REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A172/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

17/4/2023 .....
DATE

.....
MOKOSE SNI

In the mater between:

THAPELO NKABELENG Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who was represented in the court *a quo,* was charged in the Regional Court for the Regional Division of Ekurhuleni South sitting at Benoni of one count of housebreaking with intent to steal and theft.

[2] The appellant pleaded guilty as charged having indicated to the court that he understood the charge. With the leave of the court, counsel for the appellant then read into the record the statement prepared in terms of Section 112(2) of Act 51 of 1977 in which he admitted that on 3 February 2019 at Pitfontein he unlawfully and with intent to steal broke and entered the premises of OK Furniture Stores. He admitted further that he unlawfully and intentionally stole the items mentioned on the charge sheet.

[3] He explained in the statement that he removed a corrugated iron sheet from the roof to gain access into the premises and stole three laptops. He was confronted by security guards and arrested for the theft of the laptops which were at the time in his possession. The plea was accepted by the prosecutor.

[4] The appellant was sentenced to 8 years imprisonment of which 2 years were suspended for 5 years on condition that the appellant was not found guilty of any offence involving theft or attempted theft or possession of stolen properties or receiving stolen goods during the period of suspension. He was also declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act 60 of 2000. The Magistrate also informed the appellant that he was effectively jailing him for a period of 6 years.

[5] The appellant sought leave from the Magistrate to appeal his sentence and in particular, the order that he would have to serve an effective 6 years in prison. The application was dismissed. On petition, leave to appeal against sentence was granted.

[6] The appellant's personal circumstances were placed before the court *a quo*. They are that the appellant, who was a single man of 37 years, had one child of 11. At the time of his arrest, he was employed as a security guard earing R3 150,00 per month. He had a grade 11 qualification and had spent 17 days in custody awaiting the finalisation of his trial.

[7] In mitigation, it was brought to the court's attention that the appellant had pleaded guilty and taken responsibility for his actions. He was also a first offender. Furthermore, the stolen goods were recovered in a good condition.

[8] The appellant submitted that the Magistrate in the court *a quo* had misdirected himself in sentencing the appellant and suspending a portion of the sentence.

[9] Section 73(1)(a) of the Correctional Services Act 111 of 1998 provides that a sentenced offender remains in a correctional facility for the full period of the sentence. The Magistrate sentenced the appellant to 8 years imprisonment of which 2 years are suspended for 5 years on conditions. He furthermore informed the appellant that he is effectively sending him to jail for a period of 6 years.

[10] The court takes note of the sentence imposed by the Magistrate. It means that the suspended part of the sentence will lapse while the appellant is still in prison. We are of the view that the period of suspension therefore serves no purpose at all. Accordingly, we uphold the appellant's appeal in respect of the misdirection in respect of the suspension of a portion of the sentence.

[11] Furthermore, the appellant submitted that the sentence imposed was shockingly harsh and disproportionate given the mitigating circumstances which were brought to the court's attention.

[12] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the court of first instance if such discretion had not been judicially exercised. Marais AJ in the matter of **S v Malgas**[1] observed that:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of the first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appropriate court may yet be justified in interfering with the sentence imposed by the court. It may do so only where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate court is large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or*

[1] [2001] 3 All SA 220 (SCA) para 12

because it prefers it to that sentence. It may do so only where the difference I so substantial that it attracts epithets of the kind I have mentioned."

[13] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.

S v Zinn 1969 (2) SA 537 (A)

[14] This approach was followed by the court in the matter of **S v Rabie**[2] where Holmes JA said:

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

[15] It is accepted by this court that the crime the appellant has been convicted of is a serious one. The Magistrate's judgment was noted wherein he commented that the appellant had earned far lower than the minimum wage. However, it was not a reason for the appellant to break into the store. We have also noted the case law brought to our attention by the appellant in respect of similar cases but where the mitigating circumstances were far worse than those of the appellant. Accordingly, we are of the view that the Magistrate had misdirected himself in sentencing the appellant.

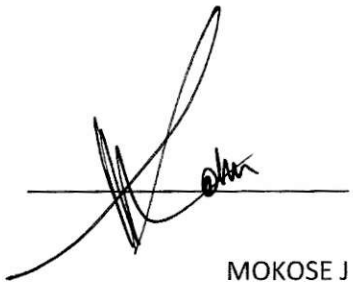
[2] 1975 (4) SA 855 at 862 G - H

[16] Therefore, the appeal is upheld and the whole sentence is set aside and replaced with the following sentence:

1. In terms of the provisions of Section 276(1)(b) of Act 51 of 1977 the appellant is sentenced to 5 years imprisonment of which 2 years are suspended for 5 years on condition that he is not found guilty of any offence involving theft or attempted theft or possession of stolen goods or receiving stolen goods or housebreaking with intent to commit theft;

2. In terms of the provisions of Section 103(1) of Act 60 of 2000 the appellant is declared unfit to possess a firearm;

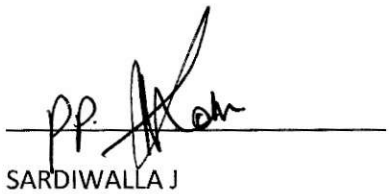
3. The order is antedated to 20 February 2019.



MOKOSE J

Judge of the High Court of
South Africa, Gauteng
Division, PRETORIA

I agree and is so ordered



SARDIWALLA J

Judge of the High Court of
South Africa, Gauteng Division,
PRETORIA

For the Appellant:

Adv Van Wyk instructed by

The Pretoria Justice Centre

For the State:

Adv Ngobeni instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 11 November 2021

Date of judgement: 17 November 2021