

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A124/15

Not Reportable

Not of interest to other Judges

In the matter between:

ABSALOM MDUDUZI MASEKO

Appellant

and

THE STATE

Respondent

J U D G M E N T

MADIMA, AJ:

[1] The appellant appeals against his conviction and sentence with leave of the trial court which sentenced him to eight (8) years imprisonment.

AD CONVICTION

[2] The appellant was placed at the crime scene by his uncontested finger-prints lifted up from a window pane and a bottle of wine. In explaining the defence to the crime, counsel for the appellant at trial proceedings stated the following:

"Your Worship the accused will come and testify that he knows nothing about of this housebreaking and theft. He is linked to this crime through a fingerprint that was found on the premises and he will explain that during the period he was working in the garden and do and also did painting jobs and he

*believe that this house of the complainant was one of the houses that he worked at, as it pleases the court."*¹

[3] The above explanation simply meant that the finger-prints were not left at the scene as a result of unauthorized breaking in.

[4] The complainant, Mrs. Emmarentia Maria, testified that the appellant looked familiar. She could nevertheless, not say with certainty, that she knew the appellant nor could she vehemently say that she had previously hired him to perform piece jobs at her house. She testified that on the 25 December 2010 she received cell phone call from her neighbour, Mr. Van Staden, about the housebreaking at her house. Sadly, Mr. Van Staden had already passed on at the time of her giving evidence. She received the above housebreaking report when she was away on holiday with her husband.

[5] An immediate month prior to breaking in, the window panes were thoroughly cleaned by Ms. Paulina. Mr. Petrus, a gardener and Ms. Paulina, assisting in the house, were the only people working for the complainant immediate three months before the incident.

[6] When they came back from holiday on the above date, complainant and her husband found that the house was ransacked. A large sitting room window pane through which entry was gained was completely removed. The liquor cabinet was opened and emptied liquor bottles were thrown all over the floor. Inside the house inclusive of sitting, bed and spare rooms, a number of goods to the total value of R34000, 00 were missing. Goods, save those found at the bush, were not recovered.

¹ Page 2 of record.

[7] During cross-examination of the complainant, the version was put to her that the appellant worked for her in 2010 prior to commission of housebreaking.

[8] The evidence of the complainant about thorough cleaning of window panes remained uncontested. Further uncontested evidence was that the window panes were cleaned immediate month before the incident of the housebreaking. The above evidence excluded all possibilities of having the fingerprints of the appellant present at the scene, in particular on the window panes.

[9] In his plea explanation, no indication was made whatsoever that the appellant was also responsible for organising the furniture in the house. The only evidence presented was that he was responsible for gardening and painting. The evidence about his role in respect of house furniture only surfaced as he was being cross-examined and [my inference] such evidence was tendered to explain the presence of finger-prints on a liquor bottle. The disturbing feature about the reliability of his evidence on the above aspect is that witnesses for the State came and left without being confronted with such version.

[10] As far as I understand the plea explanation, finger-prints were left during application of paint on the window-frames. The following passage is worth quoting:

Court: *"But the prosecutor is saying to you, that windowpane on which your fingerprint was found, was an unpainted window frame, so how can your fingerprint be on it?...In that regard Your Worship, at this stage I cannot recall exactly which window did I paint. Because amongst the windows of the house that I, some of them I was doing the painting on, others it were, I was doing the filling of the cracks. So I would not know which one is it exactly that she is referring to."*²

² Page 33 , lines 15-21 of record.

[11] Surprisingly, the lifted fingerprints were on the unpainted window. The appellant could not explain the presence of his finger-prints on unpainted window. It was at that moment when he gave a version about filling the cracks in the house as well. This, I consider to be a framed version by the appellant. This was completely new evidence which also never emerged during his evidence in chief and was not put to the state witnesses when they testified.

[12] The finger-prints expert testified that the finger-prints were still 'fresh'. The possibilities of having the accused's finger-prints on the window pane, if he worked there before, and regard being had to the fact that he never worked for the complainant immediate three months before the incident and that window panes were thoroughly cleaned, were zero. It is my considered view that the finger-prints were left at the scene during commission of this crime.

