

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

Appeal Number: A166/2014

In the appeal of:-

PETRUS SAUL SETHUN TSA

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J *et* MURRAY, AJ

JUDGMENT BY:

MURRAY, AJ

HEARD ON:

3 NOVEMBER 2014

DELIVERED ON:

11 DECEMBER 2014

[1] This is an appeal against the Appellant's conviction and sentence by the Regional Court, Brandfort, on a charge of Housebreaking with Intent to Steal and Theft on 24 October 2011.

[2] On 29 February 2012 the Appellant's application for leave to appeal against his conviction and his sentence was

dismissed. However, on 23 May 2014 this Court granted leave to appeal against the judgment and sentence by way of petition in terms of section 309C of the Criminal Procedure Act, Act 51 of 1977 (“the Act”).

[3] The Appellant was charged with housebreaking with intent to steal and theft in that he unlawfully and intentionally and with the intent to steal, broke open and entered a house in Brandfort where he wrongfully and intentionally stole clothing to the value of R3 140-00, the property of or in the lawful possession of one Mr Kasterlyn (“the complainant”).

[4] The Appellant was represented by an attorney from Legal Aid South Africa. He pleaded not guilty to the said charge and offered a plea explanation. He averred that he never broke into the complainant’s home, but only entered the complainant’s yard to ask about a certain Jurie Linde, who he alleged was the owner of a house where he was supposed to get a burglar-proofing quotation for an RDP house. He averred that the complainant and another white male then severely assaulted him, allegedly for wanting to steal from the complainant’s home.

- [5] The trial Court recorded a formal section 220 admission that the accused was in the complainant's yard on 20 June 2010, which admission the Appellant confirmed. Two witnesses testified for the State, namely the complainant and Mr Van Nieuwenhuizen. The Defence called only the Appellant.
- [6] The complainant's evidence, which the trial court found to be corroborated in all material respects by that of Van Nieuwenhuizen, was that he had lived in Brandfort for at least sixteen years and knew nobody by the name of Jurie Linde. On the relevant day he unlocked his devil's fork gate with a key to enable Van Nieuwenhuizen to collect paint from him. On his way back from the gate, he went into his laundry room to fetch a handkerchief. The door was closed but not locked. The light was off. When he switched it on, he discovered the Appellant in the room, holding two bags, one of which was the complainant's motorcycle backpack and the other a shopping bag.
- [7] When asked what he was doing there, the Appellant averred that he was looking for his father, *'the man who worked for [the complainant]'*. Upon being told that the man who did

work there was at least 20 years his junior, the Appellant fled from the laundry room, throwing down the bags as he rounded the corner of the outbuildings.

[8] As the Appellant ran towards the gate, Van Nieuwenhuizen entered the driveway in his bakkie. In the narrow space between the bakkie and the wall, the Appellant ran into a lamp post where the complainant and Van Nieuwenhuizen caught him and told him to sit while they called the police.

[9] The Appellant removed three R20 notes from his wallet, and offered it to them not to call the police. When the complainant refused to take the money, the Appellant jumped up and ran around the outbuildings towards the swimming pool where he tripped over a wall and fell again.

[10] In the meantime Van Nieuwenhuizen had called the police. When they arrived, they stopped at the front gate and the complainant and Van Nieuwenhuizen took the Appellant by the arms and marched him to the police vehicle. One of the policemen accompanied the complainant to where the Appellant had dropped the bags. The complainant opened

the bags in the policeman's presence. In the shopping bag he found clothing belonging to his children and his own clothes in his motorcycle backpack. The complainant estimated the value of the clothing as per list "C" to the record to be around R3 140-00.

[11] Van Nieuwenhuizen's evidence differed from the complainant's in a few respects, such as that the Appellant seemed to have four and not three R20 notes in his wallet, that he tried to run away four times instead of two, that he fell over a wooden bench, not a wall, that the complainant's shirt was torn when he first saw him, and that the second bag was a green cloth shopping bag, not a plastic one.

[12] The Appellant, on the other hand, testified that he had lost his way when he arrived back from Bloemfontein by taxi after five that afternoon. He averred that, while he was looking for a board denoting Jurie Linde's house, he entered the complainant's yard, but *"not through the devil's fork gate"*, to ask for Jurie Linde. He averred that the complainant and another man without reason or provocation attacked him after asking what he was doing in the yard and accusing him

of wanting to steal from the complainant. He denied ever having entered the laundry room and ever having had bags in his hands.

