THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 378/2018

In the matter between:

BERNARD ANTONY LIVANJE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Livanje v The State* (378/2018) [2019] ZASCA 126 (27 September 2019)

Coram: Maya P, Molemela, Dlodlo and Mbatha JJA and Hughes AJA

Heard: 21 August 2019

Delivered: 27 September 2019

Summary: Criminal Law and Procedure – appellant erroneously convicted of housebreaking with intent to rob instead of housebreaking with intent to commit a crime unknown to the State – appellant sentenced in terms section 51(2) of the Criminal Law Amendment Act 105 of 1977 without warning of its applicability – irregularities not of vitiating nature – conviction and sentence accordingly amended.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Rampai J and Daniso AJ sitting as court of appeal):

1 The appeal succeeds.

2 The orders of the court a quo are set aside and replaced with the following:

'2.1 The appeal succeeds.

2.2 Accused No 3 is found guilty of housebreaking with intent to commit an offence unknown to the State.

2.3 Accused No 3 is sentenced to five years imprisonment, antedated to 17 July 2015.'

JUDGMENT

Mbatha JA (Maya P, Molemela and Dlodlo JJA and Hughes AJA concurring):

[1] The appellant, Bernard Antony Livanje, was arraigned in the Regional Court, Hoopstad, Free State Province. He tendered a plea of guilty to the charge of contravening the provisions of s 49(1) of the Immigration Act 13 of 2002[1] and was duly convicted as charged and sentenced to two months imprisonment. He tendered a plea of not guilty to the charge that he unlawfully and intentionally broke open and entered the house and/or property in the lawful custody of the complainant, with intention to commit

[1] In that on 09 October 2014 at or near Witpan farm in the district of Hoopstad, in the Regional Division of the Free State, the accused (appellant) intentionally and unlawfully entered/or remained in the Republic of South Africa. By so doing the accused contravened the provisions of s 49(1) read with ss 1 and 9 of the Immigration Act 13 of 2002 and further read with s 250 of the Criminal Procedure Act 51 of 1977. The appellant did not appeal against this conviction and sentence.

a crime unknown to the State, read with the provisions of s 262(2) of the Criminal Procedure Act 51 of 1977, as amended (CPA). The appellant was subsequently convicted of housebreaking with intent to rob. The trial court found no substantial and compelling circumstances that warranted the imposition of a sentence less than the one prescribed in the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). He was accordingly sentenced to ten years imprisonment. His appeal to the High Court, Bloemfontein, against both conviction and sentence failed. With special leave of this Court, the appeal against both conviction and sentence is before this Court.

[2] In the early hours of 9 October 2014, Mr Ettienne Le Roux (the complainant), of Witpan Farm, about 12 km from the town of Hoopstad, was woken up from his sleep by the ringing of the alarm security system. By looking at the sensor lights on the alarm keypad he noted that the alarm had been triggered by a movement in the dining room. He woke up to investigate, but did not find anything amiss. He returned to bed. An hour later he was woken up by the sound of a breaking window in his bedroom. This was followed by the sound of a breaking window in his mother's bedroom. He jumped out of bed, armed himself with a firearm and rushed to his mother's bedroom. He found his mother and sister, Yvonne Venter, already at the bedroom door. At this stage he observed that the window pane was broken.

[3] Whilst looking at the window he observed that the curtain moved, which alerted him to the presence of a human silhouette behind it. It appeared as if the person behind the curtain was pushing it so as to gain entry through the window. He reacted by firing two shots at the silhouette. Surprisingly, no sound followed after the shooting. Thereafter he called for assistance from the neighbours and police. Upon examination of the window he discovered that a side window had been unlatched and opened although the windows had been closed before his sister and mother retired to bed. He testified that upon the arrival of Kobus Le Roux, a neighbour, and the police, they found that three windows were broken and a spade which was generally kept in a storeroom

lay outside on the grass. At a distance of about 20 metres from the house they found four different types of shoeprints. The complainant and the police followed the shoeprint tracks, which led to a thick bush. The bush was set alight, which flushed out the erstwhile co-accused (co-accused) of the appellant. They were arrested upon their failure to explain their presence on that farm. The complainant's evidence was corroborated by that of his sister and police officers who testified in the trial.

[4] Warrant Officer Anton Mynhardt testified that upon his arrival at the farm he observed four different types of shoeprints near the house and the shed. He uplifted several plaster castings thereof for forensic examination. These plaster castings were later on compared to the sneakers confiscated from the appellant and his co- accused. The result was that they matched. Mynhardt testified that whilst on the farm he was directed by a farm worker to the appellant who was found bleeding under a tree within the precincts of the farm. The appellant was then arrested.

[5] After the testimony of Mynhardt, the State called Detective Makgoane who testified that pursuant to further investigation, they recovered an abandoned Nissan N200 bakkie on the street in Tikwana suburb, Hoopstad. The bakkie in question was placed in police custody and later identified as the property of the appellant.

[6] The appellant was the only one who testified in his defence. He placed himself at the scene of the crime but denied committing any offence. He testified that he and his co-accused travelled from Gauteng to Hoopstad to purchase gold from a person known to one of his co-accused. Upon their arrival, a contact person in Hoopstad drove them to an unknown place which later turned out to be Witpan farm. At the precincts of the farm, they met the seller. The testing of the authenticity of the gold which was in the form of a Kruger rand was done. The negotiations for the purchase thereof were concluded for a negotiated amount of R14 000. The appellant testified that he had been in possession of R15 000.

[7] However, as soon as the seller left, the appellant suspected that he was being ripped off. He tested the gold coin again and found that a fake coin was swapped for the genuine gold coin. He and his co-accused got out of the motor vehicle in pursuit of the seller, who took the direction towards the farmhouse. The seller, who having realised that he was being pursued by the appellant and his co-accused fled, ran past a building which looked like a garage and disappeared into thin air. They all ended up near that garage where they argued about the deal that went wrong. His co-accused left and he followed them. As soon as he started moving, he heard a shot being fired, ran away up to the point where he felt powerless and fell down. It was then that he realised that he had been shot and could not move any further. He was found later under the tree. He was arrested and subsequently charged with the offences which he faced before the trial court.

[8] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found on credible evidence, that the explanation is false beyond a reasonable doubt.[2] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that the appellant's conviction can only be sustained after consideration of all the evidence, and his version of the events if found to be false.

[9] In considering whether the appellant's version was reasonably possibly true, I have taken into account that the appellant placed himself at the farm in the early hours of the morning on 9 October 2014 to conclude a gold deal, coincidentally on the same date and time the housebreaking occurred at the house occupied by the complainant and his family members. The appellant failed to explain why a gold transaction had to be

[2] *S v V* 2000 (1) SACR 453 (SCA) at 455B.

conducted between 1 and 2 am at the precincts of the remote farm as they arrived in Hoopstad at 17h30 and had been waiting for the seller since then. He could also not explain how it came about that he had the exact amount of R15 000 demanded by the dealer when the deal had not been discussed before they left Gauteng for Hoopstad. These are all the aspects which have a bearing on probabilities.

[10] Furthermore, the appellant could not explain the presence of his shoeprints which were found in close proximity to the main house. On his version, he was at a distance of about five hundred metres from the house. It can be accepted that no one else was at the window save the appellant, as he was the only person who sustained a gun-shot wound. The trial court also took judicial notice that Hoopstad was not a mining town for the appellant to have travelled from Gauteng to conclude a gold transaction. I am in agreement with the conclusion reached by the trial court that the version given by the appellant was not reasonably possibly true.

[11] It is clear that the appellant and his co-accused were on a mission to commit a crime in Witpan Farm. Such an inference can be drawn from the following objective facts: the motor vehicle driven by the appellant to Hoopstad was left unattended on the street in a township, a 12 km distance away from the farm; the person who drove them to the farm and the dealer were complete strangers to the appellant; and were nowhere to be found near the scene of the crime. The presence of the dealer and the man who drove them to the farm cannot be supported by evidence. I find it improbable that a deal involving such a huge amount of money could have been conducted in such an isolated place, under cover of darkness, more so with people unknown to the appellant.

[12] Given the many improbabilities in the appellant’s account, coupled with contradictions in his own evidence and the objective facts, the only irresistible inference to be drawn is that this was a planned excursion. I also accept the evaluation of the

evidence by the trial court and its approach to the credibility findings of the State witnesses' evidence and cannot, therefore, interfere with the trial court's findings.[3]

[13] I now turn to the questions of law raised on appeal: first, whether the evidence established beyond a reasonable doubt that the appellant intended to commit a crime of robbery; secondly, whether the appellant was informed of the applicability of the Minimum Sentences Act and lastly, if the failure to do so led to an unfair trial.

