IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: A99/2021

In the matter between:

PETER KLAASEN **Appellant**

and

THE STATE **Respondent**

Coram: Fortuin J and Pangarker AJ

Date of hearing: 28 May 2021

Date of judgment: 9 June 2021 (delivered by email to the parties' legal representatives).

JUDGMENT

PANGARKER AJ (FORTUIN J concurring):

Introduction

1. The matter emanates from the Regional Court, Stellenbosch and is an appeal against sentence only. The appellant, an adult male, was charged with three counts, namely housebreaking with the intent to steal and theft, robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the

Act) read with section 51 (2) of the Criminal Law Amendment Act 105 of 1997 and assault common. He was legally represented and after tendering a plea in terms of section 112 (2) of the Act, he was subsequently convicted on charges of theft (count 1) and robbery with aggravating circumstances (count 2). The assault common charge was withdrawn.

2. The appellant's legal representative addressed the court *a quo ex parte* in mitigation of sentence, whereafter the appellant was sentenced as follows:

Count 1 – theft - 4 years' imprisonment;
Count 2 - robbery with aggravating circumstances – 8 years' imprisonment.
The appellant represented himself in an application for leave to appeal against conviction and sentence and on 18 November 2020, he was granted leave to appeal in respect of sentence only. The appellant now appeals to this court against his sentence.

3. In respect of the merits of the theft conviction, the State alleged that on 27 April 2017 in Stellenbosch, the appellant unlawfully and intentionally with the intent to steal, broke open and entered the flat of the complainant and then stole a jacket valued at R250, the property of or in the lawful possession of the complainant. He entered the complainant's residence through an open door at 01h30 after noticing that the front door of the complainant's flat was wide open. He realised that there were no people in the flat, proceeded to enter, scouted for valuables to steal and consequently took the complainant's property. It was while he was inside the flat, that the complainant returned, and assisted by security personnel, the appellant was

arrested. He admitted that there was no justification for his actions. The State accepted the facts on a plea of theft and the appellant was convicted of theft of a jacket valued at R250.

4. In respect of the second charge, the appellant admitted that on 5 May 2017 at approximately 02h30 in the morning he saw the complainant waiting at the bus stop. He approached the complainant and asked him for a cigarette, then grabbed the complainant's arm, threatened him with a knife and demanded that he hands over his cell phone. The complainant did not have a cell phone and was robbed of R30 and a packet of cigarettes. The appellant then left the scene. The State accepted the facts in respect of the plea on theft and the appellant was accordingly convicted of theft and robbery with aggravating circumstances.

Previous convictions

5. The State proved the following previous convictions[1] against the appellant:

> 20 April 2004 – theft - fined R1200 or 8 months' imprisonment wholly suspended for a period of 5 years on certain conditions;
>
> 14 June 2005-theft - 2 years' imprisonment;
>
> 12 December 2008 - housebreaking with intent to steal and theft - 12 months' imprisonment, wholly suspended for 5 years on certain conditions;

[1] Exhibit B

18 February 2010 - housebreaking with intent to steal and theft - 12 months' imprisonment.

The appellant's case

6. The appellant's personal circumstances were placed before the court *a quo.* He was 35 years old, unmarried with no dependants, had no fixed address and lived on the streets where he looked for valuables - he was described as a *"scouter"*. He did odd jobs occasionally and would earn R200 per day. He had a grade 10 education. He had admitted his previous convictions, pleaded guilty and had understood that he faced a minimum sentence in respect of the robbery with aggravating circumstances. It was submitted that the appellant had shown remorse for his actions and the court was asked to show him mercy and take his circumstances into account and deviate from the prescribed minimum sentence of 15 years for robbery with aggravating circumstances. As to his previous convictions, his last offence was in 2010.

The respondent's case

7. In the court *a quo*, the prosecutor submitted in aggravation of sentence that the offences occurred in the early hours of the morning and that, in respect of count 1, the appellant was caught red-handed in the complainant's flat in possession of the jacket, which was recovered. Furthermore, that, in respect of count 2, the appellant used a knife to deprive the complainant of his money and cigarettes. The submission

on behalf of the State was that direct imprisonment was the only appropriate sentence.

Sentence judgment

8. In his judgment on sentence, the regional magistrate took account of the appellant's personal circumstances, that he did odd jobs and had no fixed address; that he had pleaded guilty and spent approximately 7 months in custody (from 6 November 2017 to 7 June 2018). These latter aspects were found to be mitigating factors, which the regional magistrate held were substantial and compelling circumstances allowing him to deviate from the prescribed minimum sentence on the robbery count. The seriousness of the robbery and the perpetration of violence towards a defenceless person were factors considered during sentencing.

9. In respect of the theft, the regional magistrate found that the appellant had invaded the sanctity and privacy of the complainant's home. As a further aggravating factor, the appellant's previous convictions were of a similar nature to the theft and that the appellant had not made use of the opportunities given to rehabilitate himself. The cumulative sentence imposed was 12 years' direct imprisonment.

Grounds of appeal and submissions

10. From the appellants' counsel's heads of argument, the grounds for appeal are as follows: in respect of the theft conviction, it is submitted that the regional magistrate over-emphasised the appellant's previous convictions which resulted in a

disproportionate sentence and misdirected himself in considering previous convictions older than 10 years. Secondly, the deviation in respect of the robbery with aggravating circumstances was not sufficient given that it was not at the extreme end of the scale. Thirdly, the cumulative effect of the sentence was harsh and disproportionate.

11. Mr Calitz on behalf of the appellant submitted that the appellant acted opportunistically when committing the theft and as for the robbery, his actions were on the lower scale of violence and seriousness. One of the most important contentions on behalf of the appellant is that the regional magistrate did not consider the cumulative effect of a 12 year imprisonment sentence for theft of a jacket valued at R250 and robbery with aggravating circumstances of a packet of cigarettes and R30 cash.

12. Mr Snyman submitted on behalf of the State that the appellant committed the offences within 8 days of each other, that the last previous convictions were of a similar nature to count 1 (theft) and that the appellant entered the flat of a female complainant and was caught red-handed. It was further submitted that there was no evidence as to the circumstances as to the appellant's life on the streets and that he had made choices to live a life of crime. Counsel does not agree that a further deviation on the robbery charge is warranted as the regional magistrate had already taken into account substantial and compelling factors and thus halved the minimum sentence. As to the 4 years' imprisonment, Mr Snyman submitted that the fact that the offence was committed early in the morning, was an aggravating factor. He submitted that the sentence is not shockingly inappropriate nor is the cumulative

effect of the sentence disproportionate in the circumstances. The fact that the appellant has previous convictions escalates his criminal conduct.

Evaluation

13. It is trite that the determination of sentence falls within the discretion of the trial court. In **Director of Public Prosecutions, KwaZulu Natal v P**[2], the Supreme Court of Appeal stated that:

> *"the test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate".*

Furthermore, interference on appeal may also occur where the sentence imposed by the lower court is so disproportionate or shocking that no reasonable court could have imposed it[3].

14. A sentencing court is required to take into account the well-known triad[4] of the seriousness of the crime, the personal circumstances of the offender and interests of society. The court *a quo* must weigh the mitigating and aggravating factors[5] and arrive at a balanced judgment. The main grounds of appeal in this matter are that the court *a quo* overemphasised the appellant's previous convictions and did not take into consideration the cumulative effect of imposing a 12 year sentence.

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[2] [2005] ZASCA 127 at par 10
[3] See S v Sadler 2000 (1) SACR 331 (SCA) at par 8
[4] See S v Zinn 1969 (2) SA 537 (A) at 540 G
[5] Henry and Another v S [2020] ZAWCHC 12 at par 12

15. The record clearly reflects that the regional magistrate took into account the appellant's personal circumstances, that he lived on the streets, occasionally earned R200 from menial jobs, and had achieved a grade 10 education. The regional magistrate, in my view, correctly found that the appellant's personal circumstances and the fact that he pleaded guilty, constituted mitigating factors. These factors, taken together with the fact that the appellant was in custody for 7 months at the time of sentencing, were considered as substantial and compelling factors which in terms of section 51(3)(a) of Act 105 of 1997 justified the imposition of a lesser sentence than the prescribed minimum sentence for count 2. Unfortunately, on the issue of the previous convictions, the judgment does not provide any details save that the regional magistrate found that they were similar to the theft conviction.

16. Mr Snyman submitted that the appellant's entry to the complainant's flat was premeditated. In my view, there are simply no facts from the regional court's record to support this view. Furthermore, it was accepted that the appellant lived on the street and so it is not unrealistic that he would be looking for opportunities, thus entering a flat to see what he could lay his hands on. The submission that he acted opportunistically (rather than with premeditation) in respect of the theft accords with his lifestyle, behaviour and the facts accepted by the regional court. Mr Snyman also submitted that this court should consider what could have happened had the complainant been at home when the appellant entered her flat: with respect, this would amount to speculation. The facts indicate that the appellant was apprehended before the complainant suffered any loss.

17. The record of the sentence judgment[6] indicates that the regional court based its decision to impose 4 years' imprisonment for the theft count, on the appellant's record of similar previous convictions which it considered as an aggravating factor. Unlike in a recent matter before Wille J (Kusevitsky J concurring) in **Willemse v S**[7] where the court *a quo* gave no indication as to the weight it attached to the appellant's previous convictions when imposing a sentence, in this matter, the record reflects that the regional magistrate gave particular regard to the similar nature of the previous convictions, the fact that the appellant had received a suspended sentence and subsequently, a short period of imprisonment for theft and housebreaking with intent to steal and theft, but had failed to make use of the opportunities presented to him by rehabilitating himself.

18. Two questions arise – firstly, which previous convictions were considered by the regional magistrate, and secondly, were the appellant's previous convictions over-emphasised? On the first question, it follows that previous convictions, related to the same or similar offence, would aggravate the sentence. The more recent a conviction on the same or similar offence, the more weight it would carry with the sentencing court. *In casu,* at the time of his conviction and sentence in 2018, three of the previous convictions were older than 10 years. From the regional magistrate's judgment, it is apparent that he took the 2004 and 2005 theft convictions into account for purposes of sentencing[8] and placed the same weight on these older convictions as on the 2008 and 2010 convictions.

[6] Record, pages 31-32
[7] [2021] ZAWCHC 92 at par 19
[8] See page 31 of the record

19. Mr Snyman submits that section 271A of the Criminal Procedure Act does not find applicability as the previous convictions do not fall within the category of convictions listed under subsections (a) or (b). I agree that section 271A(a) does not apply to the appellant's previous convictions. However, on closer scrutiny of section 271A(b), it would include almost any offence, and certainly housebreaking with intent to steal and theft, and theft[9]. Thus, the 2004, 2005 and 2008 convictions would fall away if a period of 10 years had elapsed after the date of conviction of the offence, unless during that period, the appellant was convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed. My understanding of the words *"unless during that period"* is that it refers to the 10 year period after date of conviction of an offence. The appellant was convicted in 2010 of housebreaking with intent to steal and theft and a 12 month imprisonment sentence was imposed. The 2010 conviction fell within the 10 year period since the last (2008) conviction. In my view, the 2004 and 2005 convictions fell away by operation of section 271A(b) and should not have been taken into account for purposes of sentencing. However, the 2008 conviction falls within the ambit of section 271A(b) and given that the appellant was convicted in 2010 to 12 months' imprisonment which is a sentence exceeding six months' imprisonment, the 2008 conviction does not fall away[10]. Thus, to sum up the above, the last two convictions in 2008 and 2010 could be considered for purposes of sentencing, with the older conviction of 2008, having less weight than the 2010 conviction.