[13] The approach in the assessment of the evidence did not fall foul of the *dictum* in the case of *S v Chabalala*³ where the appeal court said:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude a reasonable doubt about the accused's guilt."

Having considered the totality of the evidence and in particular the concession by counsel for the appellant that conviction was in order I am persuaded that the court *a quo* correctly rejected the version of the appellant. It was in all respects not reasonably possibly true and it stood to be rejected.

³ 2003 (1) SACR 134 (SCA) at 139i-140d at para [15]

AD SENTENCE

[14] In *S v RO & Another*⁴ Heher JA stated as follows:

'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality.) The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence...'

[15] Counsel for the appellant argued that the sentence of eight (8) years imprisonment was shockingly harsh and inappropriate. In advancing her argument further, she submitted that the sentence should have been eight (8) years and that the three (3) years of the eight (8) years should have been suspended.

[16] Sentencing is pre-eminently in the discretion of the trial court and the appeal court can only interfere with the imposed sentence if the appellant is able to persuade the appeal court that there was misdirection or irregularity on the part of the trial court or that the sentence was shockingly disproportionate to the imposed sentence. (*S v Rabie*)⁵.

[17] In mitigation of sentence it was submitted that the appellant was 22 years old at the time sentence was imposed on him. He was unmarried. He had a two year old child who stays with his mother and he used to perform piece jobs. He was arrested on the 24 February 2014 but could not apply for bail because he had a pending case against him.

[18] Submissions made in aggravation of sentence were that the appellant has a previous conviction of two counts of housebreaking with intent to steal and theft

⁴ 2010 (2) SACR 248 (SCA) at [30]

⁵ 1975 (4) SA 855 (A)

which offences were committed in 2009. He was convicted of the above offences and sentenced in terms of the provisions of Section 276 (1) (i) of the Criminal Procedure Act⁶. The appellant committed the present offence a year and seven months after he was sentenced for the above mentioned offence. The appellant did not co-operate with the police. He could have pleaded guilty. The State had to conduct investigations. The time spent in custody while awaiting trial was not occasioned by fault on any arm of the law. The value of stolen items was huge and most of the stolen items were not recovered. He was not the first offender and the previous conviction is relevant in that he was convicted of the same offence.

[19] In *S v Muanye and Others*⁷ Stegmann J said:

"An incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with housebreaking as a factor that tends to aggravate the seriousness of the offence and therefore the severity of the sentence."

[20] In *S v AU & Others*⁸ Mabuse J stated:

"...Courts are the instruments through which society exerts punishment on offenders, and the punishment that the courts impose on them must accordingly reflect the deep abomination with which...society regards such serious crime. The court should not shy away from or shirk the duty that the community has placed on it to mete out punishment to people who, for reasons of avarice, such as in the current case, show scant regard for the rights of others, and who have the audacity to violate the sanctity of others' homes."

[21] The aggravating factors in this case, far outweigh, the mitigating factors. I find the sentence to be proportionate to the offence committed. I therefore do not find any misdirection on the part of the court *a quo*.

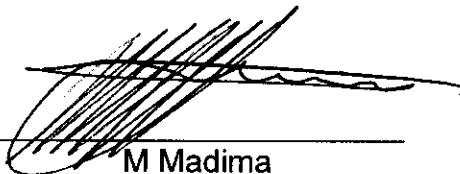
⁶ 51 of 1977

⁷ 2002 (1) SACR 266 T at 277F-278B

⁸ 2014 (2) SACR 91 (GP) at [14]

[22] Having said the above I propose the following order:

22.1 The appeal against conviction and sentence is dismissed.



M Madima
Acting Judge of the High Court

I agree

And it is so ordered



MJ Teffo
Judge of the High Court

Appearances:

For the Appellant: Adv M.C Ndalane

Instructed by Pretoria Justice Centre, Pretoria

For the Respondent: Adv. H Creighton

Instructed by Director of Public Prosecutions, Pretoria

HEARD: 31 AUGUST 2015

DELIVERED: 04 SEPTEMBER 2015