16/01/2018

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

16/01/18

CASE NUMBER: A706/2016

In the matter between:

SAMUEL DIPHAPANG JOE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The appellant, a member of the Military Police in the South African National Defence Force, was arraigned together with three other accused persons in the regional court division of Christiana on a charge of housebreaking with the intent to steal and theft ("the housebreaking"). The appellant pleaded not guilty and raised a plea of necessity.

[2] The housebreaking took place on the night of 15 April 2013 at a store known as Ellerines in Christiana. Various items to the value of R86 599, 86 were taken from the store. The appellant in his plea explanation before the trial court averred that he was forced at gunpoint to assist one Tsidiso and one of his co-accused, accused 3 ("Fish"), to transport stolen goods from the Ellerines store to the residence of Tsidiso in Jan Kempdorp. He averred further that he was threatened by the said Tsidiso that, should he (the appellant) report the matter to the police he together with his family would be killed. As a result he had no option but to do as he was told. He denied having participated in breaking and entering the store, stealing from the complainant (Ellerines), receiving any of the stolen property or any reward for assisting Tsidiso or Fish. He did not know what was loaded onto his bakkie as he was instructed at gunpoint to remain in the bakkie, and that is where he was whilst the loading took place.

[3] An admission was made in terms of s 220 of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") that a fingerprint retrieved by Sergeant Mtaudi on 16 April 2013 from a Samsung PDP television box which was found by the police outside the store, belongs to him.

[4] In his evidence, the appellant testified that on the night in question, he, through his wife's cell phone, received a call from one Tsidiso who asked the appellant to accompany him to Christiana to collect his (Tsidiso's) brother. The appellant and Tsidiso reside in the same neighbourhood in Jan Kempdorp. The appellant has a Bantam Bakkie with a canopy. Using this bakkie, he went to collect Tsidiso at his house and drove with him to Christiana. When they arrived in Christiana, Tsidiso produced a pistol, threatening the appellant, he informed him (the appellant) that they were to collect accused 3, who Tsidiso referred to as Fish, at Spar because the rest of the group was ready. At Spar, Fish climbed into the back of the bakkie and proceeded to direct the appellant to where they were going. They drove to the back of the Ellerines store where the loading of the stolen goods was done. There were two other persons at the Ellerines store who assisted with the loading; as it was dark he did not see their faces. Tsidiso remained in the bakkie with the appellant pointing a gun at him. As they were about to drive off to Jan Kempdorp, the appellant noticed a box leaning against the bakkie and he requested Tsidiso to allow him to remove it as it would scratch the bakkie. He alighted from the bakkie and removed the box and that is how his fingerprint landed on the box. The items were offloaded at Tsidiso's shack in Jan Kempdorp. The appellant thereafter went home where he narrated the incident to his wife. His wife wanted to report the matter to the police but the appellant informed her about Tsidiso's threats. The appellant did not report Tsidiso to the police until he was arrested in November of that year, that is, six months after the commission of the offence.

[5] In support of his defence the appellant relied on the testimony of his wife Grace Mongale, a clerk at the South African Police Service, who confirmed the

appellant's version that on the night in question Tsidiso talked to the appellant on her cell phone requesting to be transported to Christiana and that she reported the alleged threats by the said Tsidiso to the investigating officer. Ms Mongale's evidence is that on the night in question she was with the appellant when Tsidiso called him on her cell phone. After talking to Tsidiso the appellant told her that Tsidiso has asked him to take him to Christiana to collect his brother. She allowed the appellant to accompany Tsidiso. Tsidiso is known to the appellant and his wife. He is a traditional healer. Ms Mongale referred to him as their friend and their sangoma. She consulted with him during her pregnancy. It was confirmed during trial that Tsidiso in fact existed. A certain Constable Dinake testified that Tsidiso was arrested in another case but none of the goods in the present matter were found on him. Ms Mongale informed the police about this incident only after the appellant was arrested.

[6] The erstwhile co-accused of the appellant, accused 2 and 3, were arrested in Jan Kempdorp in possession of the suspected stolen property and were eventually found guilty of the competent verdict of receiving stolen property. Both were sentenced to five years imprisonment in terms of s 276 (1) (i) of the Criminal Procedure Act. Accused 1 was found not guilty and discharged.

[7] The appellant on the other hand was linked to the scene of crime by the fingerprint retrieved from the Samsung PDT TV box found outside the store. As already said, he admitted being on the scene of crime but raised a defence of necessity. The trial court rejected this plea on the basis that the appellant did not

establish one of the requirements of the defence of necessity, that is, the threatening conduct must have begun, be eminent but it must not have terminated. The trial court found that the threatening conduct complained of by the appellant in this instance ended when Tsidiso allowed the appellant to go home. From 15 April 2013, that is, the day on which the incident occurred, until in November 2013 when he was arrested, the appellant did not report the incident to the police nor did he make the police aware that Tsidiso was involved when he was arrested. The appellant was as such found guilty as charged. He was sentenced to seven (7) years imprisonment and declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000.

[8] The appellant appeared before us appealing both the conviction and sentence leave to appeal having been granted on petition to this court. But, in argument before us, it was conceded on his behalf, correctly so, that the findings of the trial court on conviction are correct. The appellant is, thus, before us appealing sentence only.

[9] It is argued on behalf of the appellant that the sentence of seven years imprisonment imposed by the trial court is unnecessarily harsh and induces a sense of shock. The argument is based on the following grounds:

9.1 The trial court under-emphasised the personal circumstances of the appellant in that firstly, as a first offender the sentence of seven years imprisonment in unwarranted; secondly, the trial court ought to have

taken into account that the appellant has minor children whom he was maintaining.

9.2 The trial court put too much emphasis on the fact that the appellant was a law enforcement officer. The contention is that the appellant as a military police officer was not a law enforcement officer and even if it was so, the offence was committed outside his scope of employment.

9.3 The trial court erred in treating the appellant differently to his co-accused who were sentenced to a lesser sentence of five years imprisonment in terms of s 276 (1) (i) of the Criminal Procedure Act.

[10] Punishment is eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode such discretion. As such, the sentence should only be altered if the discretion has not been judicially and properly exercised. The question is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[11] I am not in agreement with the appellant's argument that his employment as a military police officer does not render him a law enforcement officer and that the trial court in its judgment on sentence overemphasised the fact that he is a law enforcement officer. It is indeed so that the military police corps is not recognised in the strict sense as one of the law enforcement agencies in South Africa. A military police officer is, however, expected to maintain law and order and is, in that sense, a law enforcement officer. Section 31 (1) of the Defence Act 42 of 2012 provides for

the functions of military police officials as *(a)* the prevention and combating of crime; *(b)* . . . and *(c)* the maintenance of law and order. In terms of s 31 (2) *(a)* thereof, a military police official, when performing any function contemplated in subsection (1) has the same powers and duties as may be conferred on or are imposed by law upon a member of the South African Police Service. On that basis, the trial court did not overemphasis that the appellant was a law enforcement officer because indeed he is one and should at all times uphold the law. That he did not commit the offence within his scope of work cannot be taken as a mitigating factor. Like a member of the South African Police Service, a member of the military police is on duty all the time. He is expected at all times to carry himself or herself as an outstanding citizen.

[12] The individualisation of sentencing is an important factor in the consideration of sentence. The principle of individualisation of punishment, which is firmly entrenched in our law, requires that a proper consideration of the individual circumstances of each accused person be undertaken by the sentencing court. The trial court cannot be found to have erred where it individually considered the merits of each accused. In the circumstances of this instance, it is clear that the appellant and his co-accused were not convicted of a similar offence. Accused 2 and 3 were convicted of a competent verdict which is a lesser offence than the main offence of housebreaking. The appellant was found guilty of housebreaking and it goes without saying that the trial court would impose a stiffer sentence than that of the other two accused. It is worthy also to consider the moral blameworthiness of the appellant in this instance. The appellant was found to have been directly involved in the commission of the offence; his bakkie was used to transport the stolen goods from Christiana to Jan Kempdorp; as such, his participation is far greater than that of his

being a law enforcement officer, his moral blameworthiness, as indicated in paragraph [12] of this judgment, and the fact that the offence appears to be pre-meditated aggravates the situation and warrants a long term of imprisonment as meted by the trial court. There is nothing shocking and inappropriate about this sentence. It is a fair and just sentence that fits the crime and the offender and it is in the interest of society. The sentence should not be interfered with.

[15] The trial court's finding declaring the appellant not fit to possess a firearm was not contested in this appeal, correctly so. The appellant has previous convictions which involves the improper handling of a firearm. The trial court's findings in this regard can, thus, not be faulted and the sentence in this respect should also not be tempered with.

[16] I make the following order

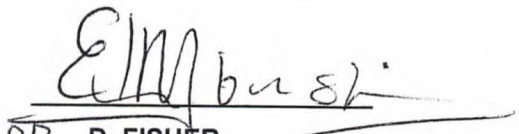
1. The appeal on both conviction and sentence is dismissed.

2. The conviction by the trial court and the sentence imposed are confirmed.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I concur



PP **D. FISHER**
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv P Pretorius Instructed by: **SCHOEMAN STEYN ATTORNEYS** **c/o VAN ZYL LE ROUX ATTORNEYS** Monument Office Park 71 Steenbok Avenue MONUMENT PARK
On behalf of the respondent:	Adv E. W. Coetzer Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001