



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

High Court case number: A258/2021

Magistrate's Court case number: B588/2020

In the matter between:

**FREDDY SCHEEPERS**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT 11 FEBRUARY 2022**

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**VAN ZYL AJ**

**Introduction**

1. This matter came to this court by way of an appeal against sentence from the decision of the Magistrate's Court, Goodwood. The appellant, Mr Freddy

Scheepers was charged together with his co-accused in the Magistrate's Court for the District of Goodwood on one count of attempted housebreaking with intent to steal, and theft. On 6 October 2021 the appellant pleaded not guilty at the outset of the trial, but did not tender a plea explanation. After hearing evidence and argument, the trial court found him guilty of attempted housebreaking with intent to steal and sentenced him to eight months' direct imprisonment. The appellant has been in custody since the imposition of sentence on 6 October 2021.

2. Aggrieved by this result, the appellant applied for leave to appeal against the sentence in terms of s 309B(1)(a) of the Criminal Procedure Act, 1977, and his application was duly granted by the presiding Magistrate. The appellant's grounds of appeal can succinctly be summarized as follows:

*That the trial court overemphasised the seriousness of the offence and failed to take into account the personal circumstances of the accused, in particular, that the appellant was 35 years old; that he was a father of a four-year old son and that he was a first offender in a housebreaking offence.*

3. At the hearing of this appeal the appellant's representative applied for condonation for the late delivery of the appellant's heads of argument. Having considered the explanation provided, in particular the fact that difficulties were experienced at the offices of Legal Aid South Africa in relation to the appeal record, the condonation sought is granted.

### **The factual matrix**

4. The charge concerned an incident at residential premises in Wagenaar Street, Bothasig on 22 July 2020, in the early hours of the morning, where an attempt had been made to break into a garage. The barrel bolt to the garage was found to be damaged, and housebreaking implements (including a bolt cutter) were found on the scene. The appellant and his co-accused were apprehended after a patrolling police vehicle came upon the scene. The appellant tried to flee, but was found and taken into custody a short while later by another police patrol.
5. It appears from the trial record (and does not seem to be in serious dispute between the parties) that the appellant was apprehended as he was walking on or near the driveway of the premises, leaving the premises to go back to the car. There were two other men on the premises, one of whom (accused number 2) was kneeling in front of the garage. The other man had a bag with him. The appellant's friend, as well as girlfriend of accused number 2 were also present, but they waited in the car because the men – so they had said - needed to relieve themselves. That, the appellant testified, was the reason for stopping next to the premises.
6. There was no evidence directly implicating the appellant in using the bolt cutter so as to cut the barrel bolt. The appellant's version was that he had been relieving himself next to a wall near the garage, and had been unaware of what his friends were doing. Upon seeing the police arrive at the scene, he

fled because it was past the lockdown curfew, and he was scared of being the locked up for disobeying the curfew.

7. The magistrate did not find the appellant's version to be reasonably possibly true, and that he had acted in common purpose with his co-accused. The appellant was accordingly sentenced as set out above.

### **Should the sentence be overturned on appeal?**

8. The test on appeal is "*whether the court a quo misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court that it so marked that it can properly be described as shockingly, startling or disturbingly inappropriate*" (*S v Van de Venter* 2011 (1) SACR 238 (SCA) at para [14]).
9. The question is essentially whether, on a consideration of the particular facts of the case, the sentence imposed is proportionate to the offence, with reference to the nature of the offence, the interests of society and the circumstances of the offender.
10. In the present matter, the appellant contends, *inter alia*, that the magistrate misdirected herself by overemphasizing the seriousness of the offence at the expense of the appellant, effectively disregarding his personal circumstances.

11. We agree. The magistrate placed much emphasis upon the prevalence and seriousness of the crime, which emphasis is, of course, important and relevant in the maintaining of a civilized and ordered society. However, as stated in *Scott-Crossley v S* 2008 (1) SA 404 (SCA) at para [35]: *“Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person 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 over-riding ones. Against that must be weighed the appellant’s prospects of reformation and rehabilitation, which appear to be good. It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”*
12. It must be stressed that sentencing is about achieving the right balance between the crime, the offender and the interests of the community (*S v Zinn* 1969 (2) SA 537 (A) at 540G-H). 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 (see *S v Banda* 1991 (2) SA 352 (BG) at 355A)
13. When taking into account the following factors, we are of the view that direct imprisonment within the circumstances of this case was not appropriate. These circumstances include the following:

- a. The appellant is a relatively young man of 25 years of age at the time of his arrest.
  - b. He has a fixed address, is married and has a minor son of 4 years old.
  - c. He is unemployed.
  - d. He had been in rehabilitation for a drug addition prior to his arrest.
  - e. He has no warrants or charges pending against him.
  - f. He has one previous conviction which is unconnected with the current offence, in that it relates to driving under the influence of alcohol more than ten years ago, in 2010. He is thus effectively a first offender for purposes of the present conviction.
14. As to the offence itself, it is clear from the evidence that the appellant did not take an active part in the attempt to enter the garage, albeit that he was found to have acted in common purpose with his companions. There was no violence or bodily injury, and the extent of the damage to the barrel bolt and keys amounted to about R300,00, and was thus minimal. No access was in fact gained into the garage, and no items were stolen.
15. In our view, and on a consideration of the matter as a whole, a suspended sentence would have better served the interests of justice, the interests of

society, and the interests of the appellant.

**Order**

16. In the circumstances, the appeal is upheld: The sentence of 8 months' direct imprisonment is hereby set aside and substituted with the following sentence:

**The appellant is sentenced to eight (8) months' imprisonment, which wholly suspended for a period of five (5) years, on condition that he is not convicted of the offence of attempted housebreaking with the intent to steal, theft, or attempted theft committed during the period of suspension.**

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**VAN ZYL AJ**

I agree and it is so ordered.

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**LEKHULENI J**

**L. N. Adams** for the appellant (Legal Aid South Africa)

**S. Buffkins** for the respondent (Director of Public Prosecutions, Western Cape)