Case no: 228/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

ADAM COALES Appellant

and

THE STATE Respondent

Coram: E M GROSSKOPF, KUMLEBEN et
F H GROSSKOPF JJA

Heard: 20 September 1994 Delivered: 29
September 1994

J U D G M E

N T F H GROSSKOPF JA:

The appellant was convicted in the regional court, Cape Town, after pleading guilty to one count of housebreaking with intent to steal (count 1), eight counts of housebreaking with intent to steal and theft (counts 2 to 7 and 9 to 10), and one count of theft of a motor vehicle (count 8). He was sentenced to nine months imprisonment in respect of each of the nine housebreaking counts, and to three years imprisonment on count 8 for the theft of the motor vehicle. The cumulative sentence on all ten counts amounted to nine years and nine months imprisonment. The trail court ordered that in the event of a suspended sentence of 40 months imprisonment imposed in 1990 being put into operation, two of the three years imposed in respect of count 8 were to run concurrently with the suspended term of imprisonment. The suspended sentence was in fact brought into operation, with the result that the effective sentence in respect of the present convictions amounted

to seven years and nine months imprisonment.

The appellant's appeal against his sentence was dismissed by the Cape Provincial Division. Leave to appeal to this court was granted on petition to the Chief Justice.

The appellant's wife was charged as accused no 2 in the regional court. She also pleaded guilty and was convicted of the same offences as the appellant. In her case the magistrate took all the counts together for the purpose of sentence and imposed a sentence of three years imprisonment which was conditionally suspended for five years.

Before dealing with the salient facts and the mitigating factors on which the appellant seeks to rely, I have to refer to an important aggravating feature, ie the appellant's criminal record. He has two previous convictions for housebreaking with intent to steal and theft, and one for theft. He was first convicted in 1984 for housebreaking with intent to steal and theft of car radios and tools to the value of R7 500 from a service station. He was sentenced to three years imprisonment

conditionally suspended for five years. In 1989 the appellant was convicted of theft of a television set valued at R450 and sentenced to a fine of R400 or four months imprisonment. In June 1990 he was again convicted of housebreaking with intent to steal and theft. On this occasion he stole tools to the value of Rl 000 from a flat, and was sentenced to 40 months imprisonment which was conditionally suspended for five years. The present crimes were committed less then two years later. One notes that prior to the present convictions he never served any period of imprisonment.

The crimes were committed over a period of about three months from approximately 14 February to 10 May 1992. The appellant was then 28 years old and his wife 30. They had been married for six years. She was pregnant at the time and has since given birth to a baby. It is common cause that they forcibly broke into a number of business premises in and around Cape Town. They stole cash, a radio with tape deck, a radio and casette player with speakers, two electric kettles, an

electric drill, a bottle of brandy, a bottle of wine, a bottle of champagne, and groceries such as coffee, tea and sugar. The total value of the stolen goods, with the exception of the motor vehicle, amounted to less than R3 000.

Counsel for the appellant conceded that housebreaking with intent to steal is a serious crime, but submitted that the trial court over emphasised the seriousness of the offences in the particular circumstances of this case. He sought to draw a distinction between breaking into a private dwelling, where the sanctity of a person's home is violated, and breaking into business premises. I do not think in this case the distinction is a significant one. Each case must depend on its own facts and be considered in the light of its own particular circumstances. The fact remains that in the present case each housebreaking, with the exception of count 10, involved an actual breaking causing damage. Either a door or burglar proofing had to be forced upon, or a window had to be cut or broken for the appellant to gain entry.

It was further submitted that the appellant really committed a series of petty thefts, and that he could have stolen more on most if not on every occasion. It is true that the total amount involved in these thefts was not large, but the fact that the appellant did not steal more can hardly be regarded as mitigatory. Had he taken more it may well have been an aggravating feature.

The undisputed evidence was that the appellant and his wife were destitute at the time. They were both unemployed; he could not find any employment, while she was in an advanced state of pregnancy. They stayed in a shack in Salt River at the back of a garden. The appellant is a British subject whose parents had returned to England two years previously, and he had no family in South Africa to whom he could turn for help. The appellant went to see the welfare authorities twice, but got no assistance from them.

Counsel submitted that the appellant committed the crimes out of sheer desperation and necessity, and in order to supply them with

food. I shall assume in the appellant's favour that the items other than edibles and cash were stolen in order to be converted into cash. While the appellant's dire need may have prompted the series of thefts which were coupled with the housebreakings, it can certainly not account for the theft of the motor vehicle. The appellant told the trial court that he stole the Datsun light delivery van in Claremont late one night when it started to rain. He and his wife used it for transport to get to their home in Salt River. Once there he abandoned the vehicle. It appears, therefore, that the appellant did not intend to deprive the owner permanently of the use of his vehicle. The appellant, however, failed to explain why they could not have made use of public transport to get to Salt River. The Datsun, which was valued at R5 000, was unfortunately never recovered by the police. Moreover, if the appellant resorted to theft only when driven by need, as he maintained, why was it necessary for him to commit three burglaries in quick succession between 27 and 31 March 1992?

It was submitted that the trial court misdirected itself by not taking into account the fact that the appellant and his wife had stolen to subsist. The desperate plight in which this couple found themselves is certainly a factor which ought to be taken into account. The magistrate specifically referred to these circumstances in his reasons for sentence and said that he would take them into account. There is no reason to suggest that he did not do so. There was accordingly no misdirection. It should also be borne in mind, as was pointed out by the court a quo, that there are unfortunately many indigent people in our country who live under similar or even worse conditions, and yet they manage to remain law-abiding citizens.

Counsel further submitted that the magistrate misdirected himself in failing to have regard to the fact that the appellant showed remorse. The magistrate did take this aspect into account, and it cannot properly be said that he misdirected himself. The question is whether he gave sufficient weight to it. In his reasons for sentence the magistrate

made the following observations in this regard:

> "It is true……as you have indicated that you went to the police, that you reported the matter to them, because you did not want to go on the way you did. The court will take that into account."

What happened was the following. About 10 May 1992 the appellant and his wife broke into the premises of SA Scale (Pty) Ltd in Salt River with intent to steal. While they were still inside the building they were suddenly overcome by remorse. They left the premises without taking anything and voluntarily handed themselves over to the police. Thereupon they confessed to every crime they had committed. They assisted the police in their further investigations and pleaded guilty at the trial. By doing so the appellant clearly demonstrated that he was truly remorseful. In my judgment his contrition and remorse were material mitigating factors to which more weight should have been given. S v Seegers 1970(2) SA 506(A) at 511G-H.) The fact that the appellant had a change of heart and was truly remorseful also makes him a better

candidate for rehabilitation.

I am further of the opinion that the magistrate paid insufficient regard to the cumulative effect of all the sentences imposed. R v Abdullah 1956(2) SA 295(A) at 299G-300A; S v Whitehead 1970(4) SA 424(A) at 238F-439H; S v Young 1977(1) SA 602(A) at 610E-H.) In my judgment the aggregate sentence of almost ten years imprisonment is startlingly inappropriate in the particular circumstances of this case. It is true that the magistrate referred to the cumulative effect of the sentences and ordered two of the three years imprisonment imposed for the theft of the motor vehicle to run concurrently with a suspended term of imprisonment. The total effective period of almost eight years imprisonment nevertheless remains unduly harsh in my opinion, also bearing in mind that the appellant has to serve the additional 40 months in respect of the suspended imprisonment.

Having regard to the various considerations I have mentioned above 1 am of the view that this court should reduce the total

effective period of the sentences imposed by the trial court. This can be done by directing that certain sentences run concurrently with others. (Abdullah's case, supra, at 300 A; Whitehead's case, supra, at 439G-H.) In the present case the trial court has already ordered that two years of the sentence on count 8 should run concurrently with the 40 months suspended sentence of imprisonment. A further direction that the sentences on some of the housebreaking counts run concurrently with the sentences on other housebreaking counts appears to me to be impractical, and would in any event not reduce the effective period of imprisonment sufficiently.

The cumulative effect of all the sentences imposed can also be curtailed by reducing the individual sentences (Young's case, supra, at 611D-G), but any meaningful reduction of the individual sentences in the present case would in my view lead to inappropriate sentences.

This court held in Young's case, supra, at 610E-H, that the practice of taking closely connected or similar counts together for the

purpose of imposing one sentence thereon may be undesirable when adopted by lower courts, but that the objection does not apply to this court inasmuch as any sentence imposed by this court is definitive. In the present case the appellant was sentenced to a total period of six years and nine months imprisonment in respect of the nine counts of housebreaking. The cumulative effect of all these sentences could be lessened by taking the nine counts of housebreaking together for the purpose of sentence, and by reducing the overall sentence in respect of those nine counts; but any significant reduction in the overall sentence would in my opinion again lead to a sentence which is too lenient in the particular circumstances of this case.

Another method of reducing the effective period of the sentences is to suspend portion of the overall sentence. I propose to adopt this method and to suspend four years of the total sentence of nine years and nine months imprisonment.

The appeal against sentence accordingly succeeds. The

following order is added to the sentence of the trial court:

> "The court further orders that four years of the total sentence of nine years and nine months imprisonment be suspended for five years on condition that accused no 1 is not again convicted of theft or housebreaking with intent to commit a crime, which is committed during the period of suspension, and in respect whereof he is sentenced to imprisonment without the option of a fine."

F H GROSSKOPF JA.

E M Grosskopf JA Kumleben JA
Concur