



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: A351/12

DPP REF NO: 9/2/5/1-209/12

In the matter between:

SIMPHIWE LANDZELA

Appellant

And

THE STATE

Respondent

JUDGMENT DELIVERED ON 21 SEPTEMBER 2012

YEKISO, J

[1] This is an appeal against sentence only imposed on the appellant on 11 May 2011 by the regional court, sitting at the magistrate's court, Bellville. The allegation against the appellant at the time of the commencement of the trial was that on 12 May 2010 and at No 2 Wellway Park, Durbanville, the appellant wrongfully, unlawfully and intentionally broke into the premises of the complainants, a Mr Willem Jongsma as well as his spouse, Mrs Jongsma, with intent to steal and theft.

[2] In an ensuing trial which commenced in the district court on 15 October 2010 the court, after hearing evidence, concluded that the state had succeeded to prove the

guilt of the appellant beyond reasonable doubt and proceeded to convict the appellant of housebreaking with intent to steal and theft as charged.

[3] Once the appellant was convicted and his previous convictions were proved, the district court which convicted him was of the view that the matter before it, because the appellant's previous convictions, was of such a nature and magnitude that it warranted punishment in excess of its jurisdiction. The appellant was subsequently referred to the regional court for consideration of an appropriate sentence in terms of the provisions of Section 116 of the Criminal Procedure Act, 51 of 1977.

[4] Once the regional court was satisfied that the proceedings in the district court were held in accordance with justice, and after hearing argument in mitigation and aggravation, it determined that a sentence of (12) years direct imprisonment was an appropriate sentence in the circumstances of the matter before it and proceeded to impose that punishment. The appellant was legally represented both at the proceedings before the district court, Bellville as well as the proceedings in the regional court. This appeal, which is against sentence only, is by leave of this court.

[5] The merits of the allegations against the appellant were that the incident of housebreaking occurred at night at the private residence of the complainants, the said Willem Jongsma as well as his spouse, Mrs Jongsma. Entry into the premises was gained by breaking a window which set the burglar alarm off. The appellant was apprehended at the scene of the commission of crime.

[6] In considering what an appropriate punishment ought to be in the circumstances of this matter, the regional magistrate took into account all those factors that are normally taken into account by courts in the determination of what ought to be an appropriate sentence. These factors related to the appellant's personal circumstances, which included a list of his previous convictions, the gravity of the offence as well as the interest of the community. The appellant's personal circumstances are on record and these relate, amongst others, that the appellant grew up in the Eastern Cape and that he came to Cape Town at the age of 12; that at the time the sentence was imposed on him he was 50 years of age; that he is unmarried and that he had two minor children who he had to support and who, it appears, reside with a member of his family in the Eastern Cape. There was placed before the magistrate a probation officer's report which recommended that the appellant complete a certain number of hours of community service and be placed under the supervision of a probation officer. However, the magistrate rejected the probation officer's report on the basis that it did not take into account the accused's previous convictions.

[7] It is trite that a matter of sentence is always a matter which inherently is within the discretion of the presiding judicial officer at any sentencing proceedings. A court of appeal will rarely, if ever, interfere with the exercise of such a discretion. It is only in those rare instances where the presiding officer, charged with a responsibility of imposing an appropriate sentence, exercises his or her discretion injudiciously, that a court of appeal will interfere with the exercise of such a discretion.

[8] As has already been pointed out elsewhere in this judgment, the regional magistrate, in considering what an appropriate punishment ought to be in the circumstances of this matter, took into account all those traditional factors which courts normally take into account in the determination of an appropriate sentence. I have thoroughly considered the judgment of the regional magistrate regarding sentence and, in my view, there is no indication at all in the record of these proceedings that the magistrate either exercised her discretion injudiciously or over-emphasized any one of the factors she had to take into account in the determination of an appropriate sentence over other relevant factors or under-emphasized any such factors. In doing so, the magistrate was mindful of the fact that the appellant was, as far back as 31 July 1998, warned in terms of section 286 of the Criminal Procedure Act of a potential to be declared a habitual criminal in the event of any subsequent conviction.. As at the date of imposition of punishment the appellant had no less than 10 previous convictions relating to housebreaking with intent to steal and theft over and above several other previous convictions which involved an element of dishonesty. Although the regional magistrate was urged, during argument in aggravation, to declare the appellant a habitual criminal, she nonetheless declined to do so and became of the view that a sentence of 12 years direct imprisonment is an appropriate punishment in the circumstances of this matter.

[9] Ms *Van der Westhuizen*, both in her submissions and in argument before us, made a point that all the forms of sentences imposed on the appellant in the past did not achieve the object striven for and that perhaps a non-custodial punishment as

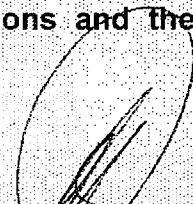
recommended in the probation officer's report might well achieve the desired results in the sense of rehabilitating the appellant. We have seriously considered the submissions by Ms *Van der Westhuizen* as well as her argument in court when she sought to persuade us to seriously consider to substitute the punishment imposed on the appellant with non-custodial punishment but we are not persuaded that non-custodial punishment will be an appropriate punishment in the instance of this matter

[10] I am not persuaded that the sentence, as imposed by the regional magistrate, is either inappropriate or induces a sense of shock as the appellant's counsel would seek to suggest in her submissions and in argument before us.

[11] In my view, the regional magistrate cannot be faulted in the approach she adopted in the determination of an appropriate sentence in this matter and, in view thereof, I am of the view that the appellant's appeal against sentence ought to fail.

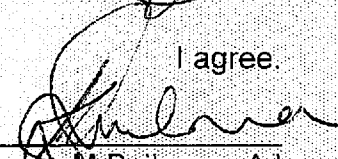
[12] In the result I would propose the following order, namely:

That the appeal against sentence be dismissed and the convictions and the sentence imposed be confirmed.



N. J. Yekiso, J

I agree.



L. M. Buikman, AJ

It is so ordered