IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A 696/2012 14/2/14

In the matter between:

Buti Hadebe Appellant

And

The State

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

07/02/2014
DATE

SIGNATURE

JUDGMENT

Maumela J.

1. This matter came before court as an appeal against sentence only. Before the Regional court sitting in Evander, the Appellant, ButiHadebe, who was legally represented, was charged with the offence of House Breaking with Intent to Steal and Theft, read with the provisions of Section 262 (1), and Section 264 of the Criminal Procedure Act 1977: (Act No 51 of 1977) "The Criminal Procedure Act".

2. The allegations against the Appellant were that upon or about the 8th of July 2011, he did unlawfully and intentionally break open and enter an office of one Heidi Molangana at G.S. College, whereupon he stole one motherboard valued at R 4 000 – 00, (Four Thousand Rand). Before the court *a*

quo, when the charge was put to him, the Appellant pleaded Guilty. He submitted a statement in terms of Section 112 (2) of the "The Criminal Procedure Act". In that statement, the Appellant admitted all the elements of the charge put to him.

3. The Appellant pleaded Guilty to the charge put. To that end, he submitted a statement in terms of Section 112 (2) of the Criminal Procedure Act. In that statement, Appellant admitted all the elements in the charge. On that basis, the court *a quo* convicted Appellant on the offence charged.

4. Appellant was then sentenced to undergo 15 (Fifteen) years imprisonment. With the leave of the court *a quo*, Appellant now appeals against the sentence meted out to him. The State opposes the appeal. This court is to decide on the appropriateness or otherwise of the sentence the court *a quo*meted out to the Appellant.

5. At the time he was sentenced, Appellant was 31 years of age. He was unmarried but he had fathered 2 children with his girlfriend. The children were aged 6 and 9 respectively. At the time of sentence, the Appellant had previous convictions. The offences in the list of his previous convictions and the dates of conviction are as follows:
   5.1. Theft on the 4th of April1997.
   5.2. Possession of Suspected Stolen Property on the 2ndMarch 2002.
   5.3. Theft on the 2nd July 2003.
   5.4. Theft on the 16th of April 2004.
   5.5. Housebreaking with Intent to Steal and Theft,on the 11th of May 2004.
   5.6. Theft on the 23rd of January 2006.

5.7. Possession of Suspected Stolen Property on the 8th of February 2006.
5.8. Assault on the 9th of November 2006.
5.9. Possession of Suspected Stolen Property on the 4th of June 2008.
5.10. Theft on the 30th of July 2008.

6. For the offences forming part of the record of his previous convictions, Appellant was sentenced to terms ofmagnitudes ranging from Three Months to Three Years Imprisonment; with some or parts of some of the sentences suspended on diverse conditions. It is not known as to whether or not the computer which was an object of the theft in this case was recovered.

7. Most of the offences that form part of the Appellant's record of previous convictions do relate to the offence of which he stands convicted in this case. The accused was 32 years of age when he was sentenced. He was unmarried. He had three children with a girlfriend. The oldest is 6 years of age. He left school at standard 7. He pleaded guilty and he expressed remorse for the offence for which he was convicted.

8. In passing sentence, the court *a quo* commented on the string of previous convictions against the Appellant's name. The court *a quo* even hinted that further offending on the part of the Appellant may result in him being declared a habitual criminal. It observed that a majority of offences that make for the record of Appellant's previous convictions is characterized by the element of dishonesty.

9. It cannot be denied that the pattern of offending on the part of the Appellant suggests at the least that he has not learnt from his previous skirmishes with the law. However, all that notwithstanding this court is to consider whether the appellant was subjected to a fitting sentence for a fitting offence, given the value of the object of his thieving on the day of the incident.

10. In arriving at the sentence meted out, the court *a quo*cites an unreported case of S v Richard Sorani and Another, heard in the WLD. The learned Magistrate points out that in the Sorani case, where the accused had committed the offence of Housebreaking with Intent to Steal and Theft, he was sentenced to undergo 6 years imprisonment.

11. In citing the above case, the learned Magistrate did not state the circumstances of the Accused, the value of the property stolen, and whether or not the Accused in undergoing trial did or did not demonstrate the same measure, if not more or less, of remorse and co-operation as was the case where it regards the Appellant in this case.

12. In S v Kgafela[1], Friedman JP remarked at 211 b-c:*"The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion, of the others. This is not merely a formula, nor a judicial incantation; the mere stating wherefore satisfies the requirements. What is necessary is that the court shall*

[1]. 2001 (2) SACR 207 (B).

consider and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender in his circumstances, and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less.

13. It appears that in this case, upon determining a fitting sentence, the court a quo considered overly the record of previous convictions of the Appellant. In S v Baartman[2] the court stated the following:
"But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphazes the interest of society at the expense of the interest of justice and the interest of the offender. If it does this, it cannot be a just sentence. In a case like this it is necessary to be aware of the three considerations:
(a). *The accused should be sentenced for the offence charged and not for his previous convictions.*
(b). *The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and*
(c). *While it may be justifiable on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased".*

14. This court notes that in this case, Appellant was not convicted for a petty offence. Housebreaking is a serious crime. In this instance, the Appellant stole a valuable item, namely a computer motherboard worth R 4 000-00 (four

[2]. 1997 (1) SACR 304 (E), at 305.

thousand rand). A computer motherboard is something valuable. However, it is clear that the sentence of 15 (fifteen) years imprisonment imposed upon the Appellant by far outweighs the break in and the concomitant theft of one computer motherboard valued at R 4 000 – 00.

15. In S v Rabie[3] the court emphasised that sentencing is to be blended with mercy. In this case Holmes JA stated:
"Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime and being fair to society".
See also S v Narker and Another[4]. The concept of mercy has been recognised by the Courts of this country as a necessary feature of a balanced sentencing approach.

16. In S v Harrison[5], the court stated: "Justice must be done but mercy, not asledgehammer, is its concomitant.This court finds that the court *a quo* did overemphasize the previous convictions of the Appellant and as a result it imposed on him a sentence that does not fit both the crime and the Accused. It cannot be stated with certainty either that the sentence meted out in this case fits the interest of the community, whereas it is triad that Appeal courts should be weary of interfering with sentenced meted out by trial courts.

[3]. 1975 (4) SA 855 (A) (supra at 861D.
[4]. 1975 (1) SA 583 (A.D.), at p 586.
[5]. 1970 (3) SA 684 (A), at 686 A.

The court finds that in this case it would be justified to do so.

17. In the result the appeal stands to succeed and the following order is made:

ORDER.

1. The appeal succeeds.
2. The sentence meted out by the court *a quo* is set aside, and is substituted by the following sentence:
"The accused is sentenced to undergo 7 (seven)years imprisonment" antedated to the date of his sentence before the court a quo.

T. MAUMELA

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

Y SIDLOVA

ACTING JUDGE OF THE HIGH COURT