IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A154 / 2018

[REPORTABLE]

In the matter between:

JUNIEL DAVIDS Appellant

and

THE STATE Respondent

Coram: **WILLE, J et SLINGERS, AJ**

Date of Hearing: **23rd November 2018**

Date of Judgment: **27th November 2018**

JUDGMENT

Wille, J et Slingers, AJ;

[1] Initially, this matter came before us by way of a petition against sentence only.[1] This is an extra-ordinary matter, involving "seemingly" a diluted set of facts, a strange conviction, coupled with two curious sentences. On the 14th of February 2018, after consideration of the petition against the sentences imposed, we granted an order for leave to the petitioner to pursue his appeal against both his conviction and his sentences.[2]

[2] It is this order[3] that deserves further attention and scrutiny, specifically within the legislative context that caters for the implementation of the minimum sentence provisions in respect of certain specified serious offences.[4] We formed the view that the sentences imposed by the court a quo were[5], as a matter of law, inextricably linked to the offence upon which the appellant was convicted. We held (albeit on petition), that in these special circumstances, leave fell to be granted against both the conviction and the sentences imposed. These proceedings are accordingly, in respect of an appeal against both the conviction and the sentences emanating from the Regional Court, in Cape Town.

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[1] The appellant filed a petition in terms of section 309 (C) as against his sentence only
[2] The order
[3] Granting leave to appeal against both conviction and sentence
[4] Act 105 of 1997
[5] In these particular circumstances

[3] The appellant was charged with and convicted on a single count of Housebreaking with Intent to Rob and Steal[6], and was sentenced as follows:

> Op die aanklag van Huisbraak met die Opset om te Roof
>
> "Ses (6) jaar gevangenisstraf"
>
> Op die aanklag van Roof met Verswarende Omstandighede
>
> "Ingevolge Artikel 51(2)(a)(i) Wet 105 van 1977, Vyftien (15) jaar gevangenisstraf"

[4] The appellant was legally represented in the court a quo and tendered a plea of guilty to the charge as preferred by the respondent. A statement in terms of section 112(2)[7] was offered up on behalf of the appellant and recorded the following:

> "I the undersigned, Juniel Davids, declares herewith and states as follows:
>
> 1. I am an adult male and the accused in this matter.
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> 2. I make this statement freely and voluntarily, and without any undue influence thereto. I understand my right to remain silent and hereby waive such right while being of sound and sober mind.
>
> 3. I am aware of the chargers contained in the charge sheet, I am familiar with the contents thereof and I understand the chargers against me.
>
> 4. I admit that I plead guilty to one count of housebreaking with the intention to rob and robbery with aggravating circumstances[8].
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> 5. On the 12th of February 2017, I was at 12 Union Street, Gardens, which is in the Regional Division of the Western Cape.

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[6] With aggravating circumstances as intended in terms of section (1) of Act 51 of 1977

[7] In terms of Act 51 of 1977

[8] The following words "with aggravating circumstances" were inserted via a handwritten amendment which amendment was signed by the appellant. Annexure "A", page 39 of the record.

6. On the said occasion I was walking pass the aforementioned building when I noticed that a window on the second floor balcony was open. I then proceeded to climb up onto the balcony and opened the window wider so that I could enter into the aforementioned property. I entered into the main bedroom where I took a cell phone and watch as I was still busy the complainant jumped up and screamed and I immediately fled and as I did so I pushed[9] the complainant off her feet as I ran out of the property. Shortly thereafter I was apprehended and arrested.

7. It was my intention to act in the said manner and in doing so I wanted to enter the property unlawfully and deprive the complainant now known to me as Lauren Cartwright, permanently of her cell phone and watch.

8. I knew that my actions were unlawful and therefore punishable by law.

9. I admit that I had no right, permission or lawful reason to act in that manner.

10. While at the time I was under the influence of intoxicating substances such as methamphetamine commonly known as tik, I still knew the differences between right and wrong.

11. My legal representative has explained the consequences of making such a statement and notwithstanding that I still want to make this statement"

[5] This plea[10] was accepted by both the respondent and the court a quo and was consequently received into evidence as exhibit "A". In his notice of appeal (as amended), the appellant, inter alia, submits that he did not admit to all the elements of the crime of "Robbery with Aggravating Circumstances" and that based on the accepted content of the statement offered up[11], his conviction was wrong in law.

