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

High Court reference number: 296/2023

Magistrate's serial number: 35/2023

Magistrate's case number: 14/510/2023

In the matter between:

THE STATE

and

LUCAS MAPHELA

Accused

REVIEW JUDGMENT – 26 February 2024

LEKHULENI *et* NZIWENI JJ

[1] This matter came before us as an automatic review in terms of section 302 of the Criminal Procedure Act ("the CPA"). The accused in this matter was convicted by

the magistrate Cape Town on 19 July 2023 of housebreaking with intent to steal and theft. The State alleged that on 17 May 2023 and at or near Pine Tree in the district of Cape Town, the accused unlawfully and intentionally with intent to steal, break open and entered house No, 3[...] P[...] Crescent, the residence of Lyle Miller and did therein steal 3 fishing reels, 2 hammers, extension lead, garden clipper, one electric drill, drill bits and various tools, the property in the lawful possession of Lyle Miller.

[2] The accused's rights to legal representation were fully explained to him, and he elected to conduct his own defence. On 19 July 2023, he pleaded guilty to the charge. The court invoked the provisions of section 112(1)(b) of the CPA. After questioning the accused, the court accordingly convicted the accused on a charge of housebreaking with intent to steal and theft. The accused was subsequently sentenced to a fine of R6000.00 or six (6) months imprisonment. In terms of section 103(2)(b) of the Firearms Control Act 60 of 2000, the court declared the accused unfit to possess a firearm.

[3] In light of the fact that we had certain concerns with the conviction on housebreaking, we then raised a query and asked the magistrate whether the accused admitted the elements of the offence of housebreaking. Our concern was premised on the admission that the accused made during questioning in terms of section 112(1)(b) of the CPA. For the sake of completeness, we reproduce verbatim the relevant part of the impugned admissions the accused made during the section 112(1)(b) questioning.

“Court: Do you plead free and voluntarily without any undue influence?”

Accused: Yes

Court: Can you explain in your own words what led to your arrest?

Accused: I was arrested on the way to Derk Hill to catch a taxi. I had a Pick and Pay bags (sic) in my possession. I was arrested by members of the public, who were driving a Jetta.

Q: Why did those people arrest you?

A: I was arrested for housebreaking I went to Pinetree Crescent in Cape Town, I found the house open, I took some of tools as listed in the charge sheet by prosecutor – 3 fishing reels, 2 X hammer, 1 x drill extension lead.

Q: Did you have any right or permission to take those tools items?

A: No . . .”

[4] We stated in our query to the magistrate that nothing in the record suggests that the accused opened the door or a window or displaced a curtain to gain access to the house. Pursuant thereto, we asked the learned magistrate whether the accused admitted all the elements of housebreaking. We further requested that the magistrate should furnish reasons for the sentence.

[5] In response to the query, the magistrate conceded that he made an error in convicting the accused on an offence of housebreaking with intent to steal and theft. The magistrate further commented that no object had been removed or opened to gain entry to the premises. Nevertheless, the magistrate maintained that the admissions made by the accused during the plea proceedings adequately cover all the essential elements of the offence of theft.

[6] In relation to the sentence imposed, the magistrate was of the view that the sentence was appropriate in light of the accused's past conduct, and he felt that a sentence with the aim to deter was justified.

[7] As far as the conviction is concerned, we are of the view that the concessions made by the magistrate were correctly made. Particularly, if regard is had to the fact that the accused, during questioning by the magistrate, categorically intimated that he found the house open and he took the items that were mentioned in the charge sheet. We fully agree with the magistrate that the accused's admissions satisfied all elements of theft.

The sentence

[8] Turning to the sentence imposed by the magistrate, we agree with the magistrate that in this matter, the past conduct of the accused reveals a long history of crime. While it is true that an accused person's long list of similar previous convictions is a relevant consideration for sentence purposes as it, amongst others, evinces that the accused is a recidivist, we hasten to add that as it is clear from the case law and relevant authorities, that the determination of an appropriate sentence cannot be simply based on the accused's previous convictions. Put differently, an accused person should not be punished for past sins or indiscretions.

