

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

22-03-2017 *J.1*

CASE NO: A328/16

In the matter between:

SEJAKE, THEMBA JONAS

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

SHANGISA AJ:

Introduction

- [1] The appellant was convicted on one count of housebreaking with intent to rob and robbery read with s 51 (2) of the Criminal Law Amendment Act 105 of 1997 and one count of assault with intent to do grievous bodily harm.
- [2] Consequently, on 12 March 2012 the appellant was sentenced to 16 years' imprisonment on the count of housebreaking with intent to rob and robbery read with s 51 (2) of Act 105 of 1997. Similarly, he was sentenced to 10 years' imprisonment on the count of assault with intent to do grievous bodily harm. The cumulative effect of both sentences was that the appellant was sentenced to an effective term of 26 years' imprisonment. The appellant was further declared unfit to possess a firearm.
- [3] The appellant was granted leave to appeal only against his sentence.
- [4] The conviction and sentence arose from the following two incidents. The subject-matter of the first count related to an incident in which the appellant and his accomplices broke into a shack occupied by two gentlemen who were complainants in the ensuing trial. Uncontested evidence led at the trial revealed that the occupants of the shack were assaulted with an assortment of objects which included wooden sticks and bricks. They were further robbed

of their valuable possessions and items which included cash, a wrist watch and a Samsung cellphone.

- [5] The second count of assault with intent to do grievous bodily harm concerned the attack and assault on a shop owner, one Mr. Mondli Makunga. The appellant and his accomplices assaulted and stabbed Makunga who sustained some injuries on his forehead and other parts of his body.
- [6] The abovementioned incidents, which resulted in the charges being preferred against the appellant, occurred on 05 December 2010.

The Sentence

- [7] The first count of housebreaking with intent to rob and robbery attracted a prescribed minimum sentence in terms of Act 105 of 1997. It follows therefore that it required the trial court to find the presence of substantial and compelling circumstances to warrant a deviation from the prescribed minimum sentence.
- [8] On sentence, the learned magistrate considered the personal circumstances of the appellant in respect of both counts. At the time of his arrest, the appellant was 25 years old. He had previously been employed as a security

officer. He had no previous convictions, and had already spent a period of 19 months in custody awaiting trial.

- [9] In aggravation, the learned magistrate also took into account the seriousness of the offence of robbery and the prescribed minimum sentence it attracted. He further considered the severity of the assault on the complainant on count 2 which resulted in him sustaining severe injuries.
- [10] On the first count of housebreaking with intent to rob and robbery, the learned magistrate laid much emphasis on the fact that it was prevalent in the area of the court's jurisdiction. He accordingly reasoned that it needed to be met by a severe sentence that would pose as deterrence to other would be perpetrators. In that regard, the learned magistrate imposed a sentence of 16 years.
- [11] It is worth noting that a period of 15 years' imprisonment is the prescribed minimum sentence in terms of Act 105 of 1997 for the offence of housebreaking with intent to rob and robbery. It goes without saying that the magistrate's sentence of 16 years inexplicably exceeded the prescribed minimum sentence. We note that the learned magistrate did not proffer any reasons for his decision to impose a sentence which was in excess of the prescribed minimum sentence. The record contains no reasons for his decision. It is clear that the learned magistrate failed to consider the mitigating

factors which militated against the imposition of a severe sentence of 16 years or even the prescribed minimum sentence.

- [12] What is more, the learned magistrate appears to have misdirected himself by placing undue weight on the prevalence of the offence in the area of the court's jurisdiction. Accordingly, he committed a material misdirection by failing to view the circumstances of the offence as a whole and accord the personal circumstances of the appellant some consideration. It would appear from the evidence on record that before his conviction the appellant had led a relatively crime-free life. He had no previous convictions and had been employed as a security officer.
- [13] Furthermore, although the incidents forming part of the two counts were separate, it is worth noting that they occurred on the same day. It is difficult to see how a cumulative sentence of 26 years could be appropriate in the circumstances of the present matter.
- [14] In our view, the learned magistrate's failure to give reasons for imposing a sentence that exceeded the prescribed minimum sentence constitutes a material misdirection which vitiates his sentence. Furthermore, the learned magistrate ought to have considered the period of 19 months the appellant had already spent in custody whilst awaiting the finalization of his trial. That is a material factor that the trial court ought to have taken into account when

considering the appropriate sentence. It is a notorious fact that conditions in prison are much worse and harsher for trial-awaiting- prisoners than their convicted counterparts.

- [15] In her submissions before us, counsel for the state fairly conceded that the sentence of 10 years on the count of assault with intent to do grievous bodily harm was unduly harsh. That is all the more so given that the assault occurred in circumstances where there was clearly a fight at the tavern among patrons who included the appellant. On a proper appraisal of the evidence on record, it could justifiably be said that the assault was by no means premeditated but occurred on the heat of the moment. In sum, the learned magistrate failed to take into account the circumstances of the assault.
- [16] In the circumstances, we find that the learned magistrate's cumulative sentence of 26 years is liable to be set aside since it is vitiated by a material misdirection. We are thus at large to impose a new sentence in respect of both counts.
- [17] In our view a sentence of 5 years' imprisonment is appropriate in respect of the count of assault with intent to do grievous bodily harm. Further, on the first count of housebreaking with intent to rob and robbery, we find that a sentence of 10 years' imprisonment would be appropriate.

The Order

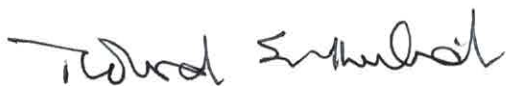
I accordingly propose the following order:

1. The appeal against sentence is upheld.
2. On the first count of housebreaking with intent to rob and robbery read with section 51(2) of Act 105 of 1997, the sentence of 16 years is set aside and substituted by a sentence of 10 years' imprisonment.
3. On the second count of assault with intent to do grievous bodily harm, the sentence of 10 years is set aside and substituted by a sentence of 5 years imprisonment.
4. Accordingly, the effective sentence of 26 years is set aside and substituted by an effective sentence of 15 years in respect of both counts.



Shangisa AJ
Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

I agree.
And it is so ordered.



Sutherland J
Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 16 March 2017

Delivered: 22 March 2017

For the Appellant:

Adv JL Kgokane,

Instructed by Legal Aid South Africa.

For The State:

Adv NP Serepo.