IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER :A213/2014

In the matter between:

SKHOSANA, LINDA ABEL APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] The Appellant was arraigned in the Kempton Park Regional Magistrate Court on a charge of housebreaking with intent to steal and theft. The Appellant was accused

number two. He pleaded not guilty and was found guilty. He had legal representation. He was sentenced to eight (8) years imprisonment.

[2] Leave to appeal, on petition to this court, was granted to the Appellant against conviction and sentence.

AD CONVICTION

[3] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If the version of the Appellant is reasonably possibly true, he must be acquitted.

[4] In considering the judgment of the Court *a quo*, this court has been mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[1]

[5] In *S v Monyane and others* 2008 (1) SACR 543 (SCA) at paragraph [15] the learned Ponnan JA stated;

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e – f)."

[6] At issue in this appeal, is whether the Appellant was one of the housebreakers who entered into the complainant's house. Mr Ebenand's house ("the complainant"), had CCTV video surveillance which captured the perpetrators on the CCTV footage, entering his house. A photograph was also taken of the Appellant and his co-accused on the cell phone of Mr Smart ("the security officer"), upon their arrest.

[7] Counsel for the Appellant submitted that the court *a quo* erred in finding the appellant guilty in that;

[1] See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

i. The learned magistrate did not objectively assess the evidence.
ii. The learned magistrate descended into the arena by questioning the Appellant's co-accused.
iii. The Appellant's rights in terms of section 35 of the Constitution were not explained prior to the Appellant's photo being captured on the cell phone of the security officer, thereby resulting that inadmissible evidence was accepted by the Court *a quo*.

The learned magistrate did not objectively assess the evidence.

[8] During the trial in the Court *a quo*, the admissibility of the video footage and cell phone photograph was not challenged.

[9] The evidence depicted on the CCTV video as well as the cell phone photograph is real evidence.

[10] In *S v Ramgobin and Others* 1986 (4) SA 117, the learned Milne JP held that for video tape recordings to be admissible in evidence, it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of interference with the recordings.

[11] In this case, there was no cross examination, disputing that the complainant was the author of the CCTV footage, or that there was interference of the original recording. The CCTV footage was compiled and downloaded by the complainant prior to showing it to Gregory Mokgoswane ("the police officer") and the security officer. There is no evidence of tampering with the CCTV footage and accordingly, the reliability of the evidence was furnished by the *viva voce* evidence of the complainant, which corroborated the visuals scrutinised on the CCTV footage. The video stills depict clearly the clothing of the people who entered the house. In the absence of any evidence disputing the authenticity of this recording, this Court finds that the aforesaid video evidence was correctly admitted by the Court *a quo*.

[12] In order for a cell phone photo to become relevant, it should firstly have bearing on the issues to be decided by the court. Secondly, it should be verified as being a true image of what was captured by the person who took it. Thirdly, it should be clear and not edited. Fourthly, it should be presented in court to be viewed. Fifthly, the device on

which the photo was captured, should be reliable. If all these factors are present, the court can take judicial notice of it and admit it. In this case, the clothing the perpetrators were wearing was crucial. The security officer confirmed he took the photo and that it depicted the type of clothing the Appellant and his co-accused were wearing. The photo was clear and it was presented in court for all to see it. The accuracy of the security officer's cell phone was not disputed, accordingly, this Court accepts it captured and stored the photo accurately.

[13] The complainant was an honest witness. The Court *a quo*, viewed the CCTV footage and the cell phone photograph and placed on record that the clothing that the Appellant and his co-accused were wearing in the photograph, was indeed identical to the clothing of the perpetrators seen on the CCTV footage. This was corroborated both by the security and police officers. It was placed on record that the Appellant was wearing a white shirt with an emblem resembling an eagle. There was accordingly sufficient corroboration regarding the attire of the Appellant from all three state witnesses for the Court *a quo* to have made these findings of fact.

[14] The Appellant's co-accused in fact admitted, that his clothing was the same as that worn by the perpetrators on the CCTV footage as well as the photo depicted on the cell phone. This aspect of the Appellant and his co-accused wearing the same clothing as depicted on the CCTV footage was never disputed by either of the two attorneys. On the contrary, accused one confirmed during cross-examination, that the Appellant was wearing a shirt with a decoration resembling an eagle.

