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

CASE NO: A233/21

In the matter between

MANILISI SPHUHLE FIRST APPELLANT

LUTHANDO NGAM SECOND APPELLANT

V

THE STATE RESPONDENT

Heard: 04 February 2022

JUDGMENT delivered on 04 February 2022

THULARE J

[1] On petition, the appellants were granted leave to appeal against both conviction and sentence. The leave granted in respect of conviction was on the limited aspect of the splitting of charges. The appellants were convicted on three counts, to wit, housebreaking with intent to commit a crime unknown to the State, assault with intent to do grievous bodily harm and robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) read with the provisions of section 51(2) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997). Each appellant was sentenced to fifteen years imprisonment on the housebreaking charge, three years imprisonment on the assault charge and fifteen

years imprisonment on the robbery charge. Ten years imprisonment imposed on the robbery charge was ordered to run concurrently with the fifteen years imprisonment on the housebreaking charge. Both were declared unfit to possess a firearm. The net effect of the sentences was that each appellant was sentenced to twenty three (23) years direct imprisonment.

[2] The appellants' case was that there was a duplication of convictions and that all the convictions should be set aside and be replaced with a conviction on a charge of housebreaking with intent to rob and robbery. On sentence the appellants' case was that the court should have imposed one cumulative sentence of direct imprisonment for the offences and should also have found substantial and compelling circumstances to deviate from the minimum sentence of 15 years imprisonment applicable in respect of the principal offence of robbery with aggravating circumstances which was facilitated by the housebreaking.

[3] The State conceded that only the charge of assault was a duplication of the charge of robbery with aggravating circumstances as the assault was committed in the process of the robbery and that it was only the conviction on assault that should be set aside. According to the State. there was no misdirection in respect of the other two charges and the argument was for the court to confirm the conviction on housebreaking with intent to commit a crime and robbery with aggravating circumstances. The State conceded that the appellants raised substantial and compelling circumstances justifying the imposition of a lesser sentence than the one prescribed by the law. The State conceded that there were grounds to interfere with the sentence.

[4] The appellants pleaded guilty to the charges they were convicted of. Their statements upon which their pleas were based, was that they together with another person, named Moses, arranged for transport for them to get to the complainants farm to break in and rob the complainants of money and other valuables. Moses opened the gate to the farm house at H[...] B[...] O[...] in Stellenbosch and in the process the dogs were alerted. As the dogs approached them, Moses hit the dogs with a hammer. Betty O'Grady ("Mrs O'Grady), a 72 year old woman screamed from inside the house. Raymond O'Grady (Mr O Grady), a 77 year old man came out of

the house to confront them. Moses hit Mr O' Grady with a hammer on his head. A scuffle ensued between Moses and Mr O'Grady and Mr O'Grady fell to the ground. Thereafter Moses and the second appellant then opened the door to the house and entered the house, whilst the first appellant kept watch outside.

[5] Both appellants were aware that Moses was armed with a hammer and would use it to force Mrs O'Grady to co-operate, inside the house. The second appellant admitted to breaking open and entering the house of the complainants with the intent to rob and to the robbery. He admitted the assault on Mr O'Grady by way of common purpose and that Mr O'Grady sustained serious injuries when he was repeatedly hit with a hammer on his head. He and Moses opened and entered the house. Mrs O'Grady was threatened with a hammer, which induced fear that caused her to hand over R7000-00 in cash, a watch, ring, cell phone, credit card and a Toyota Hilux with registration number C[...]. First appellant felt that the two inside the house were taking too long and became scared that this would result in their being caught. He came into the house to call them. Moses handed him the O'Grady's car keys, and the three of them used the vehicle to drive off. They abandoned the vehicle at Kayamandi and went to first appellant's house where the money was counted and shared amongst them. The police found Mrs O'Grady's ring and watch in possession of second appellant. Both appellant in their statement mentioned that they were sorry for what they had done and asked for mercy.

[6] There are two tests which were developed by the courts in order to determine whether a duplication of charges had occurred, and these are:

> (a) whether the offences were committed with a single intent and were part of one continuous transaction or
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> (b) whether the offences differed from one another in their elements and whether the same evidence was necessary to prove both offences [*S v Benjamin en n' Ander* 1980 (1) SA 950 (A) at 9576E-H]. These two tests can be individually or collectively applied but are not necessarily decisive [*S v Benjamin* at 956G].

