REPORTABLE

CASE NO: CA 58/2010

SUMMARY

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

NAFTALI NGHIPEWAMBEDI SAKARIA **APPELLANT**

and

THE STATE **RESPONDENT**

HOFF, J / SIBOLEKA, J

28 May 2012

Appeal against sentence by accused person. Court gives notice *mero motu* of considering increase in sentence imposed in the Court *a quo*.
Appellant cannot after notice has been given by Court that an increase will be considered withdraw his appeal without the permission of the Court – Rule of practice preventing the thwarting of Court of Appeal's power to increase sentence –
Appellant convicted in magistrate's court on two counts of attempted murder – Court on appeal may interfere with sentence imposed only where the court imposing sentence misdirected itself or where sentence imposed is startlingly or disturbingly inappropriate, or where it creates a sense of shock, or where there is a striking disparity between the sentence imposed by trial court and sentence Court of Appeal would have imposed as court of first instance
Magistrate under-emphasising interests of society and seriousness of the offences committed – sentences imposed disturbingly lenient.
Court of Appeal's right to increase sentence limited – may not impose a sentence which exceeds the jurisdictional limit of the trial court.
Court of Appeal may in terms of sectoin 304 (2)(c)(iv) of Act 51 of 1977 make an order the magistrate's court ought to have given – matter ought to have referred to the Regional Court for purpose of sentencing. In terms of section 10(8) of Act 7 of 1996 Court may declare person unfit to posssess fire-arm for minimum period of 2 years – no maximum period prescribed
Prudent and more effective manner to order that period during which accused is declared unfit to possess a fire-arm should start to run from the day of release from prison.

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In the matter between:

NAFTALI NGHIPEWAMBEDI SAKARIA **APPELLANT**

and

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CORAM: HOFF, J *et* SIBOLEKA, J

Heard on: 23 September 2011

Delivered on: 28 May 2012

APPEAL JUDGMENT

HOFF, J: [1] The appellant was convicted in the magistrate's court for the district of Windhoek on two counts of attempted murder and sentenced in respect of the first count to 2 years and six months imprisonment and in respect of the second offence to 5 years imprisonment.

[2] The appellant appealed against both the convictions as well as the sentences imposed.

[3] The appeal was originally set down on 20 May 2011 at which stage the appellant was unrepresented. The appeal was then postponed to 23 September 2011 and the Registrar was ordered to appoint *amicus curiae* counsel to appear on behalf of the appellant and it was simultaneously indicated that this Court would hear argument on the merits of the appeal as well as argument on a possible increase in respect of the sentences imposed.

Mr V Uanivi of the law firm Nambahu & Uanivi Attorneys was subsequently appointed as *amicus curiae* to argue the appeal on behalf of the appellant.

[4] Mr Uanivi submitted that there were no prospects of success on appeal and that he had informed the appellant accordingly. Mr Uanivi further informed the Court that he received instructions from the appellant to withdraw the notice of appeal.

[5] In *S v Du Toit* 1979 (3) SA 846 (AA) it was held that when set down of an appeal against sentence has taken place and notice has been given by the Court that an increase will be considered, an appellant cannot withdraw his appeal without the permission of the Court.

(See also *S v Kirsten* 1988 (1) SA 415 (AA).

[6] Where the Court of Appeal *mero motu* considers to increase a sentence imposed in the court *a quo* and has given notice to the appellant of such intention, such a notice cannot reasonably be construed in terms of the Constitution as lack of impartiality.

(See *S v Sonday and Another* 1994 (2) SACR 810 (C)).

[7] The afore-mentioned cases confirmed a rule of practice preventing the thwarting of a court of appeal's power to increase a sentence, where an appellant after receiving a notice of the court's intention to increase the sentence, withdraws the appeal.

In my view a withdrawal of an appeal should not be granted for the mere asking thereof. A Court of Appeal has a discretion to grant or refuse the withdrawal of a notice of appeal under these circumstances on good cause shown.

[8] The appellant may, therefore, in the absence of any permission by this Court, not withdraw his notice of appeal.

[9] The appellant in his notice of appeal raised as ground of appeal in respect of the conviction that the magistrate misdirected himself by failing to find that the appellant was acting in self-defence.

[10] The two complainants and a police officer testified on behalf of the State in the Court *a quo*.

[11] The complainant in respect of the first charge testified that on 9 December 2008 he was on his way home when he passed the house of the appellant and decided to approach the appellant in respect of money appellant owed him. He was in the company of the second complainant. At an earlier stage he had sold shoes to the appellant for the amount of N$100.00 and N$20.00 was still outstanding. They were standing at a counter in the shebeen where appellant worked when he requested payment from the appellant. The appellant told him that he had no money and would give him none. Thereafter the appellant entered an adjacent room and then emerged with a pistol, cocked it, and started shooting. The first complainant was hit on the side of his forehead. The second complainant was shot in the neck. The first complainant started to run to the police station but fell down and only regained consciousness in the hospital. He was discharged the next day.

[12] The second complainant corroborated the testimony of the first complainant in material respects. He added that the appellant informed them that the sneakers were in the north of the country. He further testified that he regained consciousness after the second day in the hospital. He was hospitalised for more than a year. As a result of the injuries he sustained he has been paralysed and is permanently in a wheelchair.

[13] The police officer, sergeant Natangwe Erastus, testified that the day after the incident, first complainant informed him what had happened. He went to the house of the appellant and after a search found sneakers underneath the bed of the appellant which had been identified by the first complainant as the shoes in question. The appellant handed a 7.65 mm pistol to him. In the magazine were 6 cartridges. He found spent cartridges behind the counter. The appellant was the licence holder of the fire-arm. The appellant informed him that the complainants were trying to rob him and that was the reason why he shot at them.

[14] The appellant testified that the two complainants requested him to bring their “things” and when he questioned them about the goods they broke the door of the counter. He took the fire-arm from his waist and fired three shots in the air. The first complainant according him “did not surrender” and he then shot him in the forehead. The first complainant left and second complainant came towards him and was then shot in the neck and he fell down. The ambulance came and removed the second complainant. He was arrested on 12 December 2008. He denied buying shoes from anyone of the complainants.

[15] During cross-examination the appellant testified that both the complainants were unarmed, that they did not break the door of the counter, only damaged the lock and when he was asked why he shot the second complainant he answered that he was just shooting and did not care where the shots went. The appellant readily admitted that he

foresaw the possibility that if a person is hit in the head or in the neck that it could result in the death of such a person.

[16] In his *ex tempore* judgment the magistrate was alive to the principle that the appellant bore no *onus* to convince the court of the truth of the explanation he gave why he had shot the complainants.

The magistrate found the complainants to be consistent in their testimonies, that their evidence corroborated each other and that they created a “strong impression” of honest and reliable witnesses.

The magistrate found that on the available evidence the complainants did not break or did not attempt to break the door of the counter and did not attack the appellant.

The magistrate in turn analysed the evidence of the appellant and found it to be “crippled” with inconsistencies. He pointed out that the appellant never laid a charge against the complainants, that he did not tell sergeant Erastus about the breaking of the counter door when he was arrested, that the appellant had first denied knowledge of any shoes but when the shoes were identified by the first complainant he did not dispute it; that the appellant first testified that the door of the counter was broken by the complainants but later testified that only the lock of the door was broken, that when appellant cross-examined the two complainants, the appellant never denied that he bought shoes from first complainant, and that the police officer never observed a broken counter door.

[17] The magistrate in my view correctly rejected the defence of the appellant and committed no misdirection in convicting the appellant on both counts of attempted murder.

[18] Regarding the sentence imposed, although the appellant has appealed against the sentences, his notice of appeal reflected no ground on which the appeal against sentence is based. Mr Uanivi submitted that there were no prospects of success on appeal in

respect of both the convictions and sentences and offered no opposition to a possible increase in respect of the sentences imposed.

[19] The sentence imposed in respect of the first count was 2 years and 6 months imprisonment and in respect of the second count was 5 years imprisonment of which 5 months imprisonment were suspended on condition accused is not again convicted of attempted murder or assault with intent to do grievous bodily harm committed during the period of suspension.

[20] The sentence in respect of count 1 was ordered to run concurrently with the sentence imposed in count 2.

The appellant was further declared unfit to possess a fire-arm for a period of 3 years and 3 months as from 21 April 2010 in terms of the provisions of section 10(7) of Act 7 of 1996.

[21] The appellant in mitigation stated that he was 31 years of age, not married, was self-employed, earned N$100.00 to N$150.00 per month by selling fruit and vegetables, is the father of four minor children, and that his father had passed away.

[22] The approach of a court of appeal regarding a sentence imposed in a lower court is that sentencing is pre-eminently a matter within the discretion of the trial court and that a court of appeal will only interfere where the court imposing sentence misdirected itself materially in respect of the sentence imposed.

The primary question in an appeal is not whether the sentence imposed was wrong or right but whether the trial court in imposing the sentence exercised its discretion properly and judicially.

A misdirection is material if it is of such a nature or degree that directly or by inference it can be said that the court did not exercise its discretion at all or exercised it improperly.

[23] Where it appears to a Court of Appeal that the trial court ought to have had regard to certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial court will be regarded as a misdirection on its part entitling the Court of Appeal to consider the sentence afresh. (See *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684 B).

A trial court would misdirect itself where it over-estimates or under-estimates the seriousness of an offence, or the personal circumstances of an accused, or the interests of society. Other tests to indicate that a trial court misdirected itself would be where the sentence imposed is startlingly or disturbingly inappropriate, or where it creates a sense of shock, or where there is striking disparity between the sentence imposed by the trial court and the sentence the Court of Appeal would have imposed as court of the first instance.

(See *S v Tjiho* 1991 NR 361 (HC) at 366 A – B).

[24] A Court of Appeal may also question whether the trial court in imposing a sentence properly balanced the four aims of punishment namely, deterrence, prevention, reform and retribution or whether one or more of the aims had been over-emphasised at the expense of the other aims. If there was such a misdirection the court of appeal is at liberty to consider sentence afresh.

[25] A trial court's sentence would only be set aside on appeal if it appears that the trial court exercised its discretion in an improper or unreasonable manner (*S v Pieters* 1987 (3) SA 717 (A) at 727 F – H). The final and crucial question remains whether the trial court could reasonably have imposed the sentence it did (*Pieters* 734 C – H).

[26] In *Pieters t*he Court of Appeal recognised that it would be unrealistic not to acknowledge the fact that a specific period of imprisonment in a particular case cannot be determined according to any exact, objectively applicable standard, and that there would

frequently be an area of uncertainty wherein opinions regarding the suitable period of imprisonment may validly differ. In such a case even if a Court of Appeal was of the opinion that it would have imposed a lighter (or heavier) sentence it would nevertheless not interfere, where the trial court did not misdirect itself in any way.

[27] It is in the context of the afore-mentioned precepts that the sentences imposed by the magistrate's court must be considered.

[28] However before I do so it would be instructive first to look at some decided cases.

[29] In *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) the accused persons were convicted of the crime of murder and sentenced to 10 years imprisonment which were suspended *in toto* for a period of 5 years on certain conditions. On appeal Mahomed CJ at 592 remarked that there was a striking disparity between the sentence imposed by the trial Judge and the sentence the Court of Appeal would have imposed had it been sitting as the trial court.

He stated that his main difficulty with the approach of the trial judge was that he

> "over-emphasised the personal circumstances of the respondents without balancing these considerations properly against the very serious nature of the crime committed, the many very aggravating circumstances which accompanied its commission, its actual and potentially serious consequences for others, and the interests and legitimate expectations of the South African community ..."

[30] The sentence was substituted with a term of 12 years imprisonment, two years suspended. (See also *S v Sadler* 2000 (1) SACR 331 (SCA).

[31] In *S v Mngoma* 2009 (1) SACR 435 (ECD) the accused person was convicted of the crime of murder and sentenced to 5 years imprisonment subject to the terms of s. 276(1)(i) which provides for imprisonment from which the convicted person may be placed under correctional services.

On appeal at 438 i – j to 439 (a) the Court of Appeal (as per Jones J) remarked as follows:

> "... it seems to me that despite the care with which the learned judge approached the sentence, the sentence he imposed displays a fatal lack of proportionality. This is reflected in an overemphasis of (a) the desirability of the early release of this offender, and (b) the desirability of imposing a sentence designed to alleviate overcrowding in our prisons. The result is a sentence that is shockingly and inappropriately lenient, a sentence that is startlingly disparate from the sentence which the court of appeal considers appropriate for this particular offence and this particular offender."

[32] The sentence was replaced with a sentence of 12 years imprisonment.

[33] In *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) the accused was convicted of murder and sentenced to 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. The accused killed his lover (who was seven months pregnant) four days after suspecting her of infidelity.

The State on appeal did not argue that there was any misdirection on the part of the trial court but that the sentence of 5 years imprisonment was shockingly inappropriate. The Court agreed with this submission and stated as follows at 432 a – b:

> "The sentence imposed on the accused is in my view inappropriate and distorted in favour of the accused without giving sufficient weight to the gravity of the offence and the interests of society. For a sentence to be appropriate it must be fair to both the accused and society. Such a sentence must show judicious balance between the interests of the accused and those of society."

and continued at 432 f – g as follows:

> "However one should not allow 'maudlin sympathy' for the accused to unduly influence one's objective and dispassionate consideration of an appropriate sentence. I am of the view that the sentence imposed is so disturbingly lenient that it has the effect of trivialising violence."

