REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A852/15

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

20/12/2016

In the matter between:

JAN LOURENS JORDAAN **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NOBANDA AJ

INTRODUCTION

[1] On 20 June 2013, the Appellant, then 39 years old pleaded guilty to one (1) count of housebreaking with intent to steal and theft in the Regional Court held at Klerksdorp.

[2] On the same day the Appellant was found guilty as charged and sentenced to eight (8) years imprisonment. The Appellant was legally represented during the trial.

[3] It appears from the record that the Appellant applied for leave to appeal against the sentence on 25 June 2013. For reasons not clear from the record, it was never heard. Then, during May 2015, the Appellant applied for condonation for the late filing of his leave to appeal. Leave to appeal was granted on 22 July 2015.

[4] The Appellant was released on bail fixed at R300.00 on 27 May 2013 prior to plea and sentencing. The Appellant's bail was not extended pending appeal.

[5] The appeal against sentence was heard on 5 September 2016.

GROUNDS OF APPEAL

[6] The Appellant contends that the trial court failed to consider and take into account the Appellant's personal and mitigating circumtances when imposing the sentence of 8 years imprisonment, in *inter alia* that:

- the Appellant approached the Complainant and confessed the crime to her;
- all the stolen property was recovered still in a good condition;
- the Complainant did not suffer any loss;
- the Appellant did not waste the court's time but instead plead guilty to the offence;
- the Appellant was an unmarried 39 year old man at the time;
- the Appellant has a five(5) year old son;
- the Appellant was in custody since 4 December 2012 until his release on bail on 27 May 2013.

[7] From the record filed, the Appellant testified that he did odd jobs which paid him R400-R500 per week. Further that he was sure he was going to be re-hired by the mine that had previously retrenched him which had re-opened. That he was the sole bread winner. In addition, the Appellant testified that he lives together with his fiancée at his fiancée's home together with their 5 year old son and his fiancée's mother.

[8] The Appellant further testified in mitigation of sentence that he was remorseful and ashamed of his crime more particularly since the Complainant was related to him and she trusted him.

[9] The Appellant requested that a community service sentence be imposed.

[10] The State on the other hand contended that the entire sentence, including the personal circumstances of the Appellant had been considered by the trial court. That the Appellant had relevant previous convictions for the same crime, some older than 10 years. That although certain convictions fall away as previous convictions after the expiry of 10 years in terms of Section 271A of the Criminal Procedure Act 51 of 1977 ("the Act") on certain conditions, the previous convictions are indicative of the Appellant's unrehabilitative character.

[11] The State further contended that on 23 July 2009, the Appellant was convicted of a similar offence and sentenced to 18 months imprisonment suspended on certain conditions for five years. This took place after the Appellant was released on parole on 6 December 2008 for a similar offence and other various offences after serving nine years in prison. The day after being released on parole, on 7 December 2008 the Appellant committed a similar offence.

[12] In light thereof, the State contended that the Appellant is unrehabilitative and the sentence imposed by the trial court should stand.

APPLICABLE LEGAL PRINCIPLES

[13] It is trite law that the imposition of a sentence is pre-eminently within the discretion of the trial court.

[14] It is a long established principle of our law that the appeal court should desist from altering the sentence imposed by the trial court except in circumstances where the sentence imposed is either totally out of proportion to the gravity or magnitude of the offence, or the sentence evokes a feeling of shock or outrage or the sentence is grossly excessive or insufficient or there was an improper exercise of discretion by the trial court or the interests of justice requires it.[1] The enquiry is enunciated in a number of cases by the Supreme Court of Appeal.[2]

[15] In **S v Sadler**[3], the Supreme Court of Appeal stated thus:

"*Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. <u>If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have.</u>*

[1] S v Anderson 1964 (3) SA 494 (AD) at 495 C-E

[2] S v Malgas 2001 (2) SA 1222 (SCA); S V Blignaut 2008 (1) SACR 78 (SCA) at 82 b-d; S v Johaar & Another 2010 (1) SACR 23 (SCA) at [27]; S v Truyens 2012 (1) SACR 79 (SCA)

[3] 2000(1) SACR 331 (SCA) at [8]

It is said that 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, interference is justified. In such situations the trial court 's discretion is regarded (fictionally some might cynically say) as having been unreasonably exercised" (***emphasis provided***).

[16] This principle was reiterated and confirmed by the same court, adding that even in the absence of material misdirection by the trial court, the appeal court may be justified to interfere with the sentence imposed by the trial court where disparity between the sentence imposed and that it would have imposed was so significant that it could be described as "shocking", "startling" or "disturbingly inappropriate."[4]

[17] In expanding on this principle, the Supreme Court of Appeal in **S v Blignaut**[5] sets out the test as follows:

"*The question is whether there was a material misdirection by the trial court in the manner in which it weighed the factors relevant to the determination of sentence or, if not, whether the sentence imposed was in any event so shockingly inappropriate as to give rise to the inference that there had been a failure to properly exercise the sentencing discretion.*"(***emphasis provided***).

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[4] S v Malgas (supra) at [12]; see also; S v Truyens (supra) at [4]
[5] S v Blignaut (supra) at [8]

COURT A QUO

[18] *Ex facie* the record, the trial court appears to have considered personal circumstances of the Appellant, the relevant previous convictions of the Appellant and the interests of the society as a whole in sentencing the Appellant.

[19] However, the trial court failed to balance the interests of the Appellant as well in imposing the sentence that it did. For example, the trial court considered the chances that the Appellant was previously given ranging from a long term sentence of 6 years for a similar offence and an additional 7 years for other various crimes whereinafter the Appellant was released under correctional supervision on 23 September 2005 until 16 September 2008; the sentence of 18 months imprisonment suspended for 5 years on certain conditions imposed on 23 September 2009 for a similar offence committed a day after the Appellant's parole ended and the fact that the Appellant committed the offence so that he could buy alcohol with the money, all of which are aggravating circumstances.

[20] Nowhere in his reasoning does the Regional Magistrate deal with the mitigating factors that the Appellant was the sole breadwinner; had a son who was about to start school; had confessed the crime to the owner and had pleaded guilty; that the stolen goods have been recovered still in a good condition and that the Appellant was remorseful and ashamed.

[21] Failure or the manner in which the trial court weighed the factors relevant to the determination of sentence is a material misdirection that gives rise to inference that there was failure to properly exercise the sentencing discretion.[6] As such, according to the test enunciated in ***S v Blignaut*** (*supra*) once the first leg of this test for intervention is satisfied, as it is *in casu*, it is unnecessary to consider the second leg of the test.

[22] Notwithstanding, in addition, the trial court considered various sentencing options ranging from a fine, correctional supervision and a longer or short term direct imprisonment. The Regional Magistrate concluded that taking into account the suspended sentence that will come into effect and given the Appellant's history gleaned from his previous convictions, it would not be in the interest of the community to give the Appellant a lighter sentence.

[23] Accordingly, the sentence of 8 years direct imprisonment is in my view "startlingly" or "disturbingly" inappropriate in the circumstances and ought to be interfered with.[7]

[24] As such, I propose the following order:

1. The appeal is upheld;

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[6] S v Blignaut (supra) at [5]
[7] 2006 (1) SACR 72 (SCA) para 10

2. The sentence is set aside and in its place a sentence of 5 years direct imprisonment is imposed;

3. The sentence is ante-dated to 20 June 2013.

P.L NOBANDA
Acting Judge of the High Court, Pretoria

I AGREE.

N. RANCHOD
Judge of the High Court