Editorial note: Certain information has been redacted from this judgment in compliance with the law.

| Reportable: | YES/**NO** |
|---|---|
| Circulate to Judges: | YES/**NO** |
| Circulate to Magistrates: | YES/**NO** |
| Circulate to Regional Magistrates: | YES/**NO** |

**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST DIVISION – MAHIKENG**

**Case No: CA 17/2020**

In the matter between:-

**GWAMBE ALFRED** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Coram:** Reddy AJ & Roux AJ

**Date of Hearing :** 29 November 2023

**Date handed down:** 05 March 2024

## ORDER

(i) The appeal with regard to the sentence on count 1 is upheld.

(ii) The sentence of twenty-five (25) years imprisonment imposed in count 1 is set aside and it is replaced with the following sentence:

"The appellant is sentenced to twelve (12) years imprisonment."

(iii) This sentence is antedated to 22 October 2019, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

(iv) The sentence on count 2 is confirmed.

(v) The order declaring the appellant unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

## JUDGMENT

**REDDY AJ**

**Introduction**

[1] The appellant was the third accused charged on two counts. The withdrawal of charges against the second accused caused the appellant to be referred to as accused two. For purposes of brevity, this Court will follow the order of the accused as per the court *a quo.* The first accused was charged with the same counts as the appellant, whilst the third accused was only charged with the offence of housebreaking with intent to steal and theft.

[2] It was alleged that all accused before the court *a quo* had committed the crime of housebreaking with intent to steal and theft read with the provisions of Section 260(1) and Section 264 of the Criminal Procedure Act 51 of 1977, in that upon or about the 18 October 2017 at or near Plot […] V[…] the accused did unlawful and intentionally and with the intent to steal break open and enter the house of Michelle Kirsten and did wrongfully and intentionally steal

the following items: 1 x Sony Tech television R6 000.00 1x black Telefunken tablet R1000.00 and a navy blue backpack R300.00 all of which were the property or in the lawful possession of Michelle Kirsten.

[3] As alluded to, accused 1 and the appellant feature exclusively on this count. It was averred that the latter two contravened Section 49(1)(a) of the Immigration Act 13 of 2002. Section 49(1)(a) of the Immigration Act 13 of 2002 provides that anyone who enters or remains in or departs from the Republic in contravention of the Act shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years. Resultantly, the accused were guilty of contravening the provision of section 49(1)(a) read with section 9(3)(a), 9(3)(b) , 9(4), 9A, 31, 32, 34 and 43 of the Immigration Act 13 of 2002. In that on or about the 20 October 2017 at or near Potchefstroom in the Regional Division of North West the accused being a citizen of Mozambique and therefore a foreigner, did wrongfully and unlawfully enter and remain in the Republic of South Africa in contravention of the Act by entering and remaining in the Republic without being in possession of valid passport or without being the holder of a valid permanent residence and, or without being issued with a valid visa by the Director General of the Department of a Home Affairs in terms of the provisions of the Act. or by not having entered the Republic at any port , thereby committing an offence.

[4] The appellant who enjoined legal representation confirmed the following statement in terms of section 112(2) of the CPA:

*“I , the undersigned Alfred Gwambe do hereby declares as follows: I declare that I am the accused in this matter and I understand that I am being charged with the offence of house breaking with intent to steal and theft and contravention of the provisions of Section 49(1) of the Immigration Act 13/2002.*

*I understand that I have the right to remain silent and that the state has a duty to lead evidence against me.*

*I am making this statement freely and voluntarily and without any undue influence and duress.*

*And I understand that this honourable Court can convict and sentence me on the basis on the admissions contained in this statement.*

*In respect of Count 1 I plead guilty to the charge of housebreaking with intent to steal and theft read with the provisions of Section, Section 262 and 264 of the Criminal Procedure Act 51/1977.*

*I admit that on the 18 October 2017 and at Plot […] V[…] in the Regional Division of Northwest I unlawfully and intentionally with intent steal broke open and entered the house of Michelle Kirsten and did then and there wrongfully and intentionally stole one black Telefunken tablet and one navy blue bag all valued at R7300 belonging to the complainant[1].*

*No one gave me permission to break into the house of the complainant and steal the items therein.*

*And on the date in question, I was with two co-accused, my two co-accused when we observed that the house of the complainant appeared to be unoccupied, and we then and there form an intention to break into the house. We broke the glass door and entered the house and stole the items mentioned in paragraph 5 above. As we moved out of the house, we shot at by someone and we ran away.*

[1]The plea did not include the black Telefunken television, but the correct value of all items inclusive of the latter.

*In respect of Count 2 I plead guilty to the charge of contravening the provisions of Section 49(1) read with Section 9A3 rather 93A of the Immigration Act 13/2002 and I admit the following: I admit that on 20 October 2017 and Potchefstroom I unlawfully and intentionally and being a citizen of Republic Mozambique upon lawfully entering the Republic of South Africa remained in the Country after my permission had lapsed. And I knew that my conduct as aforementioned constitute a criminal offence which is punishable by the honourable Court".*

[5] On 22 October 2019, the following **full** judgment followed:

"**COURT**: Court is satisfied that the accused especially accused 1 is pleading guilty to both counts and the statement is marked A.

AND SO YOU ARE FOUND GUILTY ON BOTH COUNTS

MR MORATHI: As the court pleases.

COURT: Accused 2 your statement is marked Exhibit C and Court is satisfied that YOU PLEAD GUILTY ON BOTH COUNTS. Accused 3 statement is marked B and you are pleading guilty to housebreaking. SO YOU ARE FOUND GUILTY AS CHARGED

COURT: And statement is marked Exhibit C.

[6] On the same day the Regional Magistrate Mtebele handed down sentence, the record provides:

***SENTENCE***

Stand up accused. In passing the sentence I am going to consider what the state and the defence have said. Firstly I have to look at the circumstances of an accused person, seriousness of the crime and also the interest of the community.

And there are decided cases to the effect that Court or Magistrate or Presiding Officers must also have mercy to an accused person.

Now accused personal circumstances is that he is not a first offender,

And in fact the three of them they have been in custody for more, almost two years now.

I have been informed of their marital status of all the accused. Accused now seated in the wheelchair because of injuries because he was shot when this offence was committed. Not it was brought to my attention that even accused 2 and accused 3 were shot at but they did not get so major injuries.

Housebreaking is very serious and it is very painful. I am talking because I am a victim twice. You know you sleep in your house or you are not in your house you leave your house perfectly when you come back you find your house broken into it is very painful. When you go inside you know you become so shocked to such an extent you do not know what are you dreaming or what. And you find that people who are doing this they do not do it properly it will be upside down. A lot of things down it is such a mess. And the stolen goods they are still expensive things and as a result of that they sell them for a song. Then if you are not insured you are a loser because now you have to start from afresh. And it is worse if let say you have got kids because the kids when they see this it traumatise them they become so vulnerable.

Another thing guys you are playing with your lives you know. You break inside like what happened now, you break inside the house you think the owner is not there then they shoot like what happened and they shoot to kill.

And to show that people are tired of housebreakings they even leave snakes inside the house. You go there you jump inside then you are a good feast for that snake.

As the Prosecutor said I am aligning myself with the Prosecutor really, really, really we are tired of people coming from Gauteng to come and break inside house in Potch. Every day we have cases of housebreaking, citizen or nationals Mozambique. And the sentiment the Prosecutor is saying she is repeating what she said I think this week ne, yes the people from there I do not know why because I understand in Mozambique the word police are being respected they do not even guns. But these people from there they come here and do whatever they want in South Africa.

I have been trying and thinking what sentence I am going to impose will be justifiable.

SO ACCUSED 1 YOU ARE SENTENCED AS FOLLOWS: YOU ARE SENTENCED TO TEN YEARS IMPRISONMENT.

COURT: The reason why I am giving you this sentence is because what will I call it (enthic) ja you reaped what you sow. Now you are seated on the wheelchair on the rest of your life.

SO TO SHOW THAT TEN YEARS INPRISONMENT OF WHICH FIVE YEARS IS SUSPENDED FOR FIVE YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF HOUSEBREAKING WITH INTENT TO STEAL AND THEFT COMMITTED DURING THE PERIOD OF SUSPENSION.

COURT: if you were not in this position I was going to give you more.

IN COUNT 2 IN RESPECT OF BEING ILLEGAL IN THE COUNTRY IS CAUTIONED AND DISCHARGED.

Accused 2 I do not want to call it we are these people who are in church when the priest preaches and preaches you do not repent you go out of church with the same position. I think a of Magistrates especially in Potch because I could see these are Regional Court cases where you were sentenced for housebreaking they said a mouthful to you but you continued doing it. But you do not want to listen.

SO BECAUSE OF YOUR PREVIOUS RECORDS YOU ARE SENTENCED TO TWENTY FIVE YEARS IMPRISONMENT.

COUNT 2 CAUTIONED AND DISCHARGED, DECLARED UNFIT TO POSSESS A FIREARM IN TERMS OF SECTION 103 OF ACT 60/200

SAME WITH ACCUSED 1

COURT: Accused 3 the only thing that is favourable to we say you have no previous records because the Prosecutor did not prove any previous record against you.

YOUR SENTENCE IS TEN YEARS INPRISONMENT OF WHICH TWO YEARS IS SUSPENDED FOR FIVE YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF HOUSEBREAKING WITH INTENT TO STEAL AND THEFT COMMITTED DURING THE PERIOD OF SUSPENSION AND FURTHER DECLARED UNFIT TO POSSESS A FIREARM."

## Grounds of appeal

[7] The sentence imposed is assailed on the basis that an effective term of twenty-five (25) years imprisonment is strikingly inappropriate, in that it:

(1) Is out of proportion to the totality of the accepted facts in mitigation.

(2) In effect disregards the period which the appellant spent in custody.

(3) The Court erred by not imposing a shorter term of imprisonment coupled with community service and /or further suspended sentence, more particularly in view of the following factors:

3.1. The age and personal circumstances of the appellant.

3.2. The rehabilitation element.

3.3 The mitigating factors inherent in the facts found proven.

4. The Court further erred in over emphasising the following factors:

4.1. The seriousness of the offence.

4.2. The interests of society.

4.3 The prevalence of the offence.

4.4 The deterrent effect of the sentence.

4.5 The retributive element of sentencing.

## An appeal court's sentencing discretion

[8] An appeal court is not empowered to usurp the sentencing discretion of a trial court. It is enjoined with a judicial discretion to act in limited circumstances. See: *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

[9] In *S v Bogaards* 2013 (1) SACR 1 (CC). Khampepe J held, at [41], that:

> 'It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[10] In *S v Hewitt* 2017 (1) SACR 309 (SCA) where Maya DP (as she then was) held that:

> 'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court

would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[11] It is against the backdrop of these seminal legal principles that the appellant's grounds of appeal are usually mirrored, bearing in mind that sentencing is pre-eminently a matter of discretion for the trial court and that this discretion should be sparingly eroded. A reading of the Regional Magistrate's judgment on sentence is however to my mind a clear indicator that there was an improper exercise of his sentencing discretion. It appears that the Regional Magistrate was oblivious to the salutary warning as set out in *S v Rabie* 1975 (4) SA 855 866 B-C where Corbett CJ, reminded us that:

"A judicial officer should not approach punishment in a spirit of anger because being a human being that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which is his task and the objects of punishment demand of him. Nor should he strive for or after severely or on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contributes to criminality".

[12] The sentence that the Regional Magistrate imposed falls to be set aside on two grounds. I first consider the greater of the two.

**Incompetent Sentence**

[13] The sentence which the Regional Magistrate imposed on the appellant was twenty-five (25) years imprisonment. It is unclear what forms this extended penal jurisdiction, as the Regional Magistrate was constrained to 15 years imprisonment in terms of

the provisions of section 92 of Magistrates Court Act 32 of 1944 which provides as follows:

"**92. Limits of jurisdiction in the matter of punishments**

(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence-

(a) **by imprisonment, may impose a sentence of imprisonment** for a period not exceeding three years, where the court is not the court of a regional division, or **not exceeding 15 years, where the court is the court of a regional division**…"

[14] The appellant was convicted of the crime of housebreaking with intent to steal and theft. The provisions of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") which provides for minimum sentences simply does not find application.

[15] It is therefore irrefutable that the penal jurisdiction of the Regional Court reaches its zenith at fifteen(15) years imprisonment. This was the ceiling that the Regional Magistrate was enjoined to impose, notwithstanding the appellant's previous convictions. It follows that the sentence imposed by the Regional Magistrate was an incompetent one.

**The improper exercise of the Regional Magistrate's sentencing discretion**

[16] Under this rubric of a material misdirection of the Regional Magistrate's sentencing discretion, his shorting comings are exploited to good effect with reference to his judgment on

sentence. The determination whether a misdirection has occurred was clearly set out by Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 553E-F 10 as follows:

> "… the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[17] What enjoined particular attention of the Regional Magistrate was his own personal experience as a victim of the two housebreaking incidents which he infused into his sentencing judgment, which he incorrectly placed much store on. Further thereto, he aerated personal prejudices which clouded the application of his sentencing discretion.

[18] Let me categorically state that sentencing is one of the most complex functions a judicial officer is called to embark upon. A judicial officer must strive to exercise control. Personal experience and prejudices can blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed, particularly when such person is an accused person. It may serve to undermine the proper course of justice and could lead to a complete miscarriage of justice. A judicial officer can only perform his demanding and socially important duty properly, if he also

stands guard over himself, mindful of his own weaknesses and personal views and whims and controls them. See: *S v Sallem* 1987 (4) SA 772 (A).

[19] In *Diniso v S* (CA14/22) [2023] ZANWHC 11 (7 February 2023) the Court (Petersen J and Reddy AJ) had occasion to address the sentencing phase of a criminal trial and vocalized the importance of same as follows:

"[20] Sentence proceedings are part of the trial process. It is not an insulated enquiry independent of the trial. The decorum of the court must still be maintained throughout. Fair trial rights are inclusive of equality and fairness in the application of sentence principles. This fairness extends to the appellant and the State as represented by the public. The verdict of guilty on the appellant's plea of guilty, which rebuts the constitutional presumption of innocence, did not provide a licence to the Acting Regional Magistrate to impugn the dignity of the appellant. The appellant was still clothed with his human dignity notwithstanding a conviction on what clearly was a dreadful crime and this applies equally to the sentence proceedings. In S v Tyebela 1989 (2) SA 22 (AD) at 29 G-H the following was stated, in respect of the duty of a judicial officer to attain a fair trial:

*"It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial... This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires."*

[21] In *President of The RSA v South African Rugby Football Union v SARFU* [1999] ZACC 9; 1999 (4) SA 147 (CC) the Constitutional Court said the following in respect of bias or perceived bias on the part of a judicial officer:

*"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour: and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.*

*They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." (our emphasis)*

[20] Having found that the sentence proceeding in the court *a quo* to be vitiated by irregularity and gross misdirection resulting in a failure of justice, this Court is at large to consider the question of sentence afresh, as a court of first instance. That being the case, the sentence of the trial court has no relevance, having regard to the circumstances under which it was reached.

**The imposition of sentence anew**

[21] Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is directed at three prominent factors, namely, the crime, the offender, and the interests of the

community. (See *S v Zinn* 1969 (2) SA 537 (A) at 540G-H). In *S v RO and Another* 2000 (2) SACR 248 (SCA) at paragraph [30] Heher JA stated the following in this regard:

*"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions."*

**The personal circumstances of the appellant**

[22] The appellant was forty (40) years old at the time of sentencing (22 October 2019). He has been incarcerated since his arrest on 20 October 2017 until sentenced on 19 October 2019. The appellant is married and the father of three (3) children aged nineteen (19), fourteen (14) and ten (10) years of age respectively. The wife of the appellant is unemployed and has returned to Mozambique. The appellant appears to be a breadwinner, but the source of his income is unknown. It was contended that the appellant had tendered a plea of guilty and this is a clear barometer of his remorse. It was emphasized that the stolen property was recovered. The appellant has a string of previous convictions several of which were for the identical crime of housebreaking with intent to steal and theft.

**The crimes**

[23] The appellant was convicted of contravening section 49(1) of the Immigration Act 13 of 2002, and housebreaking with intent to steal

and theft. The appellant admitted that on 17 October 2019 and at Plot […] V[…], he was in the company of the first and third accused as per their appearance in the Regional Court, Potchefstroom. They observed that the home of the complainant had appeared to be unoccupied. It was resolved to break and enter this premises. To this end, a glass door was broken, and entry gained. A black Sinotech television, a black Telefunken tablet and one navy blue backpack was stolen. The total value being R7300-00. Whilst making good their escape, the discharge of a firearm was heard, which did not dissuade their intent to escape. Accused one was shot and seriously wounded.

**The interests of society**

[24] The interests of society must be afforded due consideration. The role of society should not however be elevated or over-emphasized in this process of proportionality. When the interests of society are considered, it is not what society demands that should determine the sentence, but what the informed reasonable member of that community believes to be a sentence that would be just. (*S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 518). A sentence would, accordingly, not necessarily represent what the majority in the community demands, but what serves the public interest and not the wrath of primitive society.(S v *Makwanyane* [1995] ZACC 3; 1995 (2) SACR1 (CC) at paragraph [87] - [89]). In respect of society at large it is recognized, as was stated in *R v Karg* 1961 (1) SA 231 (A) at 236, that:

*"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured parties may feel inclined to take the law into their own hands."*

[25] There is no underscoring that a person's home is one's sanctuary. It matters not what type of home it is. A home is more than a shelter from elements. It is zone of personal intimacy and family security. The right to home security intertwines with a web of constitutional rights. The prevalence of these unlawful invasions is noticeable. The appellant's personal circumstances recede into the background. The appellant has an old book of sins which is replete with convictions with similar offences. Previous terms of imprisonment have not attained the desired effect. A lengthier term of imprisonment is called for.

**Order**

[26] In the result the following order is made:

(i) The appeal with regard to the sentence on count 1 is upheld.

(ii) The sentence of twenty-five (25) years imprisonment imposed in count 1 is set aside and it is replaced with the following sentence:

"The appellant is sentenced to twelve (12) years imprisonment."

(iii) This sentence is antedated to 22 October 2019, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

(iv) The sentence on count 2 is confirmed.

(v) The order declaring the appellant unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

______________________

**A REDDY**

**ACTING JUDGE OF THE HIGH COURT,**

**NORTH WEST DIVISION, MAHIKENG**

I agree.

B ROUX

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

**APPEARANCES**

| | |
|---|---|
| For the Appellant: | Adv T Kwape |
| Attorneys for Appellant | North West Bar Association,<br>Mahikeng Chambers |
| For the Respondent: | Adv N B Mudau |
| Attorneys for Respondent: | Director of Public Prosecutions |

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Mmabatho

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| **Date of Hearing :** | 29 November 2023 |
| **Date handed down:** | 05 March 2024 |
| **Revised :** | 14 March 2024 |