IN THE HIGH COURT OF SOUTH AFRICA
HIGH COURT, CAPE TOWN

CASE NO: A103/2009

In the appeal of:

NEVILLE ADAMS First appellant

LEWELLYN BRANDT Second appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 9 FEBRUARY 2011

BLIGNAULT J:

[1] Appellants were convicted on 13 March 2008 in the regional court at Atlantis on two charges. The first was housebreaking with the intent to steal and theft of various items including a motor vehicle. The second charge was theft of various items from a motor vehicle. Both offences were committed on 28 September 2006 in the same street in Melkbosstrand.

[2] Both appellants were sentenced to 5 (five) years' imprisonment on the first charge and 3 (three) years' imprisonment

on the second charge. It was ordered that 18 months of the two sentences would be served concurrently.

[3] Mr Danie Gielomie testified that he stays at 13 Waldeck Crescent, Melkbosstrand. During the night in question in September 2006 his motor car was parked on the premises outside his home. The doors were locked. He woke up during the night and found that his motor car had been broken into. The right front door and the boot were open. After the police arrived he went with them to the house of Mr Anthony Hall who stayed nearby. There he found a number of items which had been stolen from his motor car, namely a front loader, a number of CDs and an aftershave spray.

[4] Mr Anthony Hall stays at 23 Waldeck Crescent, Melkbosstrand. Early morning on 29 June 2006 he woke up and found that the door to his room, which had earlier been open, was closed. All the lights in the house were on. He went to the kitchen and saw through the window that his motor car, which had been parked in his garage, was standing in his driveway. He saw a person running towards the vehicle and jumping into the front passenger seat. The person was wearing a red top. He was fairly

tall and thin, like second appellant. He was carrying an object which looked like the loudspeakers of his DVD player. The motor car drove away. He then established that his television, DVD with loudspeakers, video machine and a jacket had been stolen.

[5] Mr Hall contacted the police and they arrived soon thereafter. He then saw that there was a blue rucksack lying in a small passage close to his front door. The police took certain items out of the bag. He identified a camera which belonged to him. The other items, being a front loader, CDs, a blue overall, pay slips, wires and after shave lotion, did not belong to him. He later found that his briefcase had been thrown over the fence and that two of his watches had been stolen. While the police were taking a statement, they received a call to say that his motor car, which had been reported stolen, had been found. At a later stage he identified his motor car at the police station. It had been severely damaged in a collision.

[6] Mr Malefane Masedi, a constable in the South African Police Service testified that the attended the scene of the crime at Mr Hall's house. He found a blue and black rucksack with various items inside including pay slips issued by Omar & Omar

Consultancy CC to Neville Adams and Lewellyn Brandt. Mr Hall's house was in a state of disorder but they could not establish how entrance was obtained to the house. He also attended a crime scene at Mr Gielomie's house where the theft from a motor car had been reported. Mr Gielomie arrived at Mr Hall's house and identified the goods in the rucksack as his.

[7] Mr Elton Brandt, an Inspector in the SAPS, took photos of the two appellants after they had been arrested. He produced the photo taken by him of first appellant. He was wearing a black Grasshopper shoe on his left foot. On his right foot there was only a sock. Brandt also took a photo of the Grasshopper shoe found in the motor car. He had compared the shoe which first appellant was wearing with the shoe which had been found in the motor car. Both shoes were black, looked the same and appeared to be of the same size. They were Grasshopper shoes which were worn and both had black shoelaces. Brandt's evidence about his observation regarding the similarities between the two shoes was not challenged in cross-examination.

[8] Mr Benjamin Mekantani testified that he was the investigating officer in the case. He attended Mr Hall's house after

the housebreaking and the rucksack with the stolen items and pay slips were handed to him. Mr Gielomie identified the goods in the rucksack as his. Mr Mekantani also inspected Mr Hall's motor car after it had been involved in the collision and found a black Grasshopper shoe for a right foot in the car. He arrested appellants later that morning at their respective homes after he had followed up the information on the pay slips. Both of them had fresh wounds at the time of their arrest. He first went to second appellant's house who tried to run away but he was caught. Second appellant could not explain why his pay slip was found at the scene of the crime. Thereafter they went to first appellant's house where they found him with fresh injuries. His condition was quite serious. He was wearing one black Grasshopper shoe on his left foot.

[9] Dr Annarie Hattingh testified that she examined both appellants after their arrest. First appellant had sustained high impact injuries including a dislocation of his shoulder. He told her that he had been involved in a collision and she noted this. She also examined second appellant. He had sustained recent injuries. He also told her that he had been in a collision and she noted this as well.

[10] Inspector Johan Grobbelaar testified that he attended the scene at Mr Hall's residence in Waldeck Crescent. He followed up a call and found a motor car which had overturned on the Darling Road. Various items that were found missing after the burglary were found in the motor car as well as a right foot black Grasshopper. He produced this shoe as an exhibit at the trial. The magistrate asked first appellant to try on the shoe to see if it fitted him. He did so and the shoe appeared to fit. The court was informed at this stage that the police was no longer in possession of the right foot shoe which first appellant was wearing at the time of his arrest. The magistrate then compared the sole of the exhibit shoe with the sole of the shoe which first appellant was actually wearing in court and placed on record that they had a similar pattern of wear. Appellant's attorney was given the opportunity to examine these two shoes and he did not dispute the magistrate's observation.

[11] First appellant testified that he knew second appellant. They worked together. He was the owner of the rucksack that was produced in court. He normally put his monthly payslip in the rucksack. Second appellant also put his payslip for August 2006 in his rucksack. On Thursday 28 September 2006 he was invited by

three friends to join them. He bought a few beers and some wine which they drank. They then went to Melkbosstrand beach. They spent the whole day there, drinking and smoking dagga. He became very drunk. He fell asleep. The next thing that he can remember was someone knocking on the door where he was staying. They were policemen. He realised that he was seriously injured. He fell onto a bench. The police arrested him. He fell asleep again and when he woke up it was the Sunday and he was in a hospital. Under cross-examination first appellant did not dispute that the right shoe that was handed in as an exhibit and the left shoe which he wore when the photo was taken by Brandt, both belonged to him. He was however unable to explain what had happened to the left shoe.

[12] Second appellant testified that he worked for the same employer as first appellant. He normally kept his payslip but in August 2006 he gave the payslip to first appellant to put in his rucksack. The day before he was arrested he was at home. He had injured his left arm the previous week at work. He also sustained injuries the previous day whilst fighting with his brother.

[13] The magistrate gave a comprehensive judgment. He first summarised the evidence and then evaluated it. He said that all the state witnesses made a good impression upon him. He was, however, not impressed by appellants. As regards first appellant he mentioned various points of criticism:

(i) He gave evasive evidence about the friend named Stan who allegedly invited him to go on the excursion;

(ii) He never told the police upon his arrest what had happened the previous day;

(iii) He said that the attorney who initially appeared for him, did not consult with him at all. This was most unlikely and was in any event contradicted by second appellant;

(iv) First appellant purported to remember in some detail what happened the previous day but when it came to relevant matters he recalled nothing;

(v) The doctor noted that first appellant told him that he had been in an accident;

(vi) He made no effort to find out what happened the previous day;

(vii) He was unable to explain the similarities between the two shoes.

[14] In regard to second appellant the magistrate pointed to the following:

(i) He testified that he had injured his left wrist but the doctor did not find or record such an injury;

(ii) He did not explain to the police why his payslip was in first appellant's rucksack;

(iii) His description of the injuries sustained in the alleged fight with his brother is not consistent with the doctor's report;

(iv) His evidence that he did not run away when the police arrested him, conflicted with that of Mekantani which was more reliable.

[15] The magistrate then listed the main items of circumstantial evidence which implicated appellants:

(i) The description of the one burglar described by Mr Hall coincided with that of second appellant. Hall furthermore said he wore a red top which was similar to that which second appellant was wearing at the time of his arrest.

(ii) First appellant's rucksack was found at Mr Hall's house containing the payslips of both appellants.

(iii) The similarities between the Grasshopper shoe worn by first appellant at the time of his arrest and the one found in the motor car. First appellant could not give an explanation for the "missing" shoe.

(iv) The stolen vehicle was found soon thereafter on the road from Melkbosstrand to Atlantis where appellants resided. It had been involved in a recent collision.

(v) Both appellants had fresh wounds at the time of their arrest and both of them told Dr Hattingh that they had been involved in a collision. Their injuries were consistent with such a collision.

[16] The magistrate held that each of the various elements of circumstantial evidence should not be viewed in isolation but as part of a composite whole. He accordingly found that both accused participated in the two offences. He convicted both appellants on both counts.

[17] For purposes of sentence, the magistrate summarised the personal circumstances of appellants. First appellant was 24 years old when the offence was committed. He did manual work and earned ± R500 per week. He was not married but he had two children. He had three previous convictions: For theft committed on 15 September 1999; theft committed on 23 March 2000 and

robbery committed on 18 May 2000. He had not received a custodial sentence for any of these convictions.

[18] Second appellant was 22 years old at the time of the commission of the offence. He was doing correctional service at the time. He had been convicted for housebreaking on three occasions. These offences were committed in May 1995, February 2001 and 16 October 2002. For each of these offences he was sentenced to direct imprisonment.