[14] The appellant was charged with the crime of housebreaking with intent to commit a crime unknown to the State, read with the provisions of s 262(2) of the CPA. Housebreaking is not a crime *eo nomine*; it must be accompanied by the intent to commit another offence on the premises entered.[4] It is clear from the evidence that the crime of housebreaking was committed by the appellant. It is trite that an additional intention is required for the substantive offence of committing a crime unknown to the State. Therefore, the main issue for consideration is whether the intent to rob was proved by the State in line with the provisions of s 262(2) of the CPA which provides:

'if the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under the statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.'

[15] The aforementioned objective facts constituted sufficient evidence to conclude that housebreaking had been committed with intent to commit a crime, in line with the principles set out in *S v Hlongwane*.[5] There, the essential elements of the offence of housebreaking were defined as follows:

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[3] *Pistorius v S* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA).
[4] A Kruger *Hiemstra's Criminal Procedure* (Electronic version, 2019) at 26-18(1).
[5] *S v Hlongwane* 1992 (2) SACR 484 (N).

'*(a)* the 'breaking' of premises in the legal sense by the displacement of obstruction to entry of a structure which forms part of the premises;

(b) the entry of the premises by means of any part of the person or an instrument;

(c) the unlawfulness of the conduct complained of; and

(d) the intention to commit an offence.'

[16] There are two uncontroverted pieces of evidence which showed that the intention of the appellant was to commit a crime unknown to the prosecutor. First, it is clear from the evidence that an offence of housebreaking with intent to commit the crime was committed because according to the complainant when the curtain moved that was the time when he saw the silhouette. It was also his evidence that the window where he saw the silhouette was the type that one could easily climb into and gain entry. Secondly, the finding of the spade near one of the broken windows, conclusively proved that it was used to break the window, as a result that either a hand or an object was inserted through the broken window to open the window next to it.

[17] It is clear from these objective facts that the unauthorised entry was gained by none other than the appellant, as it so happened that it was the appellant who sustained a gunshot wound. The complainant's undisputed evidence was that all the doors and windows were locked before they retired to bed, and the window latch could only be unsecured by inserting a hand or object though the broken window. The trial court correctly concluded that this constituted sufficient entry in terms of the law. The intention to commit the crime unknown to the prosecutor could be drawn from these objective facts, as it is the only reasonable inference to be drawn. The breaking of the windows in three parts of the house showed the persistence and determination on the part of the appellant to break into the house at all costs after the alarm had been triggered and switched off, indicating the presence of people in the house.

[18] In general, a court of appeal would not be inclined to reject the factual findings of the trial court. In *S v Hadebe* & *Others*,[6] the Court stated that'. . . in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong'.

[19] The question is therefore whether on the conspectus of the evidence, the second intention to commit robbery was proved beyond a reasonable doubt by the State. I am of the view that although the trial court correctly concluded that there was an additional intent of committing another offence, it misdirected itself when it concluded that the intention was to commit the offence of robbery. This is so because that was not the only inference that could be drawn in the circumstances of the case and there was no circumstantial or direct evidence to support that conclusion. Therefore, the conviction on the second part of the offence should be set aside and replaced with the conviction on the crime of housebreaking with intent to commit an offence unknown to the State, which is the very offence the appellant was charged with.

[20] With regard to sentence, it is trite that an appeal court will interfere only if the trial court misdirected itself materially, as expressed in *S v Malgas*[7] where it stated as follows:

'The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate

[6] *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426A-B.
[7] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[21] The appellant was sentenced to ten years imprisonment in terms of s 51(2) of the Minimum Sentences Act read together with Part IV of Schedule 2 thereto. The charge sheet did not make reference to the application thereof. Furthermore, no address was made to the court either by the prosecutor or defence as to the application of the Minimum Sentence Act nor did the court invite them to address it in respect thereof. This Court in *S v Legoa*[8] held that for the Minimum Sentences Act to apply the conviction must encompass all the elements of the offence set out in the Schedule.

[22] In *Ndlovu v The State*,[9] the appellant had been sentenced to life imprisonment in terms of s 51(1) instead of 15 years in line with the charges preferred against him in terms of s 51(2) of the Minimum Sentences Act. The Constitutional Court had to decide whether the imposition of a harsher sentence than that envisaged in the indictment infringed Ndlovu's right to a fair trial. It held that when the Regional Court found him guilty as charged, it was aware that he was charged in terms of s 51(2) and not s 51(1) of the Minimum Sentences Act and that in imposing a sentence of life imprisonment, the Regional Court exceeded its jurisdiction.

[8] *S v Legoa* 2003 (1) SACR 13 (SCA) para 11.
[9] *Ndlovu v S* [2017] ZACC 19; 2017 (2) SACR 305 (CC).