[13] He averred that after his arrest he was taken to see a doctor who completed a J88 form regarding his alleged injuries from the assault. He claimed to have handed the J88 to a policeman when he opened a case of assault against the complainant and Van Nieuwenhuizen, but claimed to have no idea what happened to that case or the J88 form. He accused Van Nieuwenhuizen and the complainant of having fabricated evidence to implicate him since they knew of the assault charge.

[14] Despite putting all the elements of the crime in dispute, the Defence failed to put many of these allegations to the State witnesses in cross-examination. As the trial court pointed out, the only fact that the Defence and the State were *ad idem* about, was that the accused was in the complainant's yard on 20 June 2010.

[15] The trial Court took into consideration that, regarding the

charge of housebreaking, the complainant was a single witness. The Court appropriately applied the cautionary rule to his evidence and found him to have been a credible witness for the following reasons:

15.1 That he was open and honest with the Court by averring that the door to the laundry room was closed but not locked; that when he entered the laundry room the light was off; and that he did not know the accused before the incident;

15.2 That he was honest in admitting that if the gate was locked someone could still gain entry to the premises by jumping over the wall and that there was no damage to the door of the laundry room.

[16] The trial Court then evaluated the complainant's evidence in its totality in order to determine whether he was credible and reliable. The trial Court believed that he had personally experienced the events since he was able to give the Court a clear, concise version thereof and was able to give a clear description of exactly where he found the Appellant in the

laundry room, as well as of their conversation. The trial Court found that his version weakened the probabilities of the Defence case and found him to be a credible and reliable witness.

[17] The trial Court also found Van Nieuwenhuizen to be a credible and reliable witness. She regarded him as having been open and honest by admitting that the Appellant fell and was injured after tripping over a bench; that he did not know what was said between the Appellant and the complainant because he was not there; that the complainant's shirt was torn, and that he succeeded in giving a clear account of what had happened on that day.

[18] The trial Court found that Van Nieuwenhuizen's evidence materially corroborated that of the complainant and that the contradictions were not material; did not point to attempts to mislead the Court; and were not such as to force the Court to reject their evidence.

[19] The trial Court stated that it had to evaluate the Appellant's evidence together with the probabilities of the case. She

found the Appellant to have been evasive; not to have been open and honest with the Court at all times and his evasiveness and dishonesty to have strengthened the probabilities in the State's case.

[20] She rejected the Appellant's version as improbable with specific reference to his allegations of having gone to the complainant's house in the late afternoon because Mr Linde worked away during the week, and to his averment that the complainant was implicating him because of the unprovoked assault and the alleged charge against him.

[21] The trial Court accepted the State's version and in determining whether the State had proved all the elements of the charge of housebreaking with intent to steal and theft, determined that the following facts were proven:

21.1 That the door to the complainant's laundry room was closed on the said day;

21.2 That the Appellant opened the door in order to enter the room;

- 21.3 That the room was on the complainant's premises and that the accused had entered the premises with the intention to steal from the complainant;
- 21.4 That there were no grounds for justification of his actions, which were unlawful;
- 21.5 That the Appellant must have entered the premises in some other way than through the gate, for instance by jumping over the wall;
- 21.6 That by running away with the laundry bag, the Appellant intended to permanently deprive the complainant of his ownership of the bag and its contents.

[22] The trial Court determined that the only reasonable inference that it could draw was consistent with the proven facts, namely that the Appellant on that day intended to go to the complainant's house with the intention to steal, and did steal, by taking the motorcycle bag with the

complainant's clothes in it, out of the laundry room. The Appellant was then convicted as charged.

[23] I agree with the trial Court that all the elements of the offence were proven, in accordance with **S v Hlongwane**¹ in which the essential elements of the offence of housebreaking were defined as:

- (a) the “breaking” of premises in the legal sense by the displacement of any obstruction to entry of a structure which forms part of the premises – such as a store room or outbuilding²; that for ‘breaking’ to take place no actual damage to the structure need to be inflicted; so that even pushing open a closed or partially open door to enter, qualifies for ‘breaking’ in the legal sense if done unlawfully and with the intention of unlawfully breaking in and committing some other crime;³
- (b) the entry of the premises by means of any part of the person;

¹ 1992 SACR 484 (N)

² Snyman: Criminal Law 5th Edition, at p. 550

³ Snyman, *supra*, at p. 552.

(c) the unlawfulness of the conduct complained of; and

(d) the intention to commit an offence.

[24] When an appeal pertains to a trial court's findings of fact, the appeal court takes into account that the trial Court was in a more favourable position than itself to form a judgment, because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial court from start to finish. An appeal court therefore initially assumes that the trial court's findings were correct and will normally accept those findings unless there is some indication that a material mistake was made.⁴

[25] This principle also applies in cases involving the application of a cautionary rule.⁵ A cautionary rule, such as the rule regarding the evaluation of the evidence of a single witness as *in casu*, does not affect the appropriate standard of proof which remains proof beyond a reasonable doubt.⁶ In R v J⁷

⁴ See: The Law of Evidence, Issue 9, at 3 – 40.

See also: *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623 – 624; and

S v Tshoko 1988 (1) SA 139 (A).

⁵ See: *S v Leve* 2001 (1) SACR 87 (ECG).

⁶ See: *S v Artman* 1968 (3) SA 339 (A) at 340 – 341 B.

⁷ 1966(1) SA 88 (RSRA) 90

the Court held that:

“While there is always the need for special caution in scrutinising and weighing the evidence of ... a single witness, the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer, having anxiously scrutinized such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence... may ... be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears.”

[26] In **R v Abdoorham**⁸ Broome JP held that if the evidence satisfied the standard of proof, the Court must convict, even if a single witness was unsatisfactory in some respects⁹ since an “*unsatisfactory*” witness might still be a “*credible*” witness in respect of material aspects of his evidence. Therefore, even though there were some discrepancies between the complainant’s evidence and that of Van Nieuwenhuizen, I am satisfied that the two of them were still ‘credible’ witnesses regarding the material aspects of their testimony.

⁸ 1954 (3) SA 163 (N) at 165 .

⁹ See: R v Abdoorham, *supra* at 165 C – D.

[27] For the reasons as set out in **R v Dhlumayo & Another**¹⁰ and in view of the facts before the trial Court, I would therefore be loath to reject the trial court's findings on credibility. The discrepancies between the complainant's version and Van Nieuwenhuizen's in my view merely strengthened the impression that the two witnesses were independently trying to tell the truth.

[28] I also support the Court's rejection of the Appellant's version as improbable. It is highly improbable, first of all, that the Appellant, whilst on his own version knowing that the alleged 'Jurie Linde's' property was duly designated by a sign, would simply enter a strange property without such a sign and there be attacked by two men for no reason whatsoever. It is even more improbable, secondly, that he would have opened a case of assault with the police, complete with a J88 report, and that no trace of such a case could be found during his trial. I am therefore satisfied that the concession by the Appellant's counsel on the merits was correctly made.

¹⁰ 1948 (2) SA 677 (A) at 689.

[29] In my view, however, the sentence of 13 years' direct imprisonment is excessive in the light of the Appellant's personal circumstances. Although the Appellant is not a first offender, and in fact has 17 previous convictions for the same type of crime, the bulk of those crimes were committed before 2002 and are therefore older than 10 years, with only 3 committed after 2002. Although previous convictions are usually highly relevant during sentencing, the weight to be attached thereto is to be decided by the court.¹¹ In **S v Mqathi**¹² Van Dijkhorst warned against holding offences against an accused in perpetuity, by deciding that:

“daar moet teen gewaak word dat die boek van die sondes van die verlede altyd geopen bly lê...”

[30] The previous Criminal Procedure Act, Act 56 of 1995, determined that the book was closed after 10 years without any conviction. Section 271A of the present Act determines that certain convictions fall away as previous convictions after the expiration of 10 years unless during that time the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed. All

¹¹ Du Toit: Commentary on the Criminal Procedure Act, Servicee 50, 2013 at 27-2.

¹² 1985 (4) SA 22 (T) at 25A-H.

other previous convictions remain in place, but the longer the time lapse, the less value the court will usually attach to the conviction except in so far as a trend appears from the previous convictions.¹³ The provision has been said to have limited value since judicial officers imposing sentence would in any event not attach any weight to such old sentences.¹⁴

[31] Although previous convictions therefore play an important role in the imposition of sentence, they should not be overemphasised at the expense of the gravity of the offence for which the accused is to be sentenced and the circumstances in which the offence was committed. (See: **S v Kalane**¹⁵). On appeal in **S v Makhaye**¹⁶ Seegobin J held that the trial court had unduly emphasised the previous convictions at the expense of factors such as the personal circumstances of the accused and held that “[t]he regional court had misdirected itself in that its decision to impose five years’ direct imprisonment ‘was based largely on the previous conviction’”.

[32] In **S v Barnabas**¹⁷ undue emphasis on previous convictions led to the reduction of a sentence of 20 years’ imprisonment

¹³ Hiemstra’s Criminal Procedure, Issue 7 at 27-3.

¹⁴ Hiemstra, *supra*, op cit.

¹⁵ 1988 (2) SA 206 (O)

¹⁶ 2011(2) SACR 173 (KZD) at 177f.

¹⁷ 1991 (1) SACR 467 (A)

to 12 years. In S v Kruger¹⁸ the Supreme Court of Appeal held that, even where previous convictions are an aggravating factor, it remains the duty of a sentencing court 'to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence'.

[33] In the present case, I am of the view that the trial Court did not adequately 'balance the mitigating and aggravating circumstances' and overreacted to the 17 prior convictions. Although the number and nature of the convictions do signify a trend which the trial Court was of course justified in taking into account, and although the last offence was committed while the Appellant was on parole, it was still incumbent on the Court to objectively balance all the relevant factors in order to arrive at a sentence that would not only satisfy the community expectations, but also be just to the Appellant in view of his personal circumstances.

[34] Not only did the Court warn the Appellant that he ran the risk of being declared 'a habitual criminal' in terms of section 186 of Act 51 of 1977, however, but also called him a repeat offender, a 'recidivist' whose past sentences had had no

¹⁸ 2012 (1) SACR 369 (SCA)

effect on his criminal behaviour, wherefore he was “*a person that does not belong in the community because [he] cannot adhere to the rules and the regulations of the law.*”

[35] The cumulative effect of the mitigating factors in my view overshadows the aggravating factors by far. The trial Court listed the following factors 1) that the Appellant was 62 years old; 2) that he had three children and lived with the 21-year old son; 3) that he was receiving a pension grant. It should have taken into account also 4) that the complainant suffered no loss as all the stolen items were recovered (although that was not attributable to the Appellant); 5) that the value of the stolen items was relatively small and 6) that the Appellant had been in custody since 20 June 2010. (See **S v Brophy**¹⁹ for the view that time served by an unsentenced prisoner was equal to double the time served by a sentenced one).

[36] The trial Court considered a number of aggravating factors, including the prevalence of the crime in the court’s area of jurisdiction; that the Appellant took the complainant’s possessions and ran away when the complainant caught him

¹⁹ 2007 (2) SACR 56 (W)

red-handed and confronted him; that the Appellant had shown no remorse, but mainly that the Appellant had so many previous convictions.

[37] The weight accorded to the previous convictions is clear from the trial Court's statement:

“Now, I do not find that there is any mitigating factors in your favour in light of your previous convictions and also in light of the current offence that you have been currently convicted for.”

[38] In stating that the Appellant's previous convictions “will contribute towards [his] getting a sentence that will weigh heavily in favour of retribution” and imposing a sentence that is more than double his previous longest sentence of five years' imprisonment of which a part was suspended, in my view the trial Court imposed a sentence that was not just to the 62 year old Appellant. In view of the Appellant's age, at least, the sentence should also have been tempered by ‘a measure of mercy’, which it was not.

[39] I accordingly find that the trial Court has misdirected itself in over-emphasising the Appellant's previous convictions and non-compliance with the various orders imposed on him for

the numerous previous convictions to the detriment of his personal circumstances. I agree that a lengthy sentence is required in the circumstances, but am of the view that it must be tempered with mercy and that part of it should be suspended to serve to deter the Applicant from repeating his unacceptable conduct once he is released.

I therefore make the following order:

1. The appeal against the conviction is dismissed and the conviction is confirmed.
2. The appeal against the sentence is upheld.
3. The sentence of thirteen years' imprisonment is set aside and replaced with the following:

“The Appellant is sentenced to nine (9) years' imprisonment of which three (3) years are suspended for five (5) years on condition that the Appellant does not commit a similar offence during the period of suspension.”

H MURRAY, AJ

I concur:

M B MOLEMELA, J

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