REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED
(4)	Signature Date 22/03/16

CASE NO: A474/2015

22/3/2016

NKOSINATHI LUVUNO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Appellant is with leave of this court appealing against his conviction and sentence by the Regional Court in Piet Retief on a charge of housebreaking with intent to steal and theft. The court imposed a sentence of 5 years imprisonment. The Respondent opposes the appeal.

[2] According to the charge sheet, the charge proffered against him and a co- Accused, was that on 23 December 2011 near Sakhisiswe Primary School ("Sakhisiswe") in Driefontein, in the region of Mpumalanga they unlawfully and intentionally broke into the school of the Department of Education or that of Clifford Winston Twala and went in, with the intention to steal and had unlawfully and intentionally stolen to wit, 2 Computers, a radio, DVD player and a TV, property with a total value of R23 000.00, that was in the lawful possession of the Department of Education and Clifford Winston Twala.

[3] The Appellant was legally represented and pleaded not guilty to the charge. He denied committing the offence. Appellant's co-accused (who is hereinafter referred to as "Accused

1" as he was referred in the court quo) alleged that the computer that was found in his possession was sold to him by the Appellant whilst Appellant denied selling stolen items or anything to Accused 1. Appellant denied everything calling upon the state to prove his guilt beyond reasonable doubt.

[4] He was convicted following the evidence led by the four state witnesses, which are Mr Clifford Winston Twala, the principal of Sakhisizwe who is the complainant ("Twala", Mbangiseni Hlatshwayo, a friend of Appellant's co-accused ("Hlatshwayo") and the two police officers that investigated the matter Maria Yende ("Yende") and Mbongiseni Khumalo ("Khumalo") plus the evidence of Appellant's co-accused. The court a quo found the evidence of the state witnesses to be credible and all of them to have been impressive witnesses, notwithstanding being subjected to a vigorous cross examination.

[5] Appellant on the contrary alleges that the state's case was full of material contradictions, inconsistencies and discrepancies that are irreconcilable. It was argued on his behalf that **all the evidence by Twala was hearsay and had to be treated with caution.** The learned magistrate was said to have misdirected himself when he allowed his knowledge and experiences to overshadow his judgment whilst neglecting to consider the evidence in front of him. **The state was criticized for not calling the clerk at the school to come and give a full description of the stolen items, their value and the gardeners who are said to have been the first one at the scene. The full grounds and arguments that were advanced are dealt with hereafter.**

[6] The approach to be adopted by the court of appeal when it deals with factual finding of a trial court are well illustrated in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) where the then Appellate Division stated that:

> "a court of appeal will not disturb the factual finding of the trial court, unless the latter has committed a misdirection. Where there has been no misdirection on facts by the trial judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it."

BACKGROUND FACTS AND EVIDENCE LED

[7] Sakhisizwe Primary School was broken into and a television, radio, computer and keyboard stolen. The guards at the school noticed that and reported to Twala, the principal. According to Twala a classroom number 11 was broken into and access gained through the ceiling to classroom 12 next door, from which a computer and a radio were stolen. He saw the damage that was done. The serial numbers of the stolen items were entered into the school inventory. The computer and radio that were retrieved by the police from Accused 1 had serial numbers that correspond with the serial numbers of the school computer and radio that was in the school inventory. Such evidence was not disputed nor was the fact that the police retrieved the computer from Accused 1.

[8] Constable Mpumelelo Maria Yende ("Yende"), the second witness indicated that Accused 1 from the onset told them that he got the computer from the Appellant. At the time they were not aware that the person referred to was indeed the Appellant. She only heard of Appellant's name from Accused 1. They went to look for the Appellant and he was not found at his place on that day.

[9] According to Siyabonga Hlatshwayo, on 12 January 2012 Accused 1 requested him to him to accompany him to Appellant's place to collect a computer. They met the Appellant at a certain house and together they waited for sunset before they proceeded to Appellant's house. On reaching the house, Appellant made them wait outside whilst he went in. Appellant then came out of his house carrying a computer tower, a keyboard and a mouse. He gave them the items. The screen was not part of the items. He subsequently saw the screen at Accused 1's house. Accused 1 told him that the Appellant sold him the computer. When it was put to him during cross examination that he actually knew where the computer came from, he replied that Accused 1 told him he was buying the computer, however Accused 1 also told him on their way to Appellant that they (the Appellant and Accused 1) took the items from Sakhisizwe School.

[10] Then Mbongiseni Eric Khumalo, a member of the SAP only testified on the arrest of the complainant. That on getting the report they went to Accused 1, introduced themselves to him and explained why they were there. Thy asked him to take them to his room. They searched his room and found a black computer flat screen and a keyboard under the bed. He told them he got the items from Appellant. He told them other items are at his parents' place. They went with him at his mother's place where they found the computer tower and the mouse. They went to look for Appellant at his place and could not find him. He could not remember about the story of the radio.

[11] On the other hand, Appellant's evidence was that the police came and searched his place and nothing was found. They told him that Accused 1 whom he only knows by sight alleged to have bought a computer from him. He simply denied selling any of the items to Accused 1.

[12] Appellant's co- accused, in his testimony had confirmed that items allegedly stolen from the school, the computer components were found in his possession. He said the radio belonged to him, he got it from his sister who works in Johannesburg who had since passed away. The computer was bought from the Appellant and he was awaiting his salary so that he can pay him when he was arrested.

CONTENTIONS RAISED ON CONVICTION

[13] Now on appeal Appellant criticizes Khumalo for failing to mention that he explained or warned the accused of his constitutional rights before or during the arrest. In that regard its alleged that the learned magistrate erred in admitting evidence or whatever information and or pointing out Accused 1 made at the time of his arrest, an issue that was never raised during the trial and therefore none of the parties dealt with it. On the record there was no pointing out made by Accused 1, the items in his room were found as a result of a search conducted by the police. The Accused thereafter spontaneously informed the police about the other items which were at his mother's place whereupon they were recovered.

[14] The criticism on Hlatshwayo's evidence was that it was contradictory on material aspects. It was argued that although he testified about being told by accused 1 to accompany him to Appellant's place to go and collect his computer, he also alleged that on their way there Accused 1 told him that he and the Appellant got the computer from Sakhisizwe School. His evidence is said to be contradicted by Accused 1's version that he bought the computer from the Appellant. Which evidence the Appellant says he finds problematic as the different

components of the computer were found in three different places. The items are alleged to have been sold by him to Accused 1 on January 2012 on credit, awaiting his salary, but by March 2012 there was no evidence that he had made a payment or arrangement or that Appellant at some stage made a demand for payment.

[15] It is alleged Accused 1's evidence is the only one that linked the Appellant to the crime, therefore the court erred in not treating same with caution as he was an accomplice to the said crime. The Appellant therefore argued that there was not enough evidence to satisfy the court a quo beyond reasonable doubt that the items were received or bought from the Appellant.

[16] Besides mentioning that it was not the court's finding that Accused 1 bought the stolen items from Appellant, I should state that it is trite that our law does not require that a court act only on absolute certainty but merely upon justifiable and reasonable convictions – nothing more and nothing less; see *S v Seedat* 2015 (2) SACR 612 per Mavundla.

[17] In respect of Hlatshwayo's evidence there was no contradiction on the material aspects as alleged. Hlatshwayo merely underlined that even though Accused 1 had told him that he bought the components from the Appellant, he however later told him that they got them from the school. The reliability of such evidence is established not by its piecemeal consideration but by taking into account all the evidence collectively, especially the evidence that could not be disputed or found to be common cause between the parties. Hlatshwayo's evidence indeed links the Appellant to the offence. He confirmed that they fetched the stolen items that were recovered from Accused 1 from Appellant's place. Therefore the Appellant had been in possession of the stolen items, not long after the items went missing from the school. The question that arises is how did Appellant come into possession of the stolen items?

[18] The court a quo did not accept as true Accused 1's evidence that he bought the stolen computer from Appellant as he could not give a satisfactory explanation of his possession of the radio as well, that was likewise stolen from the school. The court inferred that Accused 1 stole the goods from the school (as testified by Hlatshwayo) since he was familiar with its surroundings having been a student there and staying in the vicinity. Accused 1 had also confirmed in his plea explanation and under oath that the computer was in fact stolen from the school, albeit denying that stolen by him. As he could not have managed to take that number of items through the ceiling alone that Appellant was indeed a part of the break in (as testified by Hlatshwayo) who carried out the rest of the stolen items.

[19] The trier of fact in criminal trials determines if the proven facts supports the conclusion that the Accused committed the offence he has been charged with. In dealing with circumstantial evidence and the drawing of the necessary inference all the other evidence come into play. The principles applicable are as enunciated by Watermeyer J in *R v Blom* 1939 AD 188 at 202-203 where they are defined as follows:

> "there are two cardinal principles of logic" which could not be ignored when it came to reasoning by inference:
>
> > '(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn.

> (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.'

[20] The question that arises is whether the inference that the court a quo drew was consistent with all the proven facts, which is the same with the Appellant's inference that it needed the court to draw, was it consistent with all the proven facts. In other words was the Appellant's explanation a possibility, since if the explanation cannot be ruled out as a possibility, when it is judged against the principles of logic, the state would not have proven its case beyond reasonable doubt.

