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

6/9/24

[redacted]

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEAL CASE NO: **CA36/2021**

In the matter between:

NKAGISANG DANIEL MOATSHE Appellant

and

THE STATE Respondent

REID J *et* SMIT AJ

HEARD: **20 JUNE 2024**
DELIVERED: **6 SEPTEMBER 2024**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **6 September 2024**

ORDER

i) The appeal against the conviction is dismissed.

ii) The appeal against the sentence is dismissed.

JUDGMENT

SMIT AJ

[1] The appellant, having been charged with housebreaking with intent to steal and theft, appeared in the District Court of Lehurutshe, where he was found guilty and sentenced to 3 years direct imprisonment. He now appeals against both the conviction and sentence. This matter is heard in terms of section 19(a) of the **Superior Court Act** 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument.

[2] The appellant's grounds of appeal against the conviction can be summated into 4 main categories, (a) the State did not prove the guilt of the appellant beyond a reasonable doubt; (b) the evidence produced by the State witnesses' were not satisfactory, being subjected to improbabilities and contradictions; (c) the evidence of the hostile witness could not have been relied upon as he has shown to be unreliable and his statement does not synchronize with the other evidence before the Court *a quo*; (d) the interference of the Magistrate in the cross-examination of State witnesses and his refusal to recuse himself.

[3] The appellant's grounds of appeal for the sentence rests thereon that (a) the sentence is inappropriate considering the accepted facts in mitigation; and (b) a shorter imprisonment term should have been imposed in light of the appellant's personal circumstances, the facts of the case and the rehabilitation element.

[4] The appeal is anchored to the Court *a quo's* evaluation of the witnesses; their evidence before it and the factual findings based thereon. An appeal court will not be easily inclined to interfere with the findings of a trial court's evaluation of evidence.

[5] In **AM and another v MEC Health, Western Cape (1258/2018) [2020] ZASCA 89**, it was held:

"Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court and the Constitutional Court as reflected recently in the following passage from ST v CT:

'In Makate v Vodacom (Pty) Ltd the Constitutional Court, in reaffirming the trite principles outlined in Dhlumayo, quoted the following dictum of Lord Wright in Powell & Wife v Streatham Nursing Home:

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or had palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

[6] To assess whether there was a material misdirection by the Court *a quo* a summary of the evidence is needed. From an analysis of the record, it becomes evident that the majority of evidence is circumstantial. When dealing with inferences and probabilities, a court of appeal holds a greater liberty to interfere with findings of the Court *a quo*. (**Minister of Safety and Security v Craig 2011 (1) SACR 469 (SCA)** at [58]).

[7] The State called 4 witnesses: (a) the complainant Emma Tshoe Tiro; (b) Mpotsang Moiloanyane; (c) Rabone Britley Motingwa; and (d) Koketso Ramesega. The appellant exercised his right to remain silent and did not testify.

[8] On 13 October 2019 the complainant's house was broken into and several items, including a two-door fridge, was stolen. The complainant, who was not home during this break-in, assembled an entourage including a councillor member and two young men from the community. The complainant commenced her own investigation and with her entourage, followed donkey cart tracks, which led them to the home of the appellant, where a donkey cart was found. The appellant was confronted and denied any involvement of theft. None of the stolen items were found.

[9] The complainant opened a case with the South African Police Service (SAPS), but she continued her own investigation. She testified that her son told her about a rumour doing the rounds in a

tavern about the appellant's involvement in the offence. Her son did not testify and on an evaluation of the evidence, no weight was placed on this rumour. This however caused the complainant to return to the appellant's home. The appellant ran away, but a man whose identity was unknown to the complainant, approached her. The complainant testified that this man told her that the fridge was at a place named Ntsweletsoku as it was sold to one Mpotsang Moiloanyane. During cross-examination of the complainant, it became apparent that this unknown man implicated himself and the appellant in the said housebreaking.

[10] The complainant travelled to Ntsweletsoku and met Mpotsang Moiloanyane. Moiloanyane informed the complainant that the appellant had sold him the fridge. Moiloanyane then handed the fridge over to the police officer who accompanied the complainant.

[11] Mpotsang Moiloanyane testified that the appellant did sell him the fridge. He explained how the appellant phoned him and requested him to purchase the fridge; how he met the appellant at the home of a family member of the appellant; and how he paid the appellant for the fridge.

[12] Rabone Britley Motingwa, being the police officer who was present when the fridge was discovered at Moiloanyane's residence, confirmed that Moiloanyane explained how he obtained the fridge from the appellant.

[13] Koketso Ramesega was the next witness to testify for the State. He was called to testify, due to a statement he made to police officials, wherein he explained that he assisted the appellant in off-loading certain items from a donkey cart into nearby bushes. Included in this load was a silver double door fridge.

[14] Koketso Ramesega testified in the Court *a quo* that his statement to the SAPS was not true and that he was assaulted by the community and forced to make the statement. After the trial-within-a-trial, wherein the police officials who took the statement were examined, the Court *a quo* declared Koketso Ramesage a hostile witness. The statement he made was accepted into evidence. It has to be questioned whether it was correct of the Court *a quo* to accept the statement, especially where the author thereof distances himself from the content.

[15] It was held in **S v Ndhlovu 2002 (6) SA 305 (SCA)** at par [31] that:

"The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interest of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interest of justice require its admission."

[16] Considering the approach in **Ndhlovu** and the totality of the circumstances under which the statement was made, I come to the conclusion that the Court *a quo* was correct in admitting the statement.

[17] The appellant also argues that the statement does not tally with the other evidence before the Court *a quo* and unreasonable weight was placed thereon. The other evidence before the Court *a quo* shows that: (a) donkey cart tracks were found at the Complainant's home, which tracks were followed to the appellant's place of residence; (b) during the Complainant's further investigation, she came across a man who implicated himself and the appellant and informed that the fridge is with Mpotsang Moiloanyane; (c) Mpotsang Moiloanyane confirmed that the appellant sold him the fridge. The statement of the hostile witness informs that he assisted the appellant to off-load amongst other items, the fridge and placed it in the bushes. The statement, therefore, sufficiently links in with the other evidence before the Court a quo.

[18] What happened next in the trial is quite significant. The State closed its case and appellant applied for a Section 174 discharge in terms of the **Criminal Procedure Act** 51 of 1977. In refusing the application, the Court *a quo* stated that the appellant should inform where he got the fridge from, and therefore that he has a case to answer. Notwithstanding that, it was apparent that the Court *a quo* was of the view that there is a *prima facie* case for the State, the appellant then closed his case without testifying. The position where

an accused person elects not to testify, was set out in **S v Boesak 2001 (1) SA 912** at par [24]:

> *"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following:*
>
> > *'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"*

[19] In was stated in **S v Chabalala 2003 (1) SACR 134 (SCA)** at par [21]: *"The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. … To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt."*

[20] A further aspect in this appeal, is the learned Magistrate's refusal to recuse himself. This recusal application came about when the trial within a trial was taking place. The purpose of the trial within a trial, was to determine whether Koketso Ramesega should be declared a hostile witness. The State called 3 witnesses, all of them being police officers: (a) Motsatsi Eunice Modibetsane; (b) Elton Magabe; and (c) Cecilia Banyana Moesi. It was during the cross-examination of Elton Magabe that the recusal application was launched by the defence. It was not a substantive application and launched from the bar.

[21] Magabe's evidence was to the effect that Detective Modibetsane requested him to take Koketso Ramesega to Captain Moesi, to make an admission statement. Therefore, Magabe's role was to escort Koketso Ramesega from one office to another. Magabe testified that he left Koketso Ramesega in the office with Captain Moesi. It is clear from his evidence that he was not present during

the interview Moesi had with Koketso Ramesega. Magabe was cross-examined on whether he heard the discussion between Moesi and Koketso Ramesega; and whether Koketso Ramesega informed Magabe why he is making an admission statement. Magabe continuously explained that he did not have such discussions with Kokesto Ramesega and that he was not present during the interview Moesi conducted.

