Case No : 41/92
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PHILLIP J KELLY	APPELLANT
and	
THE STATE	RESPONDENT

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v H

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In the matter between:

PHILLIP J KELLY — Appellant

and

THE STATE — Respondent

CORAM: SMALBERGER, GOLDSTONE, et
VAN DEN HEEVER, JJA

HEARD: 26 AUGUST 1993

DELIVERED: 6 SEPTEMBER 1993

J U D G M E N T

SMALBERGER, JA :-

On the night of 22 January 1991 the shop of Kaizen Export and Import ("Kaizen") in His Majesty's Building, Commissioner Street, Johannesburg was broken into. Kaizen specialises in the sale of leather goods. In all 75 leather jackets were stolen from the shop. At about midnight the appellant was stopped by

two policemen while walking along Commissioner Street. He was carrying a carton box containing ten of the stolen jackets. When questioned he gave an explanation for his possession of the jackets which, as it later transpired, was clearly false.

Arising from these events the appellant was charged in the Regional Court, Johannesburg, with house-breaking with intent to steal and theft. He pleaded not guilty. At the conclusion of the trial he was convicted of theft and sentenced to 2 1/2 years' imprisonment. His appeal to the Witwatersrand Local Division against his conviction and sentence was dismissed, but he was granted leave to appeal to this Court against his sentence only. Hence the present appeal.

At the relevant time the appellant was employed by a firm of attorneys which has its offices on the thirteenth floor of His Majesty's Building. It is

not clear from the record precisely in what capacity he was employed, but it would seem that he was something akin to a messenger. The firm had a storeroom on the first floor, the floor on which Kaizen's shop was situated. The appellant used to visit this storeroom in the course of his duties. On the night in question the appellant spent a number of hours after work in and about His Majesty's Building before eventually leaving late at night. It is not necessary to traverse the evidence in this regard. Suffice it to say that no good or acceptable reason is apparent from the record for his spending that amount of time there.

The evidence does not establish how the appellant came into possession of the ten stolen jackets. He was not convicted of housebreaking as the trial magistrate held that there was a reasonable possibility that someone else had broken into the shop earlier without his knowledge. The fact that 65 stolen

jackets were not recovered reinforces this conclusion. The appellant's conviction of theft was based upon his possession of the ten stolen jackets shortly after they had been stolen, and the fact that he gave a false explanation for such possession. These considerations notwithstanding, the trial magistrate, in sentencing the appellant, stated that "there is no question of the accused succumbing to sudden temptation. This crime was carefully planned . . . ." On appeal it was contended that this amounted to a misdirection.

I agree. The finding that someone could have broken into Kaizen's shop without the knowledge of the appellant necessarily excludes the appellant from having been a party to a common purpose to break into the shop, and any associated planning. The theft by the appellant, which occurred in circumstances not apparent from the record, and about which one can no more than speculate, must inevitably have taken place after the

shop had been broken into. Despite having on the merits found it not proven that the appellant was involved in the breaking in, the magistrate gives no reason for holding, for sentencing purposes, the theft nevertheless to have been "carefully planned" - a situation which implies that the appellant applied his mind to stealing the jackets well in advance of his actions. Despite the appellant's untruthful evidence, the reasonable possibility that the appellant was unexpectedly confronted with an opportunity to steal the jackets and succumbed to the temptation of doing so cannot be excluded. Some thought clearly went into removing the jackets from His Majesty's Building without being detected by the building's security guards, but this is a far cry from the actual theft being "carefully planned". In the circumstances we are at liberty to consider the question of sentence afresh.

The appellant, a first offender, was 35 years

old at the time of the commission of the offence. He had been employed for some 5 years by the firm for which he worked (and apparently still works). He is married and has four minor children. He was in receipt of an income of between R900-00 and R1 000-00 per month. His conduct was not occasioned by dire financial need. The offence committed was a serious one given the prevalence of theft in the Johannesburg area and the value of the articles stolen (R6 000-00). In the appellant's favour it must be accepted that the theft was not pre-planned.

While the fact that a person is a first offender does not ipso facto entitle such person to escape imprisonment, it is a salutary practice of our courts to avoid, as far as possible, sending a first offender to goal. Incarceration in the case of the appellant would have the attendant negative effects of the appellant inevitably losing his employment and being

unable to maintain his family. In the current economic climate he would not after his release easily come by employment again. His wife and children, deprived of his financial support, are likely to become a burden on the State or the community in which they live. These are relevant, albeit not conclusive, considerations in determining an appropriate punishment.

It seems to me that on a balanced overview of the nature of the crime, the appellant's personal circumstances, the interests of the community and the well known objects of punishment, this is not a matter which calls for direct imprisonment as opposed to other sentencing options. The option which most commends itself is that of correctional supervision in terms of sec 276(1)(h) of the Criminal Procedure Act 51 of 1977 ("the Act"). This option was not open to the trial magistrate at the time when he sentenced the appellant, but is available now (S v R 1993(1) SA 476(A)). It

caters for a person such as the appellant who, though deserving of punishment, should not be removed from society but should be subjected to one or more of the wide variety of measures that can be applied outside of prison. As was pointed out in S v E 1992(2) SACR 625(A) at 633 b, the advantage of correctional supervision is that "it is geared to punish and rehabilitate the offender within the community, leaving his work and routines intact, and without the obvious negative influences of prison".

In my view correctional supervision would be the appropriate sentence for the appellant (cf. S v Sibuyi 1993(1) SACR 235 (A)). Bearing in mind the provisions of sec 276 A(l)(a) of the Act, this Court (which in any event is not geared to the hearing of evidence) is not in a position to impose such sentence itself. The matter therefore falls to be remitted to the trial court for compliance with the procedure set

out in sec 276 A(1) (a) and for determination by it of the particular form and the duration of the appellant's punishment (or for such alternative punishment as would be appropriate should the appellant, for good reason, be found not to be fit to be subject to correctional supervision).

The appeal succeeds. The appellant's sentence is set aside and the matter is remitted to the trial court to sentence the appellant, after due compliance with the provisions of sec 276 A(l)(a) of the Criminal Procedure Act 51 of 1977, to correctional supervision in terms of sec 276(1)(h) of that Act or, if for good reason the appellant is found not to be fit for such a sentence, to otherwise sentence him in the light of the views expressed in this judgment.

J W SMALBERGER
JUDGE OF APPEAL

GOLDSTONE, JA) VAN DEN HEEVER, JA) concur