[15] The complainant testified that when he spoke to the Appellant and his co-accused in the police van, they admitted that they had entered his property. They informed him that they were playing soccer somewhere and chose to break into a house by forceful entry. This was corroborated by the police officer who also heard them saying they were *"sorry"* and that they were known to each other from playing soccer together.

[16] The Appellant was pointed out to the security officer by an unknown man. The Appellant was walking in Monument Road when he was arrested. This is approximately 250 metres from the complainant's house. A short distance further in Viskal street, the Appellant's co-accused was pointed out and was arrested. There is some discrepancy between the version of the security officer who says the Appellant and his co-accused were walking towards each other, as compared to the police officer, who says he first

arrested the Appellant and then arrested his co-accused who was walking towards the veld. However, this Court does not view this as a material discrepancy. Both witnesses were honest and this court finds their evidence reliable and trustworthy.

[17] The evidence of the Appellant is very short. His version is one of a complete denial. During cross-examination by the State, the Appellant was confronted with the fact that his attire and that of his co-accused was the same as that appearing on the CCTV footage. His response was simply that *'I do not know'*. The Appellants version of happening to be at the wrong place at the wrong time is simply not probable and the Court *a quo* was correct is rebutting his version as false.

The learned magistrate descended into the arena by questioning the Appellant's co-accused.

[18] The questions asked by the Court *a quo* to the Appellant were very short. The Court *a quo* sought clarification in respect to how the Appellant came to Kempton Park, at which station he alighted, what time he was arrested and what time he had an appointment with Thembi. It was a total of six questions.

[19] The questions asked by the Court *a quo* to the Appellant's co-accused were not grossly irregular. They were merely questions which pertained to what was seen on the CCTV footage. These questions should have been posed by the Defence attorneys and the State. This Court finds the questions asked by the Court *a quo* were essential for a just decision of this case. Subsequent to the Court *a quo* questioning the Appellant's co-accused, both the Defence and the State had an opportunity to ask further questions, yet none were asked.

[20] For an irregularity to vitiate the proceedings, there must be a failure of justice [2].

[21] In the case of *S v Tyebela* 1989 (2) SA 22 (A), the learned Milne JA stated at page 29 that an accused person is entitled to a fair trial which;

"presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or procedure which the law requires"

[2] S v Moodie 1961 (4) SA 752 (A)

[22] In *S v le Grange* 2009 (1) SACR 125 (SCA) the learned Poonan JA at paragraph [21] stated that;

"It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial…Fairness and impartiality must be both subjectively present and objectively demonstrated…bias denotes a state of mind that is in some way predisposed to a particular result".

[23] In *S v May* 2005 (2) SACR 331 SCA the learned Lewis JA stated that;

"Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable."

[24] The questions posed by the Court *a quo* to the Appellant's co-accused were merely asked to obtain clarification. This Court does not find that the Court *a quo* lost its impartiality towards, or was biased against, either the Appellant or his co-accused. In fact, the record shows that whilst asking questions pertaining to what appeared on the CCTV footage, the Appellant's co-accused stated it was not him, to which the Court *a quo* replied *"I am not saying it is you, I am saying the same person that appears there on the CCTV was wearing the same thing as yours on that particular day, but the face is not clear"* [3]*.*

[25] For there to have been serious bias, this Court would have expected the Court *a quo* to have remarked, *"It is you"*, however, that is not what transpired. In the absence of the Appellant delineating clearly what prejudice ensued to him personally, as a result of the questions posed by the Court *a quo* to his co-accused, this Court finds the questions posed did not negatively impact on the impartiality of the Court *a quo.* Accordingly, no prejudice to the Appellant prevailed. This court cannot find that the Court *a quo* was predisposed to a particular result or that the Court had prejudged the matter. On the contrary, this court finds the questions posed, were fully justifiable to ensure fairness and justice.

[3] Page 38 line 19

[26] It is unfortunate that the Court *a quo* commenced the questions to the Appellant's co-accused by stating *"This guy is just wasting my time"*. This Court would like to utter a salutary warning that presiding officers should always exercise the utmost patience and respect when questioning any witness or accused in a trial. Words or phrases which are used with the intention of amounting to rudeness or disrespect, could in certain instances amount to an irregularity, thereby vitiating the proceedings. This court does not believe this case is one of those extreme situations.

The Appellant's rights in terms of section 35 of the Constitution were not explained prior to the Appellant's photo being captured on the cell phone of Mr Smart, thereby resulting that inadmissible evidence was accepted by the Court *a quo*.

[27] The admissibility of unconstitutionally obtained evidence is regulated by section 35(5) of the Constitution. The section provides as follows;

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[28] In terms of section 37(1)(d) of the Criminal Procedure Act, Act 51 of 1977, any police officer may "take a photographic image or may cause a photographic image to be taken of any" arrested person. Counsel for the Appellant argued that the Appellant's Constitutional rights were not explained prior to the photo being taken. Counsel for the Respondent argued that although an accused is usually informed of his Constitutional rights prior to his arrest, the complainant and the security officer, who were involved in the arrest, could not have had knowledge of such rights or the necessity of explaining them to the Appellant.

[29] Although this photo was taken by a security officer and not a police officer, this Court finds the photo aided the State witnesses in explaining their testimony as to what the Appellant and his co-accused where wearing. This photo substantiated the testimony of these witnesses and became probative evidence.

[30] The admissibility of the photograph was not disputed in the Court *a quo*. Accordingly, the evidence was not unconstitutionally obtained. Section 37(1)(d) of the Criminal Procedure Act, Act 51 of 1977 is not unconstitutional, and consequently not detrimental to the administration of justice. The Court *a quo* was correct in attaching the necessary evidential weight to the contents of the photograph.

[31] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court ***a quo's*** factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the court *a quo*. The State proved the guilt of the Appellant beyond reasonable doubt, and the court *a quo* correctly rejected the version of the Appellant as not reasonably possibly true.

AD SENTENCE

[32] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.

[33] A sentence imposed by a lower court should only be altered if;

i. An irregularity took place during the trial or sentencing stage.
ii. The trial court misdirected itself in respect to the imposition of the sentence.
iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.

[34] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[35] As was stated in the decision of *S v Malgas* 2001 (1) SACR 496 SCA;

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court."

[36] In the case of *S v Pillay* 1977 (4) SA 531 (A) at page 535 E-G, the court held that;

"..the essential inquiry in an appeal against sentence,…is…whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

[37] In *S v Salzwedel* and other 1999 (2) SACR 586 (SCA) at 588a-b, the Supreme Court of Appeal stated that an appeal court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.

[38] The following aggravating factors are present;

i. The Appellant was convicted of housebreaking in 2004 and 2008. He received six (6) years imprisonment in 2004 and six (6) years imprisonment in 2008, of which three (3) years were suspended. Both previous convictions originate in Kempton Park.
ii. The Appellant is an unrepentant and incorrigible criminal.
iii. The items which were valued at R16 000-00 were not recovered.

[39] The personal circumstances of the Appellant are the following;

i. He was twenty-nine (29) years of age, single and unemployed.
ii. He spent seven (7) months in custody awaiting the completion of his trial.

[40] No misdirection was alluded to, and neither can this Court say, that in light of the similar previous convictions that the sentence imposed by the Court *a quo* induces a sense of shock. The sentence imposed is not out of proportion to the gravity of the offence. In addition, the custodial sentences imposed on the previous convictions did not deter the Appellant.

[41] In the result, having considered all the relevant factors and the purpose of punishment I consider eight (8) years imprisonment to be an appropriate sentence.

[42] In the premises I propose the following; T
The appeal is dismissed both in respect to conviction and sentence.

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D DOSIO

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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S.E. WEINER

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant :		Adv. Z.T MADYIBI
Instructed by	:	The Legal Aid Board Zurich House 70 Fox Street Johannesburg
On behalf of the Respondent	:	Adv. M.T Ntlakaza
Instructed by	:	Director of Public Prosecutions Johannesburg
Date Heard	:	7 June 2016
Handed down Judgment	:	7 June 2016