THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 506/2011

In the matter between

ADRIAAN KRUGER **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Kruger v S* (506/11) [2011] ZASCA 219 (29 November 2011)

Coram: **HARMS AP, SHONGWE JA and PLASKET AJA**

Heard: **23 November 2011**

Delivered: **29 November 2011**

Summary: Sentence – multiple charges – cumulative effect of the sentences – harsh and disproportionate – appeal court entitled to interfere – period spent by accused person awaiting trial also to be taken into account.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Botha and Du Plessis JJ sitting as court of appeal):

1 The appeal is upheld

2 The sentences imposed by the court below are set aside and replaced by the following:

a) 'On counts 1, 3, 4 and 10 (counts of housebreaking with intent to steal and theft) the accused is sentenced to 4 years' imprisonment on each count.

b) On counts 5 and 11 (a count of theft and of contravening s 36 of the General Law Amendment Act 62 of 1955) the accused is sentenced to 3 years' imprisonment on each count. These sentences will run concurrently with the sentences in (a) above.

c) On count 6 (a count of robbery) the accused is sentenced to 4 years' imprisonment. This sentence will also run concurrently with the sentences in (a) above.

d) It is ordered that all the sentences be antedated to 24 February 2000.

e) Three years of the sentence on count 10 is to run concurrently with the sentence on count 4 in (a) above'.

JUDGMENT

SHONGWE JA (HARMS AP, PLASKET AJA concurring)

[1] The appellant was 22 years old when he was arrested on 19 June 1996. He was charged in the regional court Pretoria with twelve counts, namely counts 1, 2, 3, 4, 8 and 10 of housebreaking with intent to steal and theft, counts 5, 7, 9 and 11 of theft, count 6 of robbery and count 12 of the contravention of s 48(1) of the Correctional Services Act 8 of 1959 (escaping from lawful custody). He initially pleaded not guilty to all the charges. During the trial he changed his plea to that of guilty on five charges. He was ultimately convicted on seven counts, namely four of housebreaking with intent to steal and theft for which he was sentenced to 4 years' imprisonment on each count; one count of theft and one count of contravening s 36 of the General Law Amendment Act 62 of 1955 for which he was sentenced to 3 years' imprisonment on each count and one count of robbery for which he was sentenced to 8 years' imprisonment. Effectively he had to serve 30 years' imprisonment.

[2] His application for leave to appeal against both conviction and sentence was refused. He petitioned the Judge President of the North Gauteng High Court. Leave against sentence only was granted. The court below confirmed all the sentences save for the sentence on the robbery charge which was set aside and replaced with a sentence of 4 years' imprisonment.The court below reasoned that the robbery

concerned was not the usual one where excessive violence is involved. It likened the particular robbery to handbag snatching. Effectively he had to serve 26 years' imprisonment. This appeal is before us with leave of the court below.

[3] The appellant contends that the cumulative effect of the sentences is so harsh and disproportionate that it entitles this court to interfere: furthermore that 'the period spent in custody pending the outcome of the trial should be taken into consideration for purposes of sentence'. The State on the other hand contends that both these factors were considered by the trial and high court when imposing sentence.In my view the trial court may have said that it considered the cumulative effect of the sentences but the ultimate sentences imposed are not reflective of such consideration.

[4] It is not necessary, for the purpose of this judgment, to deal in any detail with the individual offences committed. Suffice it to mention that 8 months after the expiry of his parole the appellant started with a series of housebreakings and theft. At the end of it all he approached an old woman and pretended to be inquiring about something and when she was distracted he snatched her handbag and ran away. His conduct is classified as robbery, though with minimal violence. What is significant is that all these offences occurred within a very short space of time. Five of the housebreakings took place in June 1996. The possibility that he was indeed, under the influence of alcohol or drugs cannot be excluded. The estimated value of the items stolen is in the region of R124 350.00 which a substantial amount is considering that all this happened within a period of 4 to 5 months.

[5] When dealing with sentence the trial court considered the triad as espoused in *S v Zinn*1969 (2) SA537 (A) at 537-540G, that is, the personal circumstances of the appellant, the seriousness of the offences and the interest of society. It also considered that the appellant was taking care of his sick father and mother. It was contended on behalf of the appellant that at the time of the commission of the offences he was under the influence of drugs and alcohol. He alleged that his co-accused, Du Plessis, influenced him to take drugs. However, it transpired that he started taking drugs when he was 14 years old, long before he met Du Plessis. As a result of the drug abuse, he had to leave school in standard 6.

[6] The trial court further remarked that despite having been convicted and sentenced previously, he did not learn a lesson from the short periods of imprisonment imposed. Although the court took into account that he cared for his family – it remarked that it was clear that he cared less for other people's property. The fact that he committed the offences forming the subject of this appeal only 8 months after the expiry of his parole period was considered an aggravating factor and I agree.

[7] The appellant's previous convictions are certainly an aggravating factor to be considered. The earliest of these was in December 1991 when he was convicted of theft and sentenced to 6 cuts with a light cane; in August 1992 he was convicted of housebreaking and sentence was postponed for a period of 3 years and he was

released unconditionally; in January 1993 he was convicted of housebreaking with intent to steal and theft on two counts and sentenced to 39 months' imprisonment and on the same day he was also convicted of theft and sentenced to 15 months' imprisonment; in February 1993 he was convicted of theft and sentenced to 2 years' imprisonment. The sentence of 2 years' imprisonment was ordered to run concurrently with the sentence of 39 months so that he would effectively serve 3 years' imprisonment, again in February 1993 he was convicted of theft and sentenced to 18 months imprisonment to run concurrently with the sentence imposed on 29 January 1993. On 14 April 1993 the suspended sentence imposed on 18 November 1991 was put into operation. On 17 June 1994 he was released on parole up to 28 October 1995.

[8] In considering an appropriate sentence on appeal one must not lose sight of the settled principle of law that sentencing is pre-eminently a matter for the discretion of the trial court. However a court of appeal may interfere with the sentence imposed provided the trial court materially misdirected itself or where the sentence imposed is shockingly inappropriate – (*S v Malgas* 2001 (1) SACR 469 (SCA) para 12 and *S v Pillay* 1977 (4) SA 531 (A) at 534H – 535A).

[9] In the present case the trial and high courts considered the previous convictions as an aggravating factor. I too agree. The trial as well as the high court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and on different times. While this may be a consideration, it cannot justify a failure to factor in the

cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is a daunting exercise indeed.

[10] There is no doubt that all the offences forming the subject of this appeal are serious and have to be punished seriously. Although we also have to admit that they were not of a violent or heinous character. The appellant broke into people's houses wherein they believed themselves to be safe. He then removed their goods and exchanged them for cash. Clearly he committed these offences for his personal gain and financial reasons. It is undisputed that he cared for his sickly parents. He even lied to them that he was employed whereas he lived and supported them on proceeds of crime, which they did not know. It is no justification to turn to crime because one is destitute, but it may be a mitigating factor when balancing the cumulative effect of the whole sentence. It is said to be undesirable to impose a globular sentence where there are multiple different counts.(*S v Immelman* 1978 (3) SA 726 (A) at 728E-729A.) However the practice of taking more than one count together for purposes of sentence is neither sanctioned nor prohibited by law. In *S v Young* 1977 (1) SA 602 (A) at 610E–H Trollip JA said:

'Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

[11] In the present case clearly the trial and high courts materially misdirected themselves by ignoring the cumulative effect of the sentences. The relative youthfulness of the appellant, despite the previous convictions, should have tipped the scales in his favour. An effective sentence of 26 years, in the circumstances of this particular case is disproportionately harsh and induces a sense of shock. The other consideration is the period spent in prison by the appellant while awaiting trial. It is only fair to consider that period especially where it is a lengthy period. In the present case the appellant was incarcerated for a period of 3 years and 8 months before he was finally sentenced on 24 February 2000. One way of factoring this period into a sentence is by antedating the sentence to the date on which he was sentenced or an earlier date by simply deducting the 3 years and 8 months from the imposed sentence. (See *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 60.) Punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation.

[12] Taking into account the inordinate time spent awaiting trial of 3 years and 8 months it would be appropriate to factor that period in mitigation of the cumulative effect of the sentences.

[13] For the above reasons the following order is made:

1The appeal is upheld

2 The sentences by the trial and the court below are set aside and replaced by the

following:

a) ‘On counts 1, 3, 4 and 10 (counts of housebreaking with intent to steal and theft) the accused is sentenced to 4 years’ imprisonment on each count.

b) On counts 5 and 11 (a count of theft and of contravening s 36 of the General Law Amendment Act 62 of 1955) the accused is sentenced to 3 years’ imprisonment on each count. These sentences will run concurrently with the sentences in (a) above.

c) On count 6 (a count robbery of) the accused is sentenced to 4 years’ imprisonment. This sentence will also run concurrently with the sentences in (a) above.

d) It is ordered that all the sentences be antedated to 24 February 2000.

e) Three years of the sentence on count 10 is to run concurrently with the sentence on count 4 in (a) above’.

J B Z SHONGWE

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	F. van As
Instructed by:	Legal Aid Board, Pretoria;
	Legal Aid Board, Bloemfontein.
FOR RESPONDENT:	C. A. C. Geyser
Instructed by:	The Director of Public Prosecutions, Pretoria;
	The Director of Public Prosecutions, Bloemfontein.