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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: A590/2012

DATE:04/02/2013

In the matter between:

T S M

APPELLANT

vs

THE STATE

RESPONDENT

Coram: TEFFO J et HUGHES AJ

JUDGMENT

Delivered on: 04 February 2013 Heard on: 28 January 2013

HUGHES AJ

1. The applicant, T S M, was charged with count 1 housebreaking with the intent to commit a

crime unknown to the state, count 2 and 3 Robbery with aggravating circumstances. On 19 July 2010 he was found guilty on all three counts and sentenced to five (5) years imprisonment in respect of count 1, fifteen (15) years imprisonment in respect of count 2 and a further fifteen (15) years imprisonment in respect of count 3. The sentence in count 1 and seven (7) years of the sentence in count 3 were to run concurrently with the sentence imposed in count 2. The appellant's effective term of imprisonment being twenty-three (23) years.

2. The appellant filed a petition with this court against both his conviction and sentence. Leave to appeal was granted on 10 August 2011 by, Legodi J and Sapire AJ. In respect of count 1 and 2 leave was granted on conviction and sentence, whilst in the case of count 3 leave to appeal was granted in respect of sentence only.

3. At the commencement of the proceedings an application for condonation for the late filing of the appellant's heads of argument was made on behalf of the appellant. The respondent did not oppose this and in the interest of justice condonation was granted.

h. Initially the appellant pleaded not guilty to the offences set out in counts 1 and 2. In his plea explanation he admitted that a break-in took place, that the goods set out in the charge sheet were taken from the premises of John McDonald and that a firearm was used, however he denied that he was present when the incident took place. During the course of the proceedings, the appellant submitted formal admissions in terms of section 220 and therein he admitted having committed the offences as set out in counts 1 and 2.

5. Briefly, as regards count 1 the appellant admitted that he broke into the premises of John McDonald on 21 January 2009 by using a screwdriver to remove the window. Further, that he

removed the goods comprising of a mini hi-fi, handbag, and cellphone. He however denied having any weapons, more so, a firearm as alleged by the complainant John Me Donald.

6. Count 3 is a separate incident that took place on 18 November 2009. He admitted that indeed the robbery of the shop did take place, that during the course of the robbery a hammer was used to injure the complainant. That the items mentioned in the charge sheet of R900.00, airtime and a cellphone were in fact taken and that during the commission of this offence he was apprehended by the community. Memory Mtachi, the complaint in this incident, evidences differed from that of the appellant, in that the complainant states that the assailants had an axe and not a hammer as alleged by the appellant.

7. From the outset I must point out that both counsel indicated that the appellant should have been convicted of "housebreaking with intent to rob" and not housebreaking with intent to commit a crime unknown to the state. Both counsel argued that count 1 and 2 were interlinked and that the housebreaking was committed with the intention to rob the complainant McDonald. I must add though that both differed as to whether the appellant had been armed with a firearm when he robbed the complainant.

8. The charge as it appears in count 1 is to be read with the provisions of Section 262 of the Criminal Procedure Act 51 of 1977. Of importance is Section 262 (2) which states:

"If the evidence on a charge of house-breaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under the statute or the common law, does not prove the offence of house-breaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specified offence, or the offence of malicious injury to property, the accused may be found guilty of the

offence so proven.

9. The respondent's case against the appellant as regards the robbery with aggravating circumstances, in count 2, relates to the fact that the appellant was armed with a firearm when the robbery, of McDonald, took place. However, the appellant's version was that no weapon was used at all. Counsel for the appellant further argued, that the complainant had at trial presented two versions relating to this firearm. Initially he testified that the firearm was pointed at his face and the assailant said, "I am going to shoot you". His testimony then changed and he stated that the firearm was pointed at him through the gate and the assailant said "I am going to shoot you, I got a gun".

10. In light of the facts above it is correct that the conviction should have been housebreaking with intent to rob, as the intention of the appellant was to rob McDonald. See *S v Jasat* 1997 (1) SACR 489 (SCA).

11. In my view the discrepancy as regards the firearm is but a minor issue, what is evident from McDonald's testimony is that in both of his accounts he persists that a firearm was used. In the circumstances I do not believe that McDonald's account as regards the firearm is a recent fabrication as alluded to by the appellant's counsel.

12. I am therefore satisfied that a firearm was used when the commission of counts 1 and 2 took place.

13. I now turn to deal with sentence; both counsel were *ad idem* that the sentence of fifteen (15) years imprisonment was appropriate for count 3, As regards count 2 the respondent

submitted that the punishment metered in this instance was too harsh. The appellant should have been considered as a first offender as regards these specific offences. Though he had a previous conviction of theft that conviction dates back to 18/02/2002. Since then he had managed not to have any brushes with the law. Besides, the appellant was relatively young as he was 25 years of age when he committed these offences and as such there was still an opportunity for him to be rehabilitated.

ik. The respondent's conceded that counts 1 and 2 should have been taken as one for purpose of sentencing, as these offences were closely linked. Further, that a sentence of ten (10) years should be imposed for counts 1 and 2 instead of the minimum sentence of fifteen (15) years. That the sentence imposed for count 1 and 2 of ten (10) years, five (5) years thereof should run concurrent with the sentence in count 3. Thus the appellant would serve an effective period of twenty (20) years.

15. It is prudent to highlight the remarks that are set out in *S v TSUNGA* 1993 (1) SACR 365 V at 370 B-I, where the Court makes the following remarks:

"[4] A judicial officer should not approach punishment in the spirit of anger, because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and objects of punishment demand of him. Nor should he strive after severity nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society, which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.

[5] Therefore, during the sentencing phase, the trial court is then called upon to exercise its

penal discretion judicially and only after a careful and objectively balanced consideration of all the relevant material. Certain guidelines may be laid down in this regard. In my view the punishment must firstly be reasonable, that is, it should reflect the degree of moral blameworthiness, attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore, should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly for the punishment to clearly reflect the balance process of careful and objective consideration of all relevant facts mitigating and aggravating. The sentence should thirdly, reflect consistency as far as is humanly possible, previous sentences imposed on similar offenders committing similar offences, least society should believe that justice was not seen to be done.

[6] Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account To this end I would add that the trial court does not impose sentence in vacuum, it to the contrary, certainly does so within a certain time frame and at a certain stage in the development of people of a district or a province or a country or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its values and its moral indignations at unlawful conduct as well as the negative or harmful effects thereof on third parties or society itself.

[7] But in a civilised society punishment also reflects the interest of the offender himself. The trial court in a criminal matter then functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interest of society and all its law abiding members."

I align myself with the extract above.

16. I am mindful of the various decisions and the approach to be adopted when dealing with cases involving the prescribed minimum sentence. Even so, a court may be satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence than the prescribed minimum sentence. In that case these must be entered on the record and clearly a lesser sentence will be imposed. To this end I refer to S v MALGAS 2001 (1) SACR 469 SCA at 18. I concede that the prescribed sentence should not be departed from lightly and that one should weigh up all the traditional relevant considerations pertaining to sentence and look at the factors of a particular case cumulatively before one deviates from the prescribed sentence.

17. Having considered the argument advanced and the facts of the matter at hand I am of the view that this court is in a position to exercise its discretion and interfere with the sentence so imposed by the trial court. The appellant is regarded as a first offender for purposes of these offences, is still young and rehabilitation could change his life around, the previous conviction is ten (10) years old and since then he did not have an encounter with the law. In my mind these weigh in the appellants favour, as he is clearly rehabilitative.

18. In the circumstances I agree with the arguments advanced by the respondent and as a consequence I make the following order:

18.1. The charge set out in count 1 is amended to read "House breaking with intent to commit robbery".

18.2. The appeal in respect of the convictions as regards count 1 and 2 is dismissed.

18.3. The appeal against sentence of all three counts succeeds and is replaced with that which appears below:

18.3.1. Count 1 and 2 will be treated as one count for purposes of sentence. In respect of

count 1 and 2 the accused is sentenced to ten (10) years imprisonment.

18.3.2. Count 3 the accused is sentenced to fifteen (15) years imprisonment.

18.3.3. Five (5) years of the sentence imposed for count 1 and 2 will run concurrent with sentence imposed in count 3.

18.3. The accused will serve an effective 20 years imprisonment and in terms of Section 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to the 19th July 2010.

W. Hughes

Acting Judge of the High Court

I Agree;

M. J. Teffo

Judge of the High Court

Delivered on: 04 February 2013

Heard on: 28 January 2013

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