[22] The appellant's legal representative then questioned Magabe on whether it was correct procedure for a complainant to bring a witness to the police station to make admissions. It is here where the Magistrate intervened. He highlighted that Koketso Ramesega was brought to the police station by the complainant as a potential witness, not to make admissions. The Magistrate did not allow this question to be put to Magabe. In response, the recusal application was launched. The Magistrate, in finding that this question was not proper, refused the recusal application.

[23] In evaluating the evidence which lead to the recusal application, it is apparent the concerned question was irrelevant and not in harmony with the facts already before the Court *a quo*. Further, the extent of Magabe's involvement in this matter, rendered this question being put to him, redundant. The appellant's complaint that the Magistrate did not recuse himself, is without substance. The trial record does not reflect that the Magistrate relied on irrelevant personal believes or predispositions; and it does not show that he was bias. The Court *a quo*, correctly so, stepped in to manage the proceedings.

[24] In determining whether the State established its case beyond a reasonable doubt, the following is considered:

S v Reddy and Others 1996 (2) SACR 1(A) at 8C-D:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum on Rex v Blom 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are firstly that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should by such 'that they exclude every reasonable inference from them save the one sought to be drawn.'"

Segalo v S (A543/2010) [2017] ZAGPPHC 41 (14 February 2017):

"[15] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal as follows in S v Chabalala 2003 (1) SACR 134 (SCA) at paragraph 15: The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favor of the State as to exclude any reasonable doubt about the accused's guilt…

[16] … Where does one draw the line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of R v Mlambo 1957 (4) SA 727 (A). The learned Judge deals, at 737F-H, with an argument (popular at the Bar then) that proof

beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. This approach was rejected, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A-C):

> *'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'"*

[25] An evaluation of the evidence before the Court *a quo*, in its totality, shows that the appellant was placed centre stage of this offence. Intertwining the appellant in this offence, is the donkey cart tracks followed from the complainant's home to that of the appellant. The stolen items were not found at the appellant's place of residence, as he off-loaded the items, including the fridge, from the donkey cart, into the bushes, with the assistance of Koketso Ramesega, as confirmed in Koketso Ramesega's statement. In dissipating the items, the appellant sold the fridge to Mpotsang Moiloanyane, which is the same fridge that belonged to the complainant. Faced with a *prima facie* case against him, and with the direction of the Court *a quo* that the appellant should explain how he came to be in possession of the fridge, the appellant chose not to testify. In considering all the elements, as elucidated through the evidence

before the Court *a quo*, which points towards the guilt of the appellant, and such elements which would point to his innocence, it is clear that the balance weighs heavily in favor of the State, to such an extent that it excludes any reasonable doubt about the appellant's guilt.

[26] Having considered the evidence that was placed before the Court *a quo*, no indication could be found that there was any demonstrable and material misdirection by the said Court. I am satisfied that the State proved its case beyond a reasonable doubt. There is no justification for interfering with the finding of the Court *a quo*. In the circumstances the appellant's appeal against the conviction must fail.

[27] Turning to the sentence by the Court *a quo*, the appellant states that 3 years direct imprisonment is so severe that it induces a sense of shock. The appellant suggests a sentence of 18 months to be more appropriate. The State maintains that 3 years direct imprisonment is justified.

[28] In approaching the sentence consideration the following stated in **S v Phillips 2017 (1) SACR 373 (SCA)** at paragraph 5, is kept in mind:

"It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were the trial court and then alter the sentence arrived at by the court, simply because it disagrees with it. To do so would be to usurp the sentencing discretion of the trial court. But where material misdirection has

been demonstrated, an appellate court is not only entitled, but also duty-bound, to consider the question of sentence afresh to avoid an injustice."

