IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: A 181/09

In the matter between:

LINDA WALTER	First Appellant
ULRICH WALTER	Second Appellant

and

THE STATE	Respondent

J U D G M E N T

INTRODUCTION

1. The appellants, a married couple from Cape Town, were charged in the Regional Court, Cape Town, with theft of a motor vehicle. On 22 October 2007, they both pleaded guilty to the charge and tendered written plea explanations in terms of section 112 of the Criminal Procedure Act, 1977.

2. The prosecutor was not prepared to accept the pleas on the factual basis set out in the plea explanations and the Regional Court Magistrate, correctly, had misgivings as to whether the pleas as

tendered amounted to an admission that they had the intention to deprive the owner permanently of her property. As a result pleas of not guilty were entered.

3. After evidence was presented, both appellants were convicted of theft of a motor vehicle and were thereafter sentenced to 3 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. In addition, a further 4 years imprisonment was imposed which was suspended for a period of 4 years on condition that the appellants were not convicted of any offence of which dishonesty was an element committed during the period of suspension.

4. With the leave of the trial court, both appellants appealed against their convictions and the sentences imposed.

THE EVIDENCE

5. The second appellant's plea explanation reads as follows:

> "1. I, ULRICH WALTER, confirm that I plead guilty to the offence of car theft.
>
> 2. I admit that on the 3 March 2007 and at the Waterfront parking area, Cape Town in the area of jurisdiction of this Honourable Court I wrongfully and unlawfully stole a Renault Cleo motor vehicle with registration number CY217231 ("the Cleo") the property or in the lawful possession of Elardie Mostert.
>
> 3. The incident occurred against the backdrop of emotional, matrimonial and psychological upheavals in our lives. I am bipolar and my wife suffers from a general anxiety disorder and severe depression. Shortly before the incident

our marriage had seemingly come to an end for a number of reasons but the main ones being a relationship Linda had had with a previous boyfriend of hers and her inability to come to terms with her father abusing her when she was a child. We had attempted to overcome our difficulties by talking the problems over at great length in the days leading up to the incident and more especially that day. We had attempted to resolve the problems with the assistance of partner therapy. We had eventually agreed to stay together as a family and Linda had made a number of commitments in this regard.

4. To steal something is alien to both Linda's and my character. I fully realize my actions were wrong but at the time we acted, we acted on the spur of the moment and probably because the keys were left in the ignition of the Cleo, the doors left unlocked and the dashboard lights on.

5. We had parked next to the Cleo. We saw the keys in its ignition then and two hours later on our return to our car after shopping. We drove off in our car but before leaving the parking area the thought of Linda proving her commitments to me entered my mind and I told her to take the Cleo. I thought at the time that if I gave her a task so outrageous and contrary to her beliefs and nature and she complied this would prove to me, and to her, that we could overcome our problems. To drive off in some else's car was the "*dare*" or serious act that I believed would test her commitment only because that option was immediately at hand at that time.

6. I told Linda to drive the Cleo out in order for her to prove to me that she still loved me and our children, that she had made a commitment to our marriage and that she had in fact put behind her the emotional and psychologically debilitating trauma of being molested by her father when she was a child. Although Linda was receiving counseling, this latter problem was having such a profound effect on her and our marriage that I believed it had to be resolved. She loved her father despite what he had done to her and I was not sure that our love could be placed first in her mind. She had agreed to put this problem behind her but was not convincing in her undertaking.

7. Linda used our parking ticket to take the Clio out of the parking area and I got a replacement ticket by saying I had lost mine and by giving a false name. The giving of the false name was not only to disguise my identity because we had taken the Clio but also because I am afraid to give out my address details to strangers.

8. Linda drove the car home and parked it in the street outside our house. We had not thought through what we were doing and after parking the car we did not know what to do with it. We then became scared and afraid of the consequences of what we had done. We discussed various ways to get out of the predicament we had placed ourselves in and eventually decided to park the car near to where we had stolen it but never got around to doing so before I left to go to Namibia early the following week and then on to Germany to give a series of lectures to bankers. The emotional crises in our lives was not over and this combined with the overseas trip and uncertainty as to what to do contributed to our failing to deal with the Cleo problem immediately. We intended to sort the problem out when I returned from

Germany. We had parked the car on our property and in order to protect it from our large dogs, and also to hide the car, we put a plastic cover over it.