[34] I shall now return to consider the sentences imposed by the magistrate.

[35] The effect of the sentences imposed is that the appellant must serve a four years and seven months prison term. The appellant is a first offender but besides this there is nothing unusual regarding the personal circumstances of the appellant.

The magistrate in his reasons referred to the personal circumstances of the appellant. He referred to the fact that the accused expressed no regret or remorse for what he had done and correctly regarded this as an aggravating factor.

He referred to the interests of society and that the abuse of fire-arms has contributed significantly to the high levels of crime in society and warned members of the public that persons committing violent crimes with knives and other dangerous weapons like fire-arms will be punished more severely because by using such weapons there is always the possibility "of death hovering in attendance". The magistrate announced that the commission of crimes involving a fire-arm will be stamped out ruthlessly in order to protect society, to deter potential offenders and to "restrain the ever flourishing rapacious violence in the city".

The magistrate in conclusion stated that "quite clearly courts have, when an opportunity present itself, to play their role in protecting potential victims of this scourge imposing deterrent sentences on persons found wanting in the field of respect for human life".

[36] I do not disagree with the remarks by the magistrate – it is however the implementation of these principles which is "wanting" to borrow from the magistrate.

[37] In *S v Van den Berg* 1996 (1) SACR 19 (Nm) O'Linn J expressed the view that "the role of the court in criminal matters and the primary aim of criminal procedure should be to ensure that substantial justice is done". At 29 d – e, he expressed the view that "A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights however, must be interpreted and given effect to in the context of the rights and interests of the

law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them".

[38] I refer to this passage to underline the fact that the interests of the victim of crime who is a member of society should not be under emphasised (as was done in this case) when a trial court considers an appropriate sentence. In my view lipservice has been paid regarding the weight that should have been attached to the interests of society and the seriousness of the offences in spite of the magistrate's warnings and remarks in this regard. The magistrate misdirected himself by under-emphasising the interests of society and the seriousness of the offences.

If one has regard to the fact that the appellant went to a room, returned, cocked the fire-arm and then started shooting without any warning the only inference, in my view, is that he had direct intention to kill the complainants. This fact together with the finding of the magistrate that the appellant showed no remorse, are indications that the appellant in a callous manner committed the offences and a high degree of moral blameworthiness should be apportioned to him. In my view to impose an effective sentence of four years and seven months imprisonment for two convictions of attempted murder is comparable to a slap on the wrist of the appellant.

[39] It is apposite to recall the oft quoted words of Schreiner JA in *R v Karg* 1961 (1) SA 231 (AD) at 236 A – B where the following appears:

> "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that the courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

[40] More recently in the unreported judgment of Strydom JP (as he then was) in *Thomas Goma Jacobs v The State* CA 7/96 and delivered on 22 April 1996 (although said in relation to the crime of housebreaking with intent to steal and theft is in my view of application in respect of the commission of crime in general) the following appears at p. 3:

> "Whether we want to believe it or not we are involved in a war against crime which at present shows no sign of abating. The situation calls for exceptional measurements and in this process Courts play an important role."

[41] This Court is of the view that the sentences imposed by the magistrate is disturbingly lenient and that there is a striking disparity between the sentences imposed by the magistrate and the sentences this Court would have imposed as court of first instance. In essence the trial magistrate in imposing the sentences which he did, exercised his discretion in an improper or unreasonable manner. This Court would therefore be justified in increasing the sentences imposed.

[42] It appears however from case law regarding the issue of increasing sentences on appeal that this may be done only to the extent that a Court of Appeal may not impose a sentence which exceeds the jurisdictional limit of the trial court.

[43] Section 309(3) of the Criminal Procedure Act 51 of 1977 provides that this Court on appeal have the powers referred to in section 304(2) and in addition to such powers have the power to increase *any sentence* imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to the sentence imposed by the trial court. Section 92(1)(a) of the Magistrate's Court Act, 32 of 1944, as amended, limits the jurisdiction of district magistrates courts, in respect of criminal convictions, to a period not exceeding 5 years imprisonment per conviction.

[44] In terms of section 304 (2)(c)(iv) of Act 51 of 1977 this Court may "generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question".

(See also *section 19 of the High Court Act,* 16 of 1990).

[45] In *S v Peter* 1989 (3) SA 649 (CkAD) Galgut JA considered the question whether a Court of Appeal may increase *any sentence*. He analysed *inter alia* the sections referred to (*supra)* and remarked as follows at 653 C – D:

> "The language used in s. 309(3) does not say, as urged by the State, that the Court can, on appeal, impose any sentence of imprisonment it thinks fit. It, says that the Court has the power to increase 'any sentence imposed on the appellant' by the magistrate. Had the former been intended one would have expected the Legislature to have said so clearly. Furthermore, to read s. 309(3) as empowering the Court on appeal to impose a sentence in excess of the magistrate's jurisdiction would in my view, lead to some absurdity, inconsistency, hardship or anomaly."

and at 653 J – 654 A continued as follows:

> "An accused who has been indicted, tried, convicted and sentenced by a competent court chosen by the State has a right to appeal. From the outset he would have known the maximum sentence that could be imposed. If he exercises his rights of appeal he runs the risk of receiving a sentence in excess of the trial court's maximum jurisdiction. His right of appeal is thus unduly threatened. A question of principle is also involved. It is questionable whether a sentence, in excess of the trial court's jurisdiction, should be achieved by an expedient."

[46] In *S v Van Aswegen* 2001 (2) SACR 97 (SCA) the reasoning and findings in *Peter* were confirmed.

(See also *Attorney-General, Eastern Cape v D* 1997 (1) SACR 473 (ECD) at 478 f – g).

[47] Had the appellant been convicted and sentenced in the Regional Court, this Court would certainly have entertained the possibility of imposing sentences in excess of 5 years imprisonment.

[48] This Court may in terms of section 304 (2)(c)(iv) of Act 51 of 1977 make an order which the magistrate's court ought to have given at the trial of the accused person, namely to refer the matter after conviction to the Regional Court for purposes of sentencing in terms of section 116 of Act 51 of 1977.

[49] In such an instance the appellant may be compelled to testify again in mitigation of sentence in the light of the higher jurisdiction of the Regional Court.

[50] In conclusion I need to make a few remarks in respect of the order made by the magistrate in terms of provisions of section 10(7) of Act 7 of 1996. The magistrate declared the appellant unfit to possess an fire-arm for a period of 3 year and 3 months from 21 April 2010 i.e. from the date of the imposition of the sentence. Since the appellant had been sentenced to 4 years and seven months imprisonment this in practical terms means that the appellant on the day of his release from prison would be able to request from the Inspector-General of the Namibian Police Force possession of his pistol.

[51] In my view this is an ineffective way of imposing the additional sanction imposed by the Legislature in respect of licenced owners who commit offences or misuse fire-arms whilst in their possession.

A more effective manner in which to impose this additional restriction would be to order that the period during which he is declared unfit to possess a fire-arm should start to run from the day of his release from prison.

Section 10(8) provides that a person if so ordered by the court shall be unfit to possess an arm for a period of not less than 2 years. There is no maximum period prescribed.

[52] This Court is of the view, having regard to the circumstances of this case, that the appellant is a person that should have been declared unfit to possess a fire-arm for an indeterminate period.

[53] However it would be inappropriate to be prescriptive in this regard and I do not wish to interfere with the discretion the magistrate has to exercise in terms of the provisions of sections 10(7) and 10(8) of Act 7 of 1996, save to suggest that it should be ordered that the period should commence on the day of the release of the appellant from prison.

The magistrate must naturally before determining a period in this regard give the appellant an opportunity to address the court on this issue.

[54] In the result the following orders are made:

1. The appeal against the convictions is dismissed and the convictions are confirmed.
2. The sentences are set aside and referred to the Regional Court in terms of section 116 of Act 51 of 1977 for purposes of sentencing.
3. The period determined by the trial magistrate in terms of section 10(8) of Act 7 of 1996 as well as the date from which it was ordered to run, is set aside.
4. The Director of Legal Aid is requested to provide the appellant with the services of a legal representative to appear on behalf of the appellant in the Regional Court.

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HOFF, J

I agree

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SIBOLEKA, J

ON BEHALF OF THE APPELLANT: **MR V UANIVI**

Instructed by: **NAMBAHU & UANIVI ATTORNEYS**

ON BEHALF OF THE RESPONDENT: **ADV. NDUNA**

Instructed by: **OFFICE OF THE PROSECUTOR GENERAL**