



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A46/2015

In the matter between:

TELO GABRIEL NYELELE

Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, JP *et* RAMPAL, J

HEARD ON: 9 MAY 2016

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 9 JUNE 2016

[1] This is an appeal against the sentence only. Following his conviction, the appellant was sentenced to seven years

imprisonment. He was aggrieved by both. However, he was denied leave to appeal against his conviction but granted leave to appeal against his sentence only. The respondent opposes the appeal.

- [2] An incident took place at Bothaville in 2013 between 18 July and 22 July. The scene of the crime was in a rural area commonly known as Modderfontein Farm. The farm was occupied by Mr Josef Johannes Schoeman, the complainant who was called as the first state witness. He lived on the farm with his wife and his mother in law who stayed in a separate house.

On Friday 19 July 2013 they left the farm and travelled to Johannesburg where they attended a wedding. They returned to the farm on Sunday 21 July 2013. They then discovered that their house had been burgled and their various belongings stolen.

- [3] The complainant reported the incident to the police. The police investigation led to the arrest of four suspects, namely:
Tebello Gabriel Nyelele and 3 others.
The 4 suspects were later charged with housebreaking with intention to steal and theft.

- [4] Their trial started in the Bothaville Regional Court on 25 August 2014. Tebello Gabriel Nyelele, Mpho Joseph Lesenyeho, Matshidiso Petrus Tiro and Tshakane Michael Ramotse were tried together as accused 1, accused 2, accused 3 and accused 4 respectively. At the end of the trial accused 3 and accused 4 were acquitted but accused 2 and accused 1, now the appellant,

were convicted as charged by Mr AJ Bosch, the regional court magistrate.

- [5] On the same day the guilty two were sentenced. The appellant's co-accused, in other words accused 2, was sentenced to 4 years imprisonment. The appellant was sentenced to 7 years imprisonment. His fellow convict, accused 2, was not before us. Therefore, I shall say no more about him.
- [6] On 29 April 2015 the appellant unsuccessfully applied in the court *a quo* for leave to appeal against the conviction and the sentence. Aggrieved by the regional magistrate's refusal, the appellant petitioned the judge president in terms of Section 309 Act No 51/1977 on 5 May 2015 for leave to appeal against the conviction and the sentence. Kruger J and Bokwa AJ considered his petition. On 3 November 2015 the petition succeeded in respect of the sentence only.
- [7] The main ground of the appellant's appeal was that the court *a quo* erred in imposing a sentence of 7 years imprisonment on him. He contended that such a custodial term was excessively harsh; that it was disproportionate to the crime; that it underplayed the mitigating factors; that it was unbalanced; and that it induced a sense of shock. On account of all these, Ms Kruger submitted, on behalf of the appellant, that the sentence imposed on the appellant was thus strikingly inappropriate.
- [8] The respondent disagreed and contended that the court *a quo* committed no misdirection as the appellant contended. Counsel

for the respondent, Mr Strauss, submitted that the sentence imposed on the appellant met all the sentencing demands of the time and that no appellate interference was justified.

- [9] The first issue in the appeal was whether the sentence of 7 years imprisonment was disturbingly harsh regard being had to the number and age of the appellants' previous convictions.
- [10] Ms Kruger argued that the trial magistrate misdirected himself by unduly over-emphasizing the number of the appellants' previous convictions and by ignoring their age(s). She pointed out that of the six relevant previous convictions, the latest was in 2000.
- [11] Mr Strauss argued that the court a quo did not misdirect itself. He submitted that the appellants' bad criminal history was but one of the various considerations that were taken into account in determining an appropriate sentence. Although his previous convictions were very old, they could not be completely disregarded on the ground that they were all committed more than ten years earlier.
- [12] The cardinal principle that governs the approach to be adopted in criminal proceedings is that, in every appeal against sentence, the court hearing the appeal should be guided by the principle that punishment of an offender is pre-eminently a matter for the discretion of the trial court. That is the one important aspect of the approach. The court hearing the appeal should be careful not to erode the sentencing discretion entrusted to the trial court. That is the other important aspect of the approach. The court

hearing the appeal should be mindful that the sentence should only be altered if the trial court has not judicially and properly exercised such discretion. In every appeal the test is whether the sentence is vitiated by irregularity or misdirection or disturbing inappropriateness. **S v Rabie** 1975 (4) SA 855 (A) at 857 D-F

- [13] In **S v Shapiro** 1994 (1) SACR 112 (A) at 119j – 120c Nicholas AJA had this to say about the limited scope of appellate interference:

“It may well be that this court would have imposed on the accused a heavier sentence than that imposed by the trial judge. But even if that be assumed to be the fact, that would not, in itself, justify interference with the sentence.”