9. Linda made sure that everything in the car that could be stolen whilst it was parked in the street outside our house was removed and placed safely in our house. When the police called the following Thursday these items together with the car were returned to the police and then to the Complainant.

10. Our actions were unlawful and wrong. I am truly sorry and apologise to the Complainants for any anxiety or harm I may have caused them."

6. The first appellant in her plea explanation confirmed the contents of her husband's plea explanation insofar as it related to her.

7. The complainant, Elardie Mostert, testified that she parked her husband's car, a Renault Clio, in the basement parking at the V&A Waterfront shopping mall in Cape Town on Saturday 3 March 2007 at approximately 11h00. She had locked the vehicle and put the keys in her handbag whereafter she and a friend went looking for an evening dress. On her return to the parking area later that day, she could not find her keys in her handbag and the car was missing.

8. The car was returned to her 5 days later by the Police. Apart from a missing rear number plate, the motor vehicle was in the same condition as it was before it went missing.

9. John Davids, a surveillance operator at the V&A Waterfront shopping complex, testified that he examined images photographed by the

security cameras in the complex and found that the Renault Clio entered the underground parking area at 11h08 on 3 March 2007 and left the parking area at 13h30 on the same day. He further testified that a Mercedes Benz with a foreign registration number entered the parking garage at 12h04 and left the parking garage at 13h40 on the same day. He handed in a photograph of the driver of the Mercedes Benz who paid for a parking ticket at 13h33. He further established that the driver of the motor car with the foreign number plate had purchased a replacement parking ticket on that day. It is common cause that this was the second appellant.

10. He further established from the video recordings made by the security cameras that at 13h28 the first appellant got out of the Mercedes Benz with the foreign number plate and that she was the driver of the Renault Clio motor vehicle when it exited the parking area at 13h30.

11. Inspector Patrick Swennin ("Swennin") of the South African Police Services based at Table Bay Harbour, testified that he established through the German embassy that the Mercedes Benz vehicle was registered to second appellant, but he could not obtain his address in South Africa from the embassy. He made further enquiries and established that second appellant resided at an address in Higgovale, Cape Town. He went to the address accompanied by his commander. The first appellant opened the gate to the property for

them. He immediately recognised her as the same person that he had seen on the video footage of the V&A Waterfront shopping complex security cameras. He also noticed the Mercedes Benz with the foreign registration parked on the premises. They informed first appellant that they wanted to talk to her about a car theft case and they showed her the video footage including a photo of herself. She confirmed that it was her.

12. He then told her that they were going to arrest her for the theft of the car and warned her she did not have to answer any further questions, that she was entitled to an attorney of her choice and if she could not afford one she could apply for one. He thereafter asked her where the car in question was and she took them through the kitchen to the backyard of the property, where she pointed out a vehicle covered in black plastic. He and his colleague uncovered the vehicle and identified the vehicle as the one that was reported stolen by the complainant. The front registration plate was still on, but the rear one was missing. On his question as to the keys for the car, the first appellant went into the house and came back with the keys.

13. Whilst walking towards the police vehicle, he again reminded her of her rights and asked her why she had taken the vehicle. She informed him that she had found the keys in the vehicle and took the vehicle for

safe-keeping. She did not think of reporting the matter to the security officials at the centre. That was the case for the State.

14. First appellant was the only witness for the defence. She testified that she and second appellant had marital problems. He is bipolar and she suffers from depression. She also had an affair with her previous boyfriend which came to her husband's attention.

15. That particular weekend she had arranged for their children to sleep out with friends so that she and her husband could have time for themselves. On the Saturday morning, after they had had breakfast in Green Point, they went to the V&A Waterfront and parked in the basement parking area. As she alighted from their vehicle, she noticed that the keys of the car parked next to them were left in the ignition and that the dashboard lights were on. She and her husband went shopping. With the aid of credit card purchase receipts and the times testified to by Davids, she testified that they arrived at the V&A Waterfront at 12h04 on the 3rd March 2007, the first credit card purchase was made at 12h46, the second at 13h03 and the third at 13h20 whereafter she left the shopping centre in the Renault Clio of the complainant at 13h30.

16. She testified that when they returned to their car to leave, she noticed that the ignition of the Renault Clio parked next to them still had its keys

in the ignition and that the ignition was still on. They both got into their car and proceeded towards the exit. There were other vehicles and they had to stop. At this stage second appellant dared her to get out of their car and drive the Renault Clio out of the parking area. This, he said, would indicate that she still loved him and that she had forgotten about her boyfriend and the problems that she had with her father when she was young. She decided to do it, got out of the car and into the Renault Clio, whereafter she drove it out of the parking area. She used their parking ticket to get through the control at the exit.

17. After she had left the area, she testified that she panicked and did not know what she must do. She decided to drive to the house and she parked the car outside and waited for second appellant to arrive.

18. After he had arrived they discussed what to do with the car but they did not arrive at a solution. The car was left outside in the street. She removed the property that was in the car and stored it in the house. The next morning they moved the car onto their property and parked it at the back of the house. Second appellant covered the car with black plastic. According to her, this was done to protect the car from the dogs and from nuts that dropped from a tree in their back yard. She conceded that it was also done to hide the car.

19. On the Tuesday second appellant left for Namibia and Germany. As she did not know what to do with the vehicle, she decided to wait for second appellant to return.

20. In cross-examination she conceded that the car was not visible from the front of the house but was hidden so that nobody could see it. She also testified that before the car was covered with plastic, second appellant requested her to open the bonnet and that he had touched two nuts to the battery, explaining to her something about a tracking system.

21. On a question from the prosecutor as to why she did not tell Swinnen that she had taken the car because it was a dare from her husband, she replied that it was embarrassing and unpleasant for her. She also thought it was totally unbelievable and that he would not have believed her in any case.

22. The second appellant did not testify.

THE FINDINGS

23. The trial court found that first appellant was not a truthful witness and rejected her evidence insofar as she contradicted the evidence of the State witnesses. With regard to the keys, and having accepted the evidence of Mostert that the keys were in her handbag, the trial court

found that it could not find how the keys came to be in the possession of the appellants and called it a mystery.

24. In the circumstances the trial court found that the State had proven its case beyond a reasonable doubt and convicted both the appellants of theft of the motor vehicle.

THE ALLEGED IRREGULARITIES

25. Mr Webster who appeared, with Mr King, on behalf of the appellants submitted that the appellants did not have a fair trial on two bases. Firstly, that the interpreter who had to interpret the evidence to the appellants (who are German speaking) was not competent. Secondly, that the trial court erred to allow Swinnen to testify as to what first appellant had told him at her house, without first conducting a trial-within-a-trial to decide whether the evidence is admissible.

(a) **The interpreter**

26. The complaint about the interpreter has no merit. The trial court's concern with regard to the interpreter had nothing to do with the interpreter's ability to translate the evidence, but rather with the interpreter's lack of knowledge of court proceedings and the fact that he tended to interpret the evidence in the third person. When the interpreter was replaced with another interpreter, that interpreter was

requested to listen to the evidence, to decide whether the interpretation was correct. This was done without objection from the prosecutor or Mr King, who appeared for the appellants during the trial, and he reported to the court that he could not fault the interpretation done by the previous interpreter.

(b) **Failure to hold trial-within-a-trial**

27. As stated above, Swinnen testified that he had shown first appellant video footage from the security cameras at the V&A Waterfront, including a photo of herself and asked her if she could confirm that it was her. To this she replied in the affirmative. Mr King objected to evidence being led as to what the first appellant had said to Swinnen, on the basis that she was not warned of her constitutional rights.

28. After some discussion, Mr King agreed that the evidence may be led as the fact that first appellant was the person in the photo is not disputed. He added that "if that is the only evidence my learned friend wishes to produce, then she may proceed". He further placed on record that should the State wish to place further evidence of what first appellant allegedly said to Swinnen before court, a trial-within-a-trial should be held to establish the admissibility of such evidence.

29. According to Swinnen he then told first appellant that he was going to arrest her on the charge of theft of a motor vehicle and he warned her of her constitutional rights, including that she did not have to answer any further questions.

30. He thereafter enquired about the whereabouts of the car and she took them to the back yard where she pointed out the car. At this juncture Mr King informed the court that this evidence is also not in dispute.

31. On Swinnen's enquiry as to the keys for the car, the first appellant retrieved the keys from the house.

32. Swinnen then proceeded with the first appellant to the police vehicle to take her to the police station. His evidence in this regard reads as follows:

> "While walking, I reminded her again about her rights, and she understood her rights. I then asked why she took the vehicle.
>
> Mr King: I object to the State – she informed me that she had found the keys in the vehicle and thought of taking the vehicle for safekeeping. I then asked why she didn't go to the Security to inform Security, he would have placed a guard or do something. She replied that she didn't think of that."

33. During cross-examination by Mr King, Swinnen conceded that after the document, warning first appellant of her rights, was completed at the police station, first appellant elected to exercise her right to remain silent. Mr King's further cross-examination was, in the main, aimed at

placing in dispute Swinnen's evidence that he had informed first appellant of her right to remain silent at her house as he had testified.

34. During her evidence in chief, first appellant admitted that Swinnen had shown her the photographs and that she had admitted that it was she and second appellant in the photos.

35. She also admitted that she had told Swinnen that she had the car and had given him the keys.

36. She further testified that before they left her house, Swinnen allowed her to phone her lawyer. At the police station her rights were explained to her. She denied that Swinnen had explained her her rights at an earlier stage.

37. She confirmed Swinnen's evidence that he had asked her why she had taken the car and that he did so before they arrived at the police station. She was not asked whether she replied to that question.

38. Under cross-examination, first appellant was asked whether she told Swinnen why she took the car. Mr King immediately renewed his objection but was overruled by the Regional Court Magistrate as follows:

> "I don't agree with you Mr King. There is no basis for a trial-within-a-trial, if it was an admission or a confession, at the end of the day, at that stage. It is ex- how do you pronounce the word?"

39. The prosecutor then asked first appellant why she did not inform Swinnen that she took the car because second appellant dared her to do so. She replied that it was embarrassing and that she thought it was so unbelievable that Swinnen would not have believed her in any event.

40. In her judgment, the Regional Court Magistrate dealt with Swinnen's evidence and first appellant's evidence with regard to the conversation at the house. After finding that the statement in question was not self-incriminating, she concluded that the Constitution is not applicable. She further stated that even if the Constitution was applicable, the first appellant's rights were not infringed as her rights were explained to her.

41. Where an accused alleges that evidence is inadmissible as it was obtained in breach of his/her constitutional rights, a question of admissibility is raised. Such a question of admissibility must be decided upon in a trial-within-a-trial and not as part of the merits of the case. (See **S v Ntzweli 2001 (2) SACR 361 (C) at 363b-364a**; following **S v Mhlakaza and Others 1996 (2) SACR 187 (C)** and **S v Mayekiso 1996 (2) SACR 298 (C) at 303h-i).**

42. The trial court consequently committed an irregularity in not holding a trial within a trial to decide on the admissibility of the evidence objected to. An irregularity has been held to be an irregular or wrongful deviation from the formalities and rules of procedure at ensuring a fair trial (see **S v Jaipal 2005 (4) SA 581 (CC) at para. [38], p. 596D)**.

43. This then raises the question whether the irregularity rendered the trial unfair or was detrimental to the administration of justice (see **S v Ntzweli (*supra*) at p. 364b-d)**.

44. Bearing in mind the nature of the evidence in question, the fact that first appellant was not cross-examined with regard to the impugned reply to Swinnen's question and the plethora of other evidence establishing the guilt of the first appellant, I do not share counsel's view that the irregularity resulted in an unfair trial.

The convictions

45. The basic facts are common cause. The appellants, acting in concert, had removed the complainant's vehicle from the V&A Waterfront and hid it under a plastic cover in the back yard of their house, where the police found it five days later.

46. The issues that arose in this matter were the following:

46.1 Whether the complainant had left the keys in her car's ignition or whether it was removed from her handbag;

46.2 Whether the first appellant removed the car from the V&A Waterfront as a result of a dare from second appellant;

46.3 Whether the appellants removed the car and kept the vehicle with the intention of stealing it.

47. The court *a quo* found that the State witnesses were reliable and that the first appellant was an untruthful witness and rejected her evidence insofar as it contradicted the evidence by the State witnesses.

48. These findings are borne out by the record.

49. I do however find that the court *a quo* erred in one respect with regard to the complainant's evidence to the effect that she had locked her car and had put the keys in her handbag. This presupposes that first appellant's evidence that she found the keys in the car's ignition is false. Consequently, one of the appellants or both of them must have removed the keys from the complainant's handbag. The vast parking area and the fact that they had entered the parking area almost an hour after the complainant, discounts such an inference. That leaves the possibility that the appellants had an accomplice or that someone else had obtained the keys and left it in the car's ignition. There is no

evidence at all to justify such an inference. It follows that, contrary to what the court *a quo* found, it must at least be a reasonable possibility that the complainant had left her keys in the car's ignition, although she was firmly under the impression that she had put the keys in her handbag as she usually does.

50. It follows that first appellant's evidence that she saw the keys in the ignition is reasonably possibly true.

51. The court *a quo*, however, correctly rejected the first appellant's evidence that she had removed the car from the V&A Waterfront as a result of a dare by her husband. This evidence is clearly not reasonably possibly true for the following reasons:

51.1. Firstly, the fact that the appellants did not have parking tickets to remove both cars from the basement, militates against the dare version. Second appellant had to purchase a ticket on the false pretence that he had lost his ticket to enable him to remove his car from the parking area. According to his plea explanation he also gave a false name when he did so.

51.2. Secondly, once first appellant had removed the car from the parking area she did not leave the car somewhere as one would expect, having completed the dare, she drove the car to their

house. They then hid the car at the back of their house and covered it under a plastic cover.

51.3. Thirdly, second appellant was concerned about a tracking device and did something to the car's battery.

51.4. Fourthly, three days later second appellant departs on a business trip and leaves the car hidden in the back yard.

52. I am satisfied that the court *a quo* correctly rejected the first appellant's evidence that she was dared by her husband to remove the car and had correctly found that the appellants had the intention to steal the car, before the car was removed from the parking area.

53. It follows that both appellants were correctly convicted of theft of the motor vehicle.

SENTENCE

The applications to lead further evidence on sentence by way of affidavit

54. Both the State and the first appellant applied for leave to place further evidence before this court on appeal by way of affidavit with regard to sentence.

55. The requirements for such evidence to be allowed are the following:

55.1. The evidence must be of such quality that it will presumably be accepted as true by the court of appeal;

55.2. It must be of such importance that, if it is believed, it can reasonably be expected to lead to a different verdict or sentence; and

55.3. There is a reasonable acceptable explanation for the failure to present the evidence before the conclusion of the trial.

(See **S v De Jager 1965 (2) SA 612 (A) at 613C-D)**

The State's application

56. The State wished to place evidence before the court to the effect:

56.1. That the second appellant was sued for R61 473,84 in respect of arrear rentals for the premises on which his company conducted business. This summons was issued on 17 April 2009;

56.2. That second appellant on 23 June 2009 applied for the liquidation of his company and that the company was liquidated on 29 July 2009.

57. The State contended that this evidence is relevant with regard to the second appellant's personal circumstances.

58. Bearing in mind, that sentence was passed on 27 October 2008 and the liquidation application was filed some 8 months later, I fail to see how that can be relevant to sentence, let alone lead to a different sentence. Similarly, it is unknown whether the summons issued on 17 April 2008 was ever taken further. Moreover, Dr Labuschagne informed the court that the second appellant had suffered a severe financial setback some three years prior to the offence.

59. The application by the State to place further evidence before the court on appeal by way of affidavit is consequently dismissed.

First appellant's application

60. First appellant wished to place further evidence before this court that she was diagnosed with rheumatoid arthritis subsequent to the handing down of the sentence. Her application was served on the State well in advance of the hearing of the appeal and no notice of intention to oppose the application was filed.

61. According to her affidavit, she has to inject herself twice per week. As a result of the use of the medication, her immune system is compromised and she is susceptible to be infected by diseases such as

tuberculosis, hepatitis, bronchitis and similar contagious diseases. She has to use antibiotics for even the smallest infections. She submits that under the circumstances a sentence of direct imprisonment would be wholly inappropriate.

62. Facts that arose after sentence had been passed may, depending on the nature of the facts, be considered by a court of appeal. (See **S v Japhta 2010 (1) SACR 136 (SCA)).**

63. The facts set out in the affidavit in support of the application comply with the test for the admission of further evidence on appeal laid down in **De Jager's** case.

64. In the circumstances, the application by first appellant to place further evidence before this court on appeal by way of affidavit is granted.

MISDIRECTION

65. On behalf of the appellants it was submitted that the sentences of direct imprisonment imposed on them are too harsh in the circumstances of the matter and specifically in the light of the fact that they have children, the youngest of whom suffers from psychological problems.

66. It was furthermore submitted that the court *a quo* in any event misdirected itself in finding that the complainant's keys had not been left in her vehicle, but had been obtained by the appellants in some mysterious manner which finding, it was submitted, weighed heavily with the court when it decided to impose terms of direct imprisonment.

67. Mr Badenhorst, who appeared on behalf of the State, submitted with reference to **S v Gerber 2006 (1) SACR 618 (SCA) para. [18]** that direct imprisonment of between 3 to 5 years is the norm in cases of motor vehicle theft, although there are cases where, as a result of special mitigating circumstances, sentences other than sentences of direct imprisonment have been imposed.

68. He further submitted that the appellants did not make a clean breast of the matter but tried to mislead the court *a quo* with their version of the dare. Moreover, the fact that the vehicle was recovered had nothing to do with the appellants but with excellent detective work by the police.

69. He further submitted that insofar as the court *a quo* imposed imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 1977, it clearly tempered the sentence to cater for the extenuating circumstances deposed to by Dr Labuschagne.

70. As to the circumstances in which an appeal court will interfere with the sentence imposed by a lower court, the trite principles were restated in **The Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) at para. [11]:**

> "The powers of an appellant court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides preeminently with the discretion of the trial court. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) at p 478D-G;
>
> > '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 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 doing so, it assesses sentence as if it were a court of 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 appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when 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".'"

71. As pointed out above, the court *a quo* erred in accepting the evidence of the complainant that she removed the keys from her car and, by implication, rejecting the first appellant's evidence that the keys were in the ignition as not reasonably possibly true. This led to the finding, for purposes of sentence, that the theft required a lot of planning, including the finding that the keys came into the possession of the appellants "inexplicably". In my view the court misdirected itself on the facts in this regard and as this misdirection played a material

role in the sentence imposed, this court is free to consider sentence afresh.

72. In the case of first appellant, further evidence was placed before us that must also now be considered (see **S v Jaftha 2010 (1) SACR 136 (SCA)**).

73. As to their personal circumstances, both appellants are first offenders. They were in their early 40's when the offence was committed. They are married to each other and they have three children. At the time of sentencing the children were respectively 18, 15 and 12 years of age. At present they are 21, 17 and 15 years old. The youngest has been diagnosed with attention hyperactive syndrome and requires special attention.

74. First appellant has recently been diagnosed with rheumatoid arthritis, a condition that needs special medication which makes her susceptible to infections. Imprisonment will enhance the danger of contracting a serious disease.

75. Both appellants also have psychological problems.

76. The children are totally dependent on their parents. There are no other relatives in this country. The appellants have immigrated from Germany and the children have no ties with their grandparents.

77. In considering sentence, the fact that the appellants did not take the court into their confidence must weigh against them.

78. Furthermore, theft of motor vehicles is a serious offence and prevalent in the jurisdiction of the court *a quo*. As pointed out by Mr Badenhorst, sentences for this type of offence is normally imprisonment of between 3 and 5 years, although non-custodial sentences have also been imposed in certain circumstances.

79. Should both the appellants be imprisoned the children will be severely prejudiced. They have no family in this country and they have no ties with their grandparents. It follows that the interests of the children should weigh heavily in considering an appropriate sentence. In **S v N 2008 (3) SA 232 (CC)**, the Constitutional Court set out how a court should weigh the competing considerations between maintaining the integrity of family care and the State's duty to punish criminal misconduct.

80. On the evidence as a whole, I have no doubt that the second appellant played the leading role in the commission of this offence. He purchased the replacement ticket and gave a false name to the parking officials at the V&A Waterfront. He initiated the plan to hide the stolen vehicle under a plastic cover and he was concerned about a tracking device on the car and as a result did something to the

battery of the car. The personality of the second appellant as opposed to the first appellant, as referred to by Dr Labuschagne, strengthens this conclusion. In these circumstances a differentiation between the sentences to be imposed on the appellants are justified.

81. Bearing in mind the interests of the children, especially the youngest and the first appellant's recently diagnosed medical condition, I am of the view that a non-custodial sentence should be imposed in her case.

82. In the case of the second appellant a sentence of direct imprisonment is warranted.

CONCLUSION

83. In the result, the appeals against the convictions are dismissed, and the appeals against the sentences imposed are upheld. The sentences imposed are set aside and replaced with the following:

83.1. First appellant is sentenced to correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 1977 as more fully set out in the annexure hereto marked "X".

83.2. Second appellant is sentenced to three years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 1977.

VAN ZYL AJ

I concur.

DESAI J

ANNEXURE "X"

SENTENCE

1. In terms of section 276(1)(h) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the first appellant is sentenced to 3 years correctional supervision subject to the following provisions:

1.1. The first appellant is placed under house arrest for the full duration of the correctional supervision, from 19h00 to 06h30 on workdays and from 14h00 to 12h00 on non-working days:

Provided that the house arrest shall not be applicable during the times the first appellant is reasonably absent from her residential address for the purpose of attending:

1.1.1. Community service set out in paragraph 1.2;

1.1.2. Church services on Sundays from 08h30 to 13h00;

1.1.3. Hospitalization and/or consultation with a doctor on condition that written proof must be furnished to the Correctional Official;

Provided further that the Commissioner of Correctional Services (hereafter called the Commissioner) is authorised to suspend or to reduce the hours or period of house arrest and to re-instate same.

1.2. The first appellant shall perform such community service as prescribed by the Commissioner without compensation for a period of 20 hours per month, for the first 18 months of the sentence, provided that the Commissioner is authorised, if

merited, to suspend or reduce the period of community service or to reinstate same.

1.3. The first appellant may not change her residential or work address without prior notification to the Commissioner.

1.4. The first appellant may not leave the magisterial districts of Cape Town, Bellville and Wynberg without prior approval by the Commissioner.

1.5. The first appellant shall for the full duration of the sentence, refrain from the use of alcohol or the use of drugs other than on prescription by a medical practitioner.

1.6. The first appellant shall subject herself to monitoring by the Commissioner and shall comply with all reasonable directives issued by the Commissioner regarding the execution and administration of this sentence.

1.7. The first appellant shall report to the Correctional Officer at Cape Town on 29 June 2011 at 10h00.

2. The first appellant is further sentenced to 2 years imprisonment, wholly suspended for 4 years on condition that the she is not convicted of an offence involving dishonesty committed during the period of suspension and for which unsuspended imprisonment without the option of a fine is imposed.