[19] The magistrate sentenced both appellants to 5 (five) years' imprisonment on the first charge and 3 (three) years' imprisonment on the second charge, 18 (eighteen) months of the two sentences to be served concurrently.

[20] Each appellant was granted leave by the magistrate to appeal against his conviction and sentence.

[21] Adv A A Nel appeared on behalf of appellants on appeal. He criticised certain findings made by the magistrate in regard to first appellant, namely that first appellant gave contradictory evidence about his friend Stan; his criticism of appellant's inability to

remember all the details regarding the events; the finding that first appellant had not consumed alcohol because the doctor had not found any evidence thereof; the rejection of first appellant's testimony about the missing shoe; the magistrate's rejection of first appellant's alleged inability to remember everything despite his degree of intoxication; the magistrate's findings regarding the improbabilities surrounding second appellant's participation; adverse inferences drawn from the fact that appellants did not disclose relevant information to the police after their arrest.

[22] As regards second appellant Mr Nel criticised the following aspects of the judgment: His finding based on the presence of the second appellant's pay slip in first appellant's rucksack; the adverse inference drawn by him from the fact that second appellant had not disclosed his alibi defence to the police; the absence of any direct evidence against second appellant; that each of the facts relied upon by the magistrate is susceptible to an innocent explanation.

[23] In my view the magistrate did not in his general approach misdirect himself in any manner. The only error made by the magistrate is that he attached some weight to the fact that

appellants did not immediately disclose their alibis to the police. In the light of *S v Thebus* 2003 (2) SA 319 (CC) it is doubtful whether this kind of evidence is permissible. This was, however, only one of the elements relied upon by the magistrate.

[24] It seems to me that the main elements of objective evidence weigh heavily against both appellants. As far as first appellant is concerned the similarity between the two shoes is strong evidence against him. His rucksack with the two payslips was found at the crime. His admission to the doctor that he had been in a collision is highly relevant evidence. In the light of his injuries first appellant's evidence that he could not remember what happened between the time that he started to *tiep* until he was woken by the police, renders his evidence highly suspect.

[25] Second appellant is linked to first respondent by the presence of his payslip in first appellant's rucksack. His admission to the doctor that he had been involved in a collision is strong evidence against him also. He ran away when confronted by the police.

[26] It was argued on behalf of appellants that the crime of housebreaking had not been proved as Mr Hall could not remember whether he left the patio door open or closed. In my view this argument is well founded. The convictions of both appellant on the first charge should therefore be amended to read "theft" instead of "housebreaking with intent to steal".

[27] Subject to the amendment mentioned above I am accordingly persuaded that the appeal of each appellant against his conviction must fail.

[28] In principle the courts aim at imposing uniform sentences for similar crimes. If the personal circumstances of the accused in question differ materially, however, one may deviate from this principle. See *S v Marx* 1989 (1) SA 222 (A) at 225B.

[29] In the present case there is a material difference between the criminal record of first appellant and that of second appellant. Second appellant has already been sentenced to direct imprisonment on three occasions, the last of which had hardly expired when the present offences were committed. First appellant has not yet received a custodial sentence. In my view

this difference in the sentences previously received by them, warrants a distinction in the sentences to be imposed in this case.

[30] The amendment of the conviction on the first count, namely the deletion of the reference to housebreaking, should also be reflected in reduced sentences. In my view the sentences imposed by the magistrate on the first count should for that reason be reduced by 6 (six) months for each appellant.

[31] Save for the two adjustments mentioned above, there are in my view no grounds for interfering with the sentences imposed by the magistrate. I would therefore impose on first appellant a sentence of 4 (four) years imprisonment in respect of the first count and 2 (two) years and 6 (six) months imprisonment in respect of the second count.

[32] As to second appellant I would impose a sentence of 4 (four) years and 6 (six) months imprisonment in respect of the first count and 3 (three) years' imprisonment in respect of the second count.

[33] In the result, the appeals of first appellant and second appellant against their convictions are upheld in part in that the

conviction of each appellant on the charge of housebreaking with the intent to steal and theft is set aside and replaced by a conviction for theft.

[34] The appeals of first and second appellants against sentence are upheld in part. Their sentences are set aside and replaced by the following:

First appellant:

Count 1: 4 (four) years' imprisonment

Count 2: 2 (two) years' and 6 (six) months' imprisonment

Second appellant:

Count 1: 4 (four) years' and 6 (six) months' imprisonment.

Count 2: 3 (three) years' imprisonment

The sentence of each appellant on the first count is to run concurrently for a period of 18 months with the sentence on the second count. All sentences are ante-dated to 13 March 2008 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

A P BLIGNAULT

ENGERS AJ: I agree

K A B ENGERS