- [14] A court hearing an appeal has no clean slate on which to scribble its own preferred sentence. Its sentencing powers are circumscribed by law. In **S v Malgas** 2001 (1) SACR 469 (A) at 478d-e Marais JA aptly articulated the principle as follows:

“[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.

Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance.”

By itself, the mere fact that the court hearing an appeal would, if it had tried the case as a court of first instance, have imposed a lighter sentence than that actually imposed by the trial court, does not constitute a sound reason for interference on appeal.

[15] The personal circumstances of the appellant were as follows:

- He was born on [.....] 1973;
- He was 40 years of age at the time he broke the law and 41 at the time he was punished;
- He had one dependent minor child, 12 years of age;
- He was the child’s primary caregiver;
- He was a widower but precisely when his spouse died did not appear;
- His parents as well as his parents-in-law were also deceased;
- He was not gainfully employed but he received a disability grant of R1250 per month from the state;
- Some of the property he had stolen from the complainant was recovered.

[16] The following were aggravating factors:

- The value of the property the appellant stole was very high – R100 077;
- The bulk of the stolen property worth about R65 000 was never recovered and the victims were exponentially impoverished;
- The appellant was not a lone ranger in the criminal venture but he was seemingly a member of a criminal gang;
- He had a number of previous convictions;
- Of his 8 priors 7 concerned theft and were as such relevant to the crime of burglary;
- The nature, the gravity and the prevalence of burglary in the region were taken into account;
- The crime was certainly planned;
- He was still remorseless after his conviction.

[17] In sentencing the appellant, the regional magistrate, in the first place, said the following about the appellant's priors:

“Dit is so dat daar ‘n onderskeid is, **‘n redelike groot onderskeid**, in die ouderdomme van die twee beskuldigdes en dan **veral wat die vorige veroordelings betref** is daar nie minder as agt vorige veroordelings teen beskuldigde aangeteken nie, waarvan minstens sewe direk relevant tot dit waarvoor hy vandag gestraf moet word, terwyl daar nie vorige veroordelings teen beskuldigde 2 aangeteken is nie.” (my emphasis)

[18] In the second place, the regional magistrate commented on the type and age of the appellant's previous convictions. He said:

“Dit is wel so dat wanneer daar gekyk word na **die vorige veroordelings van beskuldigde** dit meestal diefstal was. Daar was ook een vorige huisbraak met die opset om te steel en diefstal en daar was ook in twee gevalle roof gewees, maar dit blyk dan dat die meeste van hierdie veroordelings redelik lank terug plaasgevind het, tussen 1990 en 2009.”

- [19] In the third place, the regional magistrate commented on the appellant's previous punishments and the differentiation in the sentences between the two offenders, accused 2 and accused 1, now the appellant.

“Beskuldigde 1 het al verskeie kere **verskillende tipe vonnisse** gekry wat gewissel het van lyfstraf, boetes, selfs waarskuwings, en dan termyne van gevangenisstraf wat opgeskort was, ander termyne wat hy direk moes uitdien van onder andere een jaar en drie jaar gevangenisstraf en ook by een geleentheid vier jaar gevangenisstraf. Beskuldige 1 weet dus hoe dit in die gevangenis is, maar nogtans het dit nie die gewenste uitwerking gehad nie.”

- [20] In **S v Muggel** 1998 (2) SACR 414 (C) at 418I – 419I some guidelines were outlined pertaining to consideration of an offender's previous convictions. The decision was in line with the long recognised principle that the older the previous conviction the less aggravating effect it has on the sentence about to be imposed on the offender in connection with the latest conviction. I shall revert to these guidelines.

In **Willem Reed v The State** (A296/09) ZAFHC [2009] (20.09.2010) at p6: 2-7 Kruger J, with whom Kahn AJ concurred said:

“Vir huisbrake word dikwels drie jaar gevangenisstraf opgelê wat reeds ‘n swaar vonnis is. Hierdie twee huisbrake is in dieselfde jaar gepleeg, in dieselfde woonbuurt. Ses jaar gevangenisstraf is ‘n swaar straf vir huisbraak selfs vir ‘n tweede oortreder..”

The original sentence of 12 years imprisonment was reduced to a 6 year period of imprisonment.

[21] In **S v Beja** 2003 (1) SACR 168 (SE) at 170d-e the court, per Pillay J held:

“It is trite that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished.”

The passage was quoted with approval in In **S v Stenge** 2008 (2) SACR 27 (C) at [19].

[22] In **S v Matshiba** 2012 (1) SACR 577 (ECG) the accused had been sentenced by the trial court to an effective term of 62 years imprisonment following his conviction in respect of 7 charges. Six of those convictions concerned 6 counts of housebreaking with intention to steal and theft - as in this case. On appeal the sentence was set aside and replaced with a sentence of 3 years imprisonment in respect of each of the 6 counts and 1 year in respect of count 7, viz theft. It was directed that the six sentences in respect of housebreaking must run concurrently. Accordingly

the appellant had to serve an effective jail term of 4 years imprisonment.

[23] On the strength of the aforesaid case law, Ms Kruger submitted that the sentence of 7 years imprisonment imposed on the appellant, on account of his previous convictions, was shockingly inappropriate.

[24] The appellant has had several brushes with the law in the past. His criminal record includes 4 convictions of theft, 2 of robbery and 1 of housebreaking. The last of his convictions was on 5 July 2000, almost 13 years before the conviction with which we were grappling here. Accordingly the trial magistrate was obliged to disregard the entire list of the appellants' previous convictions seeing that he did no crime for so many years. **S v Zondi** 1995 (1) SACR 18 (A) at 23g-j.

"In terms of sec 271A the sentencing court has no discretion. It cannot take into consideration any previous convictions which fall within the purview of the section **S v Zondi** *supra*."

See **S v Muggel**, *supra* per Ngcobo J as he then was. The general import of the section is that an offender's previous conviction automatically falls away as a previous convictions after the lapse of a period of ten years.

[25] During the course of sentencing the trial magistrate remarked:

"Dit is so dat daar **onderskeid is 'n redelike groot onderskeid**, in die onderdomme van die twee beskuldiges en dan **veral die vorige veroordelings betref is ...**"

He further said:

“Hoewel dit dus blyk dat daar die afgelope paar jaar nou nie veroordelings teen beskuldigde aangeteken is nie, **het hy nogtans ‘n indrukwekkende lys van veroordelings en moet dit natuurlik in aanmerking geneem word en lei tot ‘n onderskeid in die vonnis wat hom en beskuldigde 2 opgelê word.**”

- [26] I have extracted those passages from the sentence component of the judgment to show that the obsolete previous convictions were unduly and exceedingly stressed by the regional magistrate. The appellants’ chapter on previous relevant convictions was closed on 5 July 2000. The conviction concerned the crime of theft he committed on 17 September 1998. Ever since then he kept a clean sheet. Almost fourteen years later, on 19 July 2013, he committed burglary. In my view the trial court materially erred on the point of law in re-opening the closed chapter. In **S v Muggel** *supra*, at 419 g-h Ngcobo J commented:

“The tendency of taking everything that appears on the form SAP69 into consideration, regardless of the passage of time, must be avoided. It must also be borne in mind that even a criminal is entitled to ask that the lid on the distant part should be kept tightly closed. **S v Mqwathi** 1985 (4) SA 22 (T).”

I am in respectful agreement.

- [27] In view of the misdirection, we are obliged to interfere with the sentencing discretion of the regional court. The discretion was not properly exercised in a judicial manner. I would, therefore

uphold the appeal on the grounds that obsolete previous convictions, that were supposed to be disregarded, were taken into account. Such previous convictions could not correctly justify the disturbingly huge distinction made between the two offenders. This then in a way disposes of the first issue in the appeal, albeit not completely.

- [28] The second issue was whether the trial magistrate's materially misdirected himself by sentencing the appellant without considering whether the appellant was indeed a primary caregiver to a dependent minor child on whose best interest a custodial sentence might have an adverse impact. To that issue I turn now.
- [29] A similar factual omission by the trial magistrate which was further perpetuated by the high court appeal judges arose in **S v M** 2008 (3) SA 232 CC. In that case the court went to great lengths to consider the proper approach incumbent upon a sentencing court where the convicted person is the primary caregiver of minor a child(ren). The paramountcy of the child's best interest in every matter concerning the child is enshrined in sec 28(2) read with sec 28(1) (b) of the constitution. The section recognises and reflects the global trend rights, protection and entitlements that are specifically identified and accorded to children.
- [30] The curator in **S v M**, *supra*, stressed that in terms of the aforesaid constitutional provisions every child has a right to family or parental care and that when removed from the family environment, a child has a right to appropriate alternative care. He contended, and the court accepted, that taken together, those constitutional provisions impose four responsibilities on a

sentencing court when a custodial sentence for a primary caregiver is in issue. Those responsibilities were identified and listed as:

“[32] The curator emphasised that s 28(2) of the Constitution should be read with s 28(1)(b) which provides that every child has a right to family or parental care, or appropriate alternative care when removed from the family environment. Taken together, he contended, these provisions impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue. They are:

- To establish whether there will be an impact on a child.
- To consider independently the child's best interests.
- To attach appropriate weight to the child's best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.”

S v M 2008 (3) SA 232 (CC) par [32] on p251.

[31] The court examined the facts in **S v M**, *supra* and came to the conclusion that those practical modes designed to give children's paramount interest special protection during the sentencing process of their primary caregiver were not observed by the regional court. The court considered the omission, to independently have special regard for the paramount interests of the children apart from their convicted caregiver, to be a sentencing misdirection that warranted appellate interference.

[32] In the instant matter, there was neither reference made to **S v M**, *supra* nor to the applicable constitutional provisions of Section 28.

It was common cause that the special protective duties were not observed and that the appellant was sentenced without sufficiently independent and informed attention given to adverse impact the sentence might have on the minor child. Sentencing a primary caregiver is now a new ball game altogether. It is no longer business as usual.

[33] As regards the underlying philosophical purpose of the decision the distinguished judge, Sachs J, writing for the majority of the court, said:

“[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interest of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”

S v M 2008 (3) SA 232 (CC) par [35] on p252.

[34] I am persuaded that the second issue must also be decided in favour of the appellant. In view of this conclusion, the sentence cannot be allowed to stand. The appropriateness or otherwise thereof will have to be reconsidered in due course once special regard has been had to the independent circumstances of the

dependent minor child. Only then will the court be able to make an informed decision. There is an obvious potential conflict between the interest of the minor child and the interest of the victim. The broader interest of society dictates that a fair balance be struck between the child's right to family care and the victim's right to protection from housebreakers.

[35] Some reliable social welfare report will provide helpful information for resolving that possible conflict of interest the resolution of which will pave the way for the determination of an appropriate sentence. However, we must be mindful that barring the child's special regard, the gravity of the crime calls for a custodial sentence.

[36] We are in the same unfavourable position as the regional court. We hardly have one report concerning the minor child whose special interests are central to the appeal before us. It being the case, I am inclined to remit the matter to the regional court to hold the special enquiry in accordance with the authoritative decision of **S v M**, *supra* and, thereafter, to consider the question of sentence afresh.

[37] The following order is made:

37.1 The appeal is upheld;

37.2 The sentence imposed by the trial court is set aside and the matter is remitted to the trial court to impose sentence

afresh after obtaining the material evidence affecting the children in accordance with what is set out in **S v The State**, Centre for Child Law as Amicus Curiae (CCT 63/10) [2011] ZACC 7 (29 March 2011) and **S v M** (Centre for Child Law as Amicus Curiae 2007 (2) SACR 539 CC and this judgment.

M.H. RAMPAL, J

I concur

MOLEMELA, JP

On behalf of appellant: Ms Kruger
Instructed by:
Bloemfontein Justice Centre
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On behalf of respondent: Mr M Strauss
Instructed by:
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