REPUBLIC OF SOUTH AFRICA

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

8/09/2017
DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL NO: A66/2017

In the appeal of:

LESOLLE, ERIC — **Appellant 1**

SEMENYA, MAKGABA — **Appellant 2**

and

THE STATE

JUDGMENT

VUMA AJ

INTRODUCTION

[1] This is an appeal against sentence by both appellants. On 21 January 2015 both

appellants were convicted in the Wynberg Regional Court on one count of housebreaking with intent to steal and theft. On 9 April 2015 each appellant was sentenced to seven (7) years direct imprisonment.

[2] After being granted leave to appeal against their sentence only, both appellants petitioned the Judge President for leave to appeal the conviction, which application was refused. Thus, the only issue before this court is the question of sentence imposed on each appellant.

[3] Both appellants were legally represented and pleaded not guilty to the charge mentioned above.

[4] Both appellants had handed in a correctional supervision and probation officers' report (the reports) which recommended for both appellants a sentence option in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

[5] The only question for determination by this court is whether, by imposing a sentence of seven years imprisonment in respect of each appellant, the magistrate's decision is open to attack by the appeal court.

THE SUMMARY OF THE FACTS LEADING TO THE APPELLANTS' CONVICTION

[6] The appellants were found guilty of having broken into the business premises of their former employer, namely ATM Solutions, and then stealing an ATM test key pad, x-scale board test card and a digital camera belonging to ATM Solutions.

[7] ATM Solutions is a company whose business includes the construction of ATM machines and the testing of such ATM machines prior to same being installed to allocated sites. ATM Solutions puts test notes in their machines and uses test cards to draw money as if the ATM were on site thereby testing the proper function thereof.

[8] At the time of the commission of the offence, the first appellant was no longer in the employ of ATM Solutions, having been discharged therefrom three (3) months prior as he was caught stealing from an ATM machine with one of the Company's test cards.

However, the second appellant was still employed as one of the Company's investigators.

GROUNDS OF APPEAL BY BOTH APPELLANTS:

[9] The appellants contended that:

9.1 the trial court overemphasized the fact that both appellants did not show any remorse.

9.2 the trial court over-emphasized the gravity of the offence over the personal circumstances of each appellant.

9.3 The trial court did not furnish any reason why a sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977("the Act") was not an appropriate sentence.

9.4 The sentence is severe and it is shockingly harsh and inappropriate.

9.5 In respect of the second appellant, the trial court failed to have regard to the best interests of the second appellant's mentally disabled child.

THE FIRST APPELLANT'S MITIGATING FACTORS

[10] The mitigating factors which can be extracted from the first appellant's circumstances:

10.1 He is a first offender;

10.2 He was 24 years old at the time of the imposition of the sentence;

10.3 He is married to his unemployed wife and they have one child (now 5 years old);

10.4 At the time of the commission of the offence he was unemployed, having

just lost his job with ATM Solutions;

10.5 He matriculated in 2006 and obtained a certificate in computers at Edusa College.

THE SECOND APPELLANT'S MITIGATING FACTORS

[11] The mitigating factors which can be extracted from the second appellant's circumstances:

11.1 He is a first offender;

11.2 He was 54 years at the time of imposition of the sentence;

11.3 He is a widower with two children which children, at the time of sentencing, were aged 14 and 18 years respectively. The 18 year old child is mentally disabled and the second appellant has been his sole and primary care-giver since the passing of his wife in 2003. He never remarried.

11.4 At the time of the commission of the offence he was employed by ATM Solutions.

11.5 He holds a B.A. degree from UNISA.

AGGREVATING FACTORS

[12] An aggravating factor which can be extracted from the first appellant's circumstances is that at the time of the commission of the offence, he was out on bail in respect of a similar offence.

[13] An aggravating factor which can be extracted from the second appellant's circumstances is that prior to his employment at ATM Solutions, he was employed by the SAPS as a police officer for a period of almost 10 (ten) years.

CASE LAW

[14] The enquiry regarding the imposition of sentence on appeal is not whether the sentence is right or wrong but whether the court acted reasonably or properly in the exercise of its discretion (see *S v Obisi 2005 (2) SACR 350 (W)* para 8). The question whether the trial court exercised its discretion reasonably depends on whether, considering all the circumstances of the case, the trial court could have reasonably imposed the sentence which it did (see *S v Obisi* para 8).

[15] In addition, a court of appeal will only interfere with a sentence of a trial court where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection (see *S v Salzwedel and Another 1999 (2) SACR 685 (SCA)* para 10). Since *S v Rabie 1975 (4) SA 855 (A)* at 865B-C it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such discretion. The test then is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate (see *S v Rabie* at 857D-F).

[16] In *S v Salzwedel* at 591G the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[17] The question relating to remorse was held in *S v Matyityi 2011 (1)SACR 40 (SCA)* at 47a-d by Ponnan JA as follows:

> 'Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her

confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

[18] The issue relating to the best interests of the child was raised in *S v M 2007 (2) SACR 539 (CC),* where a 35 year old repeat offender of fraud and mother of three minor boys aged 16, 12 and 8 was sentenced to 4 years direct imprisonment. This, despite her being the primary caregiver to her children and the recommendation by a correctional officer that she be sentenced in terms of section 276(1)(i) of the CPA. The Constitutional Court overturned the sentence on the basis that it was not in the best interests of the minor children relying on the provisions of section 28(2) read with section 28(1)(b) of the Constitution, 1996 in doing so.

