

Reportable:	YES /
NO	
Circulate to Judges:	YES /
NO	
Circulate to Magistrates:	
YES / NO	
Circulate to Regional Magistrates:	
YES / NO	

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case No: CA&R 91/07
 Heard: 04/02/2008
 Delivered: 08/02/2008

In the matter:

SHAUN KOOPMAN

Applicant

and

THE STATE

Respondents

Coram: Bosielo AJP et Williams J

JUDGMENT ON APPEAL

BOSIELO AJP

- 1] The crisp legal issue in this appeal is whether a sentence of imprisonment for 12 months for housebreaking with intent to steal and theft of a video camera valued at R 17 000-00 can legitimately or correctly be described as “shocking”, startling” or disturbingly inappropriate”, thus justifying interference with that sentence by this court, sitting as a court of appeal.

- 2] The legal principles governing appeals against sentence are well-established and settled. Furthermore, there is a veritable body of decided cases, notably by the Appellate Division (AD) and recently by the Supreme Court of Appeal (SCA) which have attempted to shed more light on this aspect. See **S v Kgosimore** 1999(2) SACR 238 (SCA); **S v Kibido** 1998(2) SACR 213 (SCA) at 216g. The correct judicial approach to be adopted by the appeal court to an appeal on sentence was clearly and lucidly enunciated as follows by Holmes JA in **S v de Jager & Another 1965 (2) SA 616 (AD)** at p 628H – 629:
 “It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by

principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.”

- 3] It is noteworthy that in the Heads of Argument filed on appellant’s behalf, it is conceded that the magistrate properly considered the appellant’s personal circumstances. It is furthermore conceded that the magistrate properly considered, as he is required to by law, all possible and viable sentencing alternatives, but that, having done so, found that direct imprisonment is the only appropriate sentence. It is therefore abundantly clear that appellant is not relying on any irregularity or misdirection regarding his sentence. His only complaint is that the sentence is too severe and is therefore appealing for mercy.
- 4] That mercy is an intergral if not pivotal component of any just sentence has been accepted in many judgments by our courts. In **S v V** 1972(3) SA 611 (AD) at p614 Holmes JA described mercy as the hallmark of a civilized and enlightened criminal justice system. However, he seriously cautioned against true or genuine mercy being confused with soft weakness, maudlin sympathy for the appellant or even permissive tolerance, which in my view, would lead to a warped sentence. One need not be a rocket scientist to see that disturbingly lenient sentences will cause the public to lose their faith and confidence in the criminal justice system. Our criminal justice system is under serious and scathing criticism for failing to effectively deal with the ever-increasing wave of crime in our society. Our society feels that it is beleaguered and seriously threatened by crime which fear is exacerbated by the ineptitude or impotence manifested by our courts. To my mind, our courts can dispel these serious misconceptions by imposing appropriate sentences. I regret to state that what the appellant is asking for is not genuine or true mercy (oordeelkundige genade) but maudlin sympathy.
- 5] Having had the opportunity to peruse the record, I remain unpersuaded that a sentence of imprisonment for 12 months for the kind of housebreaking and theft committed in *casu* is either too severe or that it induces a sense of shock. The cold facts of this case are that the appellant

broke into the shop belonging to a certain Mr Benade, in Kakamas. Having gained unlawful entry into the shop, the appellant stole a video camera described as a Canon MVX25i valued at R 170 00-00 which was never recovered. The fact that the complainant's insurers replaced this camera, in my view, is not a mitigating factor. What makes this case worse is that although it was proved conclusively that his palm-print was found at the scene, the appellant persisted in his denial of complicity in the housebreaking and theft. Suffice to state that he proffered a pathetic and ludicrous account of how his palm print came onto the complaint's premises. It is clear therefore that appellant showed no remorse or penitence for his conduct.

- 6] The only two facts which count in his favour are his relative youthfulness (18 years at the time) and the fact that he is a first offender. Although these two facts are ordinarily accepted as a strong mitigating facts, they are no automatic bar to an accused, depending on the facts of a particular case, being sentenced to direct imprisonment. However, what counts heavily against appellant is the fact that the theft was not motivated by poverty or hunger but simple greed and selfishness. The camera which appellant stole is an item of pure luxury, and not a necessity. The appellant needs to learn not to hanker for things he cannot afford. This still remains, to my mind one of the most important moral or social values for our survival as civilized society.
- 7] In argument before us, Mr Cloete for the appellant conceded (correctly in my view) that the magistrate committed no cognisable irregularity or misdirection regarding his sentence. It is furthermore clear that the magistrate decided on direct imprisonment after a thorough , careful and dispassionate consideration of all other viable sentencing options as per **S v Siebert 1998 (1) SACR 554 (a)**, at p 559c-d. Of even great importance, Mr Cloete conceded that, given the facts of this case, he cannot argue with any measure of confidence or justification that a sentence of imprisonment for twelve months is too severe or harsh.
- 8] Having given this matter anxious consideration, I agree that housebreaking with intent to steal and theft is a very serious offence with serious consequences for ordinary law-abiding citizens. Furthermore it is the kind of offence which is very prevalent and seriously invasive of a number of constitutionally protected rights of the people of this country, inter alia, the right to privacy, security and integrity of one's home and

one's right to his/her property. I venture to say that this scourge can only be eliminated by the imposition of appropriate sentences which are intended to send a clear and loud message to our communities, including accused persons, that our courts will not countenance such anti-social behavior which is a serious threat to the peace and security of their homes.

- 9] In the circumstances, I find that a sentence of imprisonment for 12 months, does not induce a sense of shock. Neither can it be described as being shockingly, disturbingly or startlingly inappropriate to warrant interference.

The appeal against sentence is therefore dismissed.

L O BOSIELO
ACTING JUDGE PRESIDENT
Northern Cape Division

I concur

C C WILLIAMS
JUDGE
Northern Cape Division

On behalf of the Applicant:	Adv. P. J CLOETE
Instructed by:	KIMBERLEY JUSTICE CENTRE
On behalf of the Respondent:	Adv. W. BAGANANENG
Instructed by:	DIRECTOR PUBLIC PROSECUTIONS