

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

Case no.: CA&R 7/15

In the matter between:

BUTSHA MPULAMPULA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

STRETCH J:

[1] The appellant was arraigned before the East London regional court. He pleaded guilty to all the charges. He was sentenced as follows:

- a. Counts 1 to 15: contravening section 86(1) of the Electronic Communications and Transactions Act 25 of 2002 (the Act): 12 months' imprisonment on each count (to run concurrently).
- b. Counts 16 and 17: fraud: three years' imprisonment in respect of each count.
- c. Count 18: contravening section 86(4) of the Act: five years' imprisonment.
- d. Count 19 was withdrawn.
- e. Counts 20 to 34: contravening section 86(3) of the Act: 12 months' imprisonment on each count (to run concurrently with each other and concurrently with the sentences on counts 1 to 15).

[2] The effective period of imprisonment is 12 years.

[3] The penalty provisions of the Act stipulate a fine or a maximum period of 12 months' imprisonment per count for a contravention of section 86(1) or section 86(3).

[4] A person convicted of an offence referred to in section 86(4) is liable to be fined or to be sentenced to imprisonment not exceeding five years.

[5] This appeal is directed at the gravity of the sentences imposed.

[6] The appellant's grounds of appeal are that the regional magistrate erred and misdirected himself in the following respects:

- a. He made a finding, in the absence of evidence, that the appellant had committed the offences for personal gain.
- b. He over-emphasised the deterrent element of sentencing at the expense of other elements such as prevention, reformation, retribution and mercy.
- c. He expressed the view that the Act fails to reflect the seriousness of these offences, nor does it reflect the impact which the commission of these offences have on the community, and that it is hoped that the provisions would be revised to bring them into line with reality.
- d. He expressed the view that the Act sent out a message to would-be offenders that commission of these offences was worth the risk.
- e. He expressed the view (in the absence of evidence to this effect) that the type of scamming of which the appellant was guilty was commonplace, and that people invariably lost entire salaries due to this type of conduct.
- f. He expressed the view (in the absence of evidence) that the appellant had been committing these offences for some time, and that it was unlikely that the complainants referred to in the charge sheet were his only victims.
- g. He failed to consider that the total amount with respect to the two fraud counts was R9 000,00.
- h. He did not take into account the fact that it was essential for the appellant to contravene section 86(4) for him to also commit the two counts of fraud.
- i. He ought to have taken counts 16 and 17 together for sentencing purposes and ought to have directed the resultant sentence to run concurrently with that imposed on count 18.

- j. He imposed the maximum permissible period of imprisonment with respect to count 18 without considering other options.
- k. The sentences are out of touch with reality.
- l. He failed to attach adequate or any weight to the fact that the appellant had pleaded guilty, that he had shown remorse, and that he had spent a year in custody awaiting trial.

[7] I do not intend traversing each and every ground of appeal raised. Most of the grounds are, in my view, not sufficiently serious to justify this court usurping the sentencing discretion of the trial court.

[8] It is trite that a sentence will not be altered on appeal unless it is found that no reasonable man would have imposed it, or that it is out of proportion with the gravity or the magnitude of the offence, or that it invokes a sense of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court failed to exercise its discretion properly, or that interference is in the interests of justice. See by way of example *S v Anderson* 1963 (3) SA 494 (A) at 495D-E; *Nevilimadi v S* [2014] ZASCA 41 (unreported SCA case no 545/13, 31 March 2014) at [17].

[9] In *S v Bogaards* 2013 (1) SACR 1 (CC) the Constitutional Court crisply summarised an appeal court's power to interfere with sentences imposed as follows:

'It can only do so where there has been an irregularity that results in a failure of justice ...'

[10] Whilst it is so that a sentencing court may find it useful to have regard to the sentences imposed in other similar cases, each case invariably has its own peculiar circumstances, and other sentences should not be regarded as anything more than guidelines to be taken into account in the exercise of the judicial discretion of sentencing (*Nikelo v S* unreported, ECG case no CA 10/2012, 5 April 2013 at [17]).

[11] On the other hand, a court's failure to take into account the cumulative effect of a long list of sentences may, in appropriate cases, constitute a material misdirection resulting in a disproportionately harsh sentence (see *S v Kruger* 2012 (1) SACR 369 (SCA) at [11]).

[12] In the matter before us, the regional magistrate indeed stated that he would take into account the cumulative effect of the sentences he intended imposing. It is clear that he did so when he directed that the sentences on all but three of the 33 counts ought to run concurrently. However the manner in which the Court thereafter dealt with the three remaining counts, has, to my mind, the effect of vitiating any amelioration which may have resulted out of the order for the concurrent running of the sentences for most of the counts.

[13] I say this because none of the sentences on counts 16, 17 and 18 were ordered to run concurrently, nor did the sentencing Court, as correctly pointed out by counsel, give any consideration to imposing anything less than the maximum permissible period of imprisonment on count 18.

[14] The effect of this is to neutralise what the regional magistrate purported to have achieved by directing the concurrent running of the other sentences.

[15] In the light of this, it seems to me at the very least that a perception has come about that the Court below may have been inclined to punish the appellant in line with an expressed and unsubstantiated view that the appellant had been committing these offences for a long time, and that the cited complainants were not his only victims.

[16] In my view this, considered together with the harsh cumulative effect of the sentences, constitutes an irregularity which has resulted in a failure of justice, entitling this Court to sentence the appellant afresh.

[17] The order I propose is the following:

The sentence on count 18 is set aside and is substituted with the following sentence:

“Three years’ imprisonment to run concurrently with the sentence on count 17”.

I.T. STRETCH
JUDGE OF THE HIGH COURT

25 February 2016

I agree, and it is so ordered:

M. MAKULA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the appellant:

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Locally represented by:

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Instructed by the Director of Public Prosecutions

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