Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A791/2004
-REPORTABLE-

In the matter between:

JEROME NELL **Appellant**

And

THE STATE **Respondent**

Matter was heard on the 25th of April 2008 and judgment was handed down on the same day.

Counsel for the Applicant:
Adv JA van der Westhuizen SC, assisted by Adv M Salie

Counsel for the State:
Adv Currie-Gamwo

Application for leave to appeal was dismissed by the Supreme Court of Appeal of South Africa on the 16th of October 2008.

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IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A791/04
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Coram: Dlodlo et Le Grange, JJ

In the matter between:

JEROME NELL **Appellant**

and

THE STATE **Respondent**

JUDGMENT: 25 APRIL 2008

Le Grange J:

[1] The Appellant in this matter was charged in the Regional Court, Goodwood with nine (9) counts of housebreaking with the intent to steal and theft. The Appellant was convicted of only four (4) counts of contravening section 36 of Act 61 of 1955 (*the unlawful possession of stolen property)* and sentenced to a term of six (6) years' direct imprisonment.

[2] The Appellant now appeals against his conviction and the sentence imposed

by the Court *a quo*.

[3] Mr. JA van der Westhuizen SC, assisted by Mr. M Salie, appeared on behalf of the Appellant. Ms Currie-Gamwo appeared on behalf of the State.

[4] Mr. van der Westhuizen's principal submissions were that the Appellant's Constitutional rights to privacy and legal representation have been violated during a police search at the Appellant's residential house. He argued that the conscious, willful and flagrant breach of the Appellant's Constitutional rights renders the trial unfair and detrimental to the interest of justice. According to him, the trial court erred in admitting the unconstitutionally obtained evidence of Rautenbach, as the Appellant did not give the police consent to search his premises. Moreover, even if it is found that he did consent, the consent cannot be regarded as an informed consent. It was also contended that the State has failed to prove the guilt of the Appellant beyond reasonable doubt and that the Appellant's conviction on the lesser charges of contravening section 36 of Act 62 of 1955, was wrong in law as it is not a competent verdict on a charge of housebreaking with the intention to steal and theft.

[5] Mr. Salie argued that the trial court did not exercise its discretion on sentence properly and that the sentence imposed, induce a sentence of shock. He submitted that the Appellant is a suitable candidate for correctional supervision and the imposed sentence should be set aside and be replaced with a sentence in terms of the provisions of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977.

[6] Ms Currie-Gamwo, argued that even if it is found that the Appellant's Constitutional rights have been infringed, the violation in the instant matter was not deliberate. She contended that Rautenbach acted *bona fide* and would have applied for a search warrant if it was known to him that the Appellant indeed refused permission to search his premises. She also contended that the inclusion of the evidence obtained, does not bring the administration of justice into disrepute, nor renders the trial unfair and that the State did prove its case against the Appellant beyond a reasonable doubt. She disagreed with the proposition that the Appellant's convictions were wrong in law and argued in conclusion that the sentence imposed by the court *a quo*, does not induce a sense of shock as the offences the Appellant committed, are of a serious nature.

[7] In the Court *a quo*, at the beginning of the State's case, a trial within a trial was held to determine the admissibility of the evidence obtained by the police at the Appellant's house. The State relied on the evidence of two police officials namely, Captain J E van Dyk and Inspector Rautenbach. The Appellant also testified. The trial court determined the evidence obtained to be as admissible.

[8] In the main trial, after the trial court found that the evidence obtained is admissible, the State called two witnesses. Inspector Rautenbach, and Clive William Johnson. The Appellant elected to remain silent and did not call any defence witnesses.

[9] Section 22 of the Criminal Procedure Act 51 of 1977, permits circumstances in which a police official may, without a warrant, lawful search any person or container or premises for the purpose of seizing articles which on reasonable grounds are suspected to have been used in the commission of an offence: where the person concerned consents to the search for and the seizure of the article in question, or where the police official on reasonable grounds believes that a warrant would have been issued to him if he applied for such warrant in terms of section 21(1), and that the delay in obtaining such warrant, would defeat the object of the search.

[10] It is common cause that the Appellant's house was searched by Rautenbach and his team without a search warrant. It is also not in dispute that various items, which the State alleges were stolen, were found on the Appellant's premises and recorded on video by the police.

