IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A92/11

DATE: 23 MARCH 2011

In the matter between:

BURTON BERNARDO

and

THE STATE

J U D G M E N T

FORTUIN, J:

The appellant, Mr Burton Bernardo, after pleading guilty, was convicted in the Regional Court, Blue Downs, on charges of arson and assault and was sentenced to three years correctional supervision in terms of section 276(1)(H) of Act 51 of 1977 (the Act).

On 13 August 2010 the State brought an application for the sentence to be converted in terms of section 276(A)(4)(a) of the Act after the appellant did not comply with his correctional supervision conditions. The appellant was then sentenced to four (4) years and six (6) months imprisonment respectively,

on both counts. The sentences were ordered to be served concurrently.

The appellant was legally represented during the proceedings. This appeal is against sentence only.

The grounds of appeal are that the Court *a quo* misdirected itself by giving too much weight to the interests of the community and the seriousness of the offence, and in the process failed to consider the personal circumstances of the appellant.

The test as to what a suitable sentence is, and as to when a Court of Appeal can interfere with this sentence imposed by a lower Court was stated in the matter of **S v Holden** 1979(2) SA Law Reports 70 (A).

> "Daar moet gestreef word na 'n gepaste vonnis volgens die eise van die tyd en 'n gepaste vonnis sal altyd 'n vonnis wees wat gebaseer is op 'n gebalanseerde oorweging van die drie elemente.
>
> By die toepassing van hierdie benadering is die Appèlhof ook nog steeds gebonde aan wat herhaaldelik in hierdie hof gesê is, naamlik dat by die appèl daar alleen

ingegryp sal word indien daar 'n mistasting was, of indien die vonnis swaar bevind word."

It was conceded by the state that the Court *a quo* could have erred in light of the fact that upon sentencing the appellant in the first instance the Magistrate was of the view that a non-custodial sentence was appropriate.

When he thereafter reconsidered the sentence, a longer custodial sentence, longer than the initial period of correctional supervision was imposed. When the conversion in terms of section 276(A)(4)(a) was done, more than two years of the three years correctional supervision had already been served. The appellant therefore only had a short period of his three year sentence left.

I am of the view that the following factors should have been considered in favour of the appellant when the conversion in terms of section 276(A)(4)(a) was done:

1. The appellant completed more than 80% of his correctional supervision.

2. The appellant complied with all but one of the number of conditions imposed by the magistrate.

I'm of the view that Court *a quo* misdirected itself and would interfere with the sentence. It follows that the appeal against sentence should succeed. In the circumstances I would propose the following order:

The **APPEAL AGAINST SENTENCE IS UPHELD**.

The **SENTENCE IMPOSED BY THE MAGISTRATE IS SUBSTITUTED WITH THE FOLLOWING : FOUR (4) YEARS IMPRISONMENT OF WHICH THREE (3) YEARS AND FIVE (5) MONTHS IS SUSPENDED**.

This sentence is to be **BACKDATED TO THE 13TH OF AUGUST 2010 AND THE APPELLANT SHOULD BE RELEASED IMMEDIATELY**.

FORTUIN, J

HLOPHE, JP: It is so ordered.

HLOPHE, JP