IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE 17.02.2016 SIGNATURE

23/2/2016

CASE NO: A741/2015

In the matter between:

BONGINKOSI ANTONIE MNGOMA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

KEKANA AJ

[1] On 24 May 2013, in the Regional Court Pretoria *("the court a quo")*, the Appellant pleaded guilty and was convicted on a charge of fraud. On 29 August 2013 he was sentenced to 8 years imprisonment and on 18 May 2015 the court a quo granted him leave to appeal against sentence.

[2] Prior to his arrest, the Appellant was employed as a truck driver by Total Power, a delivery firm based in Durban. On 20 July 2012 He was sent to deliver a consignment of cosmetics worth R1, 2 million at a Shoprite Warehouse in Olivievenhoutbosch, Centurion. On his way to Shoprite he was approached by one Harry with an offer to divert the delivery to a different destination against payment of R100 000.00. The Appellant accepted the deal and diverted the delivery to Boksburg, where he delivered the consignment as directed by members of the syndicate. He had been given a fraudulent proof of delivery to submit to his employer, which he did. When confronted by his employer, admitted that he was approached by a syndicate to deliver the consignment in Boksburg and he was also promised payment of R100 000.00.

[3] At the trial, the accused pleaded guilty to the charge of fraud laid against him. His counsel submitted a statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977.

[4] It was submitted by the defence counsel that the court should take into account the Appellant's personal and mitigatory circumstances into account when it metes out the sentence.

[5] It is the principle of our law that the punishment is a matter for the discretion of the sentencing court. In ***S v Pillay 1977 (4) SA 531 (A) at 535,*** The appeal court stated that as the essential inquiry in the appeal against sentence, is not whether the sentence was right or wrong, but whether the court imposing it exercised its discretion properly and judiciously. 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.

[6] The presiding Magistrate has discretion when passing sentence. However, he has a duty to consider fairly and equally the personal circumstances of the convicted person, the severity of the offence and the interest of the society.

[7] The learned Magistrate in his judgment demonstrated some level of unhappiness into how the case was handled by the prosecutor.

[8] The learned Magistrates, regardless of his unhappiness, he proceeded to sentence the appellant. Sentencing is a judicial function *sui generis.*

It should not be governed by considering actions based on notion akin to onus of proof. At this stage of the trial, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court" ***(S V Siebert 1998(1) SARC 554 AD).***

[9] The learned Magistrate in sentencing the appellant, put more emphasis on the fact that the crime that the appellant committed is the one that ought to have been prosecuted in terms the minimum sentence legislation, namely Section 51 of Act 105 of 1997 which in effect would have put the appellant at risk of being sentenced to a minimum of 15 years imprisonment.

[10] Considering the circumstances of this case, it seems the court a *quo* misdirected itself in regard to sentence. This court is at large to interfere with the sentence imposed for the following reason:

[10.1] the learned Magistrate has not exercised his discretion judiciously;

[10.2] the sentence imposed by the learned Magistrate is unduly harsh and induces a sense of shock;

[10.3] the learned Magistrate misdirected himself by failing to attach proper weight to the fact the appellant is a first offender, his age being 38 and that he co-operated with the investigating officers. The fact of cooperation with the investigating officers

demonstrates his appreciation **(S v M 2007(2) SACLR 539 CC)** and acknowledgment of the extent of his error and therefore remorse on his part;

[10.4] the learned Magistrate misdirected himself by dismissing the correctional supervision report. The introduction of correctional supervision has to focus on rehabilitation and assist in the shift of emphasis from retribution.

[11] Having regard to all the circumstances, it is my view that the sentence of 8 years imprisonment without any portion of it suspended, is harsh and ought to be set aside.

[12] In the premises, I propose the following order:

1. The appeal against sentence succeeds;

2. The sentence of 8 years imprisonment by the Regional Court Pretoria, imposed on the appellant is set side and substituted by a sentence of six (6) years imprisonment, half of which is suspended for five (5) years on condition the appellant is not convicted of fraud or an offence involving an element of dishonesty; and

3. The new sentence of 6 years is antedated to 29 August 2013.

T.S KEKANA AJ
ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I concur, it is so ordered.

S.P MOTHLE J
JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG DIVISION, PRETORIA

ADV FOR THE APPELLANT	: A.B BOOYSEN
INSTRUCTED BY	: DU TOIT ATTORNEYS
ADV FOR THE RESPONDENT	: P. VOSTER
INSTRUCTED BY	: STATE ATTORNEY