officers spoke to the truck driver, the appellant and other occupants in the police van were taken to a goods train near the

Umbilo Train Station. Thereafter they went to the Lamontville Police Station where he was once again assaulted.

[22] After a short while the police went inside the police station with accused 3. When they returned to the van accused 3 sat in the front with the police officers and not at the back of the van with him and accused 2. They then travelled to a house in Lamontville and thereafter returned to the Lamontville Police Station. They were placed in the police cells and questioned in relation to the goods. The appellant testified that he did not know accused 3 and 4, and had only met them on the day of his arrest. He only knew accused 2 by sight from Jacobs and he is neither a friend nor a work colleague. He also denied being in telephonic contact with accused 2.

[23] He confirmed that on the morning in question he was wearing an orange top but denied that he had been contacted telephonically by accused 2 after he had made enquiries about hiring accused 2's bakkie. He denied that accused 2 informed him that he would contact accused 4 and arrange for him to make his bakkie available so that they could assist in moving certain items. He further denied that he had given directions to accused 2 and that on the morning in question accused 2, 3 and 4 arrived at the Maydon Wharf area to assist accused 2's friend being him, the appellant.

[24] The appellant confirmed that at the time of the incident he was self-employed and owned a container where he sold cheap cigarettes, sweets, Zambuck and airtime. He disputed accused 3 and 4's version that they met with him and after confirming that they were the people whom accused 2 had sent, assisted him in offloading the items. He further disputed that they were offloading the items when they were arrested and that he had informed accused 3 and 4 to reverse the vehicle they were in towards the container which had already been opened. He denied that he started passing boxes to them and had jumped inside the container and that he passed boxes to accused 3 who was on the ground loading the boxes into the back of the bakkie.

[25] He denied accused 4's version that after a while accused 4 noticed no one was loading items and he then drove away with a few boxes that had already been loaded. He disputed Magwaza's version that he had informed him that he was going

to buy tea from the garage and not airtime. He testified that he and his fiancée had an argument and that she had left him and one of their children earlier that evening. He phoned her immediately there was a problem and ran out of airtime whilst talking to her.

[26] This is what necessitated him going to the garage in Bayhead Road at 03h00 to buy airtime. He could not provide an explanation as to why, if he sold airtime, he simply did not go to his container for more airtime instead of going to the garage in Bayhead Road especially as he testified that everything was left in the container after doing his daily work.

[27] The erstwhile accused 2 testified that on the day in question he received a telephone call from a person by the name of Stanley Dladla. Dladla asked if he could hire his van as he needed to pick up a load and have it dropped off. Accused 2 informed him that his van was not working but that he would arrange with someone else, who it subsequently turned out was accused 4, for his van to be used. The appellant informed him that they would meet at the robot near Bayhead Road and he would be dressed in a maroon jacket and jeans. Accused 3 and 4 proceeded to the robot controlled intersection after dropping him, accused 2 off. He had arranged that they would pick him up on the way back as the vehicle would be too full and he would not be able to travel with them. This was after they had assisted Dladla in offloading the items. Because they dropped him off a distance from the robot, accused 2 did not see Dladla nor observe what clothing he was wearing.

[28] The appellant's former co-accused, accused 3, Hlonipho Mgoma, testified that he knew accused 4 as he used to assist him in the transport industry as well as accused 2 whom he also knew from the transport industry. He stated that in the evening whilst they were braaing at Glebelands Hostel, accused 4 received a telephone call from accused 2 advising that someone wanted to hire transport. He and accused 4 left the hostel as accused 2 informed him that the customer was at Maydon Wharf.

[29] Whilst they were driving, accused 4 contacted accused 2 telephonically for directions as he was unfamiliar with the area. Accused 2 told him to come to Jacobs

Hostel where they picked him up and he drove with them and gave them directions to Maydon Wharf. Accused 2 explained to them that they must proceed towards Rossburgh Garage and continue to the robot where they would find the customer. Whilst they were travelling to meet the customer, accused 2 was on his cellphone.

[30] When they got closer to where they were to meet the customer, accused 2 told them to drop him at the garage and proceed to the robot where they would find the customer. They were given a description of the clothing the customer would be wearing so as to recognise him. The reason why accused 2 requested to be dropped off at the garage was as he wanted to buy airtime to call someone to pick him up. He and accused 4 then proceeded towards the robot where a male person appeared wearing indigo jeans and an orange jacket. This person who he identified as being the appellant then asked if they were the ones who had been sent by accused 2. They answered in the affirmative and he then drove with them to where the trucks and containers were.

[31] They proceeded toward a truck and the appellant asked them to reverse towards it, as he wanted them to assist him in loading these goods. Accused 4 reversed to the back of the truck where the container was and the appellant opened the container. Accused 3 and the appellant then started offloading the boxes. He was on the ground placing the items inside the van and the appellant was on top of the container forwarding boxes to him. There were other people present at the time assisting in the offloading of the container. At the time, accused 4 was in the driver's seat of his bakkie listening to the radio.

[32] Accused 3 testified that he hurt himself whilst loading the boxes and went to wash the blood off his face. When he returned from washing his face, he bumped into someone who was fleeing the scene. He saw that no one was in the truck and did not see the van in which he and accused 4 had arrived. He was then approached by two police officers who placed him under arrest. After his arrest, one of the policemen asked him whether he was in the company of anybody wearing a blue Adidas jacket. He responded and said that it was accused 2. He was placed in the police vehicle which drove away. After they had passed the garage on Rossburgh

Road, they spotted accused 2 drinking tea. The policemen stopped the motor vehicle and arrested accused 2.

[33] Accused 4, Makamakapoleli Vela Nkoswa (Nkoswa) testified that he knew accused 2 and 3. Accused 3 used to assist him with loading and offloading items. On the day of his arrest, he received a telephone call from accused 2 informing him that there was someone who needed goods to be transported. He is acquainted with accused 2 as they are both in the transport business. Accused 2 explained to him that his car had a breakdown hence the reason why he required him to assist him. Accused 2 provided him with directions as to where the customer was in Maydon Wharf. As he was not familiar with the area, he decided that it would be easier for him and accused 3 to leave the Glebelands Hostel, pick up accused 2 and take him with to show them where the customer was in the Maydon Wharf area.

[34] Whilst they travelled with accused 2 towards the Maydon Wharf area, accused 2 kept in contact telephonically with the customer who informed Accused 2 that the goods they were going to load were boxes. The customer had explained to accused 2 that the load would fill the van to capacity. As they neared the first set of robots in Maydon Wharf, he explained to accused 2 that he knew where to meet the customer. Because of the full load, he suggested to accused 2 that he arrange alternative transport to take him home. Accused 2 agreed to this and indicated that he would remain behind at the garage.

[35] Accused 2 also informed him that he would advise the customer that it would only be accused 3 and 4 who would meet him and that he would remain behind at the garage. After speaking to the customer on the telephone in their presence, accused 2 informed him that the customer had no problem with the arrangement. On accused 3 and 4's arrival at the robots, a male approached them whilst they were still in the car whom he identified as the appellant. After the appellant confirmed that it was accused 2 who had sent them, he informed them that he wanted them to load his stock which was in the truck. The appellant gave him directions and he then reversed his vehicle towards the truck. Accused 3 alighted and went to assist the appellant offload the boxes and load them into the van.

Judgment of the court a quo

[36] The court a quo in its judgment considered the evidence of the respondent's witnesses as well as the appellant's version and that of his former co-accused, accused 2, 3 and 4. The court was alive to the discrepancies in the evidence of these witnesses which related to the distances that the appellant said he was pursued before he was arrested when compared with the evidence of the two police officers and the fact that the appellant alleged there was another person who was arrested and released on the same night. In addition, there is also the discrepancy relating to the policemen denying taking all the accused to Lamontville to locate and search for the stolen items.

[37] The court a quo in determining whether or not the appellant's version was reasonably possibly true, considered his version as against that of the respondent's two witnesses Magwaza and Mthembu and his co-accused, accused 2, 3 and 4. It found that accused 2, 3 and 4 did not deny being involved in the loading and offloading of the items from the container and neither did accused 2 deny that he had been contacted by someone named Dladla to remove the goods from the truck.

[38] The court a quo was of the view that the issue to be decided was whether or not accused 2, 3 and 4 knew that they were committing theft. In rejecting the appellant's version and that of accused 2, the court relied on the evidence of the arresting officers Magwaza and Mthembu. The court found that despite the discrepancies in their evidence, it was clear and satisfactory in all material respects, specifically insofar as what they observed at the time of the arrest of the accused. The arresting officers corroborated each other in relation to where the appellant and accused 2 and 3 were at the time of their arrest. This was in line with accused 3's concession that he was arrested a short distance from the truck and the appellant and accused 2 indicated they were further away from the truck closer to the garage.

[39] It found that the appellant's version was fabricated and fell to be rejected as he was seen by the two arresting officers wearing an orange jacket on top of the truck. This evidence is corroborated by accused 3 and 4 who met the appellant at the robot and directed them to the truck. Both of them indicated that the appellant was wearing an orange jacket. In addition, accused 2 also indicated that the appellant was wearing an orange jacket. Of further relevance is that accused 4 also

identified the appellant as the person that he and accused 3 met at the robot prior to proceeding to where the container was.

[40] In my view, the court a quo was correct in rejecting the appellant's evidence that he was coming from Flamingo Court in Umbilo to buy airtime to phone the mother of his children. There is no reasonable explanation as to why he proceeded from Umbilo all the way to Bayhead Road to buy airtime. The appellant on his own version owned a container from which he sold airtime and there was nothing precluding him from taking the airtime from his container. In addition, the evidence of the respondent's witnesses suggested there were a number of garages on the way from Flamingo Court to where he was arrested, from which he could purchase airtime.

[41] The appellant also appears to have conflicting versions as to the reason why he was at the garage at that particular time. There was an indication that he was buying tea, which he reported to Magwaza when he initially encountered Magwaza. Then there is the explanation that he had gone to buy airtime from the garage. Both Magwaza and Mthembu confirmed that when they arrived at the truck they observed the appellant on top of the truck dressed in an orange jacket and when he saw them, he ran away. In addition, accused 3 corroborated the respondent's witnesses that at the time the policemen arrived, the appellant was on top of the truck passing the boxes to him and it was the appellant who took them to the container to be offloaded.

[42] Although the appellant alleged that accused 2, 3 and 4 were conspiring against him, there was no reason proffered as to why they would conspire against him and falsely implicate him. Both arresting officers confirmed that of the five males they initially observed at the container, all five attempted to escape and this was through the only exit point. The three persons whom they arrested were co-incidentally the same three persons who they had observed at the container. Although Magwaza testified that at some stage he placed accused 3 into the police van, his evidence was that he never lost sight of the appellant. The appellant had the same orange jacket on when he first saw the appellant at the truck and when he fled toward the exit. Mthembu confirmed the clothing of the persons he had arrested specifically that the appellant was wearing an orange jacket. He also described the jacket that accused 2 was wearing as a blue Adidas jacket.

[43] In addition, the evidence of the respondent's witnesses was that the road leading from the exit of the industrial park onto Bayhead Road was well lit. Magwaza testified that the streetlights were on which enabled him to see the appellant fleeing the scene. Furthermore, Mthembu corroborated Magwaza's evidence that while they were placing accused 3 into the back of the police vehicle they were facing the direction in which the appellant had fled. He also testified that there were no other persons on the road at the time and that the lights were 'very bright'[2]. In addition, when accused 3 testified, he indicated that he was able to see as '[t]here were two lights that was illuminating the place so clear such that you could pick the pin from the floor'.[3] Thus both Mthembu and Magwaza had sufficient opportunity to observe the appellant on the top of the truck wearing an orange jacket. The lighting does not appear to have been a problem as apart from the streetlights that were on, according to accused 3 the road was well lit by lights as well.

[44] Accused 3 similarly confirmed that the appellant was wearing indigo jeans and an orange jacket on the evening in question. The appellant never disputed that at the time of his arrest the clothing he wore was indigo jeans and an orange jacket. In fact, during the course of cross-examination, it was put on several occasions to the witnesses who testified that he was wearing an orange jacket.

[45] The court a quo correctly rejected the appellant's evidence as being false. I say so for the following reasons:

(a) The appellant claimed that he did not know accused 3 and 4. However, accused 3 and 4 corroborated each other and confirmed that after receiving a telephone call from accused 2 whom they knew, about a person who wanted to hire a bakkie, they proceeded with accused 2 to the area near Bayhead Road.

(b) Accused 2 informed them that the person who they were to assist would be waiting at the robot. Both accused 3 and 4 confirmed that it was the appellant who met them at the robots and enquired from them whether they had been sent by accused 2.

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[2] Page 71, line 5 of the transcript.
[3] Page 301, lines 21-23 of the transcript.

(c) Accused 3 and 4 confirmed that at the time they met the appellant at the robot he was wearing an orange jacket. Further, that it was the appellant who directed them to the container and asked accused 4 to reverse the bakkie to the container in order to offload the boxes from the container onto accused 4's bakkie. Accused 3 and 4 testified as to how the appellant assisted in offloading the boxes from the truck.

(d) Magwaza testified that when they placed the appellant under arrest, he informed them he was going to the garage to buy tea. In addition it was suggested to all the witnesses that he was arrested as he was about to enter the garage to purchase airtime. However, when the appellant testified he indicated that he was arrested after he had left the garage and after he had purchased the airtime and was some distance away from the garage at the time of his arrest. This was because at the time of his arrest he was on the cellphone talking to someone and the signal was a problem.

(e) The appellant testified that when the police arrested him, they informed him they were looking for someone with a red shirt. However, this was never put to Mthembu or Magwaza during their cross-examination.

[46] Although Ms *Barnard* made much about the court a quo's ruling relating to the admissibility of accused 3's statement, not much need be said concerning this and in any event, such would be inadmissible against the appellant. In the result, there is no merit in the appeal against conviction and the appeal ought to be dismissed.

Ad sentence

[47] The appellant submits that the sentence imposed on him being that of direct imprisonment is unduly harsh whereas his co-accused received wholly suspended sentences. As a consequence, the appellant indicates that although the court a quo is justified in differentiating between him and his co-accused as he had a previous conviction, a sentence of five years' direct imprisonment is disturbingly inappropriate and is also tainted by misdirection.

[48] He submits that the court a quo committed a misdirection in not considering imposing a sentence in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the Act). The reason for this is that the court a quo failed to make mention of s 276

in the judgment on sentence. In this regard, the appellant relies on the decision in *S v Truyens*[4] where the court held the following:

'[26] In my view, once the learned magistrate came to the view that a custodial sentence was the only appropriate sentence, but that a sentence in excess of five years was not called for, he was not only entitled to apply the s 276(1)*(i)* sentencing option but, on clear authority from this court, obliged to consider whether its application was suitable. . .

[27] I should add that there is a misconception that a sentence under s 276(1)*(i)* of the Act is a softer option than an ordinary sentence of direct imprisonment. It is not. It merely grants the commissioner the latitude to consider an early release under correctional supervision – after a sixth of the sentence is served – and only if the personal circumstances of the offender warrant it.'

[49] The appellant submits that a sentence in terms of s 276(1)*(i)* would serve to rehabilitate and punish him and encourage him to behave himself. Although he has a previous conviction, his personal circumstances are favourable and the sentence of five years' imprisonment may have the effect that he comes out of prison a worse person than when he went in. In the alternative, the court a quo could have also considered imposing a fine coupled with a lengthier period of imprisonment wholly suspended which would have had a punitive and deterrent effect.

[50] It is trite that an appeal court's power to interfere with a sentence imposed by a court a quo is limited. It does so when the sentence is vitiated by irregularity, misdirection or where there is a striking disparity between the sentence, which the appeal court would have imposed had it been the trial court.[5]

[51] In *S v Barnard*,[6] the Supreme Court of Appeal held the following

'A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

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[4] *S v Truyens* 2012 (1) SACR 79 (SCA).
[5] *S v Sadler* 2000 (1) SACR 331 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 10.
[6] *S v Barnard* 2004 (1) SACR 191 (SCA) para 9.

[52] Failing a misdirection, the appeal court is only entitled to interfere if the sentence is disturbingly inappropriate.[7] The appellant who was 36 years old at the time of sentence had a previous conviction for theft. According to the SAP69,[8] he received a sentence of five years' imprisonment wholly suspended for five years and three years correctional supervision. This offence was committed on 20 July 2011. At the time of sentence, he resided with his fiancée and their three children in Flamingo Court. He was employed at Sunray Logistics earning R7 000 a month.

[53] It was submitted on his behalf that a fine coupled with a wholly suspended sentence would be appropriate. The court a quo considered the personal circumstances of the appellant as well as his previous conviction. It also had regard to the value of the goods stolen from the truck being the sum of R150 000. It was of the view that the appellant did not show any remorse as he protested his innocence despite overwhelming evidence. His previous sentence was considered, specifically that correctional supervision was imposed but took the view that despite being given the opportunity to mend his ways, he did not do so. He had an opportunity to stay out of prison but did not heed this.

[54] As aggravating factors, the court a quo was of the view that the appellant was the 'mastermind' and he solicited the assistance of the other accused to assist him with offloading stolen items. Instead of being remorseful, the appellant elected to remain silent and consequently a non-custodial sentence and a fine was not an appropriate sentence.

[55] The court a quo said the following when differentiating between the sentence imposed on the appellant and that of his co-accused:

'I am of the view that the sentence of accused 1 will differ from 2, 3 and 4 because of accused 1's conviction of a similar offence and because of the role that accused 1 played and the evidence of accused 2, 3 and 4 that assisted the State somewhat. . . .[9]'

[56] I agree with the court a quo's finding that this was an opportunistic crime as the appellant was gainfully employed and this appeared to be a crime of greed. I further agree with the submission of Mr *Singh* that the appellant was aware of the

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[7] *S v Whitehead* 1970 (4) SA 424 (A) at 436C-E.
[8] Page 458 of the transcript.
[9] Page 416, lines 5-9 of the transcript.

truck stops and this was an added advantage. The facts of the *Truyens* decision above and that of the present matter are distinguishable. In *Truyens*, the appellant had stolen his employer's cattle to pay for medical costs for his three children. He was a mature first offender and the crime was one of need not one of greed.

[57] The appellant's previous conviction in which he was given correctional supervision served no bar to him committing a similar offence. Consequently, the court a quo was correct in finding that he had not learnt from his previous mistake and had not rehabilitated himself.

[58] Section 276(1)*(i)* of the Act reads as follows

'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –

. . .

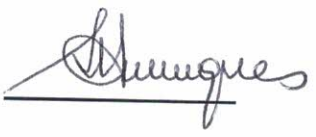
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

[59] I agree with Mr *Singh*'s submission that this is a sentencing option for the court to consider and is not mandatory. The use of the word 'may' clearly supports this interpretation. In the result, the appellant has not succeeded in showing a misdirection, or an irregularity warranting any interference by this court in respect of the sentence. Given the personal circumstances of the appellant and his previous conviction, the sentence does not induce a sense of shock nor is it unduly harsh.

[60] In the result, the following order is made:

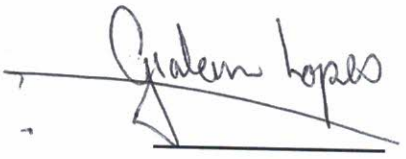
1. The appeal against conviction and sentence is dismissed.

2. The conviction and sentence of the court a quo are confirmed.



Henriques J

I agree



Lopes J

CASE INFORMATION

APPEARANCES

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Date of Hearing	:	14 February 2020
Date of Judgment	:	20 May 2020

(This judgment is delivered electronically)