In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A 127/2021

In the matter between:

MZIMASI PHUTUMANI **APPELLANT**

And

THE STATE **RESPONDENT**

Bench: Dolamo, J and Lekhuleni, AJ.

Heard: 06 August 2021

Delivered: 18 August 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 18 AUGUST 2021 at 10h00.

JUDGMENT

LEKHULENI AJ:

INTRODUCTION

[1] This matter came to this court by way of an appeal against sentence from the decision of the Magistrate's Court, Vredendal. The appellant, Mr Mzimasi Phuthumani was charged in the Magistrates Court for the District of Vredendal on one count of Housebreaking with intent to steal and theft. In the alternative, the appellant was charged with the contravention of section 36 of the General Law Amendment Act 62 of 1955 in that on 14 July 2020 and at or near Flat Waterbridge Lutzville, in the district of Vredendal he was found in possession of goods other than stock or produce as defined in section 1 of the Stock Theft Act 57 of 1959, to wit a Generator in regard to which there was a reasonable suspicion that the said generator had been stolen and the appellant was unable to give a satisfactory account of such possession.

[2] In the second alternative, the appellant was charged with the contravention of section 37 of the General Law Amendment Act 62 of 1955 in that on the same date and place, the appellant unlawfully and wrongfully received into his possession stolen goods from a person unknown to the prosecution to wit, a Generator valued at R15000 without having reasonable cause for believing at the time of such acquisition or receipt that such goods were the property of the person from whom he had received it or that such person had been duly authorised by the owner thereof to deal with or dispose of it. The appellant was legally represented throughout the trial.

[3] On 28 October 2020 he pleaded guilty to the alternative charge of possession of stolen property. The accused's legal representative submitted a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (*"the CPA"*). His guilty plea was accepted by the prosecution and the court summarily convicted him

of possession of stolen property. After hearing argument on sentence the trial court sentenced him to direct imprisonment for twelve months.

[4] Aggrieved by this result the appellant applied for leave to appeal against the sentence in terms of s 309B(1)(a) of the CPA and his application was duly granted by the presiding Magistrate. The appellant's grounds of appeal can succinctly be summarized as follows:

1. In the main the appellant contend that the Magistrate erred in finding that he had no alternative but to sentence the accused to direct imprisonment.
2. That the court overemphasised the seriousness of the offence and failed to take into account the personal circumstances of the accused, in particular, that the he was a first offender. It bears mentioning that the appellant denied a previous conviction of housebreaking reflected on his record of previous conviction (SAP69).
3. That the court a quo failed to take into account the fact that the complainant did not suffer prejudice or loss as the property in question was recovered.
4. That the trial court erred in disregarding the request by the prosecutor to impose a wholly suspended sentence considering the fact that the accused was remorseful for what he did and that the items were recovered. Consequently, the complainant did not suffer any loss.
5. More importantly, that the trial court erred in taking the previous conviction of housebreaking into account notwithstanding the fact that the appellant disputed it and same was not proven by the prosecution.

FACTUAL BACKGROUND

[5] The facts gleaned from the appellant's statement in terms of section 112(2) were that on the day mentioned in the charge sheet, one Quinton and another male person (his companion) visited the appellant at his place of residence. They had in their possession a generator. Quinton told the appellant that his companion was selling a generator. The appellant then bought the generator for R750 from Quinton's companion. Two weeks later, Quinton called the appellant, told him that his companion had stolen from his family the generator that was sold to the appellant and that the said family was looking for it. Quintin came to Lutzville where the appellant lived to fetch the generator. The appellant gave Quintin the generator and decided to drive with Quintin so that he could go and demand his refund from the seller. On the way, he was arrested by the police who demanded to know the owner of the generator. The appellant admitted that at the time of receipt of the generator, he had no reasonable cause to believe that it was not the property of the person who sold it to him or that the person in question had no authority to dispose such good.

ARGUMENTS BY THE PARTIES

[6] Ms Abdurahman, for the appellant, argued that the trial court failed to consider the fact that the stolen item was recovered without any damage, thus no loss was suffered by the complainant. She contended that the court *a quo* failed to consider imposing a wholly suspended sentence as the prosecution and the defence deemed it an appropriate sentence. Counsel argued that the trial court failed to strike a balance in the triad and considered direct imprisonment to be the only suitable sentence without providing reasons for such finding. In the main, it was contended

that the trial court overlooked the personal circumstances of the appellant and the fact that the stolen item was recovered and thus, the complainant was not impoverished. Ms Abdurrahman implored the court to set aside the sentence imposed by the trial court and substitute it with an appropriate sentence.

[7] Meanwhile, Ms Sibiya the respondent's legal representative raised a preliminary point from the bar that the proceedings in the court *a quo* have not been terminated. In other words, the *lis* between the appellant and the respondent was not terminated. Counsel contended that in the court a quo the appellant faced three charges, namely, housebreaking with intent to steal and theft which served as the main count, in the alternative, contravention of section 36 of Act 62 of 1955 (possession of suspected stole property), and in the second alternative, contravention of section 37 of Act 62 of 1955 (Receiving stolen property). Ms Sibiya argued that the appellant pleaded to the main and the alternative counts and the prosecutor accepted his plea on the first alternative count; and that the trial court convicted the accused on the first alternative count but failed to make a determination on the main and the second alternative count. To this end, she contended that the proceedings in the court a quo were not terminated and that this matter should be referred back to the trial court to address this alleged irregularity.

[8] On the merits of the matter, the respondent's counsel argued that in a case such as this, this court must be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the appeal court should be careful not to erode that discretion. Counsel contended that the sentence should only be altered if the discretion has not been judicially and properly exercised. It was

further contended that a court of appeal may not in the absence of a material misdirection by a trial court substitute the trial court's sentence simply because it prefers its own sentence as this will usurp the discretion of the trial court. On being question by the court as to whether the trial court gave reasons for imposing the sentence of twelve months direct imprisonment, the respondent's counsel conceded that, on this point, the trial court misdirected itself by imposing a sentence without giving reasons for such a finding. She further conceded that the trial court should have imposed a wholly suspended sentence as it was proposed by the prosecutor in the court a quo.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

Are the proceedings of the court a quo not terminated by the appellant's plea of guilty to the alternative charge?

[9] This appeal is only against sentence. As discussed above, it has been argued that the *lis* between the state and the defence was not terminated because the trial court did not make a finding on the main and the second alternative count after the prosecutor accepted the appellant's plea on the first alternative count. In *S v Ngubane* 1985 (3) SA 677 (A) at 683E–F the Appellate Division, as it then was, stated the following in respect of the acceptance of a plea by a prosecutor at the commencement of the trial:

> 'It must be seen as a *sui generis* act by the prosecutor by which he limits the ambit of the *lis* between the State and the accused in accordance with the accused's plea. Whether one in a case such as the present speaks of amendment, withdrawal or abandonment of the murder charge does not really seem to matter. That the *lis* is restricted by acceptance of the plea appears from ss 112 and 113. The proceedings

under the former are restricted to the offence 'to which he has pleaded guilty' and the latter must be read within that frame.'

[10] Meanwhile in *S v Tshilidzi* [2013] JOL 30585 (SCA), the Supreme Court of Appeal dealt with a similar point: the appellant had pleaded not guilty to the main charge of rape, but pleaded guilty to the alternative charge of contravention of section 14(1) of the Sexual Offences Act 23 of 1957. A statement was prepared in terms of section 112(2) of the CPA, and was accepted by the prosecutor. The contents of the statement indicated that the appellant was guilty of the offence to which he had pleaded guilty. However, the trial court refused to accept the plea of guilty on the alternative charge. As a direct result thereof, the appellant withdrew the plea of guilty on the alternative charge and pleaded not guilty on both the main and alternative charges. The trial proceeded on that basis and the court convicted the appellant of the main count of rape. On appeal to the Supreme Court of Appeal, the court found that in refusing to accept the plea of guilty on the ground that it was inconsistent with the summary of substantial facts that accompanied the indictment in terms of section 144(3)(a) of the Criminal Procedure Act, the trial court committed a gross irregularity. The court held that the acceptance by the prosecutor of the plea of guilty on the alternative charge had the result of removing the main charge from the indictment. Therefore, the conviction on the main charge was not competent.

[11] From the above authorities, it is abundantly clear that the argument of the respondent's counsel is misplaced. The acceptance by the prosecutor of the appellant's plea of guilty on the first alternative charge of possession of suspected stolen property in terms of section 36 of Act 62 of 1955, had the result of removing the main charge and the second alternative from the charge sheet. - See *S v*

Cordozo 1975 (1) SA 635 (T) were similar sentiments were echoed. It follows therefor that the preliminary point raised must be dismissed. This leads me to the evaluation of the appeal on the merits.

Appeal on the Merits

[12] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appeal court should be careful not to erode such discretion unless it has not been judicially exercised, or the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it – (See *S v Rabie* 1975 (4) SA 866 (A*)* at 857D-F; *S v Bogaards* 2013 (1) SACR 1 (CC) para 41). In *S v Malgas* 2001(1) SACR 469 (SCA) at 478D, the Supreme Court of Appeal restated the correct approach in dealing with an appeal on sentence as follows:

> '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'.

[13] In this matter, the court imposed a sentence of twelve months imprisonment. From the reading of the record, it is evident that the court did not assess the elements of the triad in earnest. In his judgment on sentence, the magistrate referred to the personal circumstances of the appellant and to the address of the prosecutor to the effect that the appellant was convicted of a very serious offence. The court then proceeded to impose a sentence of twelve months imprisonment notwithstanding that both the prosecutor and the defence prayed for a wholly suspended sentence. It is truism that the court is not bound by the submissions of the parties however in my view, it is incumbent upon the court to consider those submissions.

[14] The prosecutor implored the court to impose a wholly suspended sentence and gave reasons for those submissions. The court engaged the prosecutor as to why she was requesting a suspended sentence. The prosecutor submitted that the stolen item was recovered and the complainant did not suffer prejudice or was not impoverished. She also submitted that the appellant did not waste the court's time but pleaded guilty to the charge thereby showed remorse for what he did. The magistrate thereupon indicated that he will strike a balance of the triad and he subsequently imposed a sentence of twelve months direct imprisonment without addressing the issues raised during argument nor giving proper reasons for his judgment.

[15] In my view, the reasons given by the court were perfunctory and not well-reasoned or substantiated. In the one-and-a-half-page judgement, the magistrate did not deal with all the elements of the triad. In my view, the court took a generalised

approach to sentencing and failed lamentably to address in detail the competing interest of the triad. It must be stressed that a sentencing court should always be preoccupied in finding a balance among all the different interests involved. Sentencing therefore, is about achieving the right balance between the triad.

[16] It would appear from the severity of the sentence that the court a quo over-emphasised the appellant's two previous convictions of assault and, inadvertently took into consideration an alleged previous conviction of house breaking which the accused disputed, although it had indicated that it would disregard it. From a reading of the judgment on sentence, it is doubtful if indeed the previous conviction of housebreaking was disregarded by the court especially because the court mentioned it as a previous conviction of the accused notwithstanding that no such conviction was proved by the State.

[17] It is trite that the fact that other sentencing options existed and might have been resorted to is not the test on appeal. The question before this court is whether the sentence chosen by the trial court is unjust, in the sense that the trial court materially misdirected itself in its imposition. On a conspectus of all the facts that were placed before the trial court, I am of the view that the sentence of twelve months imprisonment in these circumstances is excessive and induces a sense of shock. The sentence displays a total disregard of the personal circumstances of the accused and other facts relevant to sentence that were placed before the trial court.

[18] It is a matter of concern in this matter that the trial court imposed a sentence of twelve months imprisonment without giving reasons in support of such findings. Our law reports are replete of authorities that emphasised the importance of giving

reasons for our judgments. This judicial injunction is critical in our jurisprudence. It enables the court to explain itself how it navigated the issues and how it reached its decision. The accused as well is entitled to know why a particular decision was taken especially where such a decision has adverse consequences to him. In *S v Mokela* 2012 (1) SACR 431 (SCA) at para 12 Bosielo JA, as he then was, stated as follows:

> 'I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know the courts do not act arbitrarily, but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory, where one judicial officer interferes with an order or ruling made by another judicial officer.'

[19] In my view, the trial court failed to heed this judicial injunction when it imposed the sentence against the accused. In my opinion, absent any such reasons the conclusion becomes inescapable that the decision by the trial court was whimsical and bereft of rationality. It is further my view that the sentencing court failed to exercise its discretion judicially thus, it committed a misdirection that warrants an intervention by this court. For the foregoing reasons, this court deems it proper to consider the sentence afresh.

[20] It has been said that the imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an

accused. That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn* 1969 (2) SA 537 (A), at 540G-H described as a 'triad' consisting of the crime, the offender and the interests of society' (see *S v Clayton Arendz and Others,* Case number CC96/09 (01 March 2010) (ECH). In *S v Banda* 1991 (2) SA 352 (B) at 355A Friedman J, as he then was, noted that 'the elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.'

[21] The personal circumstances of the accused as appears from the record were that he was 25 years of age. He was single but was living with his girlfriend. He has two minor children aged 6 and 2 respectively. He has been staying in Lutzville for the past 5 years and he has passed grade 12. He lost his employment due to the impact of Covid-19 and he is now currently working as a driver on a casual basis. He is still staying with his parents in the same yard. It was also argued on behalf of the accused that he suffered a loss as a result of this arrest in that he did not recover the money he expended to buy the generator. It was also submitted that the accused was a first offender when it comes to crimes of dishonesty. The accused pleaded guilty and did not waste the court's time.

[22] As far as the offence is concerned, it is common cause that the accused was convicted of a serious crime that involves dishonesty. It is a pernicious and malignant offence that is inimical to the values and fibre of our society. However, it

must be balanced against the personal circumstances of the accused and the other elements of the triad. Society is looking at the courts for their protection against people who commit crimes. If the courts fail to deal appropriately with criminals, society will lose confidence in the courts and this will prompt society to take the law into their own hands. It is therefore incumbent upon this court to impose a well-considered sentence that strike a balance of the triad. The court must also bear in mind that the appellant must not be sacrificed on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones - See *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35.

[23] I have considered the personal circumstance of the accused, his previous convictions as well as arguments from both sides as recorded and I am of the view that a sentence of twelve months imprisonment which is wholly suspended for a period of three years on condition that the accused is not found guilty of contravening section 36 of the General law Amendment Act 62 of 1955 committed during the period of suspension is appropriate in the circumstances.

ORDER

[24] In the result, I propose the following order:

24.1 The sentence of twelve (12) months direct imprisonment imposed by the court *a quo* on the appellant is set aside and replaced with the following sentence:

24.1.1 The accused is sentenced to twelve (12) months imprisonment which is wholly suspended for a period of three years on condition that the accused is not found guilty of contravening section 36 of the General Law Amendment Act 62 of 1955 committed during the period of suspension

_____

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

_____

DOLAMO J

JUDGE OF THE HIGH COURT