



GAUTENG DIVISION, PRETORIA

Case No. A785/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

25/4/17
DATE

[Signature]
SIGNATURE

25/4/2017

In the matter between:

COLLEN MAIMELA

Appellant

and

THE STATE

Respondent

JUDGMENT

MIA AJ:

- [1] The appellant appeared in the district court on a charge of housebreaking with intent to steal and theft on 30 May 2014. The matter was transferred to the Regional Court, Vereeniging on the 22 August 2014. The accused pleaded guilty to the charge and was convicted accordingly and sentenced to six years imprisonment. The value of the items stolen was reflected in the charge sheet as R4300. The appellant applied for leave to appeal against sentence. This was

dismissed by the trial court. The appellant petitioned the Judge President and was granted leave to appeal against sentence. The appellant is therefore before us on appeal against sentence.

- [2] Ms Masete appearing on behalf of the appellant contends that the sentence of six years imprisonment is inappropriate and that the learned magistrate erred in imposing this sentence by over emphasizing the seriousness of the offence and the interests of society and underemphasising the personal interests of the appellant. Ms Masete further contends that imposing such a lengthy period of imprisonment is harsh in that the court failed to give adequate weight to the fact that the complainant's goods were recovered and no loss was suffered other than the damage to the roof. Notwithstanding this, the concession is made that the offence is serious and is usually met with a term of imprisonment.
- [3] I have considered the submission made in the appellant's heads of argument that the sentence was out of proportion to the facts of the case, the personal circumstances of the appellant and that the accused spent time in custody awaiting trial in this matter. Further that the court erred in over-emphasising the previous convictions of the appellant and in doing so misdirected itself in imposing a sentence which was disturbingly inappropriate. It was contended that the court erred in failing to take into account that the appellant committed the offence out of his dire and impoverished circumstances rather than greed.
- [4] Mr Molatudi stood by his heads of argument. I have had regard to his submissions therein. The appellant spent five months in prison awaiting trial which is a normal part of the criminal justice system process when an accused chooses not to apply to be released on bail. There were no submissions or indication on the record to suggest that the trial or proceedings were unreasonably delayed or that any delay was attributable to the State.
- [5] Mr Molatudi submitted that that the trial court considered that impact of the previous convictions and considered a sentence that would have a deterrent impact. He requested this Court to consider that the appellant

was afforded previous opportunities to rehabilitate his conduct outside of prison and instead graduated to committing more serious offences. He argues that much like in the matter of *S v Matyityi* 2011(1) SACR 40 SCA at para 10 the appellant 'appears to have spurned the mercy shown him by the court'.

- [6] The function of the court of appeal against sentence is to decide whether or not the trial court exercised its discretion judicially and properly. It is generally accepted that an appeal court should only interfere with the sentence imposed by a trial court if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is disturbingly inappropriate that it induces a sense of shock. In *S v Pillay* [1977] 4 All SA 713 (A); 1977 (4) SA 531 (A) the correct approach to an appeal is expressed as follows by Trollip JA at p 535E-G:

"As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

- [7] Similarly, in *S v Rabie* 1[1975] 4 All SA 723(A) 724; 1975 (4) SA 855 (A) Holmes JA observed that sentencing was pre-eminently a matter for the discretion of the trial court and emphasised that such discretion should only be altered if the trial court's discretion had not been judicially and properly exercised. At page 857 E-F the court set out the following guiding principles with regard to interference with a sentence on appeal:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[8] In this matter the trial court considered whether there was a realistic possibility of a success on appeal and whether a court of appeal could reasonably arrive at a different conclusion. In coming to that determination the trial court considered a number of High Court judgments. The first being *S v Dials* 2013(2) SACR 665 wherein the accused was convicted of three counts of housebreaking with intent to steal and theft. It is apparent from the reasons for sentence that the trial court also took into account the appellant's personal circumstances the seriousness of the offence and the interests of the community.

[10] I cannot find that that the court over-emphasised the seriousness of the offence and under-emphasised or attached too little weight, to the personal circumstances of the appellant, as argued by Ms Masete. The sentence imposed in the present matter fits the circumstances of the particular case. In my view, the trial court, properly balanced the seriousness of the offence, the interests of society and the interests of the appellant. I cannot find any misdirection on the part of the trial court which warrants the interference of this Court in the sentence that it imposed.

[11] In the circumstances, I propose the following order:

The appeal against sentence be dismissed.

 5
SC MIA

Acting Judge of the High Court

I agree

IT IS SO ORDERED.


PM MABUSE

Judge of the High Court

On behalf of the Appellant:
Instructed by:

Ms Masete
Legal Aid Board
Pretoria

On behalf of the Respondent:
Instructed by:

Mr Molatudi
The State
Pretoria