THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 173/06

NOT REPORTABLE
In the matter between:

ANDRIES PETRUS DIPPENAAR
APPELLANT

v

THE STATE
RESPONDENT

Coram: Farlam, Mthiyane, Mlambo JJA

Heard: 3 November 2006

Delivered: 1 December 2006

Summary: Sentence – multiplicity of sentences resulting in effective total of 16 years – severity thereof – trial court underemphasising personal circumstances and overemphasising seriousness of offences – misdirection by trial court in not considering unchallenged evidence demonstrating remorse – effective sentence of 16 years sufficiently disparate to sentence proposed on appeal – interference on appeal warranted – appeal upheld.

Neutral citation: **This case may be cited as *Dippenaar v The State* [2006] SCA**

169 (RSA)

JUDGMENT

MLAMBO JA

[1] On 24 April 1998 the appellant was convicted in the Bellville Regional Court on three counts of attempted housebreaking with intent to steal, one count of housebreaking with intent to steal and theft, eight counts of fraud, one count of theft of a motor vehicle and one count of reckless driving in contravention of s 120(1) of Act 29 of 1989. He was sentenced to 18 months' imprisonment on each of the attempted housebreaking counts, four years imprisonment on all the fraud counts taken together, three years imprisonment on the housebreaking and theft count, four years imprisonment on the motor vehicle theft count and was sentenced to a fine of R1 500 or six months imprisonment on the reckless driving count. The sentences were not ordered to run concurrently, resulting in an effective sentence of 16 years. The appellant appeals against the sentence with leave of this court having been unsuccessful in an appeal to the Cape High Court (Traverso DJP and Van Zyl J).

[2] The appellant's spree of criminal activity, if one may call it that, started on 17 June 1997 when he attempted to break into a residence in Angelier Street, Bellville, but got cold feet and left without taking anything. The next day he again attempted to break into a residence in Hohenaar Street, Stellenberg but also left without taking anything. On 14 July 1997 he broke into a residence in Syble Street, Bellville and stole a television set and a ladies handbag containing a purse and a Nedbank cheque book.

[3] From 15 to 28 July 1997 he drew eight cheques on the stolen cheque book for amounts totalling R2 903,63. It is these transactions that formed the basis of the fraud charges.

[4] On 1 August 1997 he entered the Green Point Health & Racquet Club and removed the keys of a Toyota Camry motor vehicle, from the change rooms, and drove away in the vehicle, which belonged to a patron of the Club. After driving around aimlessly he left the stolen motor vehicle in a parking lot. On 11 August 1997 he drove the stolen motor vehicle to a residence in Bosch Street, Durbanville where he attempted to break in but his courage again deserted him and he left without taking anything. Later that day, whilst driving around in the stolen motor vehicle he was spotted by the police who were on the look out for the vehicle. When they tried to stop him he, in a reckless manner, sped away in an attempt to evade arrest and drove through an intersection, whilst the traffic lights were red. He eventually caused a collision and was arrested.

[5] Subsequent to his arrest he bared all, giving the police details of all his criminal exploits till then. He went as far as to show the police the different residences where he had attempted to break in. It is not in dispute that until he made the disclosures about the attempted housebreakings, in particular, the police were not aware of their commission.

[6] In mitigation of sentence the appellant ascribed his brief criminal spell to stress and depression. This, he told the trial court, was a consequence of his suffering from an incurable and severe type of skin disease known as atopic eczema. He testified that he was born with the disease and throughout his life had been on treatment without notable

success. Though he had achieved some success after he became gainfully employed, such as the time when he was employed as a salesperson, in winning certain prestigious awards, but in 1996 the disease had apparently taken a turn for the worst. At about the same time he was divorced from his wife and was separated from his son. He was also retrenched from his work, which led to the loss of his house in Gauteng. This left him with no option but to return to the Western Cape where he took up residence with his sister. Due to this down turn in his fortunes, he testified, he had become very depressed and this drove him to commit the offences.

[7] When the magistrate sentenced him, he made reference to his personal circumstances, particularly his severe skin disease. The magistrate stated that he would disregard the appellant's previous conviction for theft which had taken place some 10 years before. The magistrate then went on to state that some of the offences the appellant had been convicted of, in particular those for fraud and motor vehicle theft, were very serious and, in the interest of the community, warranted severe punishment. The magistrate expressed doubt regarding the appellant's remorse as well as the effect, if any of depression on his conduct. The magistrate appears to have found aggravation in the appellant's choice of shop (Woolworths), its location (the Waterfront) and the items he bought with the stolen cheques. He came to the conclusion that, save for the reckless driving offence, the other offences warranted direct imprisonment. In this regard the magistrate found that prison conditions would not aggravate the appellant's skin condition and that he would receive treatment in prison.

[8] This being an appeal regarding sentence, I am mindful of the fact

that punishment is a matter for the discretion of the trial court and that this court's power to interfere is restricted to those instances where we find that the trial court did not exercise its discretion in a proper and judicial manner. A trial court is said to have failed to exercise its discretion properly and judicially where the sentence is vitiated by irregularity or misdirection or is 'disturbingly inappropriate' or sufficiently disparate and/or is totally out of proportion to the magnitude of the offence. *S v Rabie* 1975 (4) SA 855 (A) at 857D- F and *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) at 591G.

[9] It is apparent that even though the magistrate stated that he took account of the appellant's personal circumstances, these appear to have had no bearing on the sentences he imposed. The magistrate had heard unchallenged evidence that the appellant was suffering from acute depression at the time he committed the offences. The short period of time (two months) within which all the offences were committed is demonstrative of this. Considering the effective sentence imposed (16 years) one cannot resist finding that these factors were not accorded due weight by the magistrate.

[10] It is also notable from the reasoning of the magistrate that he was preoccupied with the view that the appellant was attempting to hide behind his skin condition to escape a prison sentence. The consequence of the magistrate's approach was to underemphasize his illness and to overemphasize the seriousness of the offences.

[11] It is also clear that the disposition of the magistrate was towards a heavy sentence due to his view that the appellant had committed serious offences. Perhaps the clearest indicator that the magistrate was inclined

towards a heavy sentence is found in his expression of doubt regarding the appellant's remorsefulness. This was a clear misdirection as there was ample and uncontradicted evidence at the magistrate's disposal showing that the appellant was remorseful. In this regard it was common cause, as stated earlier, that when the appellant was arrested it was only in regard to the motor vehicle theft and reckless driving charges. It was due to his disclosures and cooperation with the police that the other offences he had committed came to light. He had also made a confession and pleaded guilty. This in my view was the clearest demonstration of remorse by an accused person and deserved to have weighed heavily with the magistrate.

[12] In the final analysis considering the cumulative effect of the sentences imposed by the magistrate I am of the view that the 16 year sentence is disturbingly inappropriate when account is taken of the appellant's personal circumstances. In *S v Holder* 1979 (2) SA 70 (A) Rumpff CJ had this to say in this regard at 81B:

'Die gemeenskap verwag dat 'n ernstige misdaad gestraf sal word, maar verwag ook tewens dat strafversagtende omstandighede in ag geneem moet word en dat die beskuldigde se besondere posisie deeglike oorweging verdien.'

[13] Taking account of the appellant's acute depression at the time he committed the offences, the short period within which he did this and his unconditional show of remorse I am of the view that an effective sentence of ten years imprisonment was more appropriate under the circumstances. This would have struck a balance between the appellant's personal circumstances, the seriousness of the offences and the interests of the community. Clearly interference is justified as the effective 16 year sentence imposed by the magistrate is sufficiently disparate to the one for

ten year I find appropriate.

[14] It follows therefore that the appeal must succeed. In the circumstances the following order is granted:

1. The appeal succeeds.

2. The order of the trial court is set aside and replaced with the following:

   ‘(i) On counts 1, 2 and 13, taken together, the accused is sentenced to 18 months imprisonment which is wholly suspended for five years on condition that the accused is not convicted of housebreaking or any other competent verdict on that charge committed within the period of suspension.

   (ii) On count 3 the accused is sentenced to three years imprisonment.

   (iii) On counts 4 to 11, taken together, the accused is sentenced to four years imprisonment.

   (iv) On count 12 the accused is sentenced to three years imprisonment.

   (v) On count 14 the accused is sentenced to 6 months imprisonment. It is ordered that this sentence is to run concurrently with the sentence imposed in count 12.’

D MLAMBO

JUDGE OF APPEAL

CONCUR:
FARLAM JA
MTHIYANE JA