[21] Twala's evidence that the serial numbers on the schools' stolen computer and the radio that was entered into the school asset inventory was the same as that of the computer and the radio retrieved from the Accused was not disputed. Therefore whether it is the clerk who works with the school inventory who went to the police station to identify the stolen items or Twala, it would not matter, the fact could be easily verified by anyone. Nevertheless Twala did also have sight of the items, and he confirmed that they bore the relevant serial numbers. For that reason there is no merit on the argument that Twala's evidence was hearsay.

[22] The criticism that was in addition levelled against the learned magistrate for taking judicial notice of the fact that States Department do keep inventories where serial numbers of the assets owned by different departments are recorded is unwarranted and excessive. The information had been attested to and proven by documentary evidence produced from the school inventory and stood undisputed; *see Van Wyk v S* [1997] 3 All SA 75 (EC). The court a quo therefore did not use its knowledge to decide the case, but to highlight the generality of the practice. The evidence adduced was already sufficient to establish beyond reasonable doubt that that the serial numbers were indeed recorded in the inventory; see *S v Land* 1987 (4) SA548 (N).

[23] The Appellant has therefore failed to substantiate his argument that the evidence of the state was not satisfactorily in all material respects and that the court should have in that regard found that doubt exists.

[24] With regard to complainant's evidence being that of a single witness Counsel made reference to *S v Teixeira* 1980 (3) SA 755 (A) at 761 where the court in evaluating the evidence of a single witness stressed that 'a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.' The fact that it is corroborated would also strengthen its probity, without which it may be rejected if it also has a litany of intrinsic probabilities, omissions and contradictions.

[25] **In deciding all the issues raised by the Appellant, we consciously considered the matter guided by the established principles governing the hearing of appeals against finding of fact. In brief, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.; see S v Hadebe and Others 1997 (2) SACR 641 (SCA).** Well, *in casu* there is no litany of probabilities, omissions and contradictions as already indicated.

[26] The notion that the failure to repeat certain allegations is prove of their untruthfulness is based on incorrect assumption as is the same as that the repeat thereof is proof of prior evidence or corroboration thereof: see S v Mkohle 1990 (1) SACR 95 (A) at 99d where it was decided that a witness previous consistent statement has no probative value'. It is superfluous evidence. It therefore cannot be used as prove of the falsehood of a statement. The attempt to try to prove that the complainant overlooked certain statements in his evidence is not an indication of untruthfulness of his evidence.

AD SENTENCE

[27] With regard to sentence the Appellant submits that the court a quo erred in finding that the cumulative effect of a sentence already imposed by another court in another offence prior to the 5 year term of imprisonment the court a quo imposed for the offence *in casu* did not call for consideration of ordering the sentence to run concurrently with the previous sentence. Also not taking into account that some of the stolen items were recovered and that Appellant had spent 4 months incarceration before he was sentenced on the other charge on 27 July 2012.

[28] The Appellant also alleged that the 5 year period of imprisonment was strikingly disproportionate to the circumstances of the offence and ought to be set aside and replaced with a suitable sentence.

[29] It is trite that in determining the appropriate sentence the Zinn triad that is, the crime committed, the blameworthiness of the offender and the interest of society is to be considered, as propagated in *S v Zinn* 1969 (20 SA 537 (A). The courts must at the same time have due regard to the purpose of punishment, that is deterrence, rehabilitation, retribution and prevention.

[30] The appeal courts are also implored to bear in mind, when considering an appeal on sentence, that sentencing is within the province of the trial court and interfere should only be if such province was not properly exercised.

[31] When determining an appropriate sentence to impose for the offence committed *in casu*, the court a quo took due regard to the fact that Appellant was already sentenced in another court for a different crime. However it is not part of our criminal law system that a sentence imposed by another court for a different crime would be considered by a subsequent court to run concurrently with the sentence it is to impose on a different *offence*.

[32] The court however did not mention whether or not the fact that the stolen items were recovered was considered as a mitigating factor. Under the circumstances we considered that fact and weighed it with all other issues /factors considered by the court and found that the sentence was still appropriate.

[33] The allegation that the sentence was strikingly disproportionate to the circumstances of the offence and ought to be set aside was just temperamental. The court *inter alia*, analysed the impact of the Appellant's conduct to society and the fact that he was not remorseful. In *S v Moswatupa* 2012 (1) SACR 259 (SCA) at par 9, the Supreme Court of Appeal underlined the seriousness of the offence of housebreaking and stated that:

"Housebreaking is an extremely prevalent offence, and it is in the general public interest that sentences imposed in these matters should act as a deterrent to others. The message needs to go out to the community that people who commit these types of offences will be dealt with severely by the courts."

[34] After weighing all the issues raised by the Appellant individually or cumulatively, we could not find that Appellant had shown that there is justification to interfere with the court's jurisdictional discretion of sentencing as well.

[35] Under the circumstances, I propose the following order

Order:

[35.1] The appeal against conviction and sentence is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I concur and it is so ordered

M ISMAIL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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