

Amended judgment

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: A532/2016

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2018/4/106
DATE


SIGNATURE

In the matter between:-

PRAGASON SHAUN PILLAY

APPELLANT

versus

THE STATE

RESPONDENT

Coram: Msimang AJ

Date of hearing:

Date of judgment: 9 MARCH 2018

JUDGMENT

MSIMANG, AJ

[1] The appellant was convicted on a count of housebreaking with the intention to steal and theft in the Regional Court Vereeniging. He was sentenced to 12 years imprisonment and declared unfit to possess a firearm in terms of Section 103 (1) of the Firearms Control Act¹.

[2] The appellant was refused leave to appeal against the conviction and sentence by the trial court and petitioned this Honourable Court for leave to appeal. On petition he was granted leave to appeal only against sentence. The appellant now appeals against the 12 year sentence imposed by the trial court.

[3] The facts of the matter are basically that the appellant was caught red handed whilst in the act of committing house breaking and theft. He was caught by the care taker of the property who immediately summoned the police. On arrival the police found the appellant inside the house and he managed to escape through the window. The police pursued him. He was arrested and brought to the scene. The appellant pleaded not guilty and denied any involvement throughout the trial. He showed no remorse whatsoever. His legal representative when addressing the court in mitigation of sentence conceded that the appellant showed no remorse whatsoever.

[4] The appellant now appeals against sentence. It is argued on behalf of the appellant that the trial court misdirected itself in imposing a sentence of twelve (12) years on the basis that the court over-emphasized the seriousness of the offence and the interest of society whilst the personal circumstances of the appellant were under-emphasized. It was submitted further that, the sentence was shockingly harsh and induced a sense of shock.

[5] The trial court considered the personal circumstances of the appellant which were placed on record particularly that:

- 5.1 He was 28 years old
- 5.2 He is single, unemployed and has no dependants
- 5.3 He went to school up to grade 12

¹ Act no. 60 of 2000

[6] The court considered that the appellant had the following previous convictions:

- 6.1 07-02-2003 (Durban) theft fined R2000.00 suspended for five years conditions unknown.
- 6.2 12-10-2004 (Durban) House breaking with intention to steal and theft sentenced to 3 years imprisonment wholly suspended for 3 years on condition that the appellant is not convicted of theft or attempted theft during the conviction period.
- 6.3 02-08-2005 (Durban) House breaking with the intention to steal and theft. He was sentenced to 5 years imprisonment.
- 6.4 12-02-2009 (Vereeniging) House breaking with the intention to steal and theft. He was sentenced to 8 (eight) years imprisonment.
- 6.5 12-02-2009 (Vereeniging) Possession of stolen property. He was sentenced to 2 years imprisonment.

[7] The argument that the court misdirected itself in imposing the sentence on the basis that it over-emphasized the seriousness of the offence and the interest of society whilst the personal circumstances of the appellant were under-emphasized has no merit and should be rejected. The court did consider the personal circumstances of the appellant. Notwithstanding the previous convictions of the appellant, the court was still of the view that the appellant still had a chance to turn his life around if he was willing to do so.

[8] The court considered all the previous convictions and the fact that the appellant had not shown any remorse during the trial even after the conviction and has not, in the least, expressed any remorse for his conduct. He blamed everyone else but himself. The court took into account the seriousness of the offence and the prevalence

of the crime and that in the commission of the crime the appellant invaded the homes of the people and violated the people's right to property and to privacy. See *S v Landau* 2000 (20 SACR 673 at 677c.

[9] The court considered that the previous sentences handed to the appellant by the courts had no deterrent effect on the appellant. At page 94 to 95 of the record the Learned Magistrate Mothibi read:

"This, however, will not detract from, as to say, the seriousness of the crime and especially your personal circumstances, the fact that you shown clearly to be a person to be removed for a long period of time from the society because despite the fact that there has been interventions, you just do not want to change and leave the other people in peace to enjoy their property..."

[10] *"I find, in the circumstances, that having been given so many chances to change your life and having refused to do so, the court must indeed impose a sentence of direct imprisonment. When you committed this crime you had been released according to you by the Department of Correctional Services."*

[11] The appeal court may not and will not interfere with a sentence imposed unless it is convinced that the discretion has been exercised improperly, unreasonably or that the sentence induces a sense of shock. In *S v Moswathupa* 2012 (1) SACR 259 (SCA)², Theron JA said:

"(4) It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or when the sentence imposed by the trial court is shocking and startlingly inappropriate. In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy. In

² *S v Moswathupa* 2012(1) SACR 259 SCA at 261(d-f)

addition to that the court must also consider the main purposes of punishment, which are deterrent, preventive, reformatory and retributive. In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others'.

[12] In *State v Rabie*³ Holmes JA said:

"1. In every appeal against sentence, whether imposed by a Magistrate or a Judge, the court hearing the appeal_____

(a) Should be guided by the principle that punishment is 'pre-eminently a matter for discretion of the trial court';

And

(b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[13] The Learned Holmes JA further said at page 865 (B-C):

"It follows that there is no basis for appellate to interfere with the trial judges sentence. This court does not have an overriding discretion to ameliorate the sentence of the trial court. The discretion is pre-eminently theirs, alterable only on the grounds mentioned at the commencement of this judgment."


[14] I am unable to find any misdirection in the sentence imposed. In my view, the aggravating factors far outweigh the mitigating factors. The trial court took into account the nature of the crime, the personal circumstances of the appellant, the interest of society and the mitigating and aggravating circumstances. I am of the view that the sentence imposed is appropriate, fair and proportionate to the offence the appellant has been convicted of.

³ 1975(4) SA 855 at 857 D-E

[15] The appeal against the sentence imposed can thus, in my view, not succeed.

[16] In the result, I propose the following order:

1. The appeal against sentence is dismissed.



HMS MSIMANG AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



MAUMELA J
JUDGE OF THE HIGH COURT

Date of hearing:

Date of Judgement: 9 March 2018

Counsel for the Appellant: MB Kgagara

Attorneys for the Appellant:

Counsel for the Respondent:

Attorneys for the Respondent: