240/55.

G.P.-S.384-1952-3-10.000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

ACHMAT ABDULLAH

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney Lovius B *Respondent's Attorney* A.G.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate *Respondent's Advocate*
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— Op die rol geplaas vir verhoor op:— Tuesday, 13th March, 1956.

(C.P.D.)

(1, 2, 5, 7, 8)

CAV.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :

ACHMAT ABDULLAH Appellant

and

R E G I N A Respondent

Coram:Centlivres C.J.,Schreiner, Fagan, de Beer et Reynolds, JJ.A.

Heard: 13th. March, 1956. Delivered: 19-3-1956

J U D G M E N T

SCHREINER J.A. :- The appellant was charged before a regional magistrate on one count of housebreaking with intent to steal and theft and on one count of receiving stolen property knowing it to have been stolen. On the first count he was convicted of theft and sentenced to one year's imprisonment; on the second count he was convicted and sentenced to five months imprisonment. He appealed to the Cape Provincial Division which dismissed his appeal but increased the sentences to two years' imprisonment on the first count and one year's imprisonment on the second count. Leave to appeal to this Court upon the alteration of the sentences was refused by the Cape

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Provincial Division but was granted by a member of this Court under section 105(2)(c)(ii) of the South Africa Act, as substituted by section 4 of Act 32 of 1952.

Before leave was granted the magistrate was requested to furnish his reasons for the sentences imposed, and those reasons form part of the record. The comment was advanced in this Court that the magistrate had in his original reasons dealt only with the convictions and had not dealt with the sentences, and it was submitted that the Cape Provincial Division would have been in a better position to judge of the appropriateness of the sentences had it called for the magistrate's reasons therefor. This criticism may be justified in relation to count 2, where the ground of appeal related purely to the merits and was so treated by the magistrate. But the ground of appeal on count 1 was that "The "Magistrate erred in finding that the accused received or "was guilty of theft in respect of any goods, other than "twelve watches." What was put in issue was thus not the conviction but the seriousness of the offence i.e. the sentence; and as I read his judgment that is the basis on which the magistrate dealt with the matter. His further reasons provided some elaboration of the earlier

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ones but were largely concerned with explaining why he had found the appellant guilty of theft and not of housebreaking to steal.

The Crown's case against the appellant on the first count was that he had instigated one Percy Muller and an associate to break into a jeweller's shop in Cape Town and steal jewellery, that this crime was carried out and that the following day the appellant received from the perpetrators jewellery to the value of about £2500. The appellant's arrest about a week later followed upon an attempt by him to "double-cross" Percy Muller and his fellow housebreaker by engaging bogus detectives to raid the party at the appellant's house, pretend to arrest the appellant and take him away together with the stolen jewellery. This treachery was presumably what led Percy Muller to give evidence against the appellant. In the possession of a female acquaintance of the appellant's were found, about the time of his arrest, a dozen or more watches which had formed part of the stolen jewellery. These watches the appellant had handed over to her and the defence was that they were the only elements of the stolen goods that had come into his hands. The magistrate did not find the appellant guilty of house-

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-breaking because, it seems, he was not wholly satisfied with the evidence of Percy Muller and of another Crown witness, David Kayser, to the effect that the appellant arranged and instigated the housebreaking. But the evidence of the same two witnesses, and of others who were also persons of doubtful character, taken in conjunction with the patently false evidence of the appellant, satisfied the magistrate that, as he put it, "the accused's "association with the stolen goods was of a larger scope "than that admitted by the defence and that he,therefore, "had greater guilt than that which he was prepared to admit." The magistrate nowhere explains what, concretely, this conclusion amounted to, but, since he refrained from finding the appellant guilty of the housebreaking, I think that he must have meant that the appellant took over from Muller a very large part, if not substantially the whole, of the stolen jewellery, knowing that Muller had obtained it in the way he had.

