

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

**CASE NUMBER:**

A627/2011

**DATE:**

10 AUGUST 2012

5 In the matter between:

**EBEN JOHNSON**

Appellant

and

**THE STATE**

Respondent

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**J U D G M E N T**

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**MANTAME, AJ**

15 This is appeal against sentence that was handed down by  
Magistrate Cannon in Somerset West Regional Court on 23  
November 2010.

20 Appellant was charged with two counts, that is housebreaking  
with an intent to rob and robbery with aggravating  
circumstances in terms of Section 51 of Act 105 of 1997 and  
1(B) of Act 51 of 1977 that was committed on 10 December  
2009 and the second count in fact committed on 4 January  
2010.

25 In respect of count 1, on his plea of not guilty he made certain

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admissions in terms of Section 220 of the Criminal Procedure Act. He was then found guilty of housebreaking with the intent to steal and theft. In respect of count 2, he was found guilty of theft.

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On count 1 he was sentenced to eight years imprisonment and count 2 he was sentenced to three years imprisonment. A further two years were suspended for five years on condition that he was not convicted of theft or attempted theft committed  
10 during the period of suspension.

Furthermore, the magistrate ordered that half of the sentence on count 2 was to run concurrently with the sentence on count 1, giving the appellant an effective sentence of nine and a half  
15 years imprisonment.

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On 11 October 2011 appellant applied for condonation for application for leave to appeal and such application was dismissed by the magistrate on the same date.

The appellant then proceeded to petition the Western Cape High Court and the application for leave to appeal against sentence was granted on 9 November 2011.

25 The State was represented by Ms Lara Joubert and the

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respondent by Ms T Berry.

This Court is called upon to decide whether the Court *a quo* misdirected itself on the following:

- 5      1. That the Court erred in over-emphasizing the seriousness of the crime, specifically by not attaching enough weight to mitigating factors, the interest of society and the prevalence of the offence, deterrent effect of sentence;
- 10      2. That the Court erred in not taking into account the personal circumstances of the appellant, that is his age and mitigating factors;
- 15      3. That the Court erred in imposing an appropriate sentence, and thus amounting to a misdirection of the magistrate's discretion. He should have approached sentencing in terms of Section 296 of Act 51 of 1977, by requesting a  
20      probation officer's report to assist with the question of whether the Appellant should be referred to a rehabilitation centre rather than imposing direct imprisonment.

Respondent submitted that a Court of appeal can only interfere  
25      with a trial Court's decision on sentence in limited

circumstances.

In S v Malgas 2001 SACR 496 (SCA) at 478e-g, Marais, JA, held that "there must be either a material misdirection by a trial court or the disparity between the sentence of the trial court and the sentence that the Appellate Court would have imposed, had it been the trial court is so marked that it can properly be described as "shocking", "startling" and "disturbingly inappropriate".

Ms Berry submitted further that there was no basis laid before the Court *a quo* upon which to consider obtaining a probation officer's report. She conceded though that the Appellant committed the offences in order to obtain money to buy drugs.

Ms Berry, however, disputes the fact that appellant had a drug dependency producing habit.

Counsel for the state argued that the personal circumstances of the appellant were taken into account for instance, the fact that he was 43 years of age; that he had two minor children; that he went up to standard 6 at school; that he was unemployed at the time of the trial and he was in custody for 10 months prior to sentence and that he pleaded guilty to the charges and he did not waste the Court's time. It is therefore

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the State's submission that the Court *a quo* correctly referred to the seriousness of the offences. Therefore the appeal court should be dismissed and the sentence should be confirmed.


5 In S v Zinn 1969(2) SA 537(A), the court held that the sentencing court should take into account the triad principle when sentencing the offender. In this case there is clearly no indication that the Court *a quo* misdirected itself as mentioned in paragraph 4 above.

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In my opinion the magistrate did take into account the crime, the interest of society and the personal circumstances of the appellant. In my view the magistrate did not misdirect itself in any way and it follows that the appeal against sentenced  
15 cannot succeed, in the result that the following order is proposed:

**THE APPEAL AGAINST SENTENCE IS DISMISSED.**

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MANTAME, AJ

I agree and it is so ordered.

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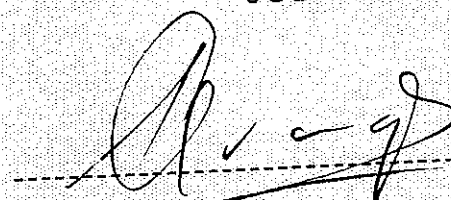
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JUDGMENT

A handwritten signature in black ink, appearing to read 'J. Le Grange', is written over a horizontal dashed line.

LE GRANGE, J

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