IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A745/2013

DATE: 31/03/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

31/03/2014 .....
DATE SIGNATURE

Date of hearing: **24 March 2014**

In the matter between:

THEMBA NKUTHA **1ST APPELLANT**

SIBUSISO MNYAMANDE **2ND APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOSEAMO AJ

[1] This is an appeal against the sentence by the Benoni Regional Court. Appellants were convicted on a charge of housebreaking with intent to steal and theft. Both appellants were subsequently sentenced on the 24th May 2012 to 15 years imprisonment of which 2 years were conditionally suspended for a period of 5 years.

[2] Appellants brought an application for Leave to Appeal against their respective convictions and sentences. The court a quo dismissed the application.

[3] Appellants were subsequently granted Leave to Appeal against their respective sentences after they brought a Petition to the Judge President of this Honourable Court seeking Leave to Appeal against their conviction and sentences.

[4] The version of the state was that: Appellants broke into the residence of the complainant and gained entry into the residence through a garage door. The appellants appropriated a laptop computer and a television set to the estimated value of R20 000.00 but they were interrupted by a burglar alarm and fled leaving the items behind. They were apprehended at a nearby residence while attempting to escape.

[5] In sentencing the appellants the courts a quo considered the prevalence of the offence within the court's jurisdiction and the appellant's previous convictions.

[6] Appellents' grounds of appeal are as follows:

[6.1] the period of imprisonment imposed by the court *a quo* is startlingly severe and disproportionate;
[6.2] the court *a quo* over-emphasized the previous convictions of the appellants and provided a hypothesis whereby the first offender for

housebreaking with intent to steal and theft deserves 5 years which escalates with 5 years for any further transgressions.

[6.3] the sentence imposed have the hallmarks of a sentence where an offender is declared a habitual criminal when the severity of the period of imprisonment is compared.

[7] Appellants conceded that in so far as the appellants were not deterred by their direct imprisonment with regard to their second previous conviction then an increase in the period of imprisonment is therefore justified in order to give effect to individual deterrence of the appellants.

[9] It is trite that the imposition of sentence is a matter, which is pre-eminently for the discretion of a trial court. It will only be interfered with where the trial court has not exercised its discretion judicially. The appellate court will interfere with the sentence if it is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[10] In **S V Rabie 1974 (4) 855 AD** it was stated that punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances.

[11] First appellant was 24 years years at the time of conviction, he was unmarried and had Grade 10 level of education, he was unemployed and depended on his brother for financial assistance.

[12] First appellant was found guilty of housebreaking with intent to steal and theft on 23 October 2003 and he was sentenced to five years; the second conviction was on the 4th August 2009 where he was found guilty of housebreaking with intent to steal and he was sentenced to 4 years imprisonment.

[13] Second appellant was 27 years old, unmarried with two children aged 5 years and 3 years respectively and had Grade 10 education, he was

unemployed but owned two public phones and he made a profit of R300.00 to R400.00 per week.

[14] Second Appellant was found guilty of housebreaking and theft on 11 April 2000 and was sentenced to 6 months imprisonment, which was suspended for 5 years on condition that the appellant is not found guilty of housebreaking with intent to steal and theft. On the 27 May 2005 he was found guilty of housebreaking with the intent to steal and theft and he was sentenced to three years imprisonment and was declared unfit to possess a firearm.

[15] In sentencing the appellants the court a quo considered the fact that the appellants were convicted of a very serious crime, which is prevalent in the court's area of jurisdiction. The court a qou noted that the appellants were not deterred by the previous sentences and that they ought to be promoted. The court a quo stated that the community is crying out for something to be done about the prevalent crime.

[16] The learned magistrate commented that the appellants are lucky that housebreaking does not fall under the Minimum Sentence Act but stated that a clear message should be sent. This comment in my view indicates anger and frustration on the part of the magistrate.

[17] In S v Rabie mentioned above at 866 A-C Corbett JA stated where that:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society, which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the

particular case"

[18] The court in **S V MASWETSA 2014 (1) SACR 288 (GSJ)** referred to *S v Maunye and others* 2002 (1) SACR 266 T at 277 F – 278 in which Stegmann J, in a full bench decision, said

'An incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with housebreaking as a factor that tends to aggravate the seriousness of the offence and therefor the severity of the sentence'.

[19] In terms of **Section 271(4) of the CRIMINAL PROCEDURE ACT 51 OF 1977** (the Act) the court is required to take previous convictions which have been proved against the accused into consideration when imposing a sentence.

[20] In **S V J 1989 (1) SA 669 A,** the court held that the relevance and importance of previous convictions depended upon the elements they had in common with the crime in question.

[21] In **S v MATIWANE 2013 (1) SACR 507 WCC** it was said that the degree of emphasis to be placed upon previous convictions is a matter which is within the discretion of the trial court. Where the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the Court of appeal will interfere.

[22] Appellants conceded that the offence with which they were charged was serious and prevalent in the court a quo's area of jurisdiction. Although the courts are allowed to take judicial notice of the prevalence of the crime in the area of jurisdiction of the court, the court should not rely upon personal experience of the judicial officer heavily.

[23] The court a quo referred to the case of S v Ingram 1995 (1) SACR 9 (A) which requires the court to strike a balance between a harsh and a lenient sentence in order to serve the interest of the society.

[24] The appellants committed a serious crime and the interest of the society needs to be protected against criminals. At the same time, the interest of the society needs to be balanced against that of a criminal and the seriousness of the crime.

[25] The question is whether a sentence of fifteen years imprisonment with two years conditionally suspended for five years is disproportionate to the conduct of the appellants. Appellants broke in to the complainant's residence and stole a laptop computer and a television set to the value of approximately R20 000.00. They abandoned the items after they were interrupted by the burglar alarm. The complainant therefore recovered the television set and the laptop.

[26] The court a quo considered the personal circumstances of the appellants but it failed to consider the socio economic circumstances of the appellants. It appears that the court over emphasized the crime, the interest of the society over the criminal. The court a quo did not pay due regard to the object of punishment.

[27] In this case the Magistrate considered the appellants' personal circumstances, but placed more emphasis on the appellants' previous convictions and the prevalence of the crime. In my view the degree of the emphasis is disturbingly inappropriate and therefore constitutes a material misdirection, which warrants interference by the appeal court.

[28] The sentence of fifteen years is startlingly severe and disproportionate that the only conclusion that can be arrived at is that the court a quo approached sentencing with the spirit of anger and there was no element of mercy in the sentencing of the appellants. Consequently the appeal against

sentence by both appellants must succeed.

In the result, I would propose the following order:

1. The sentence imposed by the Magistrate is set aside. It is substituted with the following:

'The first and second appellants are sentenced to eight years imprisonment.'

2. The sentence is ante-dated to the 24th May 2012.

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED

WRC PRINSLOO

JUDGE OF THE HIGH COURT