REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A69/2013

6/12/2013

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

2014·01·09.
DATE

SIGNATURE

In the matter between:

VUSIMUSI FRANS MKHATSHWA Appellant

and

THE STATE Respondent

J U D G M E N T

MAKGOKA, J:

[1] This appeal, with leave of this court, is against the conviction and the sentence. The appellant was convicted in the regional court, Ermelo of two counts, being housebreaking with intent to steal and theft (count 1), and theft (count 2). He was sentenced to four and three years' imprisonment, respectively, in respect of the two counts. The sentences were ordered to run consecutively, culminating in an effective period of seven years' imprisonment.

[2] Three witnesses testified for the state in the regional court. The appellant testified in his own defence and called no further witnesses. With regard to count 1, it was common cause, or could not be disputed, that on 10 May 2011, Mr Petros Nkomo's house was broken into, during which a DVD player and a cellphone were stolen. The DVD player was later recovered by the police. The state alleged that the appellant was the culprit, which he denied, and pleaded *alibi*. With regard to count 2, it was common cause that the appellant had approached the wife of the complainant, Mr Maluleka, and informed her that the latter had borrowed him a laptop computer (computer), and sought the wife's permission to remove the computer from the complainant's house. The appellant gave a plea explanation in respect of each count.

[3] In respect of count 1, he stated that one Ntokozo had approached him on the day of the housebreaking, with a request to assist him to find a purchaser for a DVD player, which he alleged belonged to him (Ntokozo). With regard to count 2, the appellant stated that he borrowed the computer from the complainant, but could not return it on the agreed day for reasons beyond his control.

[4] In count 1, Ms Busisiwe Masina, testified for the state that, on the day of the incident, in the morning, she was at her house doing laundry. After Mr Nkomo, the complainant, had left the house, she saw the appellant and Ntokozo, walking along the road. She did not know the appellant, nor seen him before. She later observed the appellant sitting on a wooden stump in close proximity to Mr Nkomo's house. As she walked past the appellant on her way to fetch water from a nearby water pump, the appellant asked her where she was going. She ignored him and proceeded to the water pump. Whilst there, she observed that Mr Nkomo's house was open. She saw the appellant exit the house, with something hid under his jacket, and ran away. The door of her house is opposite to, and approximately 4 to 5 metres from, that of Mr Nkomo.

[5] With regard to count 2 (theft), the complainant, Mr. Maluleka and Mr. Maseko testified for the state. Briefly, Mr. Maluleka testified that the appellant had attempted on several occasions to sell him a printer. On each occasion he indicated to the appellant that he did not have money to buy it. On one occasion, in his absence, the appellant arrived at his house and falsely informed his wife that he (Mr Maluleka), had given him permission to borrow his computer, and for him to return it at 13h00 the same day. The appellant did not return the computer as promised. He reported the matter to the police. Some days later he found a hand-written note under his door, written by the appellant, in which the appellant apologised for taking the computer, and directing Mr Maluleka to collect the computer the following day from a Mr Maseko. When he approached Maseko, the latter confirmed to him that he had bought the computer from one Vusi for R800.

[6] On behalf of the appellant, the conviction on both counts is attacked on the alleged insufficiency of the evidence. In respect of count 1, it is submitted that the failure of the state to call Ntokozo and the person to whom the DVD was sold (identified as Gospel) was fatal to the state' case. In respect of count 2, it is submitted that the appellant's version in the theft count is reasonable and possibly true, and further corroborated by the state's own witness. The state supports the conviction on both counts. I find no merit in the submission concerning count 1.

[7] Ms Masina was a single witness in respect of count 1. In terms of s 208 of the Criminal Procedure Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.

[8] Although Ms Masina was a single witness, her evidence finds corroboration in other common cause facts, in particular that the appellant placed himself on the scene of the

incident on the day of the break-in into Mr Nkomo's house. Ms Masina's evidence that she also saw Ntokozo with the appellant near the scene shortly before and after the break-in, and the fact that later the appellant and Ntokozo dealt with the property stolen from Mr Nkomo's house, fit in neatly into the state's case against the appellant. In my view, it was correctly rejected as not being reasonably possibly true.

[9] As to the identification of the appellant by Ms Masina, I unable to find fault with the finding of the learned magistrate. There is no discernable material misdirection. It must be borne in mind that Ms Masina had at least four opportunities in a space of short space of time to observe the appellant. She first saw him when he walked along the road with Ntokozo; she later observed him when he sat on a wooden stump; thirdly, when he walked past her and spoke to her; lastly when the appellant emerged from Mr Nkomo's house with something hidden under his jacket. On all these occasions, she was close enough for her to make a reliable observation. The incident took place at 8h30 in the morning and visibility was clear. It is therefore clear that Ms Masina and the appellant were so close to each other and which enabled her to properly identify the appellant.

[10] With regard to count two (theft) the appellant's explanation is that he intended to use Mr Maseko's computer temporarily, and that he had intended to return it on a specific day. Due to circumstances beyond his control, he was unable to do so. His explanation is reasonably possibly true, and in the absence of anything to the contrary, it must be accepted. It is not inherently far-fetched or so untenable as to be rejected summarily. However, his conduct constitutes a crime in terms of s 1(1) of the General Law Amendment Act 50 of 1956, which reads:

> 'Any person who, without a bona fide claim of right and without the consent of the owner or the person having control thereof, removes any property from the control of the owner or any other person competent to give such consent, whether or not he intends throughout to return the property to the owner or person from whose control he removes it, shall, unless it is proved that such a person, at the time of

the removal, had reasonable grounds for believing that the owner or such other person would have consented to such use if he had known about it, be guilty of an offence and the court convicting him may impose upon him any penalty which may lawfully be imposed for theft.'

[11] In the result, the conviction on the count of theft should be substituted with one of contravening the above section, which is a competent verdict to the count of theft.

[12] As stated in the introduction, the appeal is also directed against the sentences, to which I now turn. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court.[1]

[13] With regard to count 1, I find no misdirection in the manner in which the learned magistrate considered sentence. On count 2, having found that the evidence did not establish theft, but a contravention of s 1(1) of the General Law Amendment Act referred to above, the sentence should be adjusted accordingly. In my view, it would still serve the aims of punishment by suspending wholly, the sentence of 3 years on suitable conditions. In the light of this conclusion, it is not necessary to consider whether or not the learned magistrate misdirected himself in not ordering the sentences to run concurrently.

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[1] See generally: *S v Pillay* 1977 (4) SA 531 (A) at 535E-F; *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.

[14] In the result I make the following order:

1. The appeal against the conviction in respect of count 1 (house-breaking with intent to steal and theft) is dismissed;
2. The appeal against the conviction in respect of count 2 (theft) is upheld. The conviction is set aside and replaced with the following:

   'The accused is guilty of contravention of section 1(1) of the General Law Amendment Act, 50 of 1956.'
3. The appeal against the sentence imposed in respect of count 1 is dismissed;
4. The sentence imposed in respect of count 2 is confirmed, but subject to the following:

   'The sentence imposed in respect of count 2 is wholly suspended for a period of 5 years on condition that the accused shall not, during the period of suspension, be convicted of theft or any of its competent verdicts.'

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

K MANAMELA
ACTING JUDGE OF THE HIGH COURT

DATE HEARD	**: 2 DECEMBER 2013**
JUDGMENT DELIVERED	**: 19 DECEMBER 2013**
FOR THE APPELLANT	**: MR J VAN ROOYEN**
INSTRUCTED BY	**: JUSTICE CENTRE, PRETORIA**
FOR THE STATE	**: ADV AP WILSENACH**

INSTRUCTED BY	: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA