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

CASE NO.:AR535/2019

In the matter between:

SIHLE ZAKHELE MAVUNDLA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Richard's Bay Regional Court (sitting as the court of the first instance in terms of sentence):

1 The sentence on counts 3 and 5 (malicious injury to property) is confirmed

2 The sentences imposed by the regional court are set aside and replaced by the following:

(a) On counts 1, 2 and 4 (housebreaking with intent to steal and theft) the appellant is sentenced to 3 years imprisonment in respect of each count.

(b) On count 6 (theft out of a motor vehicle) the appellant is sentenced to 12 months imprisonment

3 The sentence in count 5 will run concurrently with the sentence in counts 1, 2, 3, 4 and 6.

4 The appellant is therefore sentenced to undergo an effective term of 12 years imprisonment.

5 In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substitute sentence is antedated to 30 August 2019, being the date on which the appellant was sentenced.

JUDGMENT

Delivered on : 23 August 2024

Chithi AJ (Hadebe J concurring):

[1] The appellant was charged with six counts, namely counts 1, 2 and 4 for housebreaking with intent to steal and theft, counts 3 and 5 for malicious injury to property and count 6 for theft out of a motor vehicle. The matter was heard in the Magistrate's Court for the District of Lower Umfolozi held at Richard's Bay.

[2] The three counts of housebreaking were committed at or near Arboretum in the District of Lower Umfolozi on 5 December 2007, 24 December 2009, and 4 June 2010 respectively where an assortment of household contents with a total estimated value of R60 000.00 were stolen from three different houses.

[3] The two counts of malicious injury to property were committed on 19 December 2010 and 25 December 2017 respectively at or near Birdswood and Wild en Weide in the district of Lower Umfolozi. In respect of the first incident of malicious injury to property the appellant is alleged to have unlawfully and intentionally damaged a vehicle window the property of or in the lawful possession of Mr Serchard Ebersch with intent to injure him in his property. In respect of the second incident of malicious injury to property the appellant is alleged to have unlawfully and intentionally damaged the door of the house, the windows and burglar gate, the property of or in the lawful possession of Mr Peter Jacobus with intent to injure him in his property.

[4] The last count was that of theft out of a motor vehicle which was committed on or about 8 September 2017 at or near Arboretum in the District of Lower Umfolozi where the accused is alleged to have unlawfully and intentionally stolen 1 JVC car stereo with an estimated value of R1400 the property of or in the lawful possession of Mr Muzi Msane.

[5] There was a time delay between the commission of the offences, the appellant's arrest, which was on 20 March 2019, and his prosecution. This delay was contributed by the fact that the appellant could not be traced until he was traced and linked to the offences through his fingerprints.

[6] On 3 July 2019 the appellant pleaded guilty to all six counts and was accordingly found guilty as charged of all six counts.

[7] After the appellant was found guilty the respondent proved a catalogue of previous convictions against the appellant, including 17 previous convictions for housebreaking with intent to steal and theft.

[8] In view of the appellant's previous convictions the district court then stopped the proceedings and referred the matter to the Regional Court in Richards Bay in terms of s 116(1)*(b)* of the Criminal Procedure Act 51 of 1977 ('the CPA').

[9] On 30 August 2019, after the regional court had satisfied itself that the proceedings in the district court were in accordance with justice, it proceeded to sentence the appellant. The appellant was sentenced to 5 years imprisonment for each count of housebreaking, 2 years imprisonment for each count of malicious injury to property and 3 years imprisonment for theft out of a motor vehicle. The appellant was thus sentenced to an effective sentence of 22 years imprisonment, which he was required to serve consecutively.

[10] The appellant appeals to this court only against his sentence, having been granted leave to appeal by the regional court on 3 October 2019.

[11] The appellant's appeal is premised primarily on the basis that:

(a) The regional court over-emphasised the prevalence of the offence and interests of society to the detriment of the appellant.

(b) The regional court erred in not considering that the appellant pleaded guilty to all the six counts, and that four counts are for offences that were committed nine years before the appellant was sentenced.

[12] The appellant's grounds of appeal were further buttressed in the appellant's heads of argument as follows:

(a) The regional court misdirected itself in over-emphasising the seriousness of the offence and failing to strike a judicious balance with regards to all the sentencing factors.

(b) The regional court erred in failing to apply the provisions of s 280 of the CPA particularly in losing sight of the fact that when dealing with multiple offences an aggregate penalty must not be unduly severe.

[13] Before considering the grounds upon which the appellant seeks to assail his sentence the convenient starting point is the appellant's criminal record which triggered the referral of the case to the regional court for sentencing. The appellant's criminal record is as follows:

(a) The appellant was first convicted of housebreaking on 31 December 2006, which he committed on 21 April 2006. He was then sentenced to 3 months imprisonment.

(b) On 31 December 2008, he was convicted for housebreaking. The date of the commission of this offence is recorded incorrectly on the appellant's criminal record as 27 April 2012. However, if the cas number 286/01/2008 as reflected on the appellant's criminal record is considered, this offence must have been committed in January 2008 as opposed to 27 April 2012. The appellant was sentenced in respect of this offence to 3 years imprisonment.

(c) On 31 December 2009, the appellant was convicted of theft, which was committed on 18 June 2009 and he was sentenced to 3 months imprisonment.

(d) On 4 January 2011, the appellant was convicted of housebreaking which was committed on 24 July 2010, and he was sentenced to 18 months imprisonment.

(e) On 1 June 2011, the appellant was convicted of housebreaking which was committed on 28 August 2007 and he was sentenced to 3 years imprisonment of which 1 year was wholly suspended for 5 years on condition that the appellant was not convicted of a similar offence.

(f) On 12 November 2012, the appellant was convicted of housebreaking and malicious injury to property, which was committed on 12 June 2012, and he was sentenced to 3 years imprisonment with both counts being taken as one for purposes of sentence.

(g) On 20 January 2014, the appellant was convicted of two counts of housebreaking and one count of malicious injury to property which was committed on 8 March 2006. The appellant was sentenced to 3 years imprisonment in respect of each count of housebreaking with the sentences ordered to run concurrently and was cautioned and discharged for malicious injury to property.

(h) On 19 February 2014, the appellant was convicted of two counts of housebreaking, which were committed on 28 April 2012 and he was sentenced to 3 years imprisonment in respect of each count with the sentences ordered to run concurrently with the sentence, which the appellant was serving at the time as set out in sub-para (g) above.

[14] Ms *Citera*, on behalf of the appellant, argued that the cumulative sentence of 22 years imprisonment induces a sense of shock warranting interference by this court. She further argued that taking into account the cumulative effect of the sentence, an appropriate sentence in the circumstances would be an effective sentence of 10 years.

[15] Mr *Radyn*, on behalf of the respondent, relying on *S v Ngculu*[1] argued that a sentence of 22 years imprisonment was appropriate and would effectively punish the appellant and,

'importantly will cater for society's outrage at such conduct, lest we create the impression, unwittingly that owners whose property has been stolen may take the law into their own hands with impunity.'

In addition, Mr *Radyn* relied on *Dials v S*[2] where a sentence of 12 years imprisonment for three counts of house breaking was confirmed on appeal. Mr *Radyn* argued that a sentence of 22 years imprisonment was appropriate considering that the appellant, apart from the three counts of housebreaking with intent to steal and theft was also convicted of two counts of malicious injury to property and one count of theft. Moreover, the appellant had a series of related previous convictions.

[16] Before imposing the sentence, which the appellant seeks to assail, the regional magistrate considered various factors that included the seriousness of the offences and their prevalence within the court's area of jurisdiction. The court further considered the fact that the offences were premeditated in that they were committed during the day or over the weekend when the homeowners were away. Furthermore, the court considered the nature of the items which were stolen, being high end technical equipment including TV's, cameras, laptops, electric kettles and radios and the value of such items. In relation to the appellant's personal circumstances, the court considered that the appellant was 48 years of age. He was unemployed. However, from time to time he would be casually employed at Richards Bay Harbour to clean ships and earned between R400 – R500. He was not married and he had two minor children and one major child. While the major child lived with his mother, the minor children lived with the appellant. He pleaded guilty to the offences. However, in relation to the appellant having pleaded guilty she remarked that while this could be indicative of remorse, this could also have been triggered by the overwhelming evidence in the form of fingerprint evidence which linked him to the offences.

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[1] *Ngculu v The State* [2015] ZASCA 184 para 18.
[2] *Dials v S* [2013] ZAGPPHC 539.

[17] It is trite that sentencing discretion resides pre-eminently with the trial court. in *S v Malgas*[3] Marais JA enunciated the test as follows:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[18] Before passing sentence, the regional magistrate correctly recited the well-established principles in relation to sentencing. The regional magistrate remarked that she would consider the main objectives of punishment namely retribution, prevention, deterrence, and rehabilitation. She further took into consideration the traditional triad comprising of the crime, the offender/accused as well as the interests of society. She also considered the interests of the victims. Moreover, the regional magistrate reemphasised correctly in my view that punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy. However, this is not manifested in the ultimate sentence which she imposed.

[19] In assessing what would be an appropriate sentence the regional magistrate specifically remarked that

'you had received a maximum term of imprisonment in the district court and even that did not deter you. There are clearly no prospects of rehabilitation when it comes to you seeing

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[3] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

that you have made it your career to break into other person's homes and motor vehicles. You are a danger to society.'

[20] The remarks by the regional magistrate in paragraph 19 above appear to be the reason why the regional magistrate imposed an effective term of 22 years imprisonment upon the appellant.

[21] I agree that the offences of which the appellant was convicted are undoubtedly serious and warrant a serious punishment. I further agree that the series of the appellant's related previous convictions, as the regional magistrate correctly concluded, constituted an aggravating factor. Housebreaking on its own does not only constitute an invasion of the sanctity of the person's home, but also the right to the security of a person and the right to privacy.

[22] Moreover, I agree that when offences are committed at different places and different times it may well be inappropriate to order sentences to run concurrently.[4] However, this consideration on its own cannot justify the regional magistrate's failure to consider the cumulative effect of the number of years of imprisonment, which she imposed on the appellant. After all it was the '[regional] court's duty to take the cumulative effect into account as part of the sentencing decision as a whole, so as to prevent the offender undergoing an unjustifiably severe sentence'.[5] In any event it is trite that while 'the practice of taking more than one count together for the purposes of sentence is not sanctioned, it is equally not prohibited'.[6]

[23] In my view the regional magistrate materially misdirected herself by ignoring the cumulative effect of the sentence. An affective sentence of 22 years imprisonment in the circumstances of the case is disproportionally harsh and induces a sense of shock. *S v Dube* held that '[t]he test is trite —where the cumulative effect of a number of sentences

[4] *S v Kruger* 2012 (1) SACR 369 (SCA) para 9.
[5] *S v Willemse* 2022 (1) SACR 43 (WCC) para 28.
[6] *Jacobs and another v S* [2023] ZANWHC 60 para 69; *S v Immelman* 1978 (3) SA 726 (A) at 728D - 729A.

strikes one as excessive, appellate interference is warranted.'[7] Therefore, in the circumstances of this matter, this court is at large to interfere with the sentence.

[24] It is true that retribution and deterrence is required to come to the fore in serious crimes and the rehabilitation of the offender to play a relatively smaller role.[8] However, while the previous convictions of the appellant might be demonstrative that he was less open to rehabilitation it is trite that 'the determination of an appropriate sentence cannot be simply based on the accused's previous convictions. Put differently, an accused person should not be punished for the pat sins or indiscretions.'[9] One final factor while it is not individually decisive especially when the appellant is likely to be sentenced to a long-term sentence of imprisonment, which the regional court did not consider as part of its balancing exercise, is the fact that the appellant spent four months in prison awaiting his trial.

[25] Considering all the relevant factors, including the fact that the appellant spent four months awaiting trial and given his age at the time he was sentenced there remains a possibility that with age he may mend his ways. In respect of counts 1, 2 and 4 a sentence of five years imprisonment is not proportionate to the offences. Instead, a sentence of 3 years imprisonment in respect of each count is the one which would be appropriate. In respect of count 6 the appellant merely forced the door of the motor vehicle open and did not break the door itself or a window. He only stole from the vehicle a JVC radio, which was worth R1 400.00. A sentence of 3 years imprisonment in respect of count 6 was disproportionate to the offence and, in my view, an appropriate sentence is a sentence of 12 months imprisonment in respect of count 6.

[26] In the circumstances, I am of the view, that a sentence of 12 years imprisonment, which I propose below, would satisfy the aims of punishment, would be fair to society, the

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[7] *S v Dube* 2012 (2) SACR 579 (ECG] para 11.
[8] *S v Swart* 2004 (2) SACR 370 (SCA) para 12.
[9] *S v Maphenya* [2024] ZAWCHC 67 para 8.

victims and would still leave the door open to the possibility of the appellant being rehabilitated, no matter how slender the chances might be.

[27] In the result I make the following order:

(1) The sentence on counts 3 and 5 (malicious injury to property) is confirmed

(2) The sentences imposed by the regional court are set aside and replaced by the following:

(a) On counts 1, 2 and 4 (housebreaking with intent to steal and theft) the appellant is sentenced to 3 years imprisonment in respect of each count.

(b) On count 6 (theft out of a motor vehicle) the appellant is sentenced to 12 months imprisonment

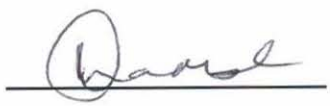
(3) The sentence in count 5 will run concurrently with the sentence in counts 1, 2, 3, 4 and 6.

(4) The appellant is therefore sentenced to undergo an effective term of 12 years imprisonment.

(5) In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substitute sentence is antedated to 30 August 2019, being the date on which the appellant was sentenced.

CHITHI AJ

I agree



HADEBE J

APPEARANCES

Counsel for the Appellant:	Ms P.M. Citera
Instructed by:	Pietermaritzburg Justice Centre
Counsel for the Respondent:	Mr. A. Radyn
Instructed by:	DPP (KwaZulu-Natal)
Dated of hearing:	14 June 2024
Date of Judgment:	23 August 2024