[7] Housebreaking in South Africa is not a crime on its own unless it is accompanied by an intention to commit an offence [*S v Livanje* [2019] ZASCA 126 at par 14]. Absent the intention to commit an offence, the unlawful breaking and entering does not constitute an offence sounding in housebreaking [*R v Badenhorst* 1960 (3) SA 563 (A) at 566B-E]. However, once the appellants unlawfully broke and entered the O'Grady's house with the intention to rob them and indeed robbed them, they committed both offences of housebreaking with intent to rob as well as the offence of robbery [*Director of Public Prosecutions, Free State v Mashune* [2018] ZASCA 60 at para 10].

[8] In *S v BM* 2014 (2) SACR 23 (SCA) at para 3 it was said:

> "[3] It is apparent that charging Mr BM with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. It has been a rule of practice in our criminal courts since at least 1887 that 'where the accused has committed only one offence in substance, it should not be split and charged against him in one and the same trial as several offences.' The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment."

[9] In *Bam v S* it was said at para 47:

> "47. I think it may safely be said that ordinarily, where an accused could be convicted of housebreaking with intent to commit an offence and that offence as well, and both would be committed with the same intent (eg housebreaking with intent to steal and theft or housebreaking with intent to rob and robbery), there can and should only be a single conviction on a composite, rolled-up charge, and only a single punishment would be competent."

[10] Housebreaking with intent to commit an offence is a substantive offence for which the appellant could be convicted [*R v Gentleman* 1919 CPD 245 at 247]. So

are charges of assault with intent to do grievous bodily harm and robbery with aggravating circumstances. However, common sense and pure legal concepts dictate that the appellants should have been convicted of a single offence of housebreaking with intent to rob and robbery with aggravating circumstances. This is also clear from the statement of facts upon which the guilty pleas were found, which statement was accepted by the State and upon which the court convicted the appellants. The conviction of the appellants on three distinct offences was a misdirection.

[11] Fairness to public prosecutors and the regional magistrate placed a duty on me to not remain silent. This is because it seems that they were following the decision in *S v Maswetswa* 2014 (1) SACR 288 (GSJ). In that decision the court discussed *S v Cetwayo* 2002 (2) SACR 319 (ECD) from 321c-322c. The last paragraph of the quotation from *Cetwayo* read:

> "There is no good reason in the present case why the accused should not have been charged and convicted of a single offence of housebreaking with intent to steal and theft in respect of each of the incidents concerning which he was charged and this is conceded by Mr De Jager. To allow convictions in respect of each incident to stand as two convictions, the one of housebreaking with intent to steal and the other of theft, could, in my view, otherwise prejudice the accused in that the impression may be given that the convictions did not arise out of a single continuous transaction even if the counts were to be taken as one for the purposes of sentence and a single sentence imposed."

[12] The court in *Maswetswa* said:

> "[3] This in my view, can no longer hold since the promulgation of the Criminal Law Amendment Act 105 of 1997 (CLAA), which prescribes minimum sentences for offences falling within the ambit of the Act. The nature of the conviction is relevant when sentencing an accused person. It is highly relevant whether the accused is found guilty of housebreaking with intent to rob or robbery. The first- mentioned conviction ordinarily attracts a minimum

> sentence in terms of part IV of sch 2 of the CLAA, ie five years' imprisonment for a first offender, seven years' imprisonment for a second offender and 10 years' imprisonment for a third offender, whilst robbery, in certain prescribed circumstances, attracts a minimum sentence of 15 years' imprisonment for a first offender, 20 years' imprisonment for a second offender and 25 years' imprisonment for a third offender. Various sentences may be imposed upon an accused, depending on the nature of his or her conviction or previous convictions, should he or she be convicted of offences referred to in the CLAA. Also, if an accused is found guilty of housebreaking with intent to rob, such a conviction, in my view, is not an offence which can be regarded as robbery for purposes of sentencing an accused as a second or third offender when he or she is later convicted on a charge of robbery. Only the substantive charge of robbery would qualify to be taken into account when sentencing an accused person to the minimum sentences prescribed for robbery under the CLAA as a second or third offender, if regard is had to the provisions of the CLAA.

