



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: A172/2022**

(1) REPORTABLE: NO.  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.  
DATE: ..... MARCH 2023  
SIGNATURE

In the matter between:

**MAKHULANI KASSIM ALBERTO**

Appellant

and

**THE STATE**

Respondent

**Summary:** *sentences for multiple offences, cumulative effect – court to take totality of effective period of imprisonment into account – effective sentencing period of 35 years imprisonment for 23 counts of housebreaking reduced to effective 20 years imprisonment.*

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**ORDER**

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The appeal against sentence is upheld and the conditions attached to the imposed sentences are amended to read, from the date of the original imposition thereof, being 1 September 2020, as follows: *“In terms of Section 280 (2) of the Criminal Procedure Act, 51 of 1977 it is ordered that sentences in respect of charges 5, 6, 7, 8, 9, 18 and 19 are to run concurrently with the sentence imposed in respect of charge 23, the sentences in respect of charges 12, 14, 15, 16, 17 and 20 are to run concurrently with the sentence in respect of charge 4, the sentences in respect of charges 2, 3, 10, 11 and 13 are to run concurrently with the sentence imposed in respect of charge 1 and the sentences in respect of charges 22 and 24 are to run concurrently with the sentence imposed in charge 21, resulting in an effective sentence of 20 years imprisonment”.*

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## J U D G M E N T

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*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

### **DAVIS, J**

#### **Introduction**

[1] This is an appeal against sentence with the requisite leave having been granted on petition to this court in terms of section 309C of the Criminal Procedure Act, 51 of 1977 (the CPA) on 10 June 2021.

[2] The appellant had been convicted of 23 counts of housebreaking and theft and one count of contravention of section 49(1)(a) of the Immigration Act 13 of

2002. He was sentenced to 5 years imprisonment in respect of each of the housebreaking charges and 1 year imprisonment in respect of the Immigration Act charge. Some sentences were ordered to run concurrently with each other, resulting in an effective sentence of imprisonment of 35 years.

### **The “cumulative effect”**

[3] When, as in this case, separate sentences are imposed for multiple offences, “*an accumulation of the severity of the sum of all these sentences rapidly develops. In our law, this is described as the ‘cumulative effect’ of sentences*”<sup>1</sup>.

[4] As a consequence, a sentencing court has to be aware of the extent of such a cumulative effect. Where the sentences were for imprisonment, a court then has an obligation to consider whether the accumulative period of imprisonment is appropriate, given all the circumstances of the case or whether the “*... aggregate penalty is not too severe*”<sup>2</sup>.

[5] In considering the severity, a court should have regard to the totality of the offender’s criminal conduct or behavior<sup>3</sup>.

[6] Should the aggregate period of imprisonment be deemed to be too severe, a court should take “*such measures as are required*” to determine an appropriate sentence<sup>4</sup>.

[7] Should a sentencing court fail to properly take the cumulative effect into account, it shall have committed a misdirection<sup>5</sup>. Similarly, should the eventual

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<sup>1</sup> S.S. Terblanche, *A Guide to Sentencing in South Africa*, 3<sup>rd</sup> Ed at 197 par 2.2.1

<sup>2</sup> *S v Muller* 2012 (2) SACR 545 (SCA) at par 9.

<sup>3</sup> See *Muller* above and *S v Mthetwa* 2015 (1) SACR 302 (GP) at par 21.

<sup>4</sup> *S v Mabaso* 2014 (1) SACR 299 (KZP) and *S v Mafoho* 2013 (2) SACR 179 (SCA) and *Terblanche* (Supra) at 199.

<sup>5</sup> *S v WV* 2013 (1) SACR 204 (GNP) at par 45 and *S v BF* 2012 (1) SACR (SCA) at par 14.

aggregate sentence be too severe or out of proportion to what is deserved by an offender, a court of appeal shall be entitled to intervene<sup>6</sup>.

### **The facts of this case**

[8] Due to the number of housebreaking offences with which the appellant had been charged, the charge sheet contained a schedule of the offences. These were detailed by date, place, complainant and items stolen or removed. Occasionally, a value of the items was added.

[9] The schedule indicate that, over the period from 2014 to 2020 the appellant had committed 22 housebreakings. These were preceded by a single incident in May 2011. The areas where the housebreakings occurred were in Springs, Tsakane, Kwa-Thema, Duduza and Dunnottar. The items stolen ranged from television sets (20 in total) to clothing, cash, cellphones and even a washing machine. The largest haul appeared to have been during the housebreaking incident of 8 February 2020 where two television sets, a washing machine, electronic tablets, laptops, a printer and a camera was stolen in the haul.

[10] The learned magistrate accordingly correctly described housebreaking as appearing to be the appellant's "profession". Fortunately the appellant had moved away from more violent conduct in his part, in respect of which he had been convicted of rape and kidnapping in 2004, which had been taken together for purposes of a sentence of 8 years imprisonment and three counts of assault, also on the same day in 2004, again taken together for purposes of a sentence of 3 years imprisonment. Despite this, imprisonment had apparently not deterred the appellant from committing criminal offences. He had a further admitted conviction for possession of an unlicensed firearm in 2012.

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<sup>6</sup> *S v Mthetwa* (above) and *S Qamata* 1997 (1) SACR 479 (E) at 483.

[11] In addition, the learned magistrate correctly referred to the principle that a person's home should be his own safe sanctuary, whether it may be a shack or a castle. The invasion thereof and the prevalence of housebreaking offences merit, for a repeat offender, a sentence of imprisonment.

