OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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

Reportable

CASE NO: A253/2019

In the matter between

C D — FIRST APPELLANT

J J — SECOND APPELLANT

AND

THE STATE — RESPONDENT

CORAM: BOZALEK J; THULARE AJ

JUDGMENT: 06 NOVEMBER 2019

THULARE AJ

[1] The appellants were granted leave in respect of the sentence only following a petition. The appeal follows their conviction on a charge of housebreaking with intent to steal and theft in the District Court (DC) and their sentence of nine (9) years imprisonment of which two (2) years were suspended for five (5) years on conditions in the Regional Court (RC). Both appellants were found not guilty on the charge of assault with intent to do grievous bodily harm.

[2] The appellants submitted that the matter was not properly placed before the RC in terms of section 116 of the Criminal Procedure Act 51 of 1977. The appellants further argued that the RC erred in not obtaining a pre-sentence report which the DC had already ordered and that the sentence imposed was not balanced.

[3] The respondent conceded that the matter was not properly placed before the RC and that the RC ought to have referred the matter back to the DC. The respondents submitted that the offence is one justiciable in the RC and that with the history of previous convictions which the appellants had, the sentence imposed should still adequately take those factors into account and accepted that the appellate court may interfere with the sentence imposed.

[4] The appellants terminated the instructions to an attorney provided by Legal Aid South Africa at their instance and elected to conduct their own defence. Both pleaded guilty to count 1 and not guilty to count 2. The court questioned both appellants. The State did not accept the facts placed before court in respect of count 1 and the court noted a plea of not guilty.

[5] The State led the evidence of the complainant. The appellants gained entry into the yard of complainant's property, Searles Trading Post, Greyton, and saw a laptop inside the office. Appellant 2 opened the window and both went inside the office. They removed the cable on which the laptop was connected to charge and took the laptop. The State did not

accept the facts upon which the appellants based their plea and as such a plea of not guilty was noted.

[6] The complainant arrived at the property at around 22:30 on Saturday 23 September 2017 and noticed that the office door was closed and the lights were switched off, which was unusual for him. His two Jack Russel dogs were standing in front of the door and barking incessantly. The Labrador dog was also barking frantically. He went to inspect and found both appellants inside the office. From the other lights in the property visibility was good. He grabbed both of them. Appellant 2 wriggled his way out of the complainant's grip, jumped through the window and fled. Appellant 1 had a large knife on him. He did not use it and the complainant was not assaulted.

[7] The complainant wrestled the knife from appellant 1. Appellant 1 pleaded that the complainant should leave him and offered to disclose the names of those who had sent him to commit the burglary. Appellant 1 managed to wriggle himself out of the complainant's grip and fled but the complainant managed to get hold of him before he escaped. The police were in the vicinity when called and managed to arrive quickly and arrested appellant 1. The complainant was some days later called for a photo identification parade and identified appellant 2.

[8] The complainant saw that the whole window pane was removed out of its frame through which entry was gained into the office. The wooden door, big screen and porcelain lamp were damaged during entry. The laptop, valued at around R12 000-00 was missing. The complainant did not see appellant 2 leave with the laptop. He recovered the laptop. The laptop still worked but was damaged.

[9] On the basis of these facts appellants were convicted and the State proved previous convictions against both appellants on 27 March 2018. The DC said the following:

"Due to the previous convictions of accused 1 and 2 relating to offences where dishonesty is an element, the court will be considering a reviewable sentence. For this purpose the court will request a probation officer's report and a correctional supervision report before sentencing. We will now arrange a new date."

The appellants were remanded in custody for sentencing and no bail was fixed. The matter was thereafter postponed several times for purposes of sentencing.

[10] Except for the constitution of the court and an entry that the matter was remanded to 24 July 2018 for RC date for sentencing purposes attached to the charge sheet, there is no further record of proceedings around sentencing before or on that date. An instruction to the clerk of the court to type the charge sheet fortified the view that the proceedings were not mechanically recorded on that date.

[11] The sentencing in the RC received attention on 14 August 2018. After admitting the DC record the RC passed the following judgment:

"The accused before court is C D aged 36 and J J aged 31. The court has received the typed record of proceedings in the District Court. I have access to it and read the record and find that the finding of the District Court is in accordance with justice and the conviction is confirmed."

