

SOUTH AFRICA / JUDGMENT

Motemba v S (CA 10/2013) [2013] ZANWHC 48 (30 May 2013)

[2013] ZANWHC 48**COURT**

North West High Court, Mafikeng

BEFORE

N Gutta, R D Hendricks

CASE / FILE NUMBER

CA 10/2013

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CA 10/2013

In the matter between:

NASON LINO MOTEMBAAPPELLANT

and

THE STATERESPONDENT

Hendricks J and Gutta J

CRIMINAL APPEAL

GUTTA J.

A.

INTRODUCTION

- [1] The appellant was arraigned in the Regional Court, Atamelang on a charge of housebreaking with the intent to steal and theft. He was convicted on 23 July 2009 and sentenced to ten (10) years imprisonment. On 07 August 2009 leave to appeal against his conviction was refused but was granted in respect of the sentence imposed upon him by the court a quo. Hence, this appeal is against sentence.

[2] The evidence presented by the State in the trial court which forms the basis of the conviction is that on the 13 December 2008 a break-in occurred at Pep Stores, Delareyville. Goods to the value of R66 000.00 were stolen. On 14 December 2008 two police

officials, after receiving information pertaining to the break-in, proceeded to Ottosdal, where they approached two men who were in possession of large bags. One of the men fled, while the other one, the appellant, remained.

[3] The appellant was searched and a cellular phone was found in his possession. Furthermore, the bags were opened and searched. The appellant was arrested and the bags and the items contained in the bags were taken to the police station. The appellant was then detained. Investigations revealed that the cellular phone found on the appellant as well as the contents of the bags were the property stolen from Pep Stores, Delareyville on the 13 December 2008. The property that was recovered was valued at R33 000.00.

B. SENTENCE

[4] The attack against sentence is premised on the basis that it is shockingly severe and excessive. The contention is that the Regional Magistrate erred in over-emphasizing the fact that appellant is not a first offender but has a recent, relevant previous conviction.

[5] The objects of punishment are either retribution, prevention or deterrence and due weight should be afforded to these elements.

[6] A trial court has a wide discretion in assessing the appropriate punishment to impose. This discretion must be exercised with due regard to the crime, the offender and the interests of society. See *S v Zinn* 1969

(2) SA 537 (A).

[7] An offender must not be sacrificed on the altar of deterrence and sight should not be lost of the individualised nature of sentencing. See *S v Maluleke* 2004

(2) SACR 577 (T); *S v Mako* 2005

(2) SACR 223 (E); *S v Dodo* [2001] ZACC 16; 2001

(1) SACR 594 (CC).

[8] It is trite that the sentence must always fit the crime and the fact that the person to be punished has a previous conviction of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished. See *S v Beja* 2003 (1) SACR 168 (SE) at 170d–e.

[9] The Magistrate was improperly influenced by the accused's previous conviction and failed to give sufficient weight to the mitigating factors mentioned in paragraph [12] *infra*.

[10] It is trite law that sentence is primarily in the discretion of the trial court and that a court of appeal will not lightly interfere with the exercise of such a discretion. A Court of Appeal will only interfere in very limited instances for example when the trial court failed to exercise its discretion judiciously or where the sentence imposed is shockingly severe and excessive and vitiated by an irregularity. See *S v Kgosimore* 1999

(2) SACR 238 (SCA); *S v Shaik & Others* [2007] ZACC 19; 2008

(1) SACR 1 (CC).

[11] The following personal and mitigating features were placed on record in the court a quo:

11.1 the appellant is thirty (30) years of age;

11.2 he is married;

11.3 he is the father of two minor children who still attends school;

11.4 his wife is unemployed;

11.5. he is the breadwinner and he maintained his family (wife and children);

11.6 he was self-employed doing tiling and paving;

11.7. he was incarcerated awaiting the finalisation of his trial in excess of seven (7) months;

11.8. he is not a first offender. He has a previous conviction of housebreaking with the intent to steal and theft and was sentenced on 16 May 2005 to undergo an effective term of imprisonment of four (4) years;

11.9. half of the stolen items were recovered, still in a good condition, valued at R33 000.00.

[12] Having regard to the facts of this case, the personal circumstances of the appellant, the mitigating and aggravating features, as well as the submissions by counsel, I am of the view that the sentence imposed is shockingly severe and excessive and this Court is accordingly at liberty to impose a more appropriate sentence.

C. ORDER

[13] Consequently, the following order is made:

a) The appeal against sentence is upheld.

b) The sentence is set aside and substituted with the following:

“Six

(6) years imprisonment.”

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

APPEARANCES

DATE OF HEARING : 24 MAY 2013

DATE OF JUDGMENT : 30 MAY 2013

COUNSEL FOR APPELLANT : ADV N.L. SKIBI

COUNSEL FOR RESPONDENTS : ADV B.T. CHULU

ATTORNEYS FOR APPELLANT : MAFIKENG JUSTICE CENTRE

ATTORNEYS FOR RESPONDENTS : THE DIRECTOR OF PUBLIC PROSECUTIONS

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