REPORTABLE

CASE NO. SA 18/2003

IN THE SUPREME COURT OF NAMIBIA

HARRY DE KLERK **Appellant**

versus

THE STATE **Respondent**

CORAM: Shivute A.J.A. *et* Maritz, A.J.A.

Heard on: 2004/10/16

Delivered on: 2006/12/08

APPEAL JUDGMENT

MARITZ, A.J.A.: [1] The appellant, like many other greed-inspired criminals before him, ultimately fell victim to his earlier unlawful success: Emboldened by the apparent ease with which he and four accomplices had broken into and stolen more than a N$ ¼ million from a strongroom of Imcor Tin Mine Ltd during late October 1997, the appellant sought to supplement his earlier ill-gotten gains by a repeat of the burglary about a year later. His extensive preparations

for the crime and the solicitation of his nephew's assistance came to naught when he was caught red-handed by the mine's security officers as he was about to gain entrance to the office complex through the roof of the section containing the company's safe. The reward for his long southward journey from Windhoek to Rosh Pinah was not the illicit bounty he had hoped to gain but an arrest and incarceration which he justly deserved. He was brought to book and on his plea of guilty convicted in the High Court on two counts: housebreaking with intent to steal and theft of N$250 787.29 and housebreaking with intent to steal and attempted theft.

[2] He was sentenced on the first count to eight years imprisonment and on the second to three years imprisonment. To ameliorate the composite effect of the sentences, the Court *a quo* directed that one year of the latter sentence should be served concurrently with the sentence imposed on the first count. Aggrieved by – what he considered to be - the severity of the sentences, the appellant applied for leave to appeal against them. The Court *a quo* dismissed the application but the appellant eventually petitioned for and obtained leave from the Chief Justice to prosecute the appeal against both sentences in this Court.

[3] It stands to his counsel's credit, I must note, that the appellant conceded at the commencement of the hearing on appeal that the sentence imposed on the second count was entirely appropriate

and, in the circumstances, justly deserved. In my view, the concession was properly made if regard is being had to the aggravating factors apparent from the evidence – most notably, that the appellant had extensively planned and prepared for the repeat offence over a considerable period of time and that he had not only solicited the assistance of his much younger nephew but, when the latter initially declined, actually prevailed upon him to participate.

[4] Counsel's concession on behalf of the appellant appreciably narrowed the scope of the appeal and it now only remains for this Court to consider whether or not the sentence of eight years imprisonment for the crime of housebreaking with intent to steal and the theft of a quarter million Namibian dollars was appropriate in the circumstances.

[5] In examining on appeal whether or not a sentence imposed by a lower Court is appropriate or not, a Court of appeal will be mindful that the determination thereof is pre-eminently a matter entrusted by law to the trial Court. As this Court remarked in *S v Alexander* (Unreported judgment in case No. SA 5/1999 dd. 13 February 2003) at pp. 3-4:

> "Steeped in the atmosphere of the case, exposed to the emotions and demeanour of victims and perpetrators alike, alert to local circumstances such as prevalence and the community's legitimate interests in a fair and just judicial response to the crimes in question, the trial Judge is normally better positioned to tailor a fitting sentence than a Court of appeal which has but

a transcript of the record to judge the matter."

This Court will not "usurp" the sentencing discretion of the trial Court (*S v Malgas*, 2001(2) SA 1222 at 1232 para 12) and it does not have a benevolent discretion to ameliorate those sentences (*R v Lindsay* 1956(2) SA 235 (N)). This approach, in the words of Chomba AJA (*S v Ndikwetepo and Others,* 1993 NR 319 (SC) at 322F), "through invariable application by appellate Courts has acquired the mantle of a rule of law – that punishment is pre-eminently a matter for the discretion of the trial Court".

