



IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CA . 57/08

In the matter between:

RUTHOANE JOSEPH

Appellant

and

THE STATE

Respondent

MMABATHO

CRIMINAL APPEAL

HENDRICKS J, GURA J.

DATE OF HEARING : 12 December 2008

DATE OF JUDGMENT : 19 March 2009

COUNSEL FOR THE APPELLANT : Adv. S. Kuapane

COUNSEL FOR THE RESPONDENT : Adv. M.R. Rasakanya

JUDGMENT

GURA J.

Introduction

- [1] The Appellant was convicted in the regional court of housebreaking with intent to steal and theft. An imprisonment term of eight years was imposed. The appeal is directed against conviction and sentence, with leave of the trial court.

Factual Background

- [2] The following evidence on behalf of the Respondent was led at the trial on 31 August 2007. Superintendent Viljoen left his house at around 07h00, and at 14h00, whilst he was still at work, he received a report that his house had been broken into. A large number of articles were stolen and their value is estimated at R60 000.00. The thieves entered the house through the back door (kitchen door) by forcing the burglar bars open and breaking the door. Seemingly, an iron bar was used to cause this forceful entry. The fingerprints of the appellant were uplifted from this damaged burglar door. I now turn to set out the evidence of the Appellant.
- [3] He is unemployed and he earns a living by getting temporary work on day to day basis. It is customary for the work-seekers to wait at a corner in the town of Rustenburg hoping that prospective employers would engage them for the day. On the day of the incident, a white couple emerged at that corner and asked the appellant to help them to load their goods on their vehicle as they were moving out of that house. Incidentally, this house turned out to be that of Superintendent Viljoen. On arrival there, he (Appellant) realised that the burglar door was bent and the wooden door was damaged.

- [4] This couple informed him that there was an attempt to break in the previous week by some unknown people. They said that was the reason why they were moving out of that house. Most of the goods had been packed already and were just waiting to be loaded. Appellant helped them to load these goods on their vehicle. He remembers that at one stage he touched the burglar door with his hand and that is how his finger print was found there. Finally, they closed the wooden door and left the burglar bar ajar. They paid him R50-00 and they left. He believed that these people were the lawful owners of the house and its contents.
- [5] On appeal, Mr Kuapane argued that there is nothing in the Appellant's explanation which renders it not to be reasonably possibly true.
- [6] The regional court magistrate was not impressed by the explanation of the Appellant. He found it to be too strange to be reasonably possibly true. He found that the Appellant's version was that the couple broke into the house, ransacked it and packed the goods in the kitchen. They left the scene to look for someone who could assist them in loading them. They found this assistance in the person of the Appellant. Simple common sense dictates that thieves do not operate like this. What is common knowledge is that immediately after breaking in, the thieves will snatch what is of value to them and disappear into thin air. Accordingly, his explanation was rejected (by the court *a quo*) as a total fabrication.
- [7] Mr Kuapane argued that in as much as there was no evidence of the habitual modus operandi of burglars, the regional court magistrate was wrong in taking judicial notice of this fact.

- [8] I am not able to fault the magistrate in his reasoning. In my view, the magistrate was correct to marvel at the behaviour of this couple. After breaking in, they went about looking for someone to help load the goods. The version of the Appellant in this regard defies any logic and common sense.
- [9] I am also of the view that the behaviour of these “thieves” (the couple), raises serious questions. Their behaviour is reminiscent of an atmosphere at a picnic. There was no urgency and they were relaxed. After packing the goods, they drove along, looking for a labourer. They picked up on a stranger to assist them to commit a crime. This is risky. The stranger may be an acquaintance of Superintendent Viljoen. Appellant was aware on arrival, that there was forceful entry into the house. The burglar door and its wooden door were damaged. An iron bar which could have been associated with the forceful entry was lying on the floor of the house.
- [10] Despite that this couple was moving altogether to a new place, they left some of their goods in that house. This, notwithstanding, when all three people went out of premises, the house was not locked. It was left unattended. Indeed, this couple is a rare species of burglars. No reasonable court can regard an explanation such as this one as reasonably possibly true. The next question is whether or not the sentence imposed is appropriate.

Sentence

- [11] The duty to impose sentence is entirely within the discretion of the trial court. A court of appeal will not lightly substitute the discretion of the trial court with its own. However, a court of appeal will, in appropriate cases, interfere with the sentence of the trial court

where there is a material misdirection on the part of the trial court, or where the disparity between the sentence of the trial court and the sentence which the court of appeal would have imposed, had it been the trial court, is so marked that it can properly be described as shocking, startling or disturbingly inappropriate (**S v Malgas 2001 (2) SA 1222 (SCA) at 1232 A-E**).

- [12] In sentencing the Appellant, the court took into account his personal circumstances, the seriousness of the offence, and the interest of the society. These are his personal circumstances:- He is aged 30 and is single although he has two minor children. He maintains these children who are presently staying with their mother and he earns R2500-00 at Smith Dairy. He is a first offender and went as far as standard eight in schooling.
- [13] The following facts were regarded as aggravating features in the case. The value of the goods was high, (R60 000-00) and complainant's loss was not redeemed. Nothing of the stolen property was retrieved. The crime had been properly planned.
- [14] Mr Kuapane submitted that the court *a quo* over emphasized the deterrent element of the triad and therefore sacrificed the Appellant on the altar of deterrence. He referred this Court to a decision in **Ernest Seichoko and Another versus The State**¹. In this case the accused were sentenced to eight years imprisonment for house breaking with intent to steal and theft. On appeal, the sentence was reduced to five years imprisonment with a further two years imprisonment suspended on conditions.

- [15] In my view, the **Seichoko** matter is clearly distinguishable from the present case. There,

¹ Case No. CA 49/08 an unreported judgment of this Division delivered on 21 November 2008.

the accused were young, 20 and 21 years respectively. Both were first offenders. They pleaded guilty, and were convicted on their plea of guilty. They were remorseful. Almost all items which had been stolen were recovered. They had served four months in custody already as awaiting trial prisoners. There were aggravating features though. They stole from their employer and the value of the stolen goods was R72 230-00.

[16] This Court is of the view that an effective term of eight years imprisonment is too severe. It would be appropriate to suspend part thereof. Six years effective imprisonment is a more appropriate sentence and will also deter prospective criminals.

[17] Consequently, the following order is made:-

- (1) The appeal against the conviction is dismissed.
- (2) The appeal against sentence is upheld. The sentence is set aside and replaced with the following:-

“Eight years imprisonment of which two years is suspended for five years on condition that the accused is not convicted of housebreaking with intent to commit an offence committed during the period of suspension”.

SAMKELO GURA
JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS
JUDGE OF THE HIGH COURT

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