



Republic of South Africa

IN THE WESTERN CAPE HIGH COURT: CAPE TOWN

CASE No: A 154 / 2010

In the appeal between:

MTHOMBELI HLATHINI

Appellant

and

THE STATE

Respondent

NOTES FOR EX TEMPORE JUDGMENT ON 21 MAY 2010

AP LAUBSCHER, AJ:

INTRODUCTION

1. On 16 September 2009, in the Bellville Regional Court before the learned magistrate N Saba ("the trial court"), the Appellant was convicted on two charges of housebreaking with the intent to steal and theft.
2. On 18 September 2009, the Appellant was sentenced to two (2) years imprisonment on count one, two (2) years imprisonment on count two and, in terms of section 103(1) of the Fire Arms Control Act, 60 of 2000 (as amended), the Appellant was declared unfit to possess a firearm.

3. The Appellant was legally represented at all stages of the proceedings.
4. On 21 October 2009, the trial court granted the Appellant leave to appeal to this court against sentence only.

BACKGROUND TO THE CONVICTIONS

5. In respect of count one, the Appellant was found guilty of breaking into the residence of one Johan Blomerus in Durbanville on 8 June 2008 and stealing 2 firearms, jewellery, rings and alcohol.
6. In respect of count two, the Appellant was found guilty of breaking into the residence of one Kevin Bailey in Durbanville on 21 January 2009 and stealing R2 000,00 in cash and various other items totalling R26 650,00.
7. At the commencement of his trial, the Appellant pleaded not guilty to both charges. However, having regard to the totality of the evidence, *inter alia* evidence that the Appellant's fingerprints were found inside the two residences, the trial court was satisfied that the State had proved its case beyond reasonable doubt on both counts.

THE EVIDENCE REGARDING SENTENCE

8. The State proved no previous conviction and the Appellant testified in mitigation of sentence. Full details of his evidence are set out hereunder and need not be repeated in this section.

THE TRIAL COURT'S APPROACH TO SENTENCE

9. In sentencing the Appellant on 18 September 2009, the trial court:
 - 9.1 Took into account the Appellant's personal circumstances, to wit that he is unmarried, has one child who is five months old, had been in custody for seven months and had no previous convictions.
 - 9.2 Took into account the offences were serious and the Appellant violated the privacy of the complainants who were sleeping when he broke into their homes.
 - 9.3 Took into account that the Appellant denied responsibility for the commission of the offences from the start of his trial and only indicated he was remorseful after he had been convicted of the offences. The trial court noted this was not true remorse.
 - 9.4 Took into account the complainants valuable items were never recovered. In this regard, the trial court noted with concern is that the

firearms which were stolen could now be used to hijack or rob or kill innocent members of the community.

9.5 Took into account the interests of society which demand that people who take what others have worked hard for, should be dealt with harshly and that sentence should teach other possible offenders that such crimes will not be tolerated.

9.6 Took into account that the the Appellant had requested a suspended sentence. However, the trial court said a suspended sentence would send the wrong message to the community and would anger members of the community who look upon the courts for protection, as such the courts have to be seen to be protecting the community. People would take the law into their own hands if the court did not protect them.

9.7 Decided that in trying to balance the personal circumstances of the Appellant, the seriousness of the offences the Appellant was convicted of as well as the interests of society, the only suitable sentence in the circumstances, which would deter the Appellant from committing further crimes and which would deter other would be offenders, is a custodial sentence.

EVALUATION OF THE SENTENCE IMPOSED BY THE TRIAL COURT

10. On perusing the record it is clear that there was no misdirection on the part of the trial court.
11. Accordingly, this appeal can only succeed if there is a disparity between the sentence imposed by the trial court, and the sentence this appellate court would have imposed, if that disparity can properly be described as shocking, startling or disturbingly inappropriate (See: S v Malgas 2001 [1] SACR 469 A at paragraph [12]).
12. In essence, in making this determination, this and any court is compelled to consider all relevant factors, aggravating and mitigating as they may be, as well as the nature of the offence, the personal circumstances of the accused and interests of society (See: S v Zinn 1969 [2] SACR 537 A at 540).
13. The mitigating factors in this Appeal are:
 - 13.1. The Appellant was born on 6 June 1987 and is 23 years of age.
 - 13.2. The Appellant has a five month old child (at sentencing – at appeal approximately thirteen months old) and was living with the mother of the child at the time of his arrest.

- 13.3. The Appellant did not have a permanent job but would do garden work when employed as such by different people and he earned approximately R450.00 per week in this manner.
- 13.4. The Appellant was in good health.
- 13.5. The Appellant asked the court to impose a suspended sentence so that he could look after his child and the mother of his child.
- 13.6. The Appellant's mother was still alive, his father had passed away and he has no brothers or sisters.
- 13.7. The Appellant was in custody for seven months (at sentencing – at appeal approximately fifteen months).
- 13.8. The Appellant is a first offender with no previous convictions.
14. The aggravating factors in this Appeal are:
 - 14.1. The two firearms stolen from Mr J Blomerus (Count one), were not recovered and are now in circulation endangering the community at large.

- 14.2. The value of items stolen from Mr K Bailey (Count two), consisted of a cash amount of R2 000,00 and various other items totalling R26 650,00.
 - 14.3. Both complainants (and their insurers) suffered financial losses as no stolen items were recovered.
 - 14.4. In both cases the Appellant was not deterred by the presence of people sleeping inside the relevant houses when he broke into them.
 - 14.5. The Appellant showed no remorse on his account and only did so when asked by the prosecutor and the trial court if he had any remorse.
15. The interests of society in this Appeal dictate that:
- 15.1. An appropriate and balanced sentence needs to be handed down which will deter other persons from committing the same offence while also satisfying society's desire for retribution.
 - 15.2. The possibility of rehabilitation of the individual has to be considered.

CONCLUSION

16. In my opinion, in view of the factors listed above, there is no disparity between the sentences imposed by the trial court and the sentences this appellate court would have imposed, let alone a disparity which is "shocking, startling or disturbingly inappropriate".
17. Moreover, in my opinion, the imposed sentences do indeed satisfy and balance all the relevant requirements set out hereinbefore.

THE ORDER

18. Accordingly, in my opinion, the Appellant's appeal against the sentences imposed by the trial court should fail and the sentences imposed by the trial court should be confirmed.

AP LAUBSCHER

MEER, J: I agree and it is so ordered.

YS MEER