[11] Rautenbach's evidence briefly stated in the trial within a trial, is that during a police investigation into a crime syndicate, he established information implicating the Appellant as the receiver of stolen goods. The Appellant was thereafter under police surveillance. Approximately two days later he established the address of the Appellant in Pinelands, and set out to question him. While on his way to the house, he met the Appellant at a robot and asked him to accompany him to the police station. The Appellant acquiesced and drove his own vehicle to the police station. At the police station he interrogated the Appellant, explained his rights to him and asked him whether he could search his home. The Appellant was given a choice and

consented with the request that it be done in an orderly fashion in order not to upset his family. He also agreed that the Appellant's daughter be fetched at school and that no marked police vehicle is to be used during the search. The Appellant pointed out various goods at his house which was then recorded on video. He testified that if the Appellant had refused him permission, he would have applied for a search warrant. He only seized goods which the Appellant pointed out. He also stated that when certain jewelry items were seized, the Appellant became upset and indicated that he intends phoning his lawyer. Thereafter the Appellant instructed his wife to phone his attorney.

[12] The evidence and cross-examination of this witness were conducted and concluded over a period of almost four (4) years. It is not entirely clear from the record the reasons for the long delay in this regard.

[13] The Appellant does not dispute the bulk of Rautenbach's evidence. He, however, denies giving the police consent to search his premises and requested a search warrant from the police. According to him, Rautenbach was abrupt and rude and his request for an attorney was denied.

[14] The Magistrate, in determining that the evidence obtained during the search was admissible, made the following finding at page 241-242 of the record:-

> *"In die getuienis van Inspekteur Rautenbach val dit op dat die Beskuldigde sy goedkeuring geheg het aan die deursoeking van Beskuldigde se huis, dat sy regte met betrekking tot die bystand van 'n regsverteenwoordiger aan hom verduidelik was. Beskuldigde gee boonop toe dat hy bewus was van sy regte*

op 'n sekere stadium, dat hy selfs regsbystand van sy prokureur versoek het. Die inbreukmaking op die Beskuldigde se regte was volgens sy oordeel nie so drasties en diepgaande soos wat aan die Hof deur die verdediging in hulle argumente voorgehou was nie tydens die deursoeking was die Beskuldigde teenwoordig. Dit was ook erken dat die Beskuldigde se vrou by tye teenwoordig was.

Dit was selfs tussen die Beskuldigde en die polisie ooreengekom dat 'n gemerkte polisievoertuig nie by sy huis sou opdaag nie en dat die ondersoek nie sy vrou moet ontstel nie. Die scenario kan myns insiens byvoorbeeld glad nie vergelyk word met die geval waar huismense byvoorbeeld sou hulle in die nag geslaap het en die polisie op 'n brutale wyse toegang tot die huis verkry het nie. Soos reeds bevind blyk dit nieteenstaande Beskuldigde 1 se getuienis dat hy by die speurderskantore en ook in die huis aangedring het op sy prokureur McCallum se teenwoordigheid. Die feit bly, daar was nie definitiewe pogings aangewend om McCallum te ontbied nie en die hele proses van deursoeking, verfilming en beslaglegging op van die items was gedoen sonder dat 'n regsverteenwoordiger ooit ontbied was. Die Beskuldigde het ook myns insiens vrywilliglik deelgeneem. Hy gee toe dat daar kommunikasie tussen hom en die polisie in sy huis was, waar hy byvoorbeeld gevra was vir dokumentêre bewys van die artikels.

Die items moes in alle waarskynlikheid ook tussen sy huismeubels en items uitgewys gewees het, want hoe anders sou dit dan geïdentifiseer kon gewees het. Ek is van oordeel dat sou die getuienis toegelaat word, sal die verhoor nie daardeur onbillik beïnvloed word nie, of sou die regspleging nie nadelig geraak word nie.

Inteendeel, sou die getuienis nie toegelaat word nie sou dit eerder die verhoor onredelik beïnvloed en sal dit ook nadelig tot die administrasie van die regspleging wees want word dit nie toegelaat nie, loop die Beskuldigde in alle waarskynlikheid as 'n vry man by die Hof uit."

[15] On a conspectus of the evidence in this case, I am in agreement with the

Magistrate's finding.

[16] Rautenbach made a favorable impression on the Magistrate, despite the extensive and sometimes acrimonious cross-examination by the Appellant's counsel. The Appellant testified that the relationship between him, Rautenbach, and the other police officials involved in the search, was very poor on the day in question. He also refused to co-operate with them. Yet, it is not in dispute that Rautenbach allowed the Appellant to fetch his daughter from school before commencing the search. Rautenbach also acquiesced to the Appellant's request not to use marked police vehicles during the search, as it may upset his wife. In cross-examination, the Appellant's counsel put it to Raubenbach that during the search, the Appellant informed him that certain goods were received from a person named Bronwin Jacobs, (also known as Amigo) and the Appellant was only warned not to incriminate himself. Rautenbach conceded this statement but added that he also warned the Appellant to remain silent. The Appellant, on his own version, denies that he co-operated with the police. The Appellant, at page 172 line 29, denies that he mentioned the name of Bronwin Jacobs to the police. In fact, according to the Appellant, it was the police who suggested the name to him. Despite the poor relationship between the Appellant and the police, the Appellant voluntarily made one of his vehicles available to assist in transporting the seized goods from his premises. The Appellant, on his own version, was also aware of his rights to legal representation and to remain silent. It is also not in dispute that when the Appellant did instruct his wife to phone his attorney, the police did not interfere or prevent her from doing so. The fact that he did not phone his attorney earlier, cannot, in my

view, be blamed on the police.

[17] The version of Rautenbach, having regard to the totality of the evidence, is more probable and plausible and the trial court was correct to accept his evidence. The Magistrate went further and admitted the evidence on the basis that if the evidence is excluded, it would render the trial unfair and would bring the administration of justice into disrepute. This decision was also attacked on appeal. I now turn to consider the questions raised by section 35(5) of the Constitution.

Section 35(5) of the Constitution provides as follows:

> *"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."*

[18] Counsel for the Appellant submitted that Rautenbach acted in bad faith and deliberately violated the Constitutional rights of the Appellant. It was also argued that the violation of Appellant's rights was neither technical nor inadvertent.

[19] The scope and effect of Section 35(5) has, in recent years, been considered in a number of reported cases. In Key v Attorney - General, Cape Provincial Division, and Another 1996 (4) SA 187 (CC) at 195F-196C, the Constitutional Court- albeit under the 1993 Constitution held at 196B that:

> *"At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit*

obtained unconstitutionally, nevertheless be admitted."

[20] In S v Mkhize 1999 (2) SCAR 632 WLD at 636*f* - 636*j* Willis J, considered the questions raised by section 35(5) of the Constitution and referred to a number of decided cases including two Canadian cases, R v Jacoy (1988) 38 CRR 290 at 298 and R v Collins (1987) 28 CRR 122 at 137. Both these cases stress that the test for the admission of real evidence is less stringent than that for other evidence. In a more recent decision of Pillay and others v S 2007 (1) All SA 11 SCA, section 35(5) was again considered by the Supreme Court of Appeal.

[21] It is evident that section 35(5) of the Constitution, envisages circumstances when evidence will be admissible even if the obtaining of the same entailed the violation of a right enshrined in the Bill of Rights. I am in agreement with the approach that the consideration whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interest of the public and all relevant circumstances. The following factors may also be considered in determining whether the admission of the evidence will bring the interest of justice into disrepute (Pillay and others, *supra*, at 39*b*): whether the evidence obtained was as a result of a deliberate and conscious violation of Constitutional rights; what kind of evidence was obtained; what Constitutional rights was infringed; was such infringement serious or mere of a technical nature, and would the evidence have been obtained in any event.

[22] I accept that there may be some debate as to whether Rauntenbach in a sense have acted deliberately and consciously in violating the Appellant's

Constitutional rights. He certainly acted deliberately when he searched the premises of the Appellant and if the Appellant's counsel is correct, that it was without the Appellant's permission, then it was unlawful to do so without a warrant. This could lead to a finding that the Appellant's Constitutional rights were violated. It is, in my view, clear however that he did not, (for the reasons already stated herein) subjectively intend to violate the Appellant's Constitutional right to privacy, unlawfully. He testified that he did not believe that a warrant was necessary and there is no reason to disbelieve him in this regard. The Appellant was aware of his rights to legal representation and did exercise it when he instructed his wife to phone his attorney.

[23] I accept that the Courts must be slow to indulge the flagrant disregard of the law of criminal procedure on the part of the police and to protect the ordinary law-abiding citizen of our country against the abuse of the formidable powers which the police necessarily have. In this case, however, other important considerations required the evidence about the discovery of the items which Rautenbach reasonably believed to have been stolen, to be admitted.

[24] The evidence obtained was real evidence, and the manner in which it was discovered, can never be regarded as a serious and flagrant breach of the Appellant's right to privacy. It is evident from the objective facts in this matter, that no force was used by the police to enter the premises of the Appellant. The test for the admission of real evidence is also less stringent than that for other evidence. In this regard see

S v Mkhize *supra* at 637. The allowance of the evidence, in this case, can never create an incentive for police officials to raid homes of the innocent at whim or upon fancy, capriciously or arbitrarily. The inclusion of the evidence will not render the trial of the Appellant unfair or otherwise be detrimental to the administration of justice. In my view, the administration of justice would rather be brought into disrepute if this evidence is to be excluded.

[25] The argument that the State has failed to prove the guilt of the Appellant beyond reasonable doubt, and that the Appellant's conviction on the lesser charges of contravening section 36 of Act 62 of 1955 was wrong in law, is without merit.