[12] The appellant's personal circumstances, namely that he was 42 years of age, a married father of two minors, do not outweigh the above considerations. Neither does the fact that he was unemployed. I am of the view that the consequential imposition of a sentence of 5 years imprisonment for each of the offences was justified and do not impose such a sense of shock or disproportionality that it should be interfered with on appeal. To do so, would be to unduly offend against the principle that the passing of a sentence remains primarily a matter for the discretion of the trial court<sup>7</sup>. The fact that the appellant had pleaded guilty is also overshadowed by the number of repetitive offences.

[13] The learned magistrate was also aware of the consequences of the cumulative effect, referred to above. However, in seeking to ameliorate the effect of the aggregate sentencing period of 115 years (23 x 5 years), the magistrate did not explain on what basis or how he determined which sentences should run concurrently with others. No explanation could also be given to us on appeal. It appears to have been done arbitrarily. Apart from this aspect, the remaining aggregate total of 35 years is also shockingly disproportionate, to the extent that it merits interference.

[14] If one were to, for example, consider that a total period of imprisonment of 20 years would be appropriate in this case, then a simple and practical approach would simply be to have the first four charges' sentences of 5 years each run consequentially and order that all the remaining sentences run

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<sup>7</sup> *R v Swanepoel* 1945 AD 444 per Davis AJA at 453.

concurrently therewith, alternatively together with the last of the four sentences. This again, to my mind, appears to be arbitrary. It might also send out a signal that one may “rack up” four or five convictions, up to, say, 20 years worth of imprisonment (as in this case) and thereafter, irrespective of the number of crimes, the sentences for those crimes will either automatically run concurrently or not increase the total sentencing period.

[15] The approach I rather propose, in similar fashion as the approach where various charges, more often than not related or linked to each other, are sometimes taken together for purposes of sentencing<sup>8</sup>, in this case and in order to obtain some measure of rationality, rather than simply doing a calculation exercise, is to take account of the chronological sequence of the offences as a guide to the concurrency of sentences. The effect of this approach would be that the sentences for the housebreakings committed during the same year or a similar spate of time should run concurrently. I stress that this is only a practical approach as a result of the large number of similar charges in this matter and the approach may not find ready application in other matters. The ultimate result should still be, as set out earlier, that the cumulative effect should not be disproportionate or shockingly inappropriate, taking all relevant factors into consideration. The proposal is, however complicated by the haphazard fashion by which the prosecution has compiled the Schedule to the charge sheet.

[16] For purposes of the above, an analysis of the Schedule to the charge sheet is necessary: chronologically, the first offence was committed on 8 May 2011 (charge 23) and the second offence on 24 December 2014 (charge 9). Thereafter six housebreakings occurred during 2015 (charges 5, 6, 7, 8, 18 and 19) these offences could constitute the first period. Thereafter seven housebreakings occurred in 2016 (charges 4, 12, 14, 15, 16, 17 and 20). This

<sup>8</sup> S. S Terblanche (supra at footnote 1) at par 2.3 on p200 and par 2.3.3. on p202.

can be termed the second period. During 2017 and 2018, another six housebreakings occurred (charges 1, 2, 3, 10, 11 and 13), constituting the third period. There were no housebreakings in 2019 and the two largest of the housebreakings were those committed on 8 February 2020 (charge 22) and on 11 April 2020 (charge 21). This could then be the fourth and last period. The appellant was apprehended shortly thereafter and the trial commenced on 9 June 2020. The sentence in respect of the Immigration Act offence can be served concurrently with the last group of offences, in similar fashion as already contemplated by the court *a quo*.

[17] I therefore propose that it be ordered that the sentences in respect of charges 5, 6, 7, 8, 9, 18 and 19 are to run concurrently with the sentence imposed in respect of charge 23, the sentences in respect of charges 12, 14, 15, 16, 17 and 20 are to run concurrently with the sentence in respect of charge 4, the sentences in respect of charges 2, 3, 10, 11 and 13 are to run concurrently with the sentence imposed in respect of charge 1 and the sentences in respect of charges 22 and 24 are to run concurrently with the sentence imposed in charge 21, resulting in an effective sentence of 20 years imprisonment.

[18] In summary and for the sake of clarity, there shall be four sentences of 5 years each to be served consecutively, being those imposed in respect of charges 1, 4, 21 and 23 and the other sentences shall be served concurrently in the fashion indicated. The appeal should therefore succeed to this extent.

## **Order**

[19] The following order is made:

The appeal against sentence is upheld and the conditions attached to the imposed sentences are amended to read, from the date of the original imposition thereof, being 1 September 2020, as follows: “*In terms of*

*Section 280 (2) of the Criminal Procedure Act, 51 of 1977 it is ordered that sentences in respect of charges 5, 6, 7, 8, 9, 18 and 19 are to run concurrently with the sentence imposed in respect of charge 23, the sentences in respect of charges 12, 14, 15, 16, 17 and 20 are to run concurrently with the sentence in respect of charge 4, the sentences in respect of charges 2, 3, 10, 11 and 13 are to run concurrently with the sentence imposed in respect of charge 1 and the sentences in respect of charges 22 and 24 are to run concurrently with the sentence imposed in charge 21, resulting in an effective sentence of 20 years imprisonment”.*

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**N DAVIS**

Judge of the High Court  
Gauteng Division, Pretoria

I agree.

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**J. S NYATHI**

Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 14 February 2023

Judgment delivered: ..... March 2023



**APPEARANCES:**

For the Appellant: Ms M.M.P Masete

Attorney for the Appellant: Legal Aid, Pretoria

For the Respondent: Adv T.S Nyakama

Attorney for the Respondent: Director of Public Prosecution, Pretoria