DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

REVISED.

11/04/14
DATE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case Number: A 307/2013

In the matter of: 11/4/2014

Selby Calvin Mthembu **Appellant**

Versus

State

JUDGMENT

Maumela J.

1. In this case, one Selby Calvin Mthembu, an adult male, appeals against sentence. Before the Regional Court Nelspruit in the Mpumalanga Province, hereinafter referred to as the court *a quo*, he was legally represented throughout the trial. He was 31 years of age at the time of his arraignment.

2. Before the court *a quo*, the Appellant was charged with three (3) counts as follow:
   2.1. House Breaking with Intent to Steal and Theft,
   2.2. Theft and,

2.3. House Breaking with Intent to Steal and Theft.

3. Appellant pleaded Guilty to all the charges, and to that end, he submitted a statement in terms of Section 112 (2) of the Criminal Procedure Act 1977, (Act No 51 of 1977), hereinafter referred to as the Criminal Procedure Act. In that statement, Appellant admitted all the elements in the charges against him. He was consequently convicted, on all the 3 charges.

4. The Appellant was sentenced as follows:
Count I: 10 years imprisonment.
Count II: 3 years imprisonment.
Count III: 8 years imprisonment.
The 3 sentences were not ordered to run concurrently. As a result, cumulatively, the sentence meted out to the Appellant quantified at 21 years of imprisonment.

5. Before the court a quo, the Appellant applied for, and was granted leave to appeal against sentence. The failure on the part of the court *a quo*, to order the three sentences above to run concurrently is the main gravamen Appellant has against the sentences meted out to him. This court has to determine whether the court *a quo* was correct or not when it did not order for the three sentences to run concurrently.

6. Regarding Count I, the allegations were that Appellant broke into a Civic Centre which was being utilized for purposes of elections and he stole goods valued at R 103 717-00. On

Count II it was alleged that the Appellant smashed a window of a vehicle and committed Theft out of it. R 5 000-00 is the value of the goods allegedly stolen. In Count III, it was alleged that the Appellant broke a window of some office premises to gain entry. He was interrupted by security officers but a computer worth R 10 000-00 got stolen in the process.

7. In essence, the Appellant requests the court to interfere with the sentence meted out to him by the court a quo. It is trite that such an exercise is not to depend on the whims of the appeal court. Instead, in exercising its discretion in that regard, this court has to heed the guiding principles as expressed in S v Rabie[1].

8. In that case the court stated: "The decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to intervene only if the trial court's discretion was not "judicially and properly exercised" which would be the case if the sentence that was imposed is "vitiated by irregularity or misdirection or is disturbingly inappropriate".

9. The appellant was not a first offender at the time he was sentenced.
   - On the 29th of May 1998, he was convicted of an offence of

[1]. 1975 (4) SA 855 (A), at 857 d-f.

House Breaking with intent to steal and Theft. He was sentenced to undergo eight (8) months imprisonment. The whole sentence was suspended on normal conditions for three (3) years.

- On the 23rd July 1998, he was convicted on a charge of Theft. He was sentenced to three (3) months imprisonment.
- On the 24th of February 2004, the Appellant was convicted on a charge of Theft. He was sentenced to undergo twelve (12) months imprisonment.
- On the 16th of May 2005, Appellant was convicted of an offence of House Breaking with intent to steal and Theft. He was sentenced to undergo eighteen (18) months imprisonment.
- On the 8th of August 2007, the Appellant was convicted of an offence of House Breaking with intent to steal and Theft. He was sentenced to undergo three (3) years imprisonment.

10. In terms of Section 271 of the Criminal Procedure Act, where an accused person admits a previous conviction, or where such a previous conviction is proved against him or her, the court shall take such a conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

11. It means therefore that in meting out a sentence against the Appellant, the court *a quo* was entitled to consider that Appellant has previous convictions. Such a consideration could only have influenced towards a sentencing approach which is imbued with lesser leniency. However, our courts

have adopted the view that in passing sentence, previous convictions are not to be over-emphasized.

12. In the case of S v Mugell[2] the court stated the following:
"The degree of emphasis to be placed upon previous convictions is a matter falling within the discretion of the sentencing court. Where the degree of emphasis was disturbingly inappropriate, in that it could not be said that the sentencing court had exercised its discretion judicially, the court of appeal would interfere".

13. It is trite that the sentence meted out has to be one that fits the crime, the criminal and the interests of the community[3]. In the case of S v Beja[4] the court stated as follows:
"It is trite that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished. A period of imprisonment must always be reasonable in relation to the seriousness of the offence".

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[2]. 1998 (2) SACR 414 (C).

[3]. S v Zinn 1969 (2) SA 537 (A).

[4]. 2003 (1) SACR 168 (SE), at 170.

14. In the case of S v Kruger[5], an appellant had been convicted on seven counts of House Breaking with intent to steal and Theft, one Count of Theft, one of contravening Section 36 of the General Laws Amendment Act 1955: (Act No: 62 of 1955), and for Robbery. For the counts of House Breaking, he was sentenced to 4 years imprisonment per count. For the Theft and for the contravention of Section 36, he was sentenced to undergo 3 years imprisonment on each count. For the Robbery charge, he was sentenced to undergo 8 years imprisonment. The total value of the goods involved in the Kruger case was R 124 350-00.

15. In S v Baartman 1997 (1) SACR 304 (EC), at 305 c, the court stated: "But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasizes the interests of society at the expence of the interest of the offender".

16. In this case, the Appellant was 30 years of age at the time he was sentenced. He was married with two children aged four and two respectively. Before his arrest the Appellant was self-employment selling cigarettes at the Nelspruit taxi rank. That way, he would earn about R400-00 per month. At the time he was sentenced, the Appellant told court that he is serving a sentence of three years imprisonment relating to a conviction on theft. He had been sentenced on the 25th of June 2009.

[5]. 2012 (1) SACR 369 (SCA).

17. There is consensus between the state and the Appellant that the sentence meted out by the court *a quo* is unduly harsh. Both sides agree that the failure on the part of the court *a quo* to order concurrency of the sentences meted out for the three counts on which Appellant stands convicted, resulted into a cumulative tally in terms of the total years of imprisonment, which induces a sense of shock. This court views that the cumulative tally of years of imprisonment imposed on the Appellant, which is 21 years of imprisonment, is clearly out of proportion with the offences committed, and the circumstances of the Appellant.

18. In the circumstances the appeal stands to succeed and the following order is made:

ORDER.

1. The appeal succeeds.
2. The sentence imposed by the court *a quo* is set aside and is replaced by the following sentence:
   (i). All three counts are taken as one for purposes of sentence.
   (ii). The appellant is sentenced to undergo 14 (fourteen) years imprisonment

T.A Maumela
Judge of the High Court

I Agree

Y SIDLOVA
ACTING JUDGE OF THE HIGH COURT