

14/2/13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

A388/12
APPEAL NO: A7/2012

In the matter between:-

ROLANE CHAUKE

Appellant

and

THE STATE

Respondent

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
14/2/2013	<i>[Signature]</i>
DATE	SIGNATURE

JUDGEMENT

Van Schalkwyk, A J

- [1] The Appellant, a 29 year old male, was convicted of one count of housebreaking with the intent to steal and theft, in the Regional court, Pretoria North, and sentenced to five years imprisonment in terms of Section 276 (1)(i) of Act 51 of 1977.

- [2] Leave to appeal against conviction and sentence was refused in the court a quo. The appellant petitioned the Judge President of this Court seeking leave to appeal against his conviction and sentence. The appellant was granted leave to appeal against sentence only.
- [3] The appellant's conviction is based on the following factual findings: The appellant and the co-accused broke into and entered the house of Charlene Slabbert, the complainant, on 4 April 2010. Entry was gained by breaking a window pane in the bedroom and the cost to repair the broken window was R 610, 00. The appellant and his co-accused were noticed by constable Jerry Mokanyane shortly after the incident occurred. They were carrying bags, but when they noticed the police officer they dropped the bags and ran. They were both arrested and the complainant identified the goods in the retrieved bags as her property.
- [4] On appeal, it was submitted on the appellants' behalf that the court a quo misdirected itself by only considering and emphasizing the seriousness of the offence and the interest of society without evaluating the personal circumstances of the appellant. The court also failed to evaluate and rule on the numerous considerations that constitute mitigating factors. It is also submitted that retribution and general deterrence was taken into account but not rehabilitation and individual deterrence.

- [5] As far as the sentence is concerned the court took into account the seriousness of the offence and the interest of society. The appellants' personal circumstances namely that he is 29 years old, and unmarried were taken into account. The appellant has one minor child; and his level of education is grade 12. The appellant has no previous convictions. He does not display any remorse and he seems to be in good health. The purpose of sentencing was also taken into account.
- [6] It is trite law that sentencing or punishment is pre-eminently a matter of discretion of the trial court. See *S v Rabie* 1975 (4) SA 855 (A) of 857 D-E. It is because of this that an appeal court will be reluctant to interfere with the trial courts' discretion. An appeal court may interfere if the discretion has not been judicially and properly exercised or the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate.
- [7] The court must weigh the mitigating factors against the aggravating factors. The court must guard against over emphasizing one of the factors because it would lead to an unbalanced sentence. The court a quo correctly took into account the seriousness of the offence, the interest of society, the prevalence of the offence, the fact that the type of offence constitutes a major invasion of the private lives of the citizens and the need for proper sentences.

- [8] The court a quo failed to make a finding as to the existence or non-existence of the mitigating factors in favour of the appellant. In *S v Nkosi* 2012 (1) SACR 87 (GNP) paragraph [30] it was held that:-

“...there is still a need to maintain a healthy and proper balance between the interests of society, the nature of the offence and the offender. Aggravating of sentences to combat increasing prevalence of a particular crime must not lead to an inevitable negation of the accused’s personal circumstances...”

- [9] The following glaring mitigating factors in favour of the appellant have been disregarded by the court a quo: ~~that~~ the offender was a first offender; he was gainfully employed until his arrest; he has one minor child who is dependant on him. The pre-sentence report favours the accused in the sense that there is no likelihood that he will commit the offence again. He spent 18 months in custody awaiting the finalization of the matter. In *S v Kruger* 2012 (1) SACR 369 (SCA) it was held that: “...It is only fair to consider the period spent in prison awaiting trial, especially where it is a lengthy period, in determining an appropriate sentence for the offences committed.” The fact that the pre-sentence report states that the appellant is a candidate for rehabilitation and he should be allowed to be a productive member of society, has been disregarded.

[10] The court *a quo* misdirected itself by merely mentioning the personal circumstances but failing to evaluate and take them into consideration during sentence proceedings. This caused the sentence imposed on the appellant to be shockingly severe and disproportionate to his personal circumstances and mitigating factors.

[11] The appellant has served 14 months imprisonment and spent 18 months in custody awaiting trial. In total he has been incarcerated for a period of approximately 32 months.

[12] Having regard to all the factors it is clear that the trial court has misdirected itself when it comes to sentencing and the sentence warrants interference.

[13] In light of the above I propose the following order:-

The appeal against the sentence succeeds;

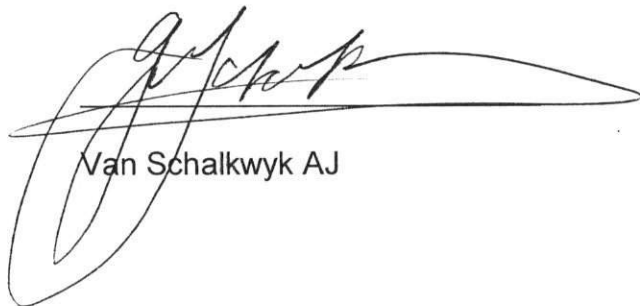
[14] I propose that the sentence imposed by the court *a quo* is set aside and the following substituted for it:

The appellant is sentenced to five years imprisonment of which three years is suspended for a period of five years on condition that the

appellant is not convicted of housebreaking with the intent to steal and theft or of theft, for which a sentence of imprisonment without the option of a fine is imposed and which was committed during the period of suspension.

In terms of the provisions of section 282 of Act 51 of 1977, the sentence is ante dated to the 5 December 2011.

The declaration in terms of Section 103 (1) of Act 60 of 2000 is upheld and it is confirmed that the appellant is deemed unfit and is accordingly declared unfit to possess a firearm.



Van Schalkwyk AJ

I agree and it is so ordered



Preller J