[4] The learned judge in *Cetwayo* did not consider the effect of such a single combined charge when a person is charged with either robbery or murder, or any offence for which a minimum sentence has been prescribed. He dealt with charges of housebreaking with intent to steal and theft. There is no prescribed minimum sentence for theft. I am of the view that such a single, combined charge is no longer appropriate and that there is good reason to have the charges formulated separately. As an example, I refer to the minimum sentence for 'a second offender of any such offence [part II of sch 2 of the Criminal Law Amendment Act], to imprisonment for a period not less than 20 years'. Part II of sch 2 refers to robbery, and housebreaking with intent to rob is not referred to at all in part II of sch 2. As indicated earlier, it appears as a substantive offence in part IV of the schedule.

[5] It is therefore trite that the crime of housebreaking with intent to commit a crime, ie theft, is a substantive, distinct crime to the theft itself. See *Cetwayo* above.

[6] There now appears good reason why the offence of housebreaking with intent to commit a crime and the crime should be charged as separate offences and not a

single offence, in the case of robbery, murder and rape, and any offence for which a minimum sentence is prescribed. In matters where the charges involve housebreaking with the intent to rob and robbery, a first offender for robbery would attract a minimum sentence of 15 years' imprisonment, whilst the housebreaking charge would attract a different, albeit lesser, minimum sentence of five years' imprisonment. The same would apply to housebreaking with intent to murder or rape. I leave aside the fact that the lesser sentences may be imposed when substantial and compelling circumstances allow for lesser sentences than the prescribed minimum sentences to be imposed.

[7] A charge of housebreaking with intent to rob and robbery, also read with s 51 of the CLAA, would, in my view, be technically ineffective, as the CLAA would apply differently to a charge of housebreaking with whatever further allegations may be made in the charge-sheet. It is thus highly relevant whether an accused is found guilty of robbery or murder or rape, and also of housebreaking with intent to commit a crime, when regard is had to the CLAA.

[8] It would consequently be desirable that, because of the provisions of the CLAA, charges be framed in such a manner in order to separate the allegations of housebreaking, with intent to commit an offence, from substantive charges such as robbery and all other charges where a minimum sentence is prescribed upon conviction."

[13] I am inclined to agree with the views expressed in *Bam v S* 2020 (2) SACR 584 (WCC) and to disagree with the views in *Maswetswa.* In *Bam* it was said at 65, 66, 68, 86 and 87:

> "[65] In determining what minimum sentence permutations may be applicable to housebreaking matters in terms of the CLAA, one must first have regard for the competent verdicts which are provided for in the CPA, in respect of a housebreaking charge. In this regard if the evidence does not prove that the housebreaking was effected with the intent to commit the offence as charged, but another offence, or the offence of malicious injury to property, the accused may be convicted accordingly.

[66] In the second place one must also consider the competent verdicts which are provided for in the CPA in respect of the 'substantive' offences which are commonly combined with housebreaking and which are usually facilitated by it, such as robbery and theft. …

[68] As far as the CLAA is concerned, broadly speaking it provides for an increasing severity of punishment in regard to the discretionary minimum sentences which are applicable, depending on the seriousness of the offences and whether an offender is a first, second, or subsequent offender. …

[86] In my view, it would therefore not be appropriate to seek to circumvent long-established practice in regard to the way housebreaking charges are formulated by separating them into 2 separate charges simply in order to allow for different discretionary minimum sentences to be imposed ion terms of the CLAA, and in most instances doing so would effectively result in a duplication of convictions and punishments, which would be liable to being set aside on appeal.

[87] Where the circumstances are such that the available evidence indicates that the accused had differing intentions in relation to the housebreaking and any subsequent offence(s) which he committed after perpetrating it; and the evidence which could be tendered in respect of each of such offences, were they to be tried separately, would not be the same, and would not be inextricably woven up or bound together and would clearly pertain to different elements, nothing would stop the State from charging the accused with separate offences in such circumstances."

[14] This matter is but one example of the jurisprudential pandemonium that the decision in *Maswetswa* occasioned. It is no wonder that M Whatney, "*Unnecessary Confusion in respect of Housebreaking*", TSAR 2014 Vol 3 606-615 closed the introductory background in that article in the following terms:

> "In the recent decision of *S v Maswetswa* (2014 1 SACR 288 (GSJ)), the court experienced some challenges in the application of the Criminal Law Amendment Act 105 of 1997 (the act is also sometimes referred to as the

> "minimum sentence act") pertaining to housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1997. The court addressed these challenges in a manner which will contribute to unnecessary confusion, not only when housebreaking prosecutions are instituted but also in the adjudication of these matters, and a comment in this regard is therefore required,"

[15] I find myself in agreement in respect of the two aspects in which Whatney opined that the court misdirected itself. I do not repeat them here because of their length. Suffice it to refer to the closing paragraph in the conclusion of the article which reads:

> "The difficulties experienced by the court in the *Maswetswa* case when dealing with the Criminal Law Amendment Act were more perceived than real and the answers thereto already available in case law and the Criminal Law Amendment Act. It is unfortunate that clearly established principles were unnecessarily questioned. In a country where this is by far the most prevalent crime, such confusion is a luxury we can ill afford."

In the result, a single, combined charge of housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 read with section 51 of the Criminal Law Amendment Act 105 of 1997 remained a competent charge, and is still part of our law.

[16] Section 262(2) of the Criminal Procedure Act reads:

> "262 Housebreaking with intent to commit an offence
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> (2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the

offence of malicious injury to property, the accused may be found guilty of the offence so proved."

[17] In *S v Kesolofetse and Another* 2004 (2) SACR 166 (NCD) it was said in para 6-9:

"[6] In my view, the magistrate was therefore wrong to convict the accused in this case of the crime of housebreaking with intent to commit a crime to the prosecutor unknown, for the simple reason that the 'evidence' did not prove that offence.

[7] Quite apart from this it would obviously be senseless, and in fact misleading for record purposes, to convict an accused on the basis of his or her having had the intention to commit a crime to the prosecutor unknown, where, at the end of the day, it is known to not only the prosecutor but indeed also to the court what the intended crime was (compare *S v Wilson* 1968 (4) SA 477 (A) at 481F and the remarks in Milton *South African Criminal Law and Procedure* Vol II 3rd ed at 908-7 and fn 146 at 807).

[8] It is obviously with this in mind, and to do away with the necessity of first amending the charge, that s 262 (2) of the Criminal Procedure Act was enacted and I am in respectful agreement with the authors of Kriegler and Kruger *Hiemstra Suid Afrikaanse Strafproses* 6th ed, where, at 666 and with reference to the provisions of s 262 (2) of the Criminal Procedure Act, it is remarked:

'Die artikel se "kan die beskuldigde aan die aldus bewese misdryf skuldig bevind word". Maar dit is een van die gevalle waar *kan* gelees sal moet word as *moet.* Dit sou sinloos wees om, as n' bepaalde opset bewys word, dit nie in die bevinding te vermeld nie.'

(See also *South African Criminal Law and Procedure* (*op cit* fn 235 at 814)

[9] It is so that the unrepresented accused were not informed of the possibility of such a competent verdict by the magistrate (see *S v Kester* 1996 (1) SACR

461 (B) at 469h-470c), but I am satisfied that this failure did not lead to any prejudice in this case."

[18] The facts set out in the plea explanation by the appellants, which was the factual matrix and the only available evidence from which the verdict was returned, demonstrate how artificial the results can be, that the *Maswetswa* approach could give. Prosecutors and magistrates, whose business is seeking and establishing the truth, once the truth was found, were forced to disregard that truth and create an imaginary truth, self-made contrary to the facts and ostensibly in pursuit of justice. When it is known from the factual matrix set out by the appellants and accepted by the State, and which was the basis of the conviction, that the housebreaking was with the intent to rob, why formulate a charge and convict on a charge which sounds in factual dishonesty?

[19] In my view, the power to institute criminal proceedings on behalf of the State, and to carry out any necessary function, incidental to instituting criminal proceedings, as set out in section 179(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution), must be fully returned to the National Prosecuting Authority in the Republic (the NPA). This includes the unfettered discretion to decide on the charges to be preferred. The exercise of that discretion is not the province of judicial officers. The independence of the NPA must be respected. It is one thing to institute criminal proceedings on behalf of the State, and another to return a verdict thereon. Both are competencies residing in Chapter 8 of the Constitution with the title "Courts and Administration of Justice". However, the former is the exclusive grazing grounds for the NPA (section 179 of the Constitution) whilst the latter is for the Judicial Authority of the Republic (section 165 of the Constitution). Chapter 8 does not envisage the one grazing in the pastures of the other. The Constitution envisaged a *quasi*-separation of powers in the Courts and the Administration of justice. Judicial Management of the discretion to prefer charges proved, in this case, to be a disaster and a threat to the proper administration of justice.

