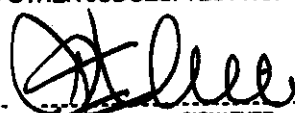


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



CASE NO: A235/2016

31/3/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
27/3/2017	
DATE	SIGNATURE

In the matter between:

WILSON NTOKOZO VINCENT GINIDZA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

SHIRILELE AJ (Hughes J Concurring):

THE BACKGROUND

- [1] The Appellant in this matter appeared in the Regional Court, Piet Retief, on a count of housebreaking with the intent to steal and theft (read with the provisions of Section 262(1) and 264 of the Criminal Procedure Act, 51 of 1977 ("the CPA").
- [2] In his plea explanation in terms of s112(2) of the CPA the Appellant admitted that on the 19th May 2015 he unlawfully and intentionally stole a generator and a monkeywrench being the lawful property of Andile Perseverance Ngema by breaking through the padlock using a bolt cutter spanner.
- [3] The Appellant was found guilty as charged in terms of s112(2) of the CPA on the 25th June 2015 and sentenced to four (4) years imprisonment in terms of Section 276(1)(b) of the CPA.
- [4] He was also declared unfit to possess a firearm.

LEAVE TO APPEAL

- [5] This Appeal comes before this Court after the Appellant had successfully petitioned this Court for Leave to Appeal against sentence.
- [6] The Appellant now appeals against the sentence.

CRITICISM OF THE TRIAL COURT

- [7] The main criticism of the trial Court is that it misdirected itself in the following respects:

- 7.1 It over emphasised the seriousness of the crime and the interest of society whilst the personal circumstances of the Appellant were under emphasised;
- 7.2 The trial Court failed to exercise its discretion judicially, fairly and properly and in particular the trial Court made the remark that certain foreigners, or a great deal of them are here [in South Africa] with one thing in mind, to commit crimes;
- 7.3 That the sentence evokes a sense of shock and is despairingly disproportionate to the offence.

PROPOSED SENTENCE

- [8] It is proposed that the whole sentence should be set aside and replaced with a wholly suspended sentence taking into account the fact that the Appellant pleaded guilty, is remorseful, and co-operated with the Police, the generator was recovered, and that he is a first offender.

SENTENCING CONSIDERATIONS

- [9] Factors taken into account by the Court *a quo* were the following:
 - 9.1 He was twenty seven (27) years old;
 - 9.2 He was unemployed;
 - 9.3 He is not married;
 - 9.4 He has five (5) minor children;
 - 9.5 He pleaded guilty;
 - 9.6 He did not benefit anything from the commission of this offence;

- 9.7 He is remorseful;
- 9.8 He is a candidate for rehabilitation;
- 9.9 The stolen generator was recovered;
- 9.10 The complainant did not suffer any loss other than the one occasioned on the padlock;
- 9.11 He co-operated with the Police;
- 9.12 He is a first offender.

[10] It is trite law that the imposition of a sentence is in the discretion of the trial Court. A Court sitting on an Appeal should be careful not to erode the discretion of the trial Court, and would generally only interfere with such discretion if it was not judicially and properly exercised on in circumstances where the sentence imposed is tainted by an irregularity or misdirection or is disturbingly inappropriate.

[See: S v Pillay 1997(4) SA 53(A) at 535 D-G] S v Packereysammy 2004 (2) SACR 169 (SCA)]

[11] A departure from the sentence imposed by the trial Court will require this Court to find truly convincing reasons for doing so.

[12] As already alluded to here above it was submitted on behalf of the Appellant that the Presiding Magistrate did not properly take into consideration all the personal circumstances of the Appellant and that the sentence imposed was shockingly harsh and inappropriate.

[13] It was further submitted that the Presiding Magistrate failed to exercise his discretion judicially, fairly and properly having regard to the remarks made relating to foreigners in South Africa being here with one purpose in mind, which is to commit crimes.

- [14] The remarks by the Presiding Magistrate are unfortunate. The remarks lend themselves to, and taint the sentence imposed by the Learned Magistrate with biasness towards foreigners, and gives the impression that the sentence imposed was influenced by the Learned Magistrate's views on foreign nationals in the country.
- [15] I am of the view that the sentence imposed, which appears to be tainted by bias on the part of the Magistrate is clearly inappropriate, having regard to all the factors put forward as mitigating factors, which the Presiding Magistrate should have taken into account.
- [16] I am of the view that the sentence imposed is in the circumstances too harsh and in appropriate.

ORDER

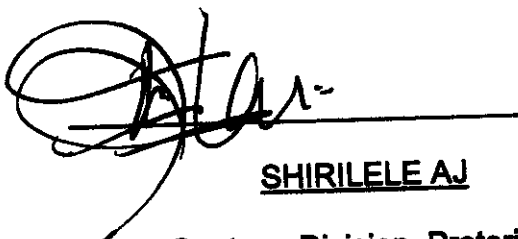
- [17] In the result I make the following order:

17.1 The Appeal against sentence succeeds;

14.1 The sentence is replaced with the following order:

"The Appellant is sentenced to four (4) years imprisonment, half of which is wholly suspended for two (2) years on condition the accused does not commit a similar offence".

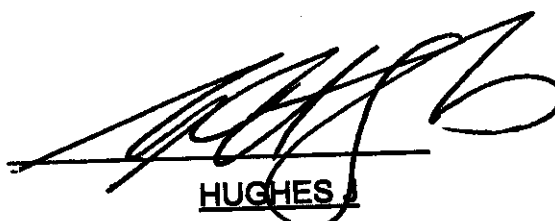
DATED AT PRETORIA ON THIS THE 27TH DAY OF MARCH 2017.



SHIRILELE AJ

Acting Judge of the High Court of South Africa, Gauteng Division, Pretoria.

I agree



HUGHES

Judge of the High Court of South Africa, Gauteng Division, Pretoria

APPEARANCES:

**FOR THE APPELANT: MB KGARARGA
PRETORIA JUSTICE CENTRE.**

**FOR THE RESPONDENT: ADV C PRUIS
THE STATE**

APPEAL DATE: 14 MARCH 2017

DELIVERY DATE: