IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.
SIGNATURE	DATE:

Case No: A68/2019

In the matter between:

SIBAYA, PATRICK **Appellant**

v

THE STATE **Respondent**

JUDGMENT

COWEN AJ (TWALA J Concurring)

[1] Mr Patrick Sibaya is appealing against a 12-year sentence imposed on him by the Kempton Park Regional Magistrates Court on 19 February 2018. Mr Sibaya was convicted of housebreaking with the intention to steal, and with

theft, following a guilty plea. Mr Sibaya applied for leave to appeal against his sentence on 13 August 2018, which was granted.

[2] The appeal came before this Court on 9 November 2021. Mr Milubi filed heads of argument on behalf of the appellant and Mr Mack on behalf of the State. In circumstances of the Covid-19 pandemic, the parties agreed that the matter could be disposed of without an oral hearing.

[3] The incident occurred in Kempton Park on 28 February 2017. Mr Sibaya was passing the home of the complainant, a Mr Rudolf van Wyk, in Birch Acres, and he noticed a garden trimming machine in the garden. He jumped over the wall. As he was about to leave, he noticed a Samsung tablet through an open window, which he also took, thereafter fleeing the scene. Mr Sibaya hid the trimming machine nearby and went to the shopping centre where he was working as a car guard. He was later apprehended by the police, who had recognised him by his clothing – the incident had been captured on CCTV. Mr Sibaya was taken back to the complainant's premises and he took the police to where he had hidden the trimming machine. He took out the tablet at the police station. The stolen items were thus recovered shortly after they were stolen.

Mr Sibaya expressed remorse in his statement made in terms of section 112(2) of the Criminal Procedure act 51 of 1977 when entering his guilty plea.

[4] The evidence upon which sentence was imposed is ~~somewhat~~ sparse and limited to information supplied in that statement and information outlining Mr Sibaya's previous convictions. No witness testified on sentence and there is no information to hand about Mr Sibaya's specific motives committing this crime nor the facts and circumstances of his previous convictions. There is no pre-sentence report shedding light on Mr Sibaya as an offender or the reasons for his recent crime.

[5] At the time Mr Sibaya was sentenced, he was single and 53 years old. He has two adult children, one independent, one still completing high school, and he was living at his parental home in Tembisa Township. Mr Sibaya completed standard five in 1991 and has no further education. At the time of committing the offence, Mr Sibaya was unemployed. As a car-guard, he was making a mere R80.00 to R150.00 per day.

[6] This is not the first time Mr Sibaya has been convicted of similar crimes. He has previous convictions as follows: possession of a prohibited dependence

producing drug (being marijuana) (sentenced on 5 May 1980 to 6 cuts with a light cane, then a lawful sentence); theft committed on 8 July 1981 (sentenced on 10 August 1981 to R150 or 6 months imprisonment); three counts of housebreaking with intent to steal and theft (sentenced on 23 April 1982 to three years imprisonment, 18 months suspended for five years on each count); two counts of housebreaking with intent to steal, and theft (sentenced on 16 October 1984 to three years imprisonment on each count); possession of a prohibited dependence producing drug on 10 January 1991, assumed to be marijuana (sentenced to R300 or two months imprisonment); theft (sentenced to three years imprisonment on 15 May 1997); housebreaking with intent to steal and theft on 19 July 1999 (sentenced to a direct term of 6 years imprisonment) and, most recently, robbery, pointing of a fire-arm and possession of house/car breaking implements (sentenced on 10 May 2006 to 10, 3 and 2 years' imprisonment respectively, to run concurrently).

[7] As mentioned, the items Mr Sibaya took were a garden trimmer and a tablet. There was no evidence before the Regional Magistrate of the value of these goods or their precise nature. The crimes of housebreaking and theft were treated as prevalent in the area.

[8] The Regional Magistrate commenced his reasoning on sentence by referring to the three central considerations applicable to the exercise of his sentencing discretion: the Zinn triad. These are the crime, the offender and the interests of society.[1]

[9] Three issues feature prominently in the Magistrate's reasoning in arriving at a 12- year sentence for Mr Sibaya. First, the Magistrate was swayed by the fact that the crime of housebreaking and theft is prevalent in the area, and is an issue in respect of which the affected community is crying out for a serious response. The prevalence of crime in an area can validly be taken into account and an appeal court should pay full regard to a trial court's views on such matters, it being in closer touch with the community which the trial court serves.[2] However, the SCA has cautioned that whether it "ought to be considered as an aggravating feature depends entirely on the type of offence committed and the circumstances in which the offence is committed".[3] Importantly, where relevant, it can never justify a sentence disproportionate to the crime itself, even in the pursuit of deterrence.[4]

[1] *S v Zinn* 1969(2) SA 537 (A) at 540G.
[2] *S v Mbingo* 1984(1) SA 552 (A) at 555H.
[3] *S v Seegers* 1970(2) SA 506 (A) at 511C-F.
[4] *S v Mbingo*, supra n2 at 555H.

[10] Secondly, the Magistrate concluded that Mr Sibaya is "such a person that if given the slightest opportunity, he will either steal or break into a house." His character as such was inferred from his previous convictions and accords with the State's submission that what stands out from his history is that Mr Sibaya has repeatedly committed the same type of offence each time he is released from a custodial sentence. Thirdly, while the State had proposed a seven-year sentence, the Magistrate rejected this noting that Mr Sibaya's most recent sentence had been 10 years (for robbery) and while the current offence was for house-breaking and theft, not robbery, both are violent crimes and in his view, this meant that a lengthier sentence should be imposed on the most recent occasion. I return to these issues below.

[11] It is trite that sentencing is a matter which lies in the discretion of the trial court. A court of appeal should interfere with a sentence only if there is a material misdirection or irregularity or the sentence imposed is so startlingly inappropriate as to create a sense of shock, in other words, is disturbingly inappropriate.[56] This entails a comparison between the sentence the trial court imposed and the sentence the appeal court would have imposed.[7]

[5] *S v Moosajee* 1999(2) All SA 535 (A) at para 8.
[6] *S v Sadler* 2000 1 SACR 331 (SCA).
[7] *S v Sadler* supra n6.

[12] Mr Milubi submitted that the Court a quo misdirected itself in various ways and imposed a startlingly inappropriate sentence wholly disproportionate to the seriousness of the offence committed. In sum, he submitted that the misdirections include a failure to give due weight, or any genuine consideration, to factors such as the fact that while house-breaking and theft are serious offences, the appellant had caused no damage to property, had no intent to commit robbery, only to steal, had committed the offence when the complainant was not home, and all stolen items had been promptly recovered. Moreover, the appellant had pleaded guilty and co-operated when apprehended and expressed remorse. He submitted further, that the Magistrate misdirected himself by effectively treating the offence as one akin to robbery and placed undue emphasis on his previous convictions, failing to appreciate that his most recent conviction was over ten years previously, in May 2006. Further, the Magistrate is said to have failed to take into account that this was a crime of opportunity, finding rather that Mr Sibaya is a person of such a character that, given the slightest opportunity, will either steal or break into a house. In this regard, Mr Milubi highlighted the duties of a sentencing court to 'strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of

and to the exclusion of the others.'[8] He also referred to the trite principle that a sentencing court must consider the objectives of punishment, being deterrence (general and specific), prevention, rehabilitation and retribution.[9] Furthermore, Mr Milubi helpfully referred this Court to the case of *Mojaki v S*, in which a 15 year sentence for housebreaking with intent to steal and theft, in similar circumstances to the present case, was reduced on appeal to a 6 year sentence.[10]

[13] In his submissions, Mr Mack recognised there are mitigating features but submitted that the sentence does not induce any sense of shock having regard to the appellant's recidivistic character and previous convictions and the prevalence of housebreaking and theft in the area. In this regard, Mr Mack submitted that what is conspicuous is that whenever Mr Sibaya has completed a custodial sentence, he commits another similar offence not long thereafter thereby demonstrating recidivistic character and an absence of any rehabilitative or retributive effect of prior sentences.

[14] I agree with Mr Milubi that the sentence imposed is disturbingly severe and disproportionate to the seriousness of the offence committed. In my view this

[8] *S v Banda* 1991(2) SA 352 (BG) at 355A; See too for example *S v RO and another* 2010(2) SACR 248 (SCA) at para 30.
[9] See for example *S v Bodibe* [2021] JOL 51537 (GP).
[10] [2018] JOL 39930 (FB).

resulted materially from the Magistrate placing undue emphasis on Mr Sibaya's previous convictions, drawing unsubstantiated conclusions (not least in the absence of a pre-sentencing report) from them and from treating the offence akin, in seriousness, to an offence of robbery. In the result, the Magistrate failed to have proper regard to the nature of the offence actually committed and its circumstances, such as they were known and imposed a disproportionate sentence.— I also agree with Mr Milubi that the decision in Mojaki is a useful comparable case for present purposes.[11]

[15] A central governing principle in sentencing is there must always be proportionality between the sentence imposed and the seriousness of the offence committed.[12] It is correct that house-breaking and theft are serious matters which cause great distress to members of society and house-breaking invariably involves an element of violence in a broad~~the~~ sense being that there is an intrusion into a person's home, which should be a place of sanctity for everyone. Nevertheless, it is not the same or as serious as robbery and the nature of the intrusion and violence involved must be considered factually and contextually in each case. In this case, there was an intrusion into a home but

[11] The appellant was convicted for housebreaking with intent to steal, had jumped into the complainant's property and fled the scene when seeing the police, the goods were returned the same day had two relevant previous convictions. The appellant was serving a sentence of six years for housebreaking with intent to steal and theft when sentenced. The value of the goods was R15 210.

[12] This is a constitutional requirement flowing the protection of the right to dignity and the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. *S v Dodo* 2001(3) SA 382 (CC) at paras 37 to 38.

no damage caused and no violence of the sort in robbery. Moreover, the crime was committed in the absence of the complainant and was short-lived, both in its immediate commission and the proximity in time until when the goods were returned.

[16] As regards, Mr Sibaya's previous convictions, the Magistrate cannot be faulted for treating these as relevant and aggravating. But the manner in which he did so, in my view, yielded an absence of proportionality between sentence and crime. The mere fact that a previous sentence for *inter alia* robbery involving a firearm, a more serious offence, was ten years in length, does not in my view justify the imposition of a longer sentence for a notably less serious offence subsequently committed. Nor can the mere facts of the appellant's previous convictions for theft, house-breaking and robbery justify a conclusion that in character a person is "such a person that if given the slightest opportunity, he will either steal or break into a house." There is simply insufficient information to hand about the nature and circumstances of the previous offences, Mr Sibaya's circumstances or the current crime to draw that conclusion and no pre-sentencing report. It is nevertheless clear that during the early 1980s and, after a gap of some ten years, again in the late 1990s, Mr Sibaya was convicted on five occasions for various counts of house-breaking and / or theft and the

courts saw fit to impose gradually more serious sentences leading to a sentence in 1999 of six years' imprisonment. Whether this was due to recidivistic character might be inferred but is not established. It is also known that in 2006, Mr Sibiya was convicted of, *inter alia* robbery involving a firearm. While these circumstances are, indeed, aggravating and warrant a more severe sentence for deterrent and protective purposes, they do not warrant the imposition of a sentence disproportionate to the seriousness of the offence currently being punished.[13]

[17] While serious, the current crime is significantly less serious than the crime of robbery. It was short-lived and no damage to property was caused. Moreover, it did not involve goods of high value.[14]

[18] But for Mr Sibaya's previous convictions ~~, the fact it was committed whilst Mr Sibaya was on parole~~ and the need to protect society in view of the prevalence of this intrusive crime, it is difficult to conceive of a court imposing a sentence of

[13] *S v Beja* 2003(1) SACR 168 (SEC) at 171; *S v Baartman* 1997(1) SACR 304 (E) at 305d-f; *S v Mojaki*, supra *S v Stenae* 2008(2) SACR 27 at para 19. In *S v Beja* the following was held: It is trite that the sentence must always fit the crime and the fact that the person to be punished had a long list of previous convictions of a similar nature while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished.". See generally, Terblanche The punishment must fit the crime: Also when the offender has previous convictions? (2011) 22 Stellenbosch Law Review 188-204. See too Du Toit et al Commentary on the Criminal Procedure Act, Juta, 27-2 to 27-3.

[14] *S v Mabena* [2019] JOL 44163 (GP) at para 9 this court confirmed that the value of goods stolen is material to sentencing and should be reflecting in a charge sheet and to the extent necessary ascertained by a court. In the circumstances of this case and in the absence of such evidence, I treat the value of the goods as not high, though I do not regard it to be trifling.

more than three years' imprisonment. Some courts would have imposed less, some avoiding incarceration altogether. If one factors in these aggravating circumstances, a higher sentence certainly enters the picture, possibly up to seven years. In light thereof, I have concluded that the sentence imposed is disturbingly severe and disproportionate to the seriousness of the crime committed and should be set aside.

[19] The remaining question is what sentence it should be replaced with. In my view the sentence should be replaced with a sentence of ~~five / seven~~six years of imprisonment.[15] This signifies the ~~seriousness with which~~harm that repeat offending for the same offence impacts on society generally and the affected community specifically. It is questionable whether it can serve specific deterrent functions in view of Mr Sibaya's history of offending but there is no pre-sentencing report, and no information about the reasons for this particular crime. I am satisfied it may still serve a specific deterrent function not least if rehabilitative programmes are pursued in custody. It can still serve general deterrent and protective functions. ~~, it can serve deterrent (general and specific) and protective functions, i~~It gives appropriate regard to the seriousness of an

[15] I am mindful that this can be sensibly reconciled with the decision in *Mojaki*, although not on all fours.

intrusion into a person's home and, the associated violence, in a broad sense, inherent in any house-breaking. , and notes the gravity with which a court should view the commission of an offence whilst on parole for an offence of robbery with a firearm. Yet it also recognises that this was an offence of house-breaking and theft, not robbery, that no damage was caused to person or property, and the value of the goods was not high and they were returned the same day. And it gives due regard to Mr Sibaya's personal circumstances as an aging single unemployed father of little means. A measure of mercy is warranted.

[20] The following order is made:

(a) The appeal is upheld.

(b) The sentence of 12 – years is set aside and replaced with a sentence of 6 years' imprisonment..

S J COWEN
Acting Judge of the High Court

XXXXXXX

M TWALA
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 6 December 2021.

SET DOWN: 9 November 2021

DECIDED ON: 6 December 2021

For the Applicant:	Adv Milubi instructed by Legal Aid, South Africa
For the Respondent:	Adv Mack, National Prosecuting Authority