[20] As regards sentence, only one sentence may be imposed for the composite charge. In *S v Davids* 2019 (1) SACR 257 (WCC) at para 12 and 13 it was said:

"[12] In sentencing the appellant, the court *a quo* took the two components of the single charge and imposed a sentence in respect of both components. …

[13] Both components of the offence arose from a single incident. By imposing sentences in respect of both components of a single offence, this had the unfair result of a duplication of the punishment imposed upon the appellant."

[21] In *Bam* the court said:

"[75] And in keeping with the rationale and principles set out above in regard to the charging and punishment of housebreaking offences where the intent in relation to the housebreaking is the same as that in relation to the offence which it facilitates and the offences are part of one criminal foray, there can only be one sentence imposed, and in my view the determinative offence ie the one which should determine the minimum sentence which may be applicable, is that which the housebreaking facilitated, which is the principal offence at which the housebreaking directed.

In my view, the sentences which may be imposed for each of the constituent parts of the composite are but relevant factors to be considered for the imposition of an appropriate sentence. The approach to sentencing remain as expressed in *Maleka v The State* (1209/2017) ZASCA 114 (18 September 2018) at para 10 where it was said:

"[10] It is trite that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial court."

[22] In *S v Phillips* 2017 (1) SACR 373 (SCA) at para 5 it was said:

"[5] It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were the trial court and then alter the sentence arrived at by that court, simply because it disagrees with it. To do so would be to usurp the sentencing discretion of the trial court. But where material

misdirection has been demonstrated, an appellate court is not only entitled, but is also duty-bound, to consider the question of sentence afresh to avoid an injustice."

In *S v Wilson* 1968 (4) SA 477 (AD) at 481 it was said:

"As the verdict must be amended the sentence cannot stand and must be reconsidered."

[23] The appellants are 26 years and 31 years old respectively. Both are unmarried and unemployed. Both are first offenders and have been in custody for about six months before their sentencing. Both have two minor children. First appellant advanced up to Grade 9 and second appellant up to grade 12 in school. In mitigation the trial court was informed that both appellants, before Covid-19 struck and their contracts were not renewed, worked for the complainants on the farm. From the victim impact reports, the door was locked and was broken open with a hammer at the time of entry. Mr O'Grady, after being hit with the hammer lost consciousness. The reports, the contents of which was admitted, also revealed that Mrs O"Grady was put into the vehicle which the appellants drove away with, and was abandoned with the vehicle in Kayamandi.

[24] The complainants were robbed of a wedding ring, watch, credit card and R5000-00 cash and the vehicle. The wedding ring, the watch and the vehicle were retrieved. Mrs O'Grady is receiving therapeutic and medical attention for the trauma she suffered, which she is paying for. One shudders to think what went through the mind of the old vulnerable person, in the context of serious sexual and violent crimes often with fatalities which are reported daily against women, as the appellants drove with her off from the farm into the unknown. She had just witnessed her husband of 45 years being hit with a hammer on his head and was left where he lay motionless on the ground. Mr O'Grady had head injuries and had injuries on his legs as well. The hammer to his head knocked him unconscious. He was taken to hospital for medical attention arising out of the attack. The injuries affected his hearing, sinuses and he thereafter experienced severe headaches. He is incurring medical expenses as a result. The resultant fear and shock caused the old couple to get extra security for

approximately 3 months which cost them R43 000-00. The victims expressed that they harbor no hatred for the appellants but want to know what led to the appellants committing the offences.

[25] There is no minimum sentence prescribed in respect of the housebreaking under these circumstances in respect of the first offence in the composite. There is however a minimum sentence of 15 years imprisonment applicable in respect of the second offence of the composite, under the circumstances. In my view, there exists no substantial and compelling circumstances proven in this case to depart from the minimum sentence prescribed for the second offence in the composite. That sentence, in my view, is appropriate for the composite offence.

[26] For these reasons I would make the following order:

(a) The convictions of both appellants on all the charges are set aside and replaced with:

(i) Each of the accused is convicted for housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) read with section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

(b) The sentences of both appellants are set aside and replaced with:

(i) Each of the accused is sentenced to 15 years imprisonment. The sentence is antedated to 10 February 2021. Each of the appellant is declared unfit to possess a firearm.

DM THULARE

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

CM FORTUIN

JUDGE OF THE HIGH COURT