



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number:	CA&R 101/2016
Datum aangehoor / Date Heard:	27 / 03 / 2017
Datum gelewer / Date delivered:	31 / 03 / 2017

In the appeal of:

BRIAN JULIES

1st Appellant

SHAYEZAKHE MNGUNI

2nd Appellant

FIKILE MBULAWA

3rd Appellant

ANDREWS JOHN

4th Appellant

and

THE STATE

Respondent

Coram: Williams, J et Erasmus, AJ

JUDGMENT ON APPEAL

Erasmus, AJ

[1] The appellants (accused no 2, 3, 4 and 5 in the court *a quo*), were convicted in the Kimberley Regional Court on

14 January 2016 on the following charges and subsequently sentenced as follows:

- 1.1 The first appellant was convicted on counts 1, 2 and 3, to wit housebreaking with the intent to steal and theft, unlawful possession of 10 rounds of ammunition and unlawful possession of both a 9 mm semi-automatic pistol and .38 revolver. He was sentenced to 5, 3 and 8 years imprisonment respectively and it was ordered that the sentences be served concurrently.
- 1.2 The second appellant was convicted on counts 2 and 3, to wit unlawful possession of 2 rounds of ammunition and unlawful possession of a .22 revolver and sentenced to 6 months and 4 years imprisonment respectively and it was ordered that the sentences be served concurrently.
- 1.3 The third appellant was convicted on counts 1 and 3 of housebreaking with the intent to steal and theft and unlawful possession of a .30-06 hunting rifle and a shotgun and sentenced to 5 and 8 years imprisonment respectively and it was ordered that the sentences were to be served concurrently.

1.4 The fourth appellant was convicted on count 1, to wit housebreaking with the intent to steal and theft and sentenced to 5 years imprisonment.

[2] The appellants now appeal against their sentences, with leave of the court *a quo*.

[3] The factual basis for the conviction was that the fourth appellant, who had been employed by the complainant, had facilitated a housebreaking and subsequent theft at the residence of the complainant during the period 14 - 16 of June 2011. The fourth appellant had knowledge of the complainant's safe, as he had assisted with its installation. He, together with the first and third appellants, forcefully removed the safe from the wall to which it had been bolted. The items in the safe included five firearms, jewellery to the estimated value of R150,000.00 and World War II medals, which the complainant had inherited from his father. Apart from the firearms, none of the other items had been recovered. During a search of the third appellant's residence, the police discovered the .30-06 rifle and shotgun of the complainant. During another search the complainant's .22 revolver and 2 rounds of ammunition were discovered in the residence of the second appellant. During a search of the residence of accused no 1 in the court *a quo*, where the first appellant had been residing,

a medal belonging to the complainant and two handgun holsters of the stolen .38 revolver and 9mm pistol were found in a bag belonging to the first appellant. During a further search the .38 revolver and 9mm pistol and 10 rounds ammunition were also discovered where it had been hidden.

[4] From the sentence proceedings it appears that the court *a quo* had duly considered the triad of the personal circumstances of the appellants, the seriousness of the offence and the interests of society. The court *a quo* had also individualized the sentences, by determining each appellant's individual moral blameworthiness and, after doing so, had imposed different sentences in accordance therewith. The court *a quo* had also considered previous sentencing trends in determining the appropriate severity of the sentences imposed and had tempered a disproportional cumulative sentence by ordering that the sentences be served concurrently.

[5] In his heads of argument, with reference to comparative case law, Adv Van Zyl Nel correctly pointed out that substantial terms of imprisonment had been imposed for offences of unlawful possession of firearms and ammunition.¹ In respect of the offence of housebreaking

¹ *S v NDINISA* 2015 JDR 1943 (GP); *S v MADIKANE* 2011 (2) SACR 11 (ECG); *S v SWARTZ* 2016 (2) SACR 268 (WCC); *S v DELPORT* 2016 (2) SACR 281 (WCC)

with the intent to steal and theft, several cases which are comparable to the offences in *casu*, were referred to.² He, on behalf of the appellants, correctly conceded that no convincing arguments could be advanced which would render the sentences imposed startlingly disproportionate or that the sentences could be vitiated by material misdirection. Mr Van Tonder, who appeared for the appellants at the hearing of the appeal, was in agreement with the submissions of Mr Nel.

[6] Adv Kgatwe, on behalf of the respondent, also submitted that the court *a quo* had exercised its discretion properly and that the sentences imposed were appropriate and that the appeal should be dismissed.

[7] It is trite that the powers of a court of appeal to interfere with the sentence imposed by the trial court are limited. In *S v Obisi*³ it was stated:

"... a Court of appeal is reminded in this passage that it should not replace the sentence imposed by the trial court with its own, for the test is not whether the appellate tribunal would have imposed another form of punishment or not, but whether the trial court exercised its discretion properly and reasonably in imposing the sentence it imposed. The trial court is deemed to have exercised its discretion properly when the discretion is not based on a substantial misdirection whether as to law or fact or where the

² *S v NOMBEMBU* 2015 JDR 2228 (GJ); *S v MKHATSHWA* 2014 JDR 0783 (GP); *S v OLIVIER EN ANDERE* 1996 (2) SACR 387 (NC)

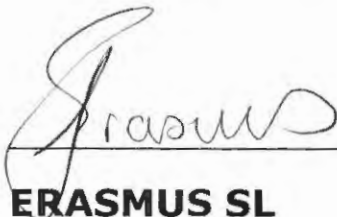
³ 2005(2) SACR 350 (W) at 353 par [7]

sentence imposed is not manifestly inappropriate and induces a sense of shock or not substantially different from that which the appeal Court would itself have imposed."

[8] We fully agree with the submissions of the counsel representing the appellants and respondent. Accordingly the appeal against the sentences stand to be dismissed.

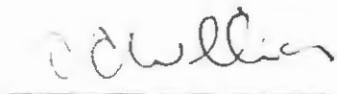
We make the following order:

THE APPEAL OF THE FIRST, SECOND, THIRD AND FOURTH APPELLANTS IS DISMISSED.



ERASMUS SL
ACTING JUDGE

I agree.



WILLIAMS CC
JUDGE

On behalf of the Appellants:	Adv. Van Zyl Nel (Adv. Van Tonder representing) oio Legal Aid SA
On behalf of Respondent:	Adv. K.M. Kgatwe (oio the NDPP)