REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A152/2017

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

07/11/2019 .....

Date **ML TWALA**

In the matter between:

SESHOKA: ABRAHAM **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

TWALA J

[1] Central to this appeal is the issue whether or not the sentence of 15 years imprisonment imposed by the Regional Court Magistrate, Randburg, for housebreaking with the intention to steal and theft of the sum of R1.3m is strikingly or startling or disturbingly or shockingly inappropriate.

[2] The appellant was charged with the offence of housebreaking with the intention to steal and theft of R1.3m and was warned in terms of the provisions of Section 51 of the Criminal Law Amendment Act, 105 of 1997. On the 20th of August 2014 the appellant was convicted as charged and sentenced to 15 years imprisonment by the Magistrate Court sitting in Randburg. On the 25th of April 2019 the appellant was granted leave to appeal against the sentence by the Court a quo.

[3] It is apparent from the record that on the 4th of February 2013 the appellant and two other people broke into the business premises of the complainant, a Mr Khan and stole a sum of R1.3m. The appellant was linked to the crime by his fingerprints which were found on an advertising board in the office of the complainant. He was standing trial with his brother who was later acquitted of the crime.

[4] Counsel for the respondent contended that although the appellant was warned that for the offence of which he was charged, section 51(2) of the CLAA which prescribes the minimum sentence of 15 years imprisonment for first offenders

may apply, the court a quo never the less did not impose a sentence in terms of that legislation. It was further contended that the aggravating factors in this case far outweigh the mitigating circumstances of the appellant. Of the R1.3m stolen from the complaint, only R40 000 was recovered. The offence was carefully planned as the appellant was arrested by chance since his finger prints were found on an advertising board which was inside the complainant's office. The perpetrators managed to evade the security system including the cameras fitted to the premises. The further aggravating factor being that the complaint did not have insurance covering his business from this kind of crime and that the crime has put his business and himself under a lot of stress and has since developed hypertension. There was no misdirection on the part of the court a quo in imposing the sentence, so the argument goes, as it correctly sentenced the appellant to 15 years imprisonment.

[5] It was contended by counsel for the appellant that the appellant was a first offender and only 34 years of age when he committed this offence. He was single with three children aged 2, 3 and 13 years with the younger two children left in the care of his living in partner. He was self-employed as a panel beater earning an income of R10 000 per month. He passed standard 6 at school. He was in custody awaiting trial for a period of almost 18 months and the court a quo failed to take these into consideration. The court a quo misdirected itself when it exercised its discretion in sentencing the appellant to a sentence prescribed by Act 105 of 1997 when it in fact stated that it was not going to rely on that Act.

[6] It is trite that sentencing is pre-eminently the domain of the trial Court. The Court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial Court did not exercise its discretion judiciously or that the exercise of such a discretion was patently wrong. Put differently, if

the Appeal Court is of the view that the sentence imposed is disturbingly inappropriate.

[7] In *S v MALGAS 2001 (1) SACR 496 (SCA)* the Supreme Court of Appeal stated the following:

> *"A Court exercising appellate jurisdiction cannot, in the* absence *of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court."*

[8] In *S v Hewitt [2016] ZASCA 100; 2017 (1) SACR 309 (SCA)* the Supreme Court of Appeal stated the following:

> *"It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."*

[9] I am unable to disagree with counsel for the appellant that the court a quo did not sentence the appellant in terms of the s51 of the CLAA. Although the court a quo exercising its discretion under the common law in imposing the sentence of 15 years imprisonment, it appears that it did not consider the triad properly and or over emphasised the one above the other. Section 51 of the CLAA prescribes a minimum sentence of 15 years imprisonment for the offence of which the appellant was convicted unless the appellant can show and establish that substantial and compelling circumstances exist which enjoined the court to deviate therefrom. It is my considered view that the court should not only consider the traditional triad under the circumstances but the appellant should establish something more to convince the court to deviate from the minimum sentence prescribed by the law. The threshold is higher when sentencing in terms of the CLAA than when sentencing under common law. However, in the ordinary course when the court is considering an appropriate sentence exercising its discretion, it should consider the triad and avoid to emphasise the one element of the triad above the other and the sentence should be blended with a measure of mercy according to the circumstances.

[10] In *S v Zinn 1969 (2) SA 537 (A)* the Appellate Division of the Supreme Court, as is then was, stated the following:

> *"What has to be considered is the triad consisting of the crime, the offender and the interests of society."*

[11] In *S v KHUMALO 1973 (3) SA 697 (A)* the Appeal Court again stated the following:

> *"Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."*

[12] In *S v Mhlakazi 1997 (1) SACR 515 (SCA)* the Supreme Court of Appeal stated the following:

> *"The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."*

[13] In *S v Obisi 2005 (2) SACR 350 (WLD)* this division as it was then, stated the following:

> *"It is true that traditionally mitigating factors, including the fact that the accused is a first offender, are still considered in the determination of an appropriate sentence....."*

[14] In *Radebe and Another v S (726/12) 2013 ZASCA 31* the Supreme Court of Appeal stated the following:

> *"A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention*

constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

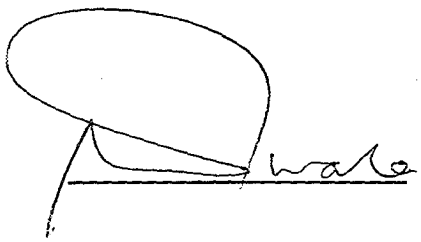
[15] It is my respectful view that the court a quo misdirected itself in this case in that it over emphasised the interest of the community and failed to consider the personal circumstances of the appellant. He was a first offender and it has been trite law that courts should always be lenient with first offenders and try to protect them from going to jail depending on the circumstances of the case. Further, in this case the appellant spent almost 18 months awaiting finalisation of this case and this should also have been considered in his favour by the court a quo but it failed to do so.

[16] I am satisfied that the court a quo misdirected itself when imposing a sentence of 15 years imprisonment which sentence is in my view, shockingly inappropriate in the circumstances of this case. I am therefore of the view that the appeal should succeed.

[17] In the circumstances, I make the following order:

1. The appeal against the sentence is upheld;
2. The sentence of 15 years imprisonment is set aside and replaced with the following:
    A. The appellant is sentenced to 10 years imprisonment;
    B. The sentence of 10 years imprisonment is antedated to 20 August 2014;

C. The appellant is declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act, 60 of 2000.

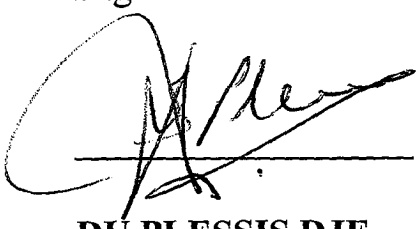


TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree



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ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:	**28th October 2019**
Date of Judgment:	**7th November 2019**
For the Appellant:	**Adv M Buthelezi**
Instructed by:	**Legal Aid South Africa** **Tel: 011 870 1480**
For the Respondent:	**Adv D Van Wyk**
Instructed by:	**National Director of Public Prosecutions** **Tel: 011 220 4228**