THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 168/11

In the matter between:

FANIE MASENYE MOSWATHUPA Appellant

and

THE STATE Respondent

Neutral citation: *Fanie Masenye Moswathupa v The State* (168/11) [2011] ZASCA 172 (29 September 2011)

Coram: PONNAN, THERON and SERITI JJA

Heard: 8 September 2011

Delivered: 29 September 2011

Summary: Sentence – imposition of – appellant sentenced to 25 years' imprisonment for two counts of housebreaking – seriousness of the offence and the interests of society overemphasized – trial court failing to balance the mitigating factors against the aggravating factors also failing to have regard to the cumulative effect of the sentences – on appeal - sentence reduced to 16 years' imprisonment.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Van Rooyen AJ and Van Zyl AJ, sitting as court of appeal):

a The appellant's appeal against sentence succeeds to the extent set out below.

b The order of the court below is set aside and replaced with the following:

1. The appeal in respect of the appellant's convictions on counts 2 and 4 is upheld and those convictions and the sentences imposed pursuant thereto are set aside.

2. The appeal in respect of the appellant's convictions on counts 5 and 6 is dismissed.

3. The appeal against the sentence imposed in respect of counts 5 and 6 is upheld. Those sentences are set aside and in its stead is substituted:
On each of counts 5 and 6 the appellant is sentenced to imprisonment for a term of 10 years, four years of the sentence imposed on count 6 is ordered to run concurrently with the sentence imposed on count 5. The appellant is thus sentenced to an effective term of imprisonment of 16 years.

JUDGMENT

THERON JA (PONNAN and SERITI JJA concurring)

[1] The appellant stood trial on seven charges in the Regional Court, Pretoria. He was convicted on four of the charges, namely housebreaking with intent to rob and robbery with aggravating circumstances (count 2), rape (count 4), housebreaking with intent to rob and robbery (count 5) and housebreaking with

intent to commit an offence to the prosecutor unknown (count 6). He was sentenced to 15 years' imprisonment in respect of counts 2, 4 and 5, respectively and 10 years' imprisonment in respect of count 6. Certain of the sentences were ordered to run concurrently resulting in an effective period of imprisonment of 45 years. The appellant's appeal to the North Gauteng High Court, Pretoria (Van Rooyen and Van Zyl AJJ) was partially successful and the convictions in respect of counts 2 and 4 were set aside. The high court confirmed the convictions in respect of counts 5 and 6 and although it altered the conviction on count 6 to one of housebreaking with intent to commit theft, it left the sentences of 15 and 10 years, respectively imposed by the trial court unaltered. The appellant was thus sentenced to an effective term of 25 years' imprisonment. The appellant appeals against those sentences with the leave of the high court.

[2] Count 5 relates to an incident that occurred on 3 February 2000 at the home of the complainants, Dr and Mrs Kernell in Waverley, Pretoria. The appellant and his companions gained entry into the complainants' home, during the course of the night, while they (the complainants) were asleep. The complainants awoke to find intruders in their bedroom. Their hands and feet were bound while the intruders searched their home for items of value. One of the intruders allegedly indecently assaulted Mrs Kernell by touching her private parts. Several household items, including a television, hi-fi stereo, video machine, jewellery and a cellular phone, to the total value of R20 000, were stolen during the incident.

[3] Count 6 relates to an incident that occurred at the Buys' residence on 9 February 2000, also in Waverley, Pretoria. Just like the Kernells, Mr and Mrs Buys awoke during the course of the night to find intruders in their bedroom. Mrs Buys fired a shot at one of the intruders. She then gave the firearm to her husband who was being attacked by one of the intruders. Mr Buys emptied the magazine of the firearm thus causing the intruders to flee. But not before he, Mr Buys, sustained multiple stab wounds. A watch, radio and leather jacket were the only items stolen during the housebreaking.

[4] It is trite that sentencing is pre-eminently a matter for the discretion of the

trial court. An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or when the sentence imposed by the trial court is shocking and startlingly inappropriate.[1] In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy'.[2] In addition to that the court must also consider the main purposes of punishment, which are deterrent, preventive, reformative and retributive.[3] In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others'.[4]

[5] On appeal, it was contended, on behalf of the appellant that the trial court had over-emphasised the seriousness of the offence and the interests of the community and had failed to balance this against the personal circumstances of the appellant. The trial court, in its judgment on sentence, made reference to 'well-established principles' that it was required to apply in exercising its sentencing discretion, while also acknowledging the object and purpose of punishment. The court mentioned that the sentence must be commensurate with the gravity of the offence. The magistrate went on to refer to the court's duty, when imposing sentence, 'to promote a respect for the law… [to] reflect the seriousness of the offence and provide just punishment for the offender, taking into account the personal circumstances of the offender'. The court noted that citizens have a right to security and to feel safe in their own homes. The court concluded that an appropriate sentence was one that would 'send [the appellant] to jail for a long time so that when you come back, you should be an old man who is here to uphold the law'. The judgment of the high court on sentence is not particularly helpful. It dealt with the question of sentence in one brief paragraph, as follows:

'In so far as punishment is concerned, I believe that given the circumstances under which the housebreakings were committed (in the dark of the night and with people in their homes

1 See *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.
2 Per Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.
3 See *R v Swanepoel* 1945 AD 444 at 455. *S v Whitehead* 1970 (4) SA 424 (A) at 436F-G; *S v Rabie* at 862A-B; *S v Banda* 1991 (2) SA 352 (BG) at 354E-G;
4 *S v Banda* at 355A-B.

attempting to protect themselves by way of burglarproofing; callous conduct from persons moving into the privacy of their homes) I have no doubt that the sentences of 15 years for count (5) and ten years for count (6) should be confirmed.'

[6] In my view, there was a clear misdirection on the part of the sentencing court. The court failed to have regard to the mitigating factors operating in favour of the accused. The trial court committed the classic error of merely reciting the 'well established principles' that ought to be taken into account when determining an appropriate sentence, but failed to properly apply these principles to the particular circumstances of this matter. The court failed to have regard to the fact that the appellant was a first offender and that he had spent 34 months in custody awaiting trial. The court instead over-emphasised the seriousness of the offence of housebreaking and the interests of society. In *S v Blignaut* 2008 (1) SACR 78 (SCA) this court was faced with a similar misdirection. Ponnan JA, writing for the court said:

'[T]he many mitigating factors that were present were not afforded appropriate recognition by the magistrate, nor were they balanced against what he perceived to be the aggravating features in the commission of the offences. It follows that the sentence imposed by the magistrate falls to be set aside and this court is accordingly free to impose the sentence it considers appropriate ….'[5].

In *S v Van de Venter* 2011 (1) SACR 238 (SCA) where the trial court had failed to have regard to relevant mitigating factors, Ponnan JA dealt with the matter in the following terms:

'None of the mitigating factors that I have alluded to merited even a mention in the judgment of the trial court. They ought to have. Nor were they balanced against what were perceived to be the aggravating features in the commission of the offences. In failing to afford any recognition to those factors in the determination of an appropriate sentence, the trial court disregarded the traditional triad of the crime, the offender and the interests of society. Instead, the learned judge appears to have emphasised the public interest and general deterrence in arriving at what he considered to be a just sentence, whilst ignoring the other traditional aims of sentencing — such as personal deterrence, rehabilitation and reformation.'[6]

It follows that as the trial court materially misdirected itself, intervention on the first

5 Para 6.
6 Para 15.

leg is justified.

[7] There appears to be no reasonable explanation for the five year disparity between the sentences imposed in respect of counts 5 and 6. Both counts relate to housebreakings which were carried out in a similar manner. During the incident at the Buys' residence, Mr Buys was stabbed and seriously injured, yet a sentence of ten years' imprisonment was imposed in respect of this offence. While the Kernell incident had the additional element of an indecent assault, none of the complainants were injured during the course of the housebreaking. The additional element of indecent assault at the Kernell residence was not such as to warrant the imposition of an additional five years' imprisonment. Further it needs to be borne in mind that 15 years is the outer limit of the regional court's ordinary penal jurisdiction. Count 5 hardly qualifies for the maximum sentence that the regional court can impose.

[8] It is clear from their judgments on sentence that the regional court, as well as the high court, had failed to have regard to the cumulative effect of the sentence. In my view, the effective sentence of 25 years' imprisonment, is shockingly inappropriate. It is trite that punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy. In *S v V* 1972 (3) SA 611 (A) at 614D-E, Holmes JA emphasised that 'the element of mercy, a hallmark of civilised and enlightened administration**,** should not be overlooked'. Holmes JA added that mercy was an element of justice and referred with approval to *S v Harrison* 1970 (3) SA 684 (A) at 686A, where the learned judge had said that, '[j]ustice must be done; but mercy, not a sledge-hammer, is its concomitant'. Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together.[7] When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.

[9] It is so that housebreaking is an extremely prevalent offence and it is in the general public interest that sentences imposed in these matters should act as a

7 *S v Johaar* 2010 (1) SACR 23 (SCA) para 14.

deterrent to others. The message needs to go out to the community that people who commit these types of offences will be dealt with severely by the courts. However, in *S v Skenjana* 1985 (3) SA 51 (A) at 54I-55E, Nicholas JA endorsed the sentiments expressed by Holmes JA in *S v Sparks* 1972 (3) SA 396 (A) at 410G, to the effect that '[w]rongdoers "must not be visited with punishments to the point of being broken"'. It is clear from the following remarks that deterrence and retribution was at the forefront of the magistrate's mind:

'I want to send you to jail for a long time so that when you come back, you should be an old man who is here to uphold the law.'

[10] An effective period of imprisonment of 25 years is a very severe punishment which should be reserved for particularly heinous offences (*Muller v The State* [2011] ZASCA 151. The two charges of housebreaking in respect of which the appellant was convicted, while serious offences are not the most heinous of offences. In my reconsideration of the matter and having regard to the nature of the offences, the circumstances of the appellant and the interests of society, an effective term of 16 years' imprisonment would be just and fair.

[11] In the result, the following is made.

a The appellant's appeal against sentence succeeds to the extent set out below.

b The order of the court below is set aside and replaced with the following:

1. The appeal in respect of the appellant's convictions on counts 2 and 4 is upheld and those convictions and the sentences imposed pursuant thereto are set aside. Those sentences are set aside and in its stead is substituted:

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L V THERON

JUDGE OF APPEAL

Appearances:

Appellant:	L Augustyn

Instructed by: Legal Aid Board, Pretoria
Legal Aid Board, Bloemfontein

Respondent: P Nkuna
Instructed by: Director of Public Prosecutions, Pretoria
Director of Public Prosecutions, Bloemfontein