IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A551/2015
Date: 11/11/16

In the matter between:

TSHEPO MOHLABINE	**FIRST APPELLANT**
MOSES SEROTA	**SECOND APPELLANT**
MPHO MAZIBUKO	**THIRD APPELLANT**
SIBUSISO MBATHA	**FOURTH APPELLANT**

and

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

10/11/2016
DATE SIGNATURE

THE STATE **RESPONDENT**

JUDGMENT

PRETORIUS J,

(1) The four appellants were convicted in the Benoni Regional Court on 16 April 2014 on a charge of housebreaking with intent to steal and theft. They were all sentenced on the same date to 10 years' imprisonment each. The appellants were legally represented throughout the trial.

(2) They all applied for leave to appeal against their respective convictions and sentences, but the trial court refused to grant leave to appeal. The appellants thereafter petitioned the High Court. The petition to appeal against convictions was refused, but the petition to appeal against the sentences was granted.

(3) Counsel for the defence, representing all four appellants, argued that a sentence of 10 years' imprisonment on a charge of housebreaking with intent to steal and theft is too harsh and induces a sense of shock.

(4) It is trite that sentencing falls within the discretion of a trial court and that this court's right to interfere with a sentence is limited to where the court *a quo* materially misdirected itself or committed an irregularity when considering all the facts, before imposing sentence.

(5) The position was clarified in **S v Rabie**[1] where Holmes JA held:

> *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -*
>
> *(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";*

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[1] 1975(4) SA 855 (A) at 857 D – E

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised"."

And in **S v Khumalo**[2] Holmes JA held:

"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to circumstances."

(6) The triad set out in **R v Zinn**[3] is applicable in all cases. The personal circumstances of the accused, the offence of which he had been convicted and the interests of society are the factors which should be considered in a balanced manner.

(7) The first appellant is 26 years old, unmarried, has two children and was earning between R200 to R300 per day at a taxi rank. He has a previous conviction for possession of ammunition, for which he was sentenced to 3 years' imprisonment on 13 April 2006.

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2 1973(3) SA 697 (A) at 698 A

3 1969(2) SA 537 (AD)

(8) The second appellant is 32 years old, is single with no dependants. He has a previous conviction for theft and was sentenced to R1 500 or 3 months' imprisonment suspended for 5 years on 14 June 2005 and a further conviction for assault for which he was fined R1 000 or 3 months' imprisonment on 7 December 2009.

(9) The third appellant is 26 years of age, is single but is the father of a young baby. He was earning R300 per day as a street vendor. He was sentenced on 28 April 2006 to 8 years' imprisonment on a count of robbery. He was released on parole on 27 April 2012 and was still on parole when the crime in the present case was committed.

(10) The fourth appellant is 27 years of age, single, has 3 young children and was employed at Checkers earning R1 900 per month. He was sentenced on 23 February 2006 on a charge of theft and the passing of sentence was postponed for a period of 5 years. This period had lapsed by the time of the commission of the crime in the present case.

(11) It is quite clear that the court *a quo* had the bare minimum before him in relation to the appellants when he sentenced them to 10 years' imprisonment. The learned magistrate seems to have paid lip service only to the principle of individualisation of the sentences when he stated:

> *"Our high courts have stated that any kind of sentence that is influenced by the public opinion is inherently flawed and as such this court cannot just follow what public opinion is saying, but we will just mete out the punishment that is balanced and adequate for the crime that has been committed, having taken into account the personal circumstances of each individual accused."*[4]

(12) His judgment on sentence deals solely with the interests of society and nowhere can this court find where he had taken the personal circumstances of each accused into consideration. Had he done so he would have differentiated between the sentences imposed on appellants 1, 2 and 4 and that of appellant 3, who was still on parole when he committed this crime. There is no indication what standard of schooling the appellants had attained, whether they grew up in single parent households which may have caused their early introduction to crime. Appellants 1 and 4's previous convictions are almost 10 years old. It is clear that all the appellants were in their youth when they were previously sentenced.

(13) It is furthermore mentioned that the appellants spent at least 9 months in custody, awaiting trial. Although the learned magistrate mentions it, it does

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[4] Page 87 – 88 of the record

not seem that he had taken in into consideration when determining that 10 years' imprisonment would be the correct sentence.

(14) In **S v Siebert**[5] the court held:

> *"Sentencing is a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role.* ***The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court****. An accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance.* ***If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, it is the duty of that court to call for such evidence****."* (Court emphasis)

(15) It is trite that although an accused is legally represented the court has a duty to ensure that all the relevant evidence is available when sentencing accused persons.

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5 1998(1) SACR 554 (A) at 558i to 559b

(16) The appellants were found guilty as charged, but according to the evidence the amount of money stolen was not R90 000, but R15 000. Most of the other stolen items were recovered and returned to the complainant. This court cannot find that the punishment in the present case was based on the **Zinn trial**[6] or that the sentence was *"blended with a measure of mercy according to the circumstances"*[7].

(17) Therefore this court finds it necessary to interfere in the sentence. After considering all the facts, the arguments by counsel and the principles set out in the authorities referred to, the court finds that the sentence is too harsh and should be set aside. There should also be a differentiation between the sentences of appellants 1, 2 and 4 and that of appellant 3, who was out on parole when he committed this crime.

(18) In the result the following order is made:

1. The sentences imposed on the four appellants on 16 April 2014 is set aside;

2. Appellants 1, 2 and 4 are sentenced to 5 years' imprisonment each of which 2 years are suspended for a period of 5 years on condition that the appellants are not convicted of housebreaking with intent to steal or theft committed during the period of suspension;

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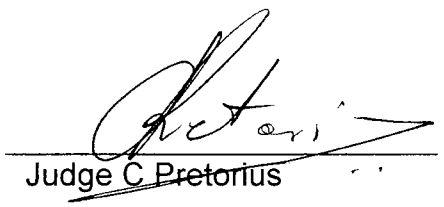
6 *Supra*

7 Khumalo case (*supra*)

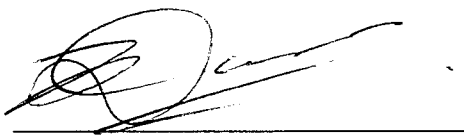
3. Appellant 3 is sentenced to 8 years' imprisonment of which 3 years are suspended for a period of 5 years on condition that appellant 3 is not convicted of housebreaking with intent to steal or theft committed during the period of suspension;

4. The sentences imposed on all the appellants are antedated to 16 April 2014.



Judge C Pretorius

I agree.



Acting Judge N Davis

Case number	: A551/2015
Matter heard on	: 3 November 2016
For the Appellant	: Adv H Steynberg
Instructed by	: Pretoria Justice Centre
For the Respondent	: Adv Maritz
Instructed by	: Director of Public Prosecutions
Date of Judgment	: