

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A248/2010

In the matter between:

FELIX NKUNA

Applicant

and

THE STATE

Respondent

CORAM: MOLOI, J et CHESIWE, AJ

HEARD ON: 8 FEBRUARY 2016

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 31 MARCH 2015

- [1] The appellant was convicted on 11 counts of housebreaking with intent to steal and theft, one count of housebreaking with intent to rob and robbery with aggravating circumstance and two counts of housebreaking with intent to rob and robbery. He was sentenced to four (4) years imprisonment on each count of housebreaking with intent to steal and theft; eight (8) years imprisonment on

each count of housebreaking with intent to rob and robbery and fifteen (15) years on the count of housebreaking with intent to rob and robbery with aggravating circumstances. The trial court had ordered that sentences on counts 1, 2, 5, 7, 9, 10, 11, 13 to 14 (Housebreaking with intent to Steal and Theft) and count 3 (Housebreaking with intent to commit a crime unknown to the prosecutor); count 6 (Housebreaking with intent to Steal and Attempted Theft); count 8 and 12 (Housebreaking with intent to Rob and Robbery) run concurrently and the sentence in count 4 (Housebreaking with intent to Rob and Robbery with aggravating circumstances) not to run concurrently with the other sentences meaning the appellant was to serve an effective period of thirty five (35) years imprisonment. He appeals against the sentences imposed, leave to appeal having being granted by this court on petition.

- [2] The grounds of appeal are that the trial court erred in over-emphasizing the interests of society and the seriousness of the offences and un-emphasized the personal circumstances of the appellant; that the sentences are shockingly harsh and inappropriate; that the trial court showed no mercy to the appellant who pleaded guilty to all the charges and was remorseful and that the period of four (4) months spent in custody pending the trial was not taken into account.
- [3] The respondent conceded that the appeal against the appellant's sentence should succeed. Mr. Reyneke, on behalf of the appellant in the heads of argument and oral argument submitted that all factors in this case and the personal circumstances of the

appellant, for the fact that he pleaded guilty to all charges, cumulatively amounted to substantial and compelling circumstances which justifies the court to deviate from the imposition of the prescribed minimum sentence.

- [4] The appellant in this matter pleaded guilty in terms of section 112 (2) of the Criminal Procedure Act 105 of 1997. The appellant was at all times legally represented. The appellants' written statement in terms of section 112(2) of the Criminal Procedure Act 51/1977, setting out the admissions of all the offences, and the factual basis supporting his guilty plea, was read into the record and was handed in as exhibit A. As set out in **S v Jansen** 1999 (2) SACR 370 I – 371 E (C), and reiterated in **S v Thole** 2012 (2) SACR 306 (FB) at para 8:

“... where an accused pleads guilty and hands in a written statement in terms of s 112(2), detailing the facts on which his plea is premised, and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed.”

- [5] The appellant showed remorse in his conduct by pleading guilty and requesting from the prosecutor that he wished to ask for forgiveness from one of the victims. This can be seen in the prosecutor's address in court at page 24 where he said:

“Klaagster op Klag 12 het met beskuldige gepraat, Albei was op 'n stadium in trane en het beskuldigde gesê dat hy jammer is oor dit wat hy gedoen het, en het Klaagster gesê dat hy hom vergewe.”

The prosecutor takes it further and said:

“Dit is so beskuldigde het gewys dat dit is nie net krokodilletrane nie, hy huil rêrig met die Klaagster.”

- [6] In **S v Brand** 1998 (1) SACR 296 (CPD) at page 304 where an accused pleaded guilty, the court was of the view that:

“If an accused shows genuine remorse, punishment will be accommodating especially when accused has taken steps to translate his/her remorse into action.”

This is noted in the remarks of the prosecutor on how the appellant and the complainant embraced each other and cried together.

- [7] The prescribed minimum sentence in terms of section 51 of the Minimum-Sentence Act, Act 105 of 1997 for robbery with aggravating circumstances is 15 years. The appellant in count 4 committed house breaking with intent to rob and robbery with aggravating circumstances. Amongst the stolen goods was a Toyota Fortuner with Registration number [D....] with an estimated value of R260, 000.00. The court takes cognisance of such crimes and is aware that these crimes are prevalent in the Welkom area.

- [8] Mr. Reyneke for the appellant and Adv. Moroka for the respondent agreed that the effective sentence of 35 years was too severe a punishment for the appellant and that it needed to be

reconsidered. In my view the concession by the respondent was correctly made.

[9] The determination of an appropriate sentence for an accused person falls primarily within the discretion of the trial court. The appeal court would not easily interfere with the exercise with such a discretion, merely because the appeal court would have exercised a different discretion, if it had been sitting as the court of first instance [**S v Malgas** 2001 (1) SACR 469 SCA at 478 D-E; **S v Botha** 1998 (2) 206 (SCA); **S v Grobler** 2015 (2) SACR 210 (SCA) para 5]. It follows that this court is not at large to interfere with the sentence imposed by the trial court. However, a court with appeal jurisdiction is entitled to interfere with a sentence imposed by the trial court in a case where the sentence is disturbingly inappropriate or is totally out of proportion with the gravity of the offence or is based on a misdirection of a nature that shows that the trial court did not exercise its discretion reasonably or properly [**S v Salzwedel and Others** 1999 (2) SACR 586 (SCA) at 591 par (10) and **S v Pillay** 1977 (4) SA 531 (AD) at 535 E-G].

[10] In sentencing the appellant, the court *a quo* took into account the following aggravating factors: That the entire episode was a criminal enterprise orchestrated by a criminal gang of which appellant was an active member; that the offences were planned; the appellant and his friends identified premises to break into; the amounts involved in these cases are relatively high. The complainant in count 4 was an old woman of 65 years and was threatened with weapons and assaulted.

- [11] The court *a quo* also took into account the following mitigating factors in sentencing the appellant that: The appellant was 20 years when the crimes were committed; the appellant pleaded guilty to all the charges against him; that he showed remorse for his actions, by crying with the complainant in count 12. See **S v Matyityi** 2011 (1) SACR 40 (SCA) para 13:

“In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.”

- [12] Adv. Moroka in the Heads of Argument submitted that the court *a quo* erred in finding the appellant’s previous transgressions amounted to previous conviction. The appellant was previously found guilty on house breaking with intent to steal and theft. The appellant was sentenced to (3) three years direct imprisonment. Adv. Moroka pointed out that the appellant was convicted on the 29 August 2010 and the latter conviction took place on 20 July 2011. These convictions should not have been considered and thus the appellant was supposed to have been treated as a first offender for purposes of sentencing on the current charges.

The appellant was incarcerated since 20 July 2011 which means he had spent 4 months incarcerated. The court *a quo* did not attach sufficient weight to the period of the appellants pre-sentencing incarceration. In **S v Stephen and Another** 1994 (2) SACR 163 (W) at 168 F-G.

“Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length ...”

It would therefore be unjust if such a period was not taken into account in any custodial sentence that is imposed on an accused. (**S v Vilakazi** 2009 (1) SACR 552 (SCA) para [60].)

- [13] In this case I am persuaded that the court *a quo* erred by failing to properly or adequately take the personal circumstances of the appellant into consideration. The court over-emphasised the magnitude of the crime, by disregarding factors which should have been taken into account: **S v Nkawu** 2009 (2) SACR 402 para 15; **Madau v S** 2013 (2) SACR 292 (SCA). The misdirection was material in that it vitiated the sentencing discretion entrusted to the court of the first instance. However, a court with appeal jurisdiction is entitled to interfere with a sentence imposed by the trial court in a case where the sentence is disturbingly inappropriate or is totally out of proportion to the gravity of the offence or the trial court did not exercise its discretion reasonably or properly.

In **S v Malgas** 2001 (1) SACR 469 (SCA) at 478-I – 479-A:

“The tests for interference with a sentence on appeal were evolved in order to avoid subverting basic principles that are fundamental in our Law of Criminal Procedure, namely that the imposition of sentence is the prerogative of the trial court for good reason, and that is not for appellate courts to interfere with that exercise of discretion, unless it is convincingly shown that it has not been properly exercised ...”

[14] In my view a reduced sentence would strike a proper balance and show fairness of justice towards the appellant. One must always remember that the object of sentencing is to serve public interests and not to satisfy public opinion **S v Mhlakaza and Another** 1997 (1) SACR 515 SCA at 518 E-F per Harms JA.

[15] Accordingly, I would make the following order.

1. The appeal against sentence succeeds.
2. The sentence imposed is set aside and replaced with the following order:
 - 2.1 The sentences imposed are ordered to run concurrently with the result that the appellant shall serve an effective period of 15 years imprisonment.
 - 2.2 The aforesaid sentences shall be deemed to have been imposed on 29 July 2011.

S. CHESIWE, AJ

I concur

K.J. MOLOI, J

On behalf of applicant: Mr. J.D. Reyneke
Instructed by:

Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent: Adv. MMM. Moroka
Instructed by:
Director of Public Prosecution
Bloemfontein

/PC