[26] Rautenbach investigated the Appellant as being part of a housebreaking syndicate and had information that he was in possession of stolen goods. The police found several television sets, Hi-fi sets, leather jackets, a large amount of jewelry and other household appliances in the Appellant's home. Some of these items, according to Rautenbach, were later identified by the complainants. The Appellant was unable to give a satisfactory explanation for his possession of the goods.

[27] The Appellant's conviction on the lesser charges of contravening section 36 of Act 62 of 1955, is in my view proper. Counsel for the Appellant relied on the decision of

S v Chauke and Another 1998(1) SACR 354 (V). In Chauke, it was held that a verdict of guilty of receiving stolen property is not a competent verdict on a charge of housebreaking with intent to steal and theft. The learned Acting Judge in

Chauke gave express consideration to the proposition that housebreaking with intent to steal is one offence *(of which the competent verdicts specified in section 262 of Act 51 of 1977 may be entered if established by the evidence)*, and theft is another *(of which the competent verdicts specified in section 264 may similarly be entered)*. It is correct, when there is an incident of housebreaking with intent to steal and theft committed on a single occasion and with a single intention, it must be charged as one offence, and only a single verdict can be entered and a single sentence imposed. In Chauke it was held that in view of the state of affairs, it would be wrong to conclude that the verdicts that are competent in terms of section 264, on a charge of theft, would also be competent on a charge of housebreaking with intent to steal and theft. The learned Acting Judge was of the view that to conceive of the latter charge as having separate components, with each component carrying a separate list of possible competent verdicts, would amount to an improper splitting of charges.

[28] In S v Maunye and others 2002 (1) SACR 266 TPD, the decision in Chauke was considered and the Court came to a different conclusion. Stegmann J, at 277*f* – 278*b* held that:- *"There is a considerable weight of authority, that has been followed for many years, to the opposite effect. An incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with the housebreaking as a factor that tends to aggravate the seriousness of the offence of theft and therefore the severity of the sentence. On this approach, a charge of housebreaking with intent to steal and theft has often been accepted as a proper basis for convicting the accused on a verdict that, in terms of the Criminal Procedure Act, is a competent verdict on a charge of theft. In my respectful view, the law must continue to be*

understood in this way, and the contrary opinion expressed in Chauke does not represent a correct statement of the law."

[29] I am in agreement with the dictum of Stegmann J. The approach adopted in Chauke is bad in law. The trial court in *casu,* correctly convicted the Appellant of the lesser offences. It follows that the appeal against the convictions cannot succeed.

[30] Counsel for the Appellant also submitted that the sentence imposed induces a sentence of shock. He submitted that the Appellant is a suitable candidate for correctional supervision and the imposed sentence should be set aside and be replaced with a sentence in terms of the provisions of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977 or, alternatively, that the imposition of a fine should be considered.

[31] The imposition of sentence is pre-eminently a matter falling within the discretion of the court *a quo,* and a court of appeal will only interfere where such discretion was not properly or judiciously exercised. The trial court, in my view, gave due consideration to all the relevant factors before sentence and the various sentence options available. At page 265, line 22 and further of the record the following is recorded:-

> "*Die vonnisopsie omtrent die boete, dink ek nie is onder die omstandighede gepas nie. So 'n vonnisopsie was aan die beskuldigde by die vorige geleentheid opgelê, dit het nie die gewenste uitwerking gehad om die beskuldigde te weerhou van misdaadpleging soos wat die Korrektiewe Toesigbeampte omtrent dit ook gereël het nie.*

Al wat gevolglik oorbly is 'n vonnis van Korrektiewe Toesig. Daaromtrent het die Hof met verwysing na die saak van Sinden alreeds 'n beslissing gemaak, dat ook wat daardie vonnisopsie betref, net eenvoudig nie gepas is nie, omrede die Hof van oordeel is dat dit onder die omstandighede, gesien in die lig van die beskuldigde se misdaadrekord, te versagtend sal wees as vonnis."

[32] The trial Magistrate also gave consideration to the provisions of section 276(1)(i) of the Criminal Procedure Act and advanced proper reasons why it was not considered an appropriate sentence. The Appellant in this matter is not a first offender. He has relevant previous convictions which the trial court correctly considered. In December 1992, he was convicted of contravening section 37 of Act 62 of 1955 (receiving stolen goods) to the value of R 60 000. The goods found in his possession then, were television sets, leather Jackets and household items.

[33] In as much as the imposed sentence may at first glance seems harsh, in considering the Appellant's personal circumstances (including his previous convictions), the interest of society and the seriousness of the offences he committed, the sentence of six (6) years direct imprisonment does not, in my view, induce a sense of shock. It follows that the appeal against sentence cannot succeed.

[34] In the result I propose the following order.

The appeal against the convictions and sentence is dismissed.

LE GRANGE, J

I agree. It is so ordered.

DLODLO, J