[23] In giving judgment in this case, the trial court reiterated the charges that were put to the appellant but sentenced him to a prescribed minimum sentence in terms of the Minimum Sentences Act in circumstances where he had not been warned about the applicability thereof. This was a material misdirection on the part of the trial court which calls for a fresh consideration of the appellant's sentence. I align myself with the views expressed by the Constitutional Court in *Ndlovu*[10] where it said:

'. . . . Courts are expressly empowered in terms of section 86 of the Criminal Procedure Act to order that a charge be amended. Upon realising that the charge did not accurately reflect the evidence led, it was open to the Court *at any time before judgment* to invite the State to apply to amend the charge and Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment.'

The Constitutional Court also affirmed that s 35(3) of the Constitution guarantees the right to a fair trial, including the right to be informed of the charge with sufficient detail to answer it.

[24] In terms of s 322(1)(*a*) of the CPA, an appeal court may allow an appeal if satisfied, on any ground, there was a failure of justice. A conviction may be set aside or altered by reason of an irregularity in the proceedings if it results in a failure of justice. It is my view that an irregularity only occurred at the sentencing stage, which cannot be said to be so gross an irregularity to have resulted in the failure of justice. The test is whether the appeal court on the evidence and on the credibility findings (if any), unaffected by the irregularity, considers that there is proof of guilt beyond a reasonable doubt.[11] Therefore, this Court has to reconsider the sentence afresh.

[25] In considering the sentence afresh, I have taken into account that sentencing is pre-eminently within the discretion of the trial court and that the court of appeal will not

[10] *Ndlovu v S* [2017] ZACC 19; 2017 (2) SACR 305 (CC) para 56.
[11] *S v Yusuf* 1968 (2) SA 52 (A) at 57C-F.

lightly interfere with the exercise of such a discretion.[12] A correct synopsis of the law in this regard was set out in *S v Hewitt*[13] where this Court held:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[26] The appellant, a Mozambican national, was 39 years old at the time of sentencing. He was employed as a part time carpenter earning about R2 000 per month and had a girlfriend and children of the ages of 14 and 18 years. He had two previous convictions for theft and assault in 1998 and 2005, respectively. I accept the conclusions reached by the trial court regarding the seriousness of the offence, that the offence was planned and persisted with even though the appellant was aware of the presence of the occupants of the house, the prevalence of such an offence and that the appellant was not a first offender.

[27] As a final string on the bow, the appellant asked this Court to take into account the time he spent in custody awaiting finalisation of the trial. We were referred to various authorities in which this Court held that the trial court did not exercise its sentencing discretion judiciously in failing to take into account the time spent in

[12] *R v Maphumulo & others* 1920 (AD) 56.
[13] *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.

custody.[14] The views expressed by this Court in *Radebe & another v S*,[15] where it held that '. . . the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime. . . .' are relevant to this matter.

[28] The appellant was arrested on 9 October 2014 and was hospitalised before his first appearance in the Regional Court on 24 February 2015. The trial proceedings commenced on 21 April 2015 and were concluded on 17 July 2015. He was convicted and sentenced on 17 July 2015. Therefore the time spent in custody by the appellant was not inordinately long. It is a factor which has been taken into account by this Court in reconsidering his sentence.

[29] The appellant's sentence has been considered in line with the principles set out in *S v Zinn*.[16] This Court has taken into account that the sentence imposed should be sufficient to dissuade the appellant from re-offending and to discourage potential offenders. It is only necessary for this Court to interfere with the sentence, on the premise that a wrong sentencing law was applied by the trial court. However, I find nothing that suggests that the misdirection as to sentence was that envisaged in *S v Pillay*,[17] in that it is not '. . . of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[30] Accordingly, the following order is made:

1 The appeal succeeds.

2 The orders of the court a quo are set aside and replaced with the following:

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[14] *Maake v Director of Public Prosecutions* [2010] ZASCA 51; 2011 (1) SACR 263 (SCA) and *Mathebula & another v S* [2011] ZASCA 165; 2012 (1) SACR 374 (SCA).
[15] *Radebe & another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) para 14.
[16] *S v Zinn* 1969 (2) SA 537 (A).
[17] *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

‘2.1 The appeal succeeds.

2.2 Accused No 3 is found guilty of housebreaking with intent to commit an offence unknown to the State.

2.3 Accused No 3 is sentenced to five years imprisonment, antedated to 17 July 2015.’

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YT Mbatha
Judge of Appeal

APPEARANCES

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For the Respondent:	Adv S Giorgi
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