[6] In terms of section 1 of the Criminal Procedure Act[12], aggravating circumstances are defined for the purposes of robbery, as:

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[9] By way of a handwritten amendment duly signed by the appellant, the word "bumped" was substituted with the word "pushed".
[10] As tendered by the appellant
[11] In terms of section 112 (2) of Act 51 of 1977
[12] Act 51 of 1977

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm

[7] The definition of "aggravating circumstances" do not pertain to the definition of robbery. Rather, the definition of "aggravating circumstances" are relevant to the sentence that may be imposed and not whether the robbery took place.[13] Aggravating circumstances are facts that objectively exist.[14] In this case, the objective fact is that the appellant pushed the complainant off her feet when he fled the premises so as to facilitate his escape. The question that arises is whether this suffices to constitute aggravating circumstances, as legislatively defined.

[8] The respondent submits[15] that the "aggravating circumstances" is that portion in terms of which the complainant was "pushed down the stairs". This, does not appear from the facts set out in the plea accepted by the court a quo and the respondent and on which the appellant was convicted. The accepted facts are that:

> "I pushed the complainant off her feet as I ran out of the property"

[9] It is common cause on the facts of the pleaded and accepted stated case, that:

(i) the appellant did not wield a fire-arm or any other dangerous weapon;

(ii) the appellant did not threaten to inflict grievous bodily harm to the complainant, Lauren Cartwright; and

(iii) the complainant had not suffered any grievous bodily harm.

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[13]Minister of Justice and Constitutional Development and Another v Masinggili (CCT 44/13) [2013] ZACC 41
[14]Minister of Justice and Constitutional Development and Another v Masinggili (CCT 44/13) [2013] ZACC 41
[15] In the Heads of Argument

[10] Consequently, it follows that the act of pushing the complaint off her feet does not objectively establish "aggravating circumstances" as defined in section 1(1)(b) of the Criminal Procedure Act, Act 51 of 1977.

[11] In dealing with the appellant during the sentencing proceedings the court a quo makes the positive statement that the appellant was found guilty and convicted of two distinct offences.[16] This is a serious misdirection and this misdirection is regrettably perpetuated when the sentences are imposed upon the appellant. A single charge of housebreaking with intent to rob and robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 was put to the appellant.[17] The appellant pleaded guilty thereto[18] and was consequently convicted of a single offence. [19]

[12] In sentencing the appellant, the court a quo, took the two components of the single charge and imposed a sentence in respect of both components. This is evident from the following excerpt:

> **"**Ek het the applicant skuldig bevind of een aanklag wat bestaan uit twee komponente naamlik huisbraak met die opset om te roof en roof met verswarende omstandigheded en ek het die vonnis opgelê ten opsigte van hierdie komponente"[20]

[13] Both components of the offence arose from a single incident. By imposing sentences in respect of both components of a single offence, this had the unfair result of a duplication of the punishment imposed upon the appellant.[21]

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[16] Line 22, page 20 of the record.
[17] Annexure "A", page 3 of the record.
[18] Line 10, page 3 of the record.
[19] Lines 21-24, page 5 of the record.
[20] Lines 11-19, page 34 of the record.
[21] Maseti v S (353/13) [2013] ZASCA160 (25 November 2013)

[14] In considering the petition on sentence, we considered, inter alia, the legislative framework as set out as follows:[22]

> **"(**1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction";
>
> and
>
> "(1) Subject to section 15(1), the Constitution and any other law–
>
> (b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal"[23];

[15] The issue of whether a Supreme Court of Appeal is vested with the appropriate jurisdiction to entertain the appeal on the merits[24] under the circumstances similar to this matter was considered in ***Dipholo***.[25] The appellant in this instance, had been granted special leave after his application for leave to appeal by way of petition had been refused and no appeal on the merits had been adjudicated in the High Court. In our view, the ultimate test for a High Court to adopt on petition[26], is whether or not, there are reasonable prospects of success in the envisaged appeal.

[16] Section 309C (8)[27] also specifically provides as follows:

> "(8) All applications contained in a petition must be disposed of –

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[22] Section 309(1)(a) of the Criminal Procedure Act
[23] Section 16(1)(b) of the Superior Courts Act
[24] In connection with a conviction
[25] Dipholo v S [2015] ZASCA 120
[26] In connection with the merits of the conviction and/or the sentence
[27] The Criminal Procedure Act

(a) as far as possible, simultaneously: and

(b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended"

[17] Further, in our view, this is particularly significant where the sentence imposed upon the petitioner is inextricably linked to the petitioner's conviction[28], the court[29], in such circumstances, is enjoined to deal with the "merits" of the petition. In discharging our judicial duties, we have a constitutional obligation to do so in accordance with the principles, purport and objective of the Constitution. Sections 173, 35(3)(o) and 12(1)(a) are relevant to the case at hand and have informed our approach to the matter.