The Cape Provincial Division took the view that the sentence of twelve months imprisonment was altogether too light a sentence even for a first offender, which the appellant was. There is much to be said in favour of this view. The value of the jewellery -

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was considerable and the knowledge which the appellant must have had that it came from a housebreaking and not from some less serious form of theft was also a factor in favour of a severe penalty. But, unfortunately, BEYERS A.J., who gave the court's judgment, dealt with the case as if the appellant had been found guilty, or at any rate was guilty, of the housebreaking. So the learned judge says, "In a crime of this kind, instigated - as the "evidence appears to me to show quite clearly - by the "accused who got these two men to break in and commit a "burglary of this particular magnitude and character, "twelve months with compulsory labour appears to me to be "quite inadequate." And it was clearly on this basis that the court increased the sentence.

Now an appeal court is entitled, in considering whether a sentence should be increased, to examine the evidence and make up its mind whether the lower court took a sufficiently serious view of that evidence. But to treat an accused person who has been found guilty of one offence as if he had been found guilty of a different and more serious offence would be going much further than is warranted either by authority or by the principles governing the procedure in criminal matters.

There/.....

There have, it is true, been cases in which this Court, under powers similar to those contained in section 98(2) of Act 32 of 1944, has altered convictions of one offence to a conviction of a different and, as would be generally understood, a more serious offence (See Rex v. Sanderson, 1941 A.D. 121; Rex v. von Elling, 1945 A.D. 234; Rex v. Mkwanazi, 1948(4) S.A. 686). But in those cases the sentences were not affected. It would not be legitimate in a case like the present for the appeal court to change the verdict to one of guilty of a more serious offence and then increase the sentence to make it appropriate to the latter.

There remains the fact that on the magistrate's findings, although the appellant was not a party to the housebreaking, he was guilty of a very serious theft of the nature of receiving. This Court is not precluded by the error of the Cape Provincial Division from itself coming to the conclusion that there is such glaring inadequacy in the sentence (cf. Regina v. Theunissen, 1952(1) S.A.201 at page 204) as requires an increase of the sentence, and therefore, the increase having already been made, that the appeal should be dismissed. The case seems to me to be a borderline one but on the whole

I have come to the conclusion that there is not sufficient justification for this Court to decide that the magistrate's sentence on count one is so inadequate as to call for increase, on the assumption that the appellant's guilt did not extend to complicity in the housebreaking. The appeal on this count must therefore succeed.

The second count was one of receiving a camera and two pairs of binoculars knowing them to have been stolen. They formed part of about £1600 worth of goods stolen by housebreaking from a firm in Cape Town. The goods proved to have been received by the appellant were worth about £100. The housebreaking under count 2 preceded that under count 1 by some three weeks; the appellant received the camera and binoculars a few days before he received the jewellery the subject of count 1. In dealing with the sentence on the second count BEYERS A.J. said, " Again I find this sentence wholly inadequate. "Why the magistrate imposed this sentence I do not know, "but it certainly does not meet the exigencies of the "crime." It would have been preferable if the Cape Provincial Division had asked the magistrate why he had imposed the sentence which he did. This was not done but we have the magistrate's reasons for sentence in regard

to this count. He says, " In assessing the quantum of "punishment which should be imposed on this count, the "court bore in mind the principle that where there are "more counts than one, regard should be had to the cumu- "lative effect of such sentences. Had the accused suffered "a conviction on this count only an appreciably more severe "sentence would have been imposed. In view of the sentence "of twelve months on the first count the court considered "that a just sentence in respect of this count would be "one of five months imprisonment with compulsory labour."

I do not think that if this statement of the magistrate's reasons had been before the Cape Provincial Division it would, or should, have changed its view as to the inadequacy of the sentence. The principle to which the magistrate refers should no doubt be borne in mind, especially where there are a number of counts and the total punishment appears to be harsh. In such cases the sentences on the several counts may be arbitrarily reduced to produce a reasonable result when taken together; or, preferably, the whole or part of some of the sentences, where they consist of imprisonment, may be made to run concurrently with others. But in the present case there was little room for the application of

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the principle applied by the magistrate. There were only two counts and they were independent and serious. The camera and binoculars were valuable articles; it seems improbable that the appellant was unaware that they had been obtained by housebreaking. It has not, in my view, been shown that the Cape Provincial Division was wrong in increasing the sentence on this count.

In the result the appeal is allowed on count 1 and the sentence of one year's imprisonment with compulsory labour is restored. The appeal on count 2 is dismissed.

Centlivres, C.J.,
Fagan, J.A.
de Beer, J.A.
Reynolds, J.A.
} Concur

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