[6] Moreover, a sentence is not inappropriate simply because a Court of appeal considers that the imposition of another type of punishment might also have been appropriate in the circumstances of the case. It is also not inappropriate because the Court of appeal would have imposed a slightly different sentence had the matter been called before it in the first instance. It is inevitable, as Schreiner J pointed out in *R v Reece* 1939 TPD 243 *in fine*, that different people will take different views on what an appropriate punishment would be in any particular case. Between the two extremities of a sentence which is inappropriately lenient and one which is inappropriately severe, is a range of appropriate sentencing options available to the trial Judge. In the judicial (and judicious) selection of a particular option intended to give effect to the interrelated components of *Zinn's* oft-applied *triad* (c.f. *S v Zinn*,

1969(2) SA 537 (A) at 540G) and best suited to satisfy the objectives of contemporary criminal penology (c.f. *S v Vekueminina and Others,* 1992 NR 255 (HC) at 257B and *S v Khumalo and Others*, 1984(3) SA 327 (A)), the trial Judge is allowed a margin of judicial appreciation. The selection of a particular sentencing option and the imposition thereof with a determined degree of severity (or leniency) will only be interfered with on appeal if the trial Judge has not exercised his or her discretion judicially and properly (c.f. *S v Gaseb and Others*, 2000 NR 139 (SC); *S v Shikunga and Another*, 2000 (1) SA 616 (NmS) at 631G). The litmus test to pass muster in that inquiry, reduced to its bare essentials - as Holmes JA observed in *S v Rabie*, 1975 (4) SA 855 (A) at 857E – is whether the imposed sentence is (a) vitiated by irregularity or misdirection or (b) is disturbingly inappropriate (Compare also: *S v Van Wyk*, 1993 NR 426 (SC) at 447G-H).

[7] It is with these two components of the test in mind that I now turn to consider the merits of the appeal – and I shall do so, firstly, by examining whether the appellant has made out a case that his sentence is vitiated by an irregularity or misdirection.

[8] In the appellant's application for leave to appeal he asserts that the Court *a quo* has "erred in the law and/or on the facts to give no, alternatively, insufficient weight" to the evidence that he was a first offender; that he is a person of "good character" who had

created a favourable impression as a witness; that he was relatively young and that his future might be "destroyed and/or severely affected by a long term of incarceration"; that he had remorse and that he offered a plea of guilty, especially in relation to the more serious of the two counts "where there existed very little evidence against him". It falls to be noted that the appellant did not suggest that the Court *a quo* misdirected itself in regard to any of the legal principles relating to sentencing or that a material irregularity has occurred in the proceedings (*S v Tjiho*, 1991 NR 361 at 366B). Except for the last of those grounds, Mr Grobler, who appears for the appellant, did not persist with any of the alleged misdirections – except, perhaps, within the context of his argument on the severity of the sentence, which I shall consider later in this judgment. He, however, sought to press another in his heads of argument: That the trial Judge suspected that the appellant had played a more substantial role in the planning of the first burglary and "sentenced him accordingly". He also submitted without much emphasis, I should say to his credit, that the Court *a quo* erred by emphasising the importance of the mining industry to the Namibian economy as an aggravating factor.

[9] Even if I were to accept that no evidence had been led in aggravation about the importance of the mining industry to the economy of Namibia, it seems to be a rather common sense inference made by the Court *a quo* from the operations of a

notoriously known player in the Namibian economy. The extensive regulation of the mining industry by legislation and the frequency with which cases relating to that sector of the economy come before the courts are testimonials of its importance and profile. I do not think that the Court's comments made in general terms about employment opportunities provided by the mining industry and foreign investment attracted by as part of its discussion of society's interest in combating crimes of this nature was inappropriate or that it constitutes a misdirection. I am not persuaded that the Court *a quo* ought to have assessed the value of these considerations differently from what it did. These findings were, in any event, not of any great moment in the totality of evidence considered as part of the process of reasoning in determining the appellant's sentence and, as Mr Small pointed out during argument on behalf of the State, not every misdirection justifies interference on appeal. This much is clear from the reasoning in *S v Pillay,* 1977 (4) SA 531 (A) at 535E-G:

> "Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be 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. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence

afresh"”

[10] I am also not satisfied that the trial Judge imposed a heavier sentence on the appellant because she suspected that he had played a more substantial role than he would have had the Court believe in the planning of the first burglary. It is indeed so that the Court expressed grave doubt about the veracity of the account given by the appellant both with regard as to who he had been involved with and what his own role therein had been. The origin of this observation is not shrouded in any mystery – it is all too clear that it was made in view of the frontal challenge launched by the Prosecution during cross-examination on the appellant’s explanation and, in particular, the many inconsistencies and improbabilities inherent therein. The trial Judge had to make a finding in that regard and she concluded that, her suspicion notwithstanding, the appellant had to be accorded the benefit of her doubts and that he had to be sentenced on the basis of the account he had given to the Court. Having considered the judgment on sentence very carefully, I find no indication of the intellectual impropriety alluded to Mr Grobler and I am entirely unimpressed by his contention that the trial Judge actually sentenced the appellant on a different factual basis than the one professed.

[11] The only other misdirection alluded to in argument relates to the degree of contrition shown by the appellant for the commission

of his crimes. The trial Judge noted that, but for the appellant's admission, the Prosecution would have had little to go by to secure a conviction on the fist burglary and that his plea of guilty to that count "must be indicative at least of some degree of contrition". Appellant's counsel suggests that the degree of remorse shown by the appellant was understated and, therefore, constituted the misdirection alleged in the application for leave to appeal. In dealing with this point, this Court must caution itself (as Van Winsen did in *S v Fazzie and Others,* 1964(4) SA 673 (A) at 684B) that a Court of appeal "will not readily differ from the Court *a quo* in its assessment either of factors to be had regard to or as to the value to be attached to them."

[12] As it is, it seems to me that the Court *a quo* gave the appellant more credit than was due in the assessment of the degree of contrition to be inferred from his plea of guilty on the first count. The trial Judge premised her finding of contrition on the assumption that, but for the appellant's admission, the Prosecution would have had little to go by to secure a conviction on count 1. There is, however, no evidential rationale on record for that assumption. The Court was simply not apprised of all the evidence in the Prosecution's possession which linked the appellant to the first burglary. Neither the evidence nor counsels' submissions suggest whether he had been linked to the crime only by his confession or by fingerprints found on the scene.

[13] Whereas it has become a salient and sound feature of sentencing practice that credit should be accorded to an accused for information given to the authorities implicating him- or herself (or, for that matter, other persons involved) in the commission of crimes which has not as yet been solved by the police, it is an area fraught with difficulties and both the circumstances under which and the degree of credit to be given should be approached with circumspection. I do not propose to give a list of guidelines on the principles upon which a court should act in such circumstances (as, for example, Lord Bingham has done in *R v A and B*, [1999] 1 Cr.App.R.(S) 52), nor do I deem it necessary for purposes of this judgment to do so.

[14] Suffice it to say that although a confession of guilt or a plea of guilty (especially when made at the outset of a police investigation or at an early stage in the proceedings) may well be indicative of remorse on the part of an accused, it remains a factual question to be assessed by the Court with regard to the circumstances of the case. As part of this assessment the court will consider that and other conduct of the accused from which remorse may be inferred (compare: *S v Coales,* 1995 (1) SACR 33 (A) at 36C-E), such as co-operation with law enforcement and prosecuting authorities in relation to the crimes he or she had committed; assisting the police in the detection, investigation and prosecution of others involved in

the same or related crimes; being open-hearted and truthful to the Court; apologising to the victim(s) of his or her crime and, wherever possible, by paying compensation to address or limit their losses.

[15] Moreover, as Flemming DJP said in *S v Martin,* 1996 (2) SACR 378 (W) at 383H, true remorse "connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt" as a consequence of the accused's conduct – a finding which is often difficult to make unless the accused "does not step out to say what is going on in his inner self".

[16] Just as a plea of guilty in the face of overwhelming evidence does not by itself justify an inference of remorse (as the Court held in *S v Van Der Westhuizen,* 1995 (1) SACR 601 (A) at 605D), the confession by an accused to a crime he has been caught in the act with unassailable proof available does not necessarily speak of contrition. Such a confession or plea may still bear on a possible reduction of an accused's sentence for not wasting the Court's time or the public's resources, but, for a confession or a plea of guilty to point to an inference of remorse, some evidence – or, at the very least, some formal acknowledgement by the Prosecution – must be tendered in the course of the trial to indicate that it goes beyond what the inescapable conclusion facing the accused on the weight of evidence would have been. In this case there was none. If the Court therefore erred in finding "some contrition" on account of the

appellant's plea of guilty, the error favoured the appellant.

[17] In the result, I do not find any misdirection by the Court *a quo* on facts material to sentencing or, for that matter, on legal principles relevant thereto. This Court is therefore not at liberty to consider the sentence afresh on account of any misdirection. What remains to consider is the issue of severity and whether the trial Judge properly and judicially exercised her discretion in that regard.

