REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A054/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

In the matter between:

CHIMOLA SAMUEL KHOLOFELO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the o7th of May 2021.

DIPPENAAR (TWALA J CONCURRING)

[1] This is an appeal against both the conviction and sentence premised under the provisions of s260 and 262 of the Criminal Procedure Act[1], 51 of 1977 (CPA) as amended. The appellant was arraigned, convicted and sentenced[2] by the Regional Court, K[....] Park. This appeal is with leave of the Court a quo[3]. The parties were in agreement that an oral hearing could be dispensed with and the appeal could be determined on the papers.

[2] The appellant was charged in the Kempton Regional Court with one count of housebreaking with the intent to rob and robbery (read with the provisions of s262(1) and s260 of the CPA). He was convicted of housebreaking with the intent to rob and robbery with aggravating circumstances and sentenced to twelve years' imprisonment, which was not to run concurrently with the sentence he was serving at the time.

[3] The central issues for determination in this appeal are threefold. The first is whether, as argued by the appellant, his version is reasonably possibly true and whether he should have been acquitted. The second is whether the appellant was correctly convicted of the correct offence. The third issue is whether the sentence imposed should be set aside or altered.

[4] It is noteworthy to at this stage mention that the appellant pleaded not guilty and in his plea explanation denied that he broke into the complainant's home or took the items removed from the complainant's home. The appellant was at all times legally represented.

[5] The State's evidence was that on 18 March 2017 at approximately 02h40 Mr Thompson ("the complainant"), an off duty policeman was sleeping in his bedroom when he heard a noise in the house. His home is in a gated off area in G[....] M[....], K[....] Park with a fence and one entrance manned by security guards. He retrieved his firearm from the safe and approached the bedroom door. Two men burst into his room,

[1] 51 of 1977 as amended
[2] On 16 November 2017
[3] Granted on 21 December 2017

charged at him and attacked him. He fell on his bed with both intruders on top of him trying to assault him. One of the intruders had a large steel monkey wrench and tried to hit the complainant on his head. A knife was later found in the complainant's bedroom where he had been attacked. The complainant fired two shots at the first assailant, the appellant, who fled from the bedroom. The second intruder continued with the attack. The complainant shot the intruder, ("the deceased") who collapsed on him on the bed.

[6] After pushing the deceased to the floor, the complainant left the room, called the police station and switched on the lights. He met his stepfather, who was coming down the stairs and told him to go upstairs as he did not know where the appellant was. The appellant had fled through the kitchen window, leaving a blood trail. He exited the house via the front door with his stepfather where they found the appellant who had collapsed on the driveway in front of the door. He was bleeding and groaning. As the complainant was in his underwear he went inside and got dressed. Entry to the house was gained through the kitchen window at the driveway. The latch was damaged from the outside and exhibited tool marks used to open the window. The window had been closed when the complainant went to bed. The appellant exited the house through the same window.

[7] The complainant and his stepfather noticed there was a large pile of their belongings in the driveway, two laptops, food from the freezer and fridge and bags to carry the belongings. The foodstuffs were removed from the kitchen and the electronic equipment from a landing on the second floor. A white Samsung tablet was found next to the appellant and a polony roll and cheese in his pockets. The value of those goods was about R70 000.00. Nobody observed these items being taken. In cross examination the complainant disputed the appellant's version, which in his evidence, differed in certain respects from the version put to Mr Thompson.

[8] The complainant's stepfather, Mr Jacobs, heard gunshots in the house. He was advised by the complainant that there were intruders in the house and he should return to his bedroom. He saw the complainant was in his sleeping wear. He could see the deceased lying in the bedroom. He observed the blood trail in the kitchen leading to the

window and also observed blood on the window and the countertop. He accompanied the complainant outside where they found the appellant collapsed on the driveway. After switching on a spotlight which illuminates the driveway, he saw on the driveway, between the wall and the car, a bag containing two laptops.

[9] Constable Mudau confirmed that the appellant was found with a Samsung tablet next to him and a polony roll and cheese on his person. He was also found with a Huawai cell phone on his person. She further confirmed that a bag with electronic goods was found hidden next to a car on the driveway of complainant's home.

[10] Constable Nkosi who took photographs of the scene some 1.5 hours after the incident confirmed that the shots were fired in the complainant's bedroom, where the casings were found. He confirmed that the deceased was also found in the complainant's bedroom.

[11] It is apparent from the record that the evidence established that the electronic and food items were taken from the home before the appellant and the deceased entered into the complainant's bedroom and the assault on him occurred.

[12] In summary, the evidence of the appellant was that he and the deceased were on their way to collect stolen chairs from one of the properties in the secure area in G[....] M[....], K[....] Park, when dogs started barking. They hid behind an electricity box for a while and proceeded to walk fast to pass the property where the dogs had barked. The complainant, Mr Thompson, confronted them and asked what they were doing. He did not accept their explanation that they were just passing and were on their way somewhere.

[13] The complainant aimed a cocked firearm at them and directed them to enter into a property whose door was open. The appellant was under the impression that the complainant was a security officer. He was wearing black trousers and a leather jacket. Once inside, he realised that they were in a house and were in an open plan sitting

room. The complainant again asked what they wanted. He did not accept appellant's and the deceased's explanation. The appellant's hands were raised above his head. The complainant shot the appellant in the arm, the appellant ran off and hid under the sitting room table. The complainant shot the appellant again in his lower back. He saw the kitchen window was open he ran towards it and jumped on the kitchen counter top. The complainant shot him a third time in his upper back intending to shoot him in the heart. He wanted to make a noise but the complainant told him to keep quiet. A while later he heard a shot somewhere in the house, pushed the window and fell outside. He saw the neighbours and called to them to call the police.

[14] His explanation for possession of the polony roll was that he had purchased it at a garage before entering the complex to feed to the dogs at a neighbouring property to where the chairs were. The appellant disputed having cheese or a Samsung tablet in his possession or that there was a laptop bag with two laptops on the driveway. He identified the Huawai phone found in his possession as his. He accused the complainant and the other State witnesses of lying.

[15] Turning to the first issue, it is apposite to refer to some general principles. It is trite that the burden is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused. In *S v Jackson*[4] the court stated as follows:

> *"The burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."*

[16] In *Shackell v State*[5] the Supreme Court of Appeal held:

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[4] 1998 (1) SACR 470 (SCA) at 476
[5] 2001 (2) SACR 185 (SCA) para [30]

"*A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."*

[17] It is further trite that that a Court may convict an accused person of any offence on the single evidence of any competent witness.[6] However, the Court needs to treat that evidence with caution. The evidence must be credible and reliable and be supported by other evidence or facts. In considering the evidence, the Court must not take a compartmentalised approach but to consider the evidence in its totality.

[18] S 208 of the CPA provides:

"Conviction may follow on the evidence of single witness:
An accused may be convicted of any offence on the single evidence of any competent witness".

[19] In *S v Van Der Mayden*[7], it was stated:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[20] In R v Mlambo[8], the Court held:

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[6] S v Dyira 2010 (1) SACR 78 (SE); S v Sauls and Others 1981 (3) SA 172 (A) 180E-G; S v Webber 1971 (3) SA 754(A)
[7] 1991(1) SACR 450 (WLD)

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to the 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 charges. He must, in other words, be morally certain of the guilt of the accused".

[21] In applying these principles to the facts, the evidence of Mr Thompson was consistent and was corroborated by the evidence presented by the other state witnesses. Such corroborating evidence established that:

[21.1] the shots were fired in Mr Thompson's bedroom and not in the sitting room and kitchen as contended by the appellant as all the damage was in the bedroom;

[21.2] the deceased and the monkey wrench in the possession of the appellant and the deceased, were found in the bedroom;

[21.3] there was a blood trail belonging to the appellant leading to the kitchen and the window through which the appellant exited;

[21.4] the laptop bag with two laptops were found on the driveway;

[21.5] the Samsung tablet, polony roll and cheese, taken from the complainant's home, were found on the appellant;

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[8] 1957 (4) SA 727 (A) at 738

[21.6] When Mr Jacobs went downstairs after hearing the shots, the front door was locked and Mr Thompson was in his sleepwear, not as the appellant contended dressed in black pants and a leather jacket.

[22] In my view, the court a quo cannot be faulted for not accepting the version of the appellant as reasonably possibly true. First, there were certain inconsistencies betwee what was put as the accused version to the State witnesses and what he actually testified. Second, his version of where the shootings occurred was belied by the photographs and evidence of where the bullet casings and shells were found. Third, his denial of the items found in his possession and the driveway was false and belied by the objective evidence. Fourth, his version that the complainant accosted him and the deceased in the street and forced them into his home at gunpoint where after simply shooting them was entirely contradictory to the evidence of the State witnesses The appellant's version, is fanciful and contrived.