[18] In accordance with the provisions of section 173 of the Constitution, Higher Courts are prescribed to take into account the interests of justice when developing the common law and in exercising their inherent powers to protect and regulate their own process.

[19] Furthermore, in terms of section 35(3)(o) of the Constitution, the right to a fair trial includes the right to an appeal or to a review by a Higher Court. Section 12(1)(a) of the Constitution guarantees the right not the be deprived of freedom when that deprivation is either arbitrary or without just cause.

[20] In the present matter the sentences imposed are intrinsically linked to the conviction[30]

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[28] Section 51(2)(a)(i) of the Criminal Law Amendment Act, Act 105 of 1997 which reads as follows:
Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
(a) Part II of Schedule 2, in the case of- (i) a first offender, to imprisonment for a period not less than 15 years

[29] The High Court

[30] The minimum sentence provisions only find application following a conviction of robbery with aggravating circumstances.

[21] If the appellant's conviction of robbery with aggravating circumstances is allowed to stand, it would follow that the provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997, would be applicable and the minimum sentence of fifteen (15) years' imprisonment would have to be imposed, unless the appellant showed substantial an compelling circumstances why it should not be imposed. [31] Thus, even if the petition against sentence was successful, without granting leave to appeal against the conviction, the starting point for imposing an appropriate sentence would be the 15 years imprisonment with the appellant bearing the onus to show compelling and substantial reasons why the 15 years prison sentence should not be imposed. This position is untenable.

[22] In this matter no objective facts establishing aggravating circumstances during the robbery were presented. Therefore, a conviction in respect of robbery with aggravating circumstances could not be sustained. It would be a breach of our judicial office and constitutional duty, especially in respect of the constitutional right set out in section 12(1)(a), to consider the sentence of the petitioner in a vacuum, especially in circumstances where the sentence is inextricably linked to a conviction, which appear on the fact of it to be, erroneous or irregular. We are not expected to indulge in an exercise of "legal gymnastics" to consider and pronounce upon a sentence on appeal, in isolation, in circumstances where the underlying basis for the sentence, namely the conviction, may be suspect. The SCA,[32] in AD v The State[33] called for:

"thought to be given to legislative reform so that petitions can be finalized speedily at the High Court level"

[31] Section 51(3)(a) of Act 105 of 1997.
[32] The Supreme Court of Appeal (previously the Appellate Division)
[33] (334/2011) [2011] ZASCA 215

[23]. In S v Bogaards[34], the Constitutional Court held that an appellate court's power to interfere with sentences imposed by lower courts is as follows:

"It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it"

[24] In Van Wyk and Galela[35], it was held that a Court of Appeal may interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence this court would have imposed, was such that interference was competent and required. We are of the view that this is a case where there is a sufficient degree of disparity between the sentence imposed and what this court would have imposed to justify interference. When regard is had to all the facts of the present case, the sentence of fifteen (15) years' imprisonment, plus a further six (6) years' imprisonment is so disproportionate and shocking that no reasonable court would have imposed it.

[25] What is of significance is the manner in which the court a quo sentenced the appellant for two offences, after having convicted him only on a single offence and thereafter, applied the minimum sentence provisions when imposing sentence, in addition to the sentence imposed in respect of the "additional" offence. In the end, one is left in the dark about what the trial court's opinion was with regard to the actual offence to which the guilty plea was tendered and accepted.

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[34] 2013 (1) SACR 1 (CC)
[35] Van Wyk v S and Galela v S 2015 (1) SACR 584 (SCA)

[26] It follows that the appeal against conviction and sentence must succeed. In the result the following order is made:

1. **The appeal in connection with both the conviction and sentences is upheld.**

2. **The conviction and sentences of the court a quo are set aside and are substituted with the following:**

> **"The appellant is convicted of Housebreaking with Intent to Rob and Robbery and is sentenced to six (6) years imprisonment to run with effect from the 15th of November 2017"**

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WILLE, J

I agree,

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SLINGERS, AJ