[12] Section 116(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA) provides as follows:

"116 Committal of accused for sentence by regional court after trail in magistrate's court

(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

(b) That the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

[13] The appellants pleaded guilty to count 1, the subject matter of this appeal. The DC found it to be an ill-considered plea of guilty. The factual information elicited to confirm the appellants' standpoint showed that a trial was necessary for the State to cover the essential elements of the offence which it had to prove. The legal basis for the guilty plea was not established during the questioning. Where an accused person pleaded guilty, and the court entered a plea of not guilty on their behalf, and an accused was thereafter convicted, such conviction satisfied a "conviction following on a plea of not guilty" as envisaged in section 116(1) of the CPA. Jurisprudential certainty, justice and fairness demanded that.

[14] The State put previous convictions to both appellants and both appellants admitted their previous convictions respectively. After conviction but before sentence the DC was not of the opinion that the previous convictions of the appellants were such that the offence in respect of which they were convicted merited punishment in excess of the jurisdiction of the DC court [*S v Kgomo* 1978 (2) SA 946 (T) at 947A-B].

[15] The DC started the sentence proceedings. The magistrate made an order for the acquisition of two reports, one from a probation officer and another from a correctional officer. The remarks on the record also showed that the magistrate had a *prima facie* view of what that sentence would be, to wit, a reviewable sentence. From the record it is not clear as to when and on what basis the opinion of the magistrate as regards the sentencing of the appellants changed. The order for the acquisition of two reports for purposes of sentencing stood. They were never set aside by a competent court. They could not be simply be disregarded.

[16] The DC's order for committal to the RC was merely a ruling of a procedural nature [*S v Duma* 2012 (2) SACR 585 (KZP) at para 11]. The correct procedure for such committal as envisaged in section 116(1) (b) of the CPA was not followed. Although the committal was in peremptory terms, it was subject to the opinion of the DC magistrate [*S v Beyers* 1948

(4) SA 816 (NC) at 817G]. The opinion and the reasons therefore should be clearly expressed and the committal should unequivocally appear on the record of proceedings [*S v Beyers, supra* at 817H]. It does not appear from the record that the committal to the RC was explained to the appellants. In my view, the matter was not properly placed before the RC in terms of section 116(1) (b) of the CPA. The RC was misdirected in the view that the proceedings before the DC were in accordance with justice.

[17] This is a matter where the RC should have considered a request for reasons from the DC [section 116(3) (a) of the CPA]. It is also a matter where the RC should have considered transmitting the matter to the High Court for review under section 303 of the CPA. It is a matter where the High Court should interfere with the sentence.

[18] Appellant 1 had thirteen previous convictions. Three of which were malicious damage to property (two in 1997 and one in 1998), two of housebreaking (1997 and 2002), three of theft (two in 1997 and one in 2015), three of assault (2000 and two in 2008), one *crimen injuria* (2010) and one unlawful possession of drugs (2017). Appellant 2 had five previous convictions. Three of which were housebreaking (2004, 2005 and 2014), one theft (2010) and one unlawful possession of drugs (2013).

[19] Appellant 1 had one recent relevant previous conviction for theft in 2015 for which he was sentenced to 6 months imprisonment. Appellant 2 had a recent relevant previous conviction of housebreaking with intent to steal and theft and was sentenced to two years imprisonment in terms of section 276(1)(i) of the CPA.

[20] Appellant 1 was 37 years of age, unmarried and had two children aged 19 and 13. Their mother was the primary care giver. He attended school until grade 9. He was a general worker and earned R200 a day. He had been in prison awaiting trial for 11 months. The appellant's eldest child was at University and needed his financial support.

[21] Appellant 2 was 31 years of age and had two children aged 5 and 4 years. Their mother was the primary caregiver. He attended school until grade 10. He was a general worker and earned R1500 per week. He paid R800 child maintenance per child. He had a drug problem form a young age. He had been awaiting trial for 11 months.

[22] The appellants were convicted of a serious offence. They both in general have a history of being in conflict with the law. They showed no respect for another person's property. They had been in prison for almost a year before their sentencing in the RC. After careful consideration of all these factors I would make the following order:

(1) The appellants sentences are set aside and replaced with the following:

(2) "Each of the accused is sentenced to four (4) years imprisonment of which two years imprisonment is suspended for five (5) years on condition that the accused is not convicted of housebreaking with intent to commit an offence or a charge of theft committed during the period of suspension.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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L BOZALEK
JUDGE OF THE HIGH COURT