[29] The previous convictions of the appellant had been admitted. The appellant was sentenced on 21 May 2021. At that stage, his previous convictions were older than 10 years, stretching from 1993 to 2004. In the ordinary course, these convictions therefore do not play a role in considering the appropriate sentence and the appellant may be sentenced as a first-time offender. However, one conviction did receive some attention during the sentencing process. In 2003 the appellant was found guilty on a charge of robbery and sentenced to 12 years imprisonment. He was released on parole on 11 December 2017. The SAPS 69 indicate that the appellant is under parole supervision until 8 June 2045. No significant argument from the side of the appellant, regarding this date, was placed before the Court *a quo*. What is however significant is that the appellant was released on 11 December 2017, only to commit this concerned offence in October 2019. This raises concern as to whether the appellant was rehabilitated. I find it appropriate to have regard to this aspect, in considering the sentencing of the appellant.

[30] At the time of sentencing the appellant was 43 years old and had 3 minor children of which one was 8 years old. He was self employed selling water and wood, earning a weekly salary of approximately R600.00.

[31] Also relevant is that this offence is serious in nature and causes distress to members of society. In this instance, the complainant's privacy was invaded when unauthorized access into her home was gained, and her belongings removed. This would negatively impact on the complainant's, and the community's sense of security. During the trial it was stated that the value of the items taken was estimated to be R24 000.00. Only the fridge was recovered. It is also evident that this community has a serious loathing towards these types of offences, as the complainant gathered community members to assist her in locating her stolen items, taking the investigation upon herself.

[32] In **S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)** at paragraph 10, the following was stated:

"Sentencing is innately controversial. However, all the parties to this matter agreed that the classic Zinn triad is the paradigm from which to proceed when embarking on 'the lonely and onerous task' of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interest of the community are the relevant factors determinative of an appropriate sentence. In Banda Friedman J explained that:

> *The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the*

offender and his circumstances and the impact of the crime on the community, its welfare and concern."

[33] I am satisfied that the Court *a quo* cannot be faulted for concluding that the path of the appellant requires a more severe corrective measure. I am satisfied that a prison sentence could not have been avoided and that the Court *a quo* did not misdirect itself in having undue consideration to the old previous convictions, because if it did, a lengthier sentence would have been ordered. The sentence of 3 years imprisonment balances the impact of such offence on the society in general and the affected community specifically; and it might still serve a specific deterrent function not least if rehabilitative programmes are pursued in custody. I am satisfied that the sentence gives appropriate regard to the seriousness of an intrusion into a person's home whilst recognising that the offence is not one of robbery, with its own inherent associated violence that is not, as in this instance, present with housebreaking with the intent to steal and theft. It gives due regard to the appellant's personal circumstances, being a father of 3 with little income, whilst also balancing the damage relating to the unrecovered items and the value thereof.

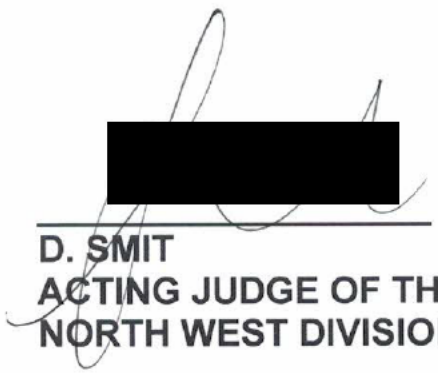
[34] Therefore the appeal against the sentence also fails.

Order

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

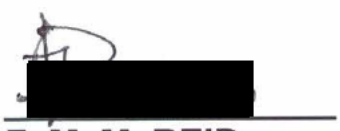
i). The appeal against the conviction is dismissed.

ii). The appeal against the sentence is dismissed.



D. SMIT
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree,



F. M. M. REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	:	**20 JUNE 2024**
DATE OF JUDGMENT	:	**6 SEPTEMBER 2024**

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