IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR435/2015

In the matter between:

MLAMULI HUDSON SITHOLE — APPELLANT

and

THE STATE — RESPONDENT

Coram : Gorven et Seegobin JJ
Heard : 11 February 2016
Delivered : 19 February 2016

ORDER

On appeal from the Regional Court, Pietermaritzburg (Mr Ngobese, sitting as a court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

SEEGOBIN J (Gorven J concurring):

[1] On 26 March 2015 the appellant, a 36 year old male, was convicted on a plea of guilty in the Regional Court, Pietermaritzburg, on count 1 of being in unlawful possession of a firearm and on count 2 of unlawful possession of ammunition in contravention of the relevant provisions of the Firearms Control Act 60 of 2000. Both counts were taken as one for purposes of sentence and he was sentenced to five years imprisonment. This sentence was ordered to be served with a sentence which the appellant was already serving in respect of two rape convictions. The sentence on the rape convictions was the subject of a pending appeal. On 30 April 2015 the appeal was upheld and the sentence was set aside. The present appeal against sentence is with leave of the court *a quo*.

[2] It is trite that sentences may be interfered with on appeal only if the sentencing court misdirected itself, or if the sentence is shockingly inappropriate[1]. It should be borne in mind that the inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially. Misdirection that could result in the setting aside of a sentence on appeal is an error committed by the court in determining or applying the facts for assessing an appropriate sentence. However, as is pointed out in *S v Pillay*[2], a mere misdirection is not by itself sufficient to entitle a court to interfere with the sentence on appeal. It

[1] S v Malgas 2001(1) SACR 469 (CA) (2001(2) SA 1222; [2001] 3 All SA 220) para 12.
[2] 1977(4) SA 531 (A) at 535 E-F; see also Mpofu v Minister for Justice and Constitutional Development 2013(2) SACR 407.

must be of such a nature, seriousness or degree that it shows that the court did not exercise its discretion or that it exercised it improperly or unreasonably.

[3] The appellant's personal circumstances were said to be the following: (i) he was 36 years old at the time of sentencing; (ii) he is single but has five minor children, the first is eight years old, two are six years old, the fourth is three years old and the last is eight months old; (iii) he was the primary care-giver of the two children whose mother has passed on and the others reside with their respective mothers; (iv) he maintained his children as he was employed earning an amount of R3000.00 per month, and (v) he was in custody for 22 months awaiting his trial.

[4] On behalf of the appellant two issues were raised on appeal; the *first* was that the trial court had failed to take into account that the appellant was the primary care-giver of two of his children whose mother had passed away by the time he was sentenced; the *second* was that the trial court failed to have regard to the period spent by the appellant in custody while awaiting his trial.

[5] As far as the first issue is concerned, the trial court did in fact consider that the appellant was the primary care-giver of two of his minor children. However, it considered that these children have been taken care of by the appellant's aunt since the appellant's arrest. There was no evidence to suggest that the children were not being properly cared for. The appellant himself did aver that these children were experiencing a hardship as a result of his incarceration.

[6] As for the second issue, the trial court did consider that the appellant was in custody for about 22 months. However, what was not clear to the trial court was whether these 22 months also included the period which the appellant was

serving in respect of two rape charges for which he was convicted on 30 January 2014.

[7] Against the factors referred to above the trial court considered the seriousness of the offences of which the appellant was convicted and their prevalence. While the appellant had pleaded guilty to these charges, he did not disclose the facts and circumstances giving rise to his possession, either of the firearm or the ammunition. The trial court found, correctly in my view, that the most serious crimes which are ravaging this country at present such as robberies, car-hijackings, house robberies, business robberies and killings, are committed by people in possession of illegal firearms and ammunition. In light of this the relevant legislation provides for maximum sentences in respect of these types of offences. Both sections 3 and 90 of the Firearms Control Act prescribe a maximum period of 15 years imprisonment for these offences.

[8] Weighing up all these factors against the personal circumstances of the appellant, including the fact that the appellant was in custody for about 22 months, the trial court reasoned, correctly in my view, that the seriousness of the offences out-weighed the circumstances personal to the appellant.

[9] While sentencing courts will generally try to take into account the period served by an accused person awaiting trial in order to determine whether the effective period of imprisonment to be imposed would be justified, in my view there is no hard and fast rule in this regard. It is but one of the many factors that has to be considered in each case. Ultimately what is required is for a sentencing court to consider whether the sentence to be imposed is proportionate to the crime committed[3].

[3] See: S v Radebe and Another 2013(2) SCR 165 SCA; also Director of Public Prosecutions v Gcwala 2014 ZASCA 14 (unreported) handed down on 31 March 2014.

[10] Bearing in mind that the issue of sentence falls eminently within the discretion of the trial court, I do not consider it necessary to interfere with the sentence imposed. In my view, the learned magistrate carefully considered all the factors that were placed before him and thereafter exercised his discretion in a fair and judicious manner. The appellant can indeed consider himself fortunte that a higher sentence was not imposed.

ORDER

[11] The order I make is the following:

The appeal against sentence is dismissed.

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_____ I agree

GORVEN J

Date of Hearing	:	11 February 2016
Date of Judgment	:	19 February 2016
Counsel for Appellant	:	EX Sindane
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	MS Mtambo
Instructed by	:	The Director of Public Prosecutions, Pietermaritzburg