[23] The appellant argued that the court a quo erred in not accepting that the version of the appellant was reasonably true in that he did not rob the complainant. That however conflates the issue of whether his version is reasonably possible true with the issue whether the appellant should have been convicted of robbery, a separate issue which arises in this appeal.

[24] It is also apposite to refer to *S v Francis*[9], wherein it was stated:

"The court's powers to interfere on appeal with the findings of fact are limited. Accused No 5's complaint is that the trial court failed to evaluate D's evidence properly. It is not suggested that the court misdirected itself in any respect. In the absence of misdirection, the trial court's conclusion, including its acceptance of D's evidence, is presumed correct. In order to succeed on appeal, accused No 5 must therefore convince us on adequate grounds that the trial court was wrong in

[9] 1991 (1) SACR 198 (A), quoted with approval in Maphana v S (174/2017) [2018] ZASCA 8 (1 MARCH 2018)

accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony."

[25] It is my considered view that the Court a quo did consider the whole conspectus of the evidence before it and did not misdirect itself on any factual findings. It further correctly found that the State proved its case against the appellant beyond reasonable doubt and that the appellant's version could not be accepted as reasonably probably true.

[26] However, the legal conclusions drawn from those factual findings stand on a different footing. In the present instance, the Court a quo did not take into account that the goods were removed from the complainant's home before there was any violence. The violence only ensued when the appellant and the deceased entered the complainant's bedroom. The evidence did not establish that any goods were taken from his bedroom.

[27] This brings me to the second issue, namely whether the appellant's conviction of housebreaking with the intent to rob and robbery with aggravating circumstances is sustainable on the facts. The court a quo, in finding the appellant guilty of robbery with aggravated circumstances, had regard to s262 and the definition of robbery with aggravating circumstances as defined in s 1 of the CPA. It found that the use of the monkey wrench used to attack the complainant constituted aggravating circumstances.

[28] On this issue the Court a quo misdirected itself in various respects. First, the appellant was found guilty of an offence more serious than that with which he was charged. A charge of robbery with aggravating circumstances was never put to the appellant and he was not afforded the opportunity to address the issue. The charge was never amended to robbery with aggravating circumstances, which would prejudice the

appellant in his defence[10]. The appellant could thus not have been convicted of robbery with aggravating circumstances.

[29] The respondent conceded in its heads of argument that the Court a quo misdirected itself on this issue and contended that the appellant should have been found guilty of housebreaking with the intent to rob and robbery. I do not agree with this contention.

[30] The complainant confirmed that no items had been taken from him during the attack in his bedroom. He further confirmed in cross examination that the items which were later found outside his home on the driveway and in the possession of the appellant had been taken before the incident in his bedroom and that the appellant and the deceased had come back a second time when the assault took place. The items had thus been appropriated and removed from the complainant's home prior to any violence occurring and no items were removed pursuant to any violence. The complainant was thus not threatened with bodily injury in order to obtain possession of his property and he did not hand over any property to avoid injury[11].

[31] In convicting the appellant of robbery, the Court a quo relied on *S v Yolelo*[12]*.* Considering the facts, such reliance was misplaced as the evidence did not establish a sufficient causal link between the theft of the goods and the violence perpetrated on the complainant that they can be considered connecting components of one action. It follows that the conviction of robbery was a misdirection on the part of the Court a quo.

[32] The items had already been removed from the complainant's home when the attack on the complainant occurred. Rather, the evidence established that removal of the items had already been completed when the attack ensued in the complainant's bedroom. No further items were taken after the attack.

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[10] S86 CPA; S v Kearney 1964 (2) SA 495 (A)
[11] Ex Parte Minister of Justice: In re R v Gesa; R v De Jongh 1959 (1) SA 234(A)
[12] 1981 (1) SA 1002 (A)

[33] The evidence further established that the appellant and the deceased managed to exercise full and effective control over the items found on the appellant and on the driveway and that the complainant had lost control over those items. The facts thus did not establish robbery but did establish the offence of theft, which is a competent verdict of the offence of robbery. The facts pertaining to the attack on the complainant by both the appellant and the deceased in his bedroom established the offence of assault. Although a monkey wrench was used in the attack on the complainant he was not injured as a result, but sustained only minimal bruises.

[34] The relevant portion of s 260 of the CPA provides:

> *If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but-*
>
> *(a) the offence of assault with intent to do grievous bodily harm;*
>
> *(b) the offence of common assault;*
>
> *(c) the offence of pointing a fire arm, air-gun or air pistol in contravention of any law;*
>
> *(d) the offence of theft; …*

The accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences."

[35] The relevant portions of s262 of the CPA, relating to housebreaking with the intent to commit an offence, provides:

"(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with the intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence if housebreaking with the intent to commit an offence to the prosecutor unknown, but eh offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved; … (3)

[36] It is thus competent under s260 of the CPA to convict the appellant of both theft and assault[13]. It is further competent under s262 of the CAP to convict the appellant of housebreaking with the intent to steal and theft, considering that the facts established the offence of theft.

[37] I conclude that the appeal against the conviction must thus succeed and the conviction must be altered accordingly.

[38] Turning to the issue of sentencing, the appellant argued that the sentence imposed by the Court a quo, of 12 years' imprisonment, was shockingly inappropriate.

[39] Sentencing is pre-eminently the domain of the trial Court. A Court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial

[13] S v Matjeke 1980 (4) SA 267 (B); S v Jabulani 1980 (1) SA 331 (N), [1980] 3 All SA 178 (N)

court did not exercise its discretion judicially or where the sentence is strikingly inappropriate.

[40] In *S v Malgas*[14], the Supreme Court of Appeal stated:

> *"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."*

[41] Considering the conclusion reached regarding an alteration to the appellant's conviction, the Court a quo materially misdirected itself when imposing a 12 year imprisonment sentence. The sentence imposed must be appropriately amended.

[42] S 260 of the CPA clearly contemplates a separate sentence in respect of each offence in an appropriate case. Obviously when considering an appropriate sentence the cumulative effect of such sentences must be taken into account.[15] A court may also treat the separate counts as one for purposes of sentencing[16]. Considering the facts, this is not an appropriate case for the imposition of separate sentences.

[43] The appellant was not a first offender. The SAPS 69 forms proved the appellant as having two prior convictions: a conviction of robbery on 29 September 2009 in Germiston with a 3 year imprisonment sentence and a conviction for escape from lawful custody at Nebo on 25 March 2013, with a 3 year imprisonment sentence. According to the charge sheet obtained, the appellant has a third prior conviction, on 4 July 2014 at Tembisa of five charges for possession of a firearm and ammunition without a licence, two charges under the Arms and Ammunitions and theft. He was sentenced to five years' imprisonment on counts 1, 3 and 4 and 12 months each on counts 2 and 5. The sentences were to run concurrently and concurrently with the sentence he was serving

[14] 2001 (1) SACR 496(SCA)
[15] S v Jabulani supra
[16] S v Rwayi [1997] JOL 961 (Tk)

at the time. Before the Court a quo, the appellant requested that the sentence imposed on him was to run concurrently with the sentence he was serving at the time. He had been placed under correctional supervision but had been back in incarceration as he had broken his parole conditions and he still had 620 days to complete on that sentence.

[44] At the time of sentencing, the appellant was 32 years old and has a grade 9 education. He was unmarried and has three minor children. There was no evidence that he was the primary caregiver of the children and considering his incarceration, the court a quo correctly accepted that he could not be their primary caregiver as he was serving an incarceration sentence. It was argued that as the appellant got shot during the incident he had suffered a lot already and had not yet recovered from his bullet wounds. The goods taken were recovered and the complainant suffered no loss, with the exception of the cheese and the polony roll and minor damage to his property.

[45] On the converse side, the appellant showed no remorse, pleaded not guilty and presented a fanciful version. There was no probation officer's report available. He had previously been convicted of both theft and robbery and has a history of disregard for the law. The previous incarceration sentences imposed on the appellant did not serve as a deterrent against the commission of any further crimes.

[46] Considering all the facts, a sentence of eight years' imprisonment would be appropriate.

[47] It follows that the appeal must succeed, both against the conviction and sentence imposed by the Court a quo.

[48] I grant the following order:

[1] The appellant's conviction is set aside and altered as follows:

The appellant is convicted of (i) housebreaking with the intent to steal and theft and (ii) common assault read with the provisions of ss 262(1) and 260 of the Criminal Procedure Act 51 of 1977 as amended.

[2] The appellant's sentence is set aside and altered as follows:

The appellant is sentenced to eight (8) years imprisonment.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 06 May 2021
DATE OF JUDGMENT	: 07 May 2021
APPLICANT'S COUNSEL	: Adv EA Guarneri
APPLICANT'S ATTORNEYS	: Legal Aid SA
RESPONDENT'S COUNSEL	: Adv. R. Ndou
RESPONDENT'S ATTORNEYS	: State Attorney