

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER:

A92/11

DATE:

23 MARCH 2011

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In the matter between:

BURTON BERNARDO

and

THE STATE

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J U D G M E N T

FORTUIN, J:

15 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).

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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
25 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.

5 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
10 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
15 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
20 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
25 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
5 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
10 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
15 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:

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

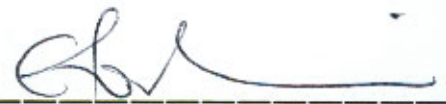
2. The appellant complied with all but one of the number
25 of conditions imposed by the magistrate.

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
5 propose the following order:

The APPEAL AGAINST SENTENCE IS UPHELD.

The SENTENCE IMPOSED BY THE MAGISTRATE IS
10 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
15 2010 AND THE APPELLANT SHOULD BE RELEASED
IMMEDIATELY.



FORTUIN, J

HLOPHE, JP: It is so ordered.



HLOPHE, JP