IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

Case No: A 80 / 2021

In the matter between:

JACKSON WILLEMSE **Appellant**

and

THE STATE **Respondent**

Coram: Wille et Kusevitsky, JJ

Heard: 7th of May 2021

Delivered: 11th of May 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an appeal directed solely against sentence with the leave of the court on petition. The appellant was convicted in the lower court on (2) counts of housebreaking with intent to steal and theft. The appellant was legally represented for the duration of his trial and he pleaded not guilty to both the charges as preferred by the respondent. He elected not to tender any plea explanation and exercised his right to remain silent.

[2] The appellant was sentenced to (6) years direct imprisonment on each count. The judicial officer in the lower court in addition made the following order in connection with the sentences that were imposed, namely that:

'*The two will not run concurrently'*

More about this issue later.

THE APPELLANT'S CASE

[3] The appellant contends for the following: that he was (39) years old when he was sentenced: that he was unmarried with (2) minor children and (1) major child: that these children reside with their biological mother: that she receives a social grant of R400,00 per month per child: that the appellant is self-employed as a repair technician

earning the sum of R500,00 per week: that he has a grade (7) education and that he was incarcerated as an awaiting trial prisoner for (19) months prior to his conviction.

[4] It is argued on behalf of the appellant that the presiding officer in the lower court, inter alia, did not sufficiently engage with the personal circumstances of the offender and did not sufficiently weigh up the period that the appellant endured as an awaiting trial prisoner prior to his conviction. Besides, the seriousness of the crimes committed, were over emphasised and the judicial officer did not sufficiently take into account the cumulative effect of the consecutive sentences imposed upon the appellant. The main argument that remains is that the cumulative effect of the sentences imposed upon the offender is something that the lower court should have guarded against in these particular circumstances.

THE CASE FOR THE RESPONDENT

[5] In aggravation of sentence, the respondent called the complainant in connection with count (1) who testified: that the offence was committed when the farming activities in the area were severely ravaged by drought and the agricultural sector was economically depressed at the time: that the value of the items and equipment stolen was in the sum of about R140 000,00: that the complainant's farming operations were extensively disrupted due to the theft of these goods: that the general farming community in this area felt unsafe in their homes due to a recent spate of farm burglaries: that since the incarceration of the appellant, crime in the area had to an extent subsided: that both the properties that were violated (in connection with both counts), were situated in the same farming region

and finally, that the appellant exhibited no remorse. Most significantly, it was common cause that the appellant was on bail in connection with the offence as particularized in count (2), when he committed the offence as formulated in count (1).

THE RELEVANT FACTUAL MATRIX

[6] In connection with count (1) the following: the offender unlawfully broke into a storeroom and a workshop on the subject farm and stole a vast number of essential farming items and equipment: this consisted of some essential irrigation equipment and some crucial generating equipment: severe damage was caused to the storeroom and the office in the storeroom: the total value of the loss suffered was R137 275,00: substantial damage was also caused to the structure of the storeroom and the workshop: a laptop computer was stolen that regulated and controlled the entire farms irrigation system: certain video camera footage was recovered which exhibited an image of the suspect who broke into the storeroom and the office: images of the suspect were then posted on a 'WhatsApp' group for the farmers in the area and within minutes the offender was positively identified: it was discovered that the appellant was on bail at the time and the appellant was not allowed to be in this particular farming area. Put in another way, the offender was in violation of his bail conditions at the time that he committed the offence as particularized in count (1). Sometime thereafter the offender was apprehended, and he was found in possession of the laptop computer belonging to the complainant in count (1).

[7] A further witness[1], testified that the offender was well known to her and she also positively identified him on the video footage images. Yet another two witnesses[2],

[1] Ms Julies

testified that the offender was well known to them and they also positively identified the appellant on the video footage images. Further, an independent witness[3], testified that the police apprehended the offender whilst still in possession of the stolen laptop computer.

[8] As far as count (2) was concerned, the following: the complainant testified that the offender is well known to her: her shop had been broken into: the back door of her shop had been forced open: a number of her goods were stolen to the value of about R10 000,00. She also confirmed that some of her stolen belongings were recovered from where they had been abandoned in a nearby open area. These goods were delivered up to her by some young people from this area. Indeed, one young boy testified in this connection and corroborated her version on this aspect. This complainant also identified the offender on the video footage images exhibited to her.

[9] Ms Snyman testified that the offender was well known to her. She, in real time, observed the offender break into and enter into the complainant's shop as set out in count (2). Certain goods were stolen from her store. The investigating officer testified essentially in connection with count (1) and corroborated some of the evidence tendered in support of the respondent's case.

[10] A number of other witnesses testified in connection with some of the collateral issues in support of the respondent's case. I do not deem it prudent to refer to or summarize any of their evidence as their evidence was not in any manner connected with, or germane to the appeal on sentence under consideration by this appeal court.

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[2] Mr Ceaser and Mr Kiewiets
[3] Mr Plaatjies

[11] The appellant elected to testify in his own defence. In this connection, the following: he denied he was the person described in the video camera footage: he denied that he was apprehended in possession of the laptop computer that was stolen in connection with count (1) and he advanced that the witness who identified him as the person who broke into the shop [4], was possessed with a motive and had a score to settle with him. His evidence and version of events was rejected as being both improbable and false. This, correctly so.

DISCUSSION

[12] I need to examine not only the nature and seriousness of the crimes, but also the aggravating circumstances and weigh them up against the mitigating circumstances (if any), to determine whether the sentences were, in the circumstances of this case, appropriate and proportionate to the offences committed. I also need to examine carefully the cumulative effect of the sentences imposed on the offender.

[13] In *Boggards*[5], an appeal court's discretion to interfere with a sentence was aptly described in the following terms: when there has been an irregularity that results in a failure of justice: or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated: or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[4] In connection with count (2)
[5] *S v Boggards* 2013 (1) SACR (CC) at [4]

[14] Regarding the significance of time spent in detention, pre-sentencing, Lewis JA in *Radebe*[6], made it clear that this is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proportionate to the crime committed and therefore in the final analysis justified. In a case involving armed robbery[7], she held, inter alia, as follows:

'*the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed; whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one'*

[15] The offender in this case had been incarcerated for (19) months prior to his conviction. In *Fortune*[8]**,** it was held that although the fact that a convicted offender has spent time in prison awaiting trial is undoubtedly a relevant consideration in determining an appropriate sentence, it is not one that '*carries any mechanical effect*' and accordingly, this does not apply automatically.

[16] In *Radebe*[9]**,** the court disapproved of the notion that time in prison before sentencing should necessarily count as the equivalent of 'double the time' post-sentencing. Lewis, JA made it clear that there should be no mechanical formula regarding the calculation of the weight to be attached to the period spent incarcerated whilst awaiting trial. Rather, in each case the court should assess the accused's individual circumstances to determine the extent to which the proposed sentence should be reduced,

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6 *S v Radebe* 2013 (2) SACR 165 (SCA) at [14]
7 *Director of Public Prosecutions, North Gauteng; Pretoria v Gcwala and Others* 2014 SACR 337 at [16]
8 *S v Fortune* 2014 (2) SACR 178 (WCC)
9 *S v Radebe* 2013 (2) SACR 165 (SCA) at [14]

if at all. In determining whether the effective period of imprisonment is justified and proportionate to the crime committed, the period in detention pre-sentencing is but '*one of the factors'* to be taken into account.

[17] In *Fortune*, it was noted that the enquiry in respect of the period spent in custody awaiting trial, was whether its effect would render the imposed sentence so disproportionate to the offence for which the offender had been convicted. In the present case, the crime of which the appellant has been convicted on count (1), was committed while he enjoyed bail in connection with count (2). I am accordingly unpersuaded that the period spent in custody awaiting trial had the effect of rendering the imposed sentence, so disproportionate to the offences for which the offender had been convicted, that this in itself, mechanically warrants the imposition of a lesser sentence. It is however noted that the judicial officer in the lower court made no mention whatsoever in his judgment on sentence of the period spent in custody by the appellant whilst awaiting trial.

[18] The appellant's lack of remorse and the interests of the community are material factors in considering whether the sentences were appropriate and proportional to the crimes committed. The lack of remorse on the part of the offender is, as a matter of logic, more closely connected to the offender's prospects of rehabilitation. The judicial officer in the lower court correctly noted that the appellant was not a first offender.

[19] A perusal of the record exhibits that the appellant possesses a number of previous offences for housebreaking and theft, together with some previous convictions relating to

the unlawful possession of dependence producing substances.[10] The judicial officer in the lower court mentions the appellant's previous convictions and records that he is not a first offender. However, regrettably he goes no further than this in his judgment on sentence. Again, as a matter of logic, previous convictions reflect on the character of the offender and may show that the offender is less open to rehabilitation. The important issue is to what extent the previous convictions may or may not aggravate the sentence. This, in turn depends on the 'weight' attached to these previous convictions by the court of first instance. The weight that the judicial officer in the lower court attached to the offender's previous convictions in this case, is absent from the record. I am unsure to what extent this weighed on the judicial officer's mind when he imposed the sentences upon the offender.

[20] Nevertheless, in the present case, I am satisfied that the aggravating circumstances surrounding the commission of these (2) offences, outweigh the mitigating ones. Accordingly, the sentences imposed by the judicial officer in the lower court were appropriate. However, the cumulative effect of the sentences imposed upon the offender is an entirely different matter and this bears careful scrutiny.

[21] The imposition of sentences to run consecutively clearly involves a negative element. I say this because the negative connotation is the sum of all the different sentences, may simply be too high, too severe, or out of proportion to what is deserved by the offender. Put in another way, when the sum of the sentences imposed is an appropriate punishment, it can either be said that there is no cumulative effect, or that the cumulative effect is acceptable.

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[10] Most of these offences were committed more than a decade ago, whilst (2) of the drug related offences were committed in 2015 and 2016 respectively

[22] On this score, the judicial officer said the following in the judgment on leave to appeal:

'*…going to your concern about the sentences not being – "running concurrent" - that was this court's prerogative'*

'...It will be up to the court, if I want now to say for both offences you are serving six years'

'...I gave you six years for each, and it was up to me to make it run concurrent'

'...I felt that it must not "run concurrent" and no judge will deviate from that, not unless there has been an irregularity from the beginning to the end, then the judge will have a right or an authority to alter the sentence'

'...However, even if it can be altered, it cannot be altered in such a way that when I said that it is not "running concurrent" - then they make it concurrent. It is not "running concurrent" - because you committed these offences at different times and they were separate offences'

[23] It seems to me that the sole and only reason for the judicial officer in the lower court making an order[11] that the sentences shall not be served concurrently, is because the offences were 'separate offences' committed by the appellant. This is manifestly a misdirection. To begin with, a sentencing court has to be acutely aware of any cumulative effect of the sentences imposed by it upon an offender. Where the cumulative effect is not taken into account, this in any event, may be a misdirection standing on its own.

[11] I am of the view that the judicial officer does not have this power at all. See my obiter comments.

[24] The sentencing court must as a matter of logic take into account the totality of the offender's criminal conduct and moral blameworthiness. Put in another way, the sentencing court is required to ameliorate the cumulative effect, reduce the cumulative effect or avoid the cumulative effect. The cumulative effect, in my view, cannot be used as 'additional punishment' to be imposed upon the offender.

[25] Besides, the court has to act on the obligation to do something about the cumulative effect. In *Muller*[12], the court explained that the court has to determine:

'…what an effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe'

[26] Multiple offences often relate to what is described as essentially the same event. It is so that when offences are connected in some way then the need for the cumulative effect to be reduced, is generally greater. In *Kruger*[13], the court noted that both the trial court and the first court of appeal reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different times and at different places.

[27] Elaborating on this aspect the court in *Kruger*, accepted that:

'…This may be a consideration, [but] it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed'

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[12] *S v Muller* 2012 (2) SACR 545 (SCA) at para 9
[13] *S v Kruger* 2012 (1) SACR 369 (SCA) at para 9

[28] What this really means is 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. This, especially when the sentence consists of imprisonment. In my view, the court a quo did not take this into account and may have attempted to visit upon the offender an 'additional punishment' by making an order that the sentences imposed were not to be served concurrently. At the very least, a portion of the sentence imposed in connection with count (2) should have been ordered to have been served concurrently with the sentence imposed on count (1).

IN PASSING AND OBITER

[29] The appellant takes the position that the judicial officer in the lower court when imposing the sentences on the offender could have ordered the sentences to be served concurrently, alternatively, a portion thereof to be served concurrently. This, in terms of section 280(2) of the Act.[14] Indirectly, although not strictly raised on appeal, this raises the question of whether the judicial officer in the lower court was seized and vested with the power to make the following order when imposing the (2) separate sentences upon the offender, namely:

'The two will not run concurrently'

[30] It may very well be that this is a very narrow issue and is not strictly before us on appeal. I accept this issue was not a defined issue before us for adjudication. The

[14] The Criminal Procedure Act 51 of 1977

position on this score has recently been eloquently formulated by Schippers JA, in the *Gun Owners*[15]case, as follows:

'*…in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the judge remains neutral and aloof to the fray. This court, has on more than one occasion emphasised that the adjudication of a case is confined to the issues before court'*[16]

[31] This is undoubtedly the correct legal position and that is precisely why my remarks in this connection are obiter. Section 276 of the Act[17], provides for a closed list of sentences that may be imposed upon an offender by a judicial officer in the lower court. To order that the sentences imposed upon the offender shall not be served concurrently, is not one of the listed competent sentences.

[32] Section 280(2) of the Act, in turn, provides the judicial officer with a specific discretion to order that any sentences imposed upon the offender may be ordered to be served concurrently. This is a discretion to be exercised to the benefit of the offender. By contrast, the power to order that these sentences shall not be served concurrently, is absent.

[33] The primary provision of section 280(2) refers to the consecutive serving of multiple sentences of imprisonment. Its real impact however lies in the provision regarding the concurrent running of the sentences. In my view the primary provision

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15 *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88 (23 July 2020)
16 *Gun Owners* at 16 para 26
17 The Criminal Procedure Act, 51 of 1977

is completely unnecessary because of the provisions of section 39(2)(a) of the Correctional Services Act.[18] Besides, the provision that the court may determine the sequence of how the sentences are to be served, seems to me, for the same reason to be of very limited legal or practical value. This, because the relevant authorities have this power and are left to determine this issue in terms of section 39(2)(a) of the Correctional Services Act. It is precisely because of this legislative intervention and taking into account the doctrine of the separation of powers, that it may be argued that it could amount to judicial overreach by a judicial officer in the lower court to have made the order that the (2) sentences imposed upon the offender, shall not be served concurrently. Alternatively, at best for the judicial officer in the lower court, the 'remarks' that the (2) sentences imposed upon the offender shall not be served concurrently fall to be interpreted as if they were not written at all.[19]

[34] In the result, the following order is granted:

1. That the appellant's convictions are hereby confirmed.

2. That the appeal against the sentence imposed upon the offender in count (1) is dismissed.

3. That the appeal against the sentence imposed upon the offender in count (2) is upheld and the sentence in connection with count (2) is set aside and substituted with the following sentence:

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[18] Act 111 of 1998
[19] *'Pro non scripto'*

'In terms of section 280(2) of the Criminal Procedure Act 51of 1977, it is ordered that half of the sentence imposed on count (2) is to run concurrently with the sentence imposed on count (1)'

4. That the substituted sentence imposed in connection with count (2) is antedated in that the substituted sentence imposed shall be deemed to have been imposed on the 6th February 2020.

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WILLE, J

I agree,

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KUSEVITSKY, J

APPEARANCES:

For the Appellant: Mr MW Strauss

Instructed by Cape Town Justice Centre
Cape Town

For the Respondent: Advocate MJ September

Instructed by The Director of Public Prosecutions
Cape Town