[18] In *S v Van Wyk,* 1993 NR 426 (SC) at 447H-I this Court (*per* Ackerman AJA) held with reference to *S v Whitehead,* 1970 (4) SA 424 (A) at 436D-E that it will be inferred that the trial Court had acted unreasonably if –

> "there exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (*Berliner's* case, supra at p. 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startingly (*S v Ivanisevic and Another, supra* at p. 575) or disturbingly (*S v Letsolo*, 1970 (3) SA 476 (AD) at p. 477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence."

[19] In other cases the Courts have drawn such an inference if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock (*S v Salzwedel and Others*, 2000 (1) SA 786 (SCA) 790D–E; *R v Zonele and Others*, 1959 (3) SA 319 (AD) at 331D) or if there has been such an excessive devotion to further

a particular sentencing objective that others are obscured (*S v Maseko,* 1982 (1) SA 99 (A) at 102F). These are all accepted tests and, as Holmes AJ said in *S v Letsoko and Others*, 1964 (4) SA 768 (A) at 777, all amounts to much the same. Mr Grobler relies on both these grounds: He submits the sentence of 8 years imprisonment evokes a sense of shock and that the Court has placed too much emphasis on deterrence as a sentencing objective.

[20] He impresses on this Court that the appellant was a first offender at the age of 39; that he was gainfully employed for most of his adult life and that he had shown genuine remorse for what he had done. He highlights the appellant's obligations towards his disabled father, his sickly wife and four children. Much of his argument focuses on the moral blameworthiness of the appellant: He submits that the appellant did not commit the crime out of greed but that he has done so "to relieve his financial position" and to support his father and family. It is urged upon the Court that the appellant went through a period of severe financial stringency. The appellant, he contends, was not the principal perpetrator of the crime. He was imposed upon for assistance by a person he only came to know as Sonny and was merely engaged for a fraction of the bounty because of his expertise as a welder. He was financially in dire straits and could not provide adequately for his family from his income of about N$1 900 per month.

[21] Mr Small, on the other hand, underlines the seriousness of the crime: Not only is it by its nature so regarded, but it is also prevalent. He refers the Court to the remarks of Strydom JP (as he then was) in the unreported case of *Thomas Goma Jacobs versus The State* quoted with approval in *S v Bezuidenhout and Others*, CA 58/99, Unreported Judgment of the High Court dd. 17 May 2001, pp 3-4:

> "The many reviews that this Court is dealing with every day and the outcry of the society are all proof of the prevalence of crime and more particularly crimes such as housebreaking and theft. Those who commit this crime overlook nobody. No distinction is made between rich and poor. All levels of society have fallen victims to thieves and housebreakers alike. Whether we want to believe it or not, we are involved in a war against crime which at presence shows no sign of abating. The situation calls for exceptional measures and in the process the courts play an important role. In this regard the imposing of a prison sentence for housebreaking and theft, even in the case of a first offender, has more or less been the general rule."

[22] He reminds us that cash in the amount of N$250 787.29 was stolen from the safe and that nothing has been recovered. Although the appellant only received N$10 000, it was his expertise which made the commission of the crime possible. Notwithstanding his "noble" intentions, he did not spend a penny of his share of the booty to care for his father or to settle his debt to a friend. Instead, he bought himself a motor vehicle to commute between Windhoek and Rehoboth and to transport passengers at a fare on that route. No evidence was placed before the court to show that he used the income generated for those "noble" purposes. Although the

respondent accepts that the appellant had financial difficulties, the evidence showed that he was better off than many others. He was gainfully employed, had a regular income and was a qualified welder who could generate additional income by doing private work after hours. No evidence was led to show why his wife could not obtain employment and supplement the family's income. Moreover, if one were to consider the purpose towards which the appellant applied his ill-gotten gains, Mr Small submits, it is clear that he was motivated by avarice and greed – not by need.

[23] It is evident from the judgment on sentence in the Court below that both the mitigating circumstances advanced by the appellant and the aggravating circumstances relied on by the Prosecution have all been taken into consideration as part of the interrelated principles of sentencing considered by the Court: the personal circumstances of the appellant, the seriousness of the crime and the interests of society (c.f *S v Zinn*, *supra*). But, as Ackermann A J A said in *S v Van Wyk*, *supra*, at 448D-E), "the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts".

[24] I do not think that the manner in which the Court has done so can be faulted. It cannot be said that "the trial Court ought to have had regard to certain factors and that it failed to do so, or that it

ought to have assessed the value of these factors differently from what it did" (*per* Van Winsen AJA in *S v Fazzie and Others, supra* at 684B-C). Neither can it be said that the Court did not accord the correct weight to all the mitigating and aggravating factors. In arriving at this conclusion, I considered the personal circumstances and characteristics of the appellant; the need to individualise punishment with regard to the character of the appellant; the circumstances which preceded and led up to the commission of the crime; the seriousness and prevalence thereof; the effect of his imprisonment on his family, his father, and creditors; the interests of society and the appellant's conduct after the commission of the crime. I need not repeat all those considerations for purposes of this judgment: many of them appear from the summary of submissions and findings recorded earlier in this judgment. Two of them, however, require special mention: the seriousness of the crime and the character of the appellant.

[25] The serious nature and prevalence of this type of crime aside, it is abundantly clear from the record that it was carefully planned in advance and executed with precision. Although the appellant did not participate in planning the details thereof, he must have gathered from what he had been told that his co-conspirators had inside information about the location of the strongroom and safe, the layout of the buildings, the security measures in place and the large amount of cash in safe storage on that day. Although the appellant

only received N$10 000, his expertise and industry was the most essential cog in the operation which led to the theft of more than N$ ¼ million dollar of which the owner did not recover any. Crimes involving the theft of such large amounts must inevitably result in sentences of some severity.

[26] It counts heavily in favour of the appellant that he was a first offender at the age of 39. Generally, a Court will be reluctant to imprison a first offender if the same sentencing objectives can be achieved by the imposition of another adequate punishment (*S v Seoela,* 1996 (2) SACR 616 (O) at 620C-D). The ratio behind this approach is that accused persons falling within that category of offenders do not have a demonstrated record criminal inclinations; that they are more likely to be rehabilitated by an appropriate sentence than hardened criminals; that it may well be the only crimes they would commit during their lifetimes and that there is no apparent reason to fear that they will become repeat offenders.

[27] It is with this in mind that the appellant's character must be considered. I do so whilst considering with sympathy and understanding that the appellant's financial position was very precarious at the time. On the other hand, there was much he could have done to supplement his income legitimately. Instead, he was, in my view, won over by Sonny to assist in the commission of the crime with relative ease and without real or undue pressure. He had

enough time to consider the request and his participation, yet, he did not desist. He knew that his participation would require of him to abuse the skills which he had acquired through training at public corporations or institutions. He was callous about the consequences of the crime to the intended victim and gave little or no consideration to the extent of the loss to be suffered by it. He did not apply his part of the booty to address the immediate concerns which had motivated him to participate in the commission of the crime. But most importantly perhaps, he did not repent; he did not have any remorse. He planned yet another raid and repeatedly imposed on his much younger nephew to assist him. He generally behaved himself in such a manner as to make it absolutely necessary that suitable condign punishment should be imposed on him.

[28] The sentence, I agree, is severe but, given all the facts and circumstances, it does not appear to me to be so severe that it is unjust or unreasonable. It is not disproportionate to the demands of the crime and the interests of society – even if due weight is given to the personal circumstances and characteristics of the appellant. It is certainly does not induce a sense of shock and I am not persuaded that it evidences a patent or disturbing disparity if compared to the sentence which this Court would have imposed had it been the Court of first instance. For these reasons, the appeal falls to be dismissed.

[29] In conclusion, I must mention that Teek JA presided on the Bench before which this appeal was argued. Due to the circumstances detailed in the unreported judgment of *R D Wirtz v H J L Orford and Another* (Case No. SA01/2003 dd. 11 May 2005), he became incapable of acting and/or is absent within the contemplation of s. 13 of the Supreme Court Act, 1990. For the reasons mentioned in that case, the remaining two Judges constitute a *quorum* and may properly dispose of the appeal if they are in agreement on the result.

[30] In the result, the following order is made:

> "The appeal is dismissed."

(Signed) J.D.G. Maritz

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MARITZ, A.J.A.

I concur.

(Signed) P.S Shivute

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SHIVUTE, A.J.A

ON BEHALF OF THE APPELLANT:	MR. Z.J. GROBLER
Instructed by:	A. LOUW & CO.
ON BEHALF OF THE RESPONDENT:	MR. D.F. SMALL
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