[9] See Hiemstra's Criminal Procedure, A Kruger, Issue 12, at 27-3
[10] See S v Jacobs 2015 (2) SACR 370 (WCC); S v Matiwane 2013 (1) SACR 507 (WCC) at 509

20. The regional magistrate's consideration of the 2004 and 2005 theft convictions was incorrect and amounted to a misdirection. Having then taken into account the two housebreaking convictions, were the convictions over-emphasised? My view is that the regional magistrate did not over-emphasise the 2008 and 2010 convictions – they were similar in nature to the 2017 theft conviction, the appellant received a suspended imprisonment sentence (2008) and later direct imprisonment (2010), and he was convicted during the period of suspension.

21. However, the record does not reflect that the regional magistrate had any regard to the fact that for seven years since his release on parole after the 2010 conviction[11], the appellant had not been convicted of any offence. The appellant's next involvement in crime was in 2017, being the two offences forming the subject matter of this appeal. This brings me then to whether the 4 years' imprisonment was disproportionate given the facts and circumstances of the matter, the appellant's circumstances, the interests of society and the criminal record. The last two convictions show that the appellant's conduct had escalated to serious offences. My view is that when imposing the 4 years for theft, the regional magistrate failed to have regard to the cumulative effect of the sentences he was imposing. In this regard, no mention or consideration was made of the provisions of section 280 (1) and (2) of the Act, which affords the court a discretion to order that imprisonment sentences are to run concurrently. Once a finding or decision was made to sentence the appellant to 4 years' imprisonment, a further consideration was necessary, and that was the cumulative effect of a 12 year sentence for the two offences. In **S v**

[11] See exhibit B-the appellant was released on parole on 21 February 2011

Kruger[12], the SCA stated that a failure to factor in the cumulative effect of the number of years' imprisonment imposed, cannot be justified on the basis that it was inappropriate to order the sentences to run concurrently because they were committed at different places and at different times. The offences were committed 8 days' apart and both occurred in Stellenbosch. I agree with Wille J in **Willemse**[13] where he holds that:

> *"…it is the court's duty to take the cumulative effect into account as part of the sentencing decision as a whole so as to prevent the offender undergoing an unjustifiably severe sentence".*

22. The failure to consider the cumulative effect of 4 years' imprisonment for the theft plus 8 years for the robbery aggravating, rendered the sentence of 4 years disproportionate in the circumstances of the appellant and the facts of the matter, in that it was theft of a jacket valued at R250. In the circumstances, interference on appeal is warranted.

23. In respect of the robbery with aggravating circumstances, the regional magistrate was correct in finding substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of 15 years' imprisonment. The submission that the regional magistrate should have deviated further, would in my view over-emphasise the appellant's personal circumstances and make light of the seriousness of the offence, where the unsuspecting complainant was confronted in the early hours of the morning by the appellant who

[12] 2012 (1) SACR 369 (SCA) at par 9 - paraphrased
[13] Par 8 of the judgment

was armed with a knife. The sentence of 8 years, which is in effect slightly more than half of the prescribed minimum, does not warrant interference on appeal.

24. In the result, the appeal is upheld. The order of the court *a quo* is replaced with the following*:*

(a) Count 1: Theft - Four (4) years' imprisonment

Count 2: Robbery with aggravating circumstances as intended in Section 1 Act 51 of 1977 – Eight (8) years' imprisonment

(b) The cumulative sentence of 4 years on count 1 (theft) and 8 years on count 2 (robbery with aggravating circumstances), shall run concurrently in that the 4 years shall run concurrently with the 8 years' imprisonment, so that the effective period of the sentence is 8 years' direct imprisonment.

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M. PANGARKER

Acting Judge of the High Court

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C.M. FORTUIN

Judge of the High Court

Appearances:

For Appellant: Adv M Calitz

For State: Adv L Snyman