[19] In respect of correctional supervision as a sentence option, the Constitutional Court held that: 'The introduction of correctional supervision with its prime focus on rehabilitation, through section 276 of the Act, was a milestone in the process of humanizing the criminal justice system.' As was observed by Kriegler AJA (as he then was) correctional supervision should not be categorized as a lenient alternative to direct imprisonment (see *S v R 1993 (1) SACR 209 (A) (1993 (1) SA 476)* at 221h (488G(SA)).

[20] According to the triad formulated by the Appellate Division in *S v Zinn 1969 (2) SA 537 (A),* the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence.

ANALYSIS AND FINDINGS

[21] **Remorse**

What is common cause is that neither the first nor the second appellant expressed any remorse. I do agree with the appellants' submission that the trial court seemed to have factored that in by over-emphasizing it. So much is clear from the following: 'None of you showed the slightest bit of remorse'. As stated in the *S v Matyityi supra*, I am of the view that indeed, the question of remorse could only play a role if the appellants had

shown remorse for their conduct. Accordingly I am of the view that the trial court took into account and over-emphasized a factor which it shouldn't even have considered, given its absence. In a constitutional democracy, being remorseful is often (not always) evidenced by pleading guilty and can (depending on the circumstances) be considered mitigatory. The oppposite cannot be regarded as aggravating. It is an accused's person's right to plead not guilty and no inference can or should be drawn from such fact. It would appear that the court a quo erred in this regard which would entitle this court to interfere.

[22] **In respect of second appellant, the trial court under-emphasized the best interests of the child**

22.1 In the probation officer's report, the issue relating to the second appellant's mentally disabled child was mentioned. What is raised therein is primarily the options to be explored in respect of the minor child, namely, either for him to be taken-in by the second appellant's sister who is based in Limpopo, failing which, the minor child is to be institutionalized in a facility that caters for mentally disabled persons.

22.2 What is common cause is that, during the sentencing proceedings, the trial court did not hold an enquiry as to the child's alternative care or investigate what the status quo *vis-à-vis* the child was, given the suggestions in the report. Neither did the trial court enquire what the potential impact of the second appellant's custodial sentence may be on the minor child.

22.3 In handing down the sentence, the trial court mentioned that it is evidence (*sic*) from the first report that the second appellant's mentally challenged child had been catered for. I am not pursuaded that the magistrate's remark is evident or confirmed in the report which he refers to. All that the said report does is to state the options to be explored in respect of the child. Accordingly I find is that there is nothing in the trial court's judgment which supports the trial court's finding, namely: "*With regard to accused 2 (second appellant in this appeal), I have taken into account your personal*

circumstances, especially the interest of the child. As it is evidence from the first report however this child had been catered for".

22.4 I am of the view that the trial court passed sentence without giving sufficient independent and informed attention, as required by section 28(2) read with section 28(1)(b) to what impact the sending of the second appellant to prison will bring upon the child. Thus, the trial court failed to comply with the duties bearing upon a court sentencing a primary caregiver of a mentally disabled child as laid down in the *S v M supra.*

22.5 As was held in *S v M supra*, the comprehensive and emphatic language used in section 28 of the Constitution indicates that law enforcement (including the courts) must be child-sensitive. The emancipatory character of section 28 presupposes that the sins of the fathers should not be visited upon their children.

22.6 The brunt that would have been borne by the second appellant's child given the latter's prolonged absence is unimaginable, but could only have best been decried by the former late President Nelson Rolihlahla Mandela when he said "*The true character of a society is revealed in how it treats its children".*

22.7 The failure by the trial court to investigate and enquire about the care of the child in itself constitutes a misdirection on the part of the magistrate.

22.8 However, the aggravating factor in respect of the first appellant is an indication that the pending criminal case he had at the time of the commission of the offence *in casu* had not taught him anything.

22.9 In respect of the second appellant, I am of the view that his former employment at the SAPS as a police officer should have acted as an incentive for him to be a model citizen, in particular to the first appellant.

[23] I am of the view that both appellants succeeded to show that the regional magistrate misdirected himself in holding the view that '*direct imprisonment is the rule*

rather than exception.' I am satisfied that the aforegoing misdirections entitle this court to interfere. I am of the view that correctional supervision would have been an appropriate sentence for both appellants, given each appellant's individual circumstances.

CONCLUSION

[24] I conclude that in the light of all the circumstances of this case, both appellants succeed in their appeal against sentence and that for each appellant, a sentence of five years imprisonment in terms of s 276(1)(i) would be appropriate.

[25] In the result the following order is made:

25.1 The appeal is upheld.

25.2 The sentence imposed by the Wynberg Regional Court is set aside and replaced with the following:

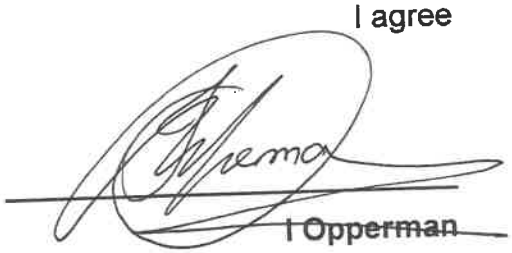
Each accused is sentenced to 5 (five) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

25.3 In terms of section 282 of the Criminal Procedure Act 51 of 1997 the sentence is antedated to 9 April 2015.

pp L VUMA

Acting Judge of the High Court

I agree



I Opperman

Judge of the High Court

Heard on:	31 July 2017
Judgment delivered on	11 September 2017
Appearances:	
For first appellant:	Adv J Huysamen
For second appellant:	Adv N Mtsweni
For Respondent:	Adv M Moleko