[9] Undeniably, an accused's previous convictions for the same kind of offence naturally play an important role in the imposition of sentence. However, it should not be overemphasised at the expense of the seriousness of the offence for which the accused is to be sentenced and the circumstances under which it was committed. (*S v Kalane* 1998 (2) SA 206 (O)). Previous convictions show that the accused has not learnt from his past mistakes. They further reveal that the accused has chosen a

path of lawlessness. It also reveals that an accused has a propensity to commit certain types of offences. Simply put, in assessing a fair and just sentence, a repeat offender cannot be treated as leniently as a first offender. In *S v Joaza* 2006 (2) SACR 296 (T) at 297G-H, Patel J correctly pointed out that if persons are simply regarded as first offenders and receive lenient sentences, then the administration of our criminal justice system will invite societal disdain.

[10] In the instant case, the accused was previously convicted for similar offences. In fact, in this case, the previous convictions of the accused show a predisposition to commit offences related to theft and housebreaking. The accused has eight previous convictions of housebreaking with intent to steal and theft and one previous conviction of theft. Plainly, the accused pattern of convictions shows a marked lack of respect for the law and total disregard for other people's property. He has been released on parole twice, and he seems not to have rehabilitated or learned from his past indiscretions.

[11] It is evident that the accused has been afforded by courts an opportunity to rehabilitate himself outside the walls of confinement. The previous convictions of the accused show that he had not been amenable to the sentences imposed on him previously by the courts. Undoubtedly, the previous sentences have dismally failed to rehabilitate the accused. The accused's conduct has shown that he has spurned and disregarded every attempt and effort from the courts to rehabilitate him. Clearly, the accused has shown himself as not being a good candidate for rehabilitation.

[13] Significantly, the previous conditions reveal that the accused was a menace to society. It is evident here that the accused required a sentence that would reinforce the personal deterrence factor. And a sentence that will adequately protect the community from his recidivism. In our view, the sentence the magistrate imposed is unimpeachable.

The circumstances under which the crime was committed.

[14] Other than the previous convictions of the accused, there is another aggravating factor that militates against the accused. The circumstance under which the crime was committed needs to be taken into account. The fact that the accused entered an open house of a person and stole, is aggravating. It is a well-known fact that people consider their homes as their safe havens where they find their safety protection. Here, it is evident that the accused invaded the privacy of the complainant when he committed the offence with brazenness.

[15] In our view, the fact that the accused went to steal from a house that was open, makes this particular offence distinctively worse than the ordinary shoplifting or theft case. As mentioned previously, the accused showed a flagrant disregard for homeowners' privacy, personal safety, and security. Hence, we are of the firm view that the sentence should remain the same and not be interfered with. Such a sentence would make the accused aware of the severity of his conviction.

Personal circumstances of the accused

[16] Given the personal circumstances of the accused, the only thing mitigating in favour of the accused is the fact that he pleaded guilty. In this matter, the aggravating factors clearly far outweigh the mitigating factor. Notwithstanding the fact that the accused has relevant previous convictions, the conviction by the magistrate resulted in a lesser sentence than the ones that were imposed in the prior cases. This clearly demonstrates the magistrate's leniency despite the accused's prior convictions for similar offenses. In the circumstances, as mentioned previously, the sentence imposed by the magistrate cannot be said to be excessive or inappropriate, albeit it was for housebreaking with intent to steal and theft.

[17] In the circumstances, considering the nature of the theft, and the accused's previous convictions, it cannot be said that the sentence that was imposed for the housebreaking is unfit in the context of the theft offence involved in this case. Thus, the circumstances of this case do not warrant a reduction of the sentence that the magistrate imposed.

Order

[18] Consequently, the following order is made:

18.1 The conviction of the accused on the offence of housebreaking with intent to steal and theft is hereby reviewed and set aside and replaced with a conviction for "theft".

18.2 The sentence of R6000.00 or six (6) months imprisonment that was imposed by the magistrate is hereby confirmed.

LEKHULENI, J

Judge of the High Court

NZIWENI, J

Judge of the High Court