IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A98/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

20/02/2019
DATE

SIGNATURE

In the matter between:

RAMAQELE FRANCIS **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

SIWENDU J:

[1] The appellant was arraigned before the Magistrate's Court sitting in Protea on two counts of Robbery with aggravating circumstances in terms Section 1 of the Criminal Procedure Act 51 of 1977 read with Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. It was alleged that on 19 September 2013, he unlawfully and intentionally assaulted Mmatele Xabi and Percy Nhlapho. He

forcefully removed their cell phones. The aggravating factor was the use of a firearm. The appellant also stood accused of housebreaking with intent to steal. In respect of Count 3, it was alleged that on 24 May 2013, he unlawfully and intentionally broke and entered Moses Mchunu's house where he stole various items including a Norinco Pistol with six (6) rounds of ammunition. Count 4 constituted a charge for possession of an unlicensed semi-automatic 9mm Parabellum firearm.

[2] The appellant was acquitted on counts 1 to 3 but found guilty of unlawful possession of a firearm. He was declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act 60 of 2000. The finding of guilt attracts the prescribed minimum sentence of 15 years imprisonment in terms of section 51(2) (a) of the Criminal Law Amendment Act. The trial court sentenced him to a fifteen (15) year term of imprisonment, five (5) of which it suspended on condition that he is not found guilty of possession of an unlicensed firearm in terms of Section 103 of the Firearms Control Act. There were no previous convictions proved against the appellant; therefore, he was a first offender. He had been in custody awaiting trial from the date of his arrest to the date of sentencing. He appeals against the sentence imposed. The appeal is with the leave of the trial court. This court granted the appellant condonation for the late filing of his heads of argument. The delays were attributed to the late referral of the appeals to the Legal Aid Board. The state did not oppose condonation but persisted with its opposition of the merits of the appeal.

[3] The bone of contention in the appeal is that the sentence imposed by the trial court was harsh, strikingly inappropriate and out of proportion with the facts in mitigation accepted by the trial court. Also, the appellant contended a striking disparity

between the sentence and that imposed by other courts.[1] Counsel for the Appellant, Mr Tshishonga argued that the sentence took into consideration facts the appellant was not convicted of. It failed to consider that the appellant was a victim of mob justice, and over-emphasized the prevalence of the crime and the interest of the community above other relevant considerations.

[4] The facts leading to the conviction are briefly that Constable Lekanyane was off duty in civilian clothes. He left his home at about 8 pm to buy airtime from a tuck shop nearby. As he approached a soccer-field, near Pimville, he overheard a female voice screaming and approached the scene. He saw two females and three men. Two of the males escaped, but the third man was apprehended by the females who held him to the ground down around the waist area. The females accused the man of forcefully taking their cellular phones. Constable Lekanyane identified the appellant as the man apprehended. He searched the appellant but did not find the cell phones in his possession; however, he found a firearm tucked between the appellant's pants and waist area. The firearm had no ammunition. He took possession of the firearm and called the Kliptown Police station for reinforcement. While waiting for the police, community members arrived at the scene.

[5] It is common cause that the appellant disputed involvement in the robbery. It is further common cause, and the trial court accepted, that the appellant was assaulted by members of the community and was admitted at Baragwanath Hospital as a result. Even though Constable Lekanyane testified to have heard a gunshot fired, there was no evidence that the firearm found in possession of the appellant had been

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[1] *S v Qalokusha* (AR 203/16) [2016] ZAKZPHC 74 (25 August 2016)

discharged. The firearm handed in evidence together with an empty magazine is described as a Norinco semi-automatic firearm with serial number 43006297.

[6] This appeal merits a restatement of the applicable principles. The courts have emphasized that the imposition of a sentence is pre-eminently a matter falling within the discretion of the trial court. A court of appeal can interfere if the trial court materially misdirected itself or did not exercise its discretion judicially and properly, or if the sentence is startlingly inappropriate or that the interest of justice requires it. *In S v Pillay* [2] Trollip JA stated that :

> *"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.*[3]

[7] Our courts have also recognized that sentencing is complex. It requires the judicial officer to separate her own emotions and those of others from the realities of the case and consider the matter objectively in all aspects, devoid of emotion.[4] Contrary to the argument advanced by the appellant, that the trial court ought to have followed case law in similar matters, a mere disparity in sentences imposed does not on its

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[2] 1977 (4) SA 531 (A).

[3] Ibid, 535 D-G.

[4] *The State v Ahroon Liyaqath* GJS Case SS46/07.

own justify a departure from the sentence. Sentencing is not a mathematical exercise, and the sentence must be just, given the circumstances of the particular case.[5]

[8] But, of course, dealing with the minimum sentencing legislation, the test is different. In S v PB,[6] Bosielo JA formulated the approach as follows:

> *"What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not[7]"*

[9] S v Vilakazi[8], Nugent JA said:

> *"It is enough for the sentence to be departed from that it would be unjust to impose it. To determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing and referred to as "mitigating factors".[9]*

[10] In S v Nkomo[10], Lewis JA held as follows:

> *"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may*

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[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

[6] 2013 (2) SACR 533 (SCA) para 20.

[7] Ibid, para 20.

[8] 2009 (1) SACR 552 (SCA).

[9] Ibid, para 20-21.

[10] 2007 (2) SACR 198 (SCA) para 3.

include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional.[11]"

[11] The trial court accepted the evidence of the appellant's age and that he was a first offender with no previous convictions. In purporting to balance the personal circumstances of the appellant, the seriousness of the offence and the interest of the community, it imposed a fifteen (15) year sentence, five (5) of which it suspended for five (5) years. I now turn to the trial court's approach to the sentence to determine whether this court should interfere with the sentence.

[12] The record reveals that the trial court referred to principles laid out in S v Zinn[12] that:

"The over-emphasis of the effect of the appellant's crimes, and the underestimation of the person of the appellant, constitutes, in my view, a misdirection and in the result the sentence should be set aside.

It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society."[13]

However, these principles cannot be applied in a perfunctory fashion.

[13] Mr. Tshishonga argued that the trial court ought to have taken into account that the community severely assaulted the appellant. There is difficulty with this submission. To recognise the assault as a mitigating factor would legitimise illegal conduct. Although the attack is reprehensible and cannot be condoned, it is a neutral

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[11] Ibid, para 3.

[12] *1969 (2) SA 537 (A).*

[13] Ibid, 540F-G.

factor for determining this sentence. Notwithstanding, the question of whether the sentence was startlingly inappropriate and or there was a misdirection remains. The complaint is that the trial court sentenced him for something on which it had acquitted him. The answer is linked inextricably with the approach adopted by the trial court.

[14] I now turn to the trial court's approach to the sentence to arrive at whether this court should interfere. The trial court referred to the seriousness and prevalence of the use of unlicensed firearms within the community. It reasoned that the community expects the court to hand down appropriate sentences that would deter the crime. Dealing with the relentless assault of the appellant by community members which occurred in the presence of police, it did not condone the conduct as the record states:

> *"But I can surely understand the frustration of the community as well because they are also sick and tired of people walking around with unlicensed firearms, committing offences within their area where they reside [sic]"*

[15] In imposing this sentence, the record reveals the court took account of the appellant's age and that he was a first offender with no previous convictions. However, there had been no evidence of the appellant's involvement in the robbery hence the acquittal. Besides, there was no evidence that the firearm was discharged or used in the robbery. It was found tucked inside the appellant's waist. The firearm had no ammunition. Given these facts, the criticism is valid. It was held in S v Matjeke[14],

> *...if the imposition of the prescribed sentence would be 'disproportionate to the crime, the criminal and the legitimate needs of society' that, on its own, constitutes a*

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[14] (049/2016) [2016]ZAGPJHC 129 (7 June 2016).

substantial and compelling circumstance, justifying — and, indeed, requiring — the imposition of a less severe sentence."

The approach and reasoning led to a disproportionate result. Nevertheless, the issue does not stand in isolation. The trial court's attempt to "balance" the appellant's personal circumstances, the seriousness of the offence and the interest of the community, resulted in the fifteen (15) year sentence, five (5) of which was suspended for five (5) years and this merits scrutiny.

[16] Where as in this case, a statute imposes a prescribed minimum sentence, the court has no option but a duty to impose the minimum sentence in terms of the section unless it can find substantial and compelling circumstances which justify the imposition of a sentence other than prescribed[15] [emphasis added]. As stated in *S v Malgas*[16].

"Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2)."

[17] To succeed as a sentence imposed *"in terms of the Act,"* the preceding condition is that a court must establish grounds for deviating from the prescribed minimum sentence. The trial court is obliged to articulate and make a finding of what the substantial and compelling circumstances are on the facts of this case.[17] It is once the grounds for deviating from the sentence have been established that the court is at large to impose any sentence which it finds appropriate[18].

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[15] *Rainier Hildebrand v The State* (SCA) Case No 00424/2015 [2015] ZASCA 174 (26 November 2015).

[16] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

[17] *S v Mabuza* (A384/2015) [2016] ZAGPPHC 334 (17 March 2016) para 8.

[18] *Rainer Hildebrand v The State* [2015] ZASCA 174 (26 November 2015).

[18] There was a misdirection by the trial court which became pronounced during argument. The trial court erred in two respects. It conflated the requirements of Section 51 (5) of the Act resulting in a procedural confusion. It purported to "suspend" the prescribed minimum sentence without a finding of what the substantial and compelling circumstances were found to support the deviation from the prescribed minimum sentence. A suspension is, in the absence of substantial and commpelling circumstances and in terms of Section 51(5) not competent. In addition to the finding that the sentence was disproportionate, the sentence was not one imposed in terms of the Act.

[19] Faced with these difficulties, Mr Van Wyk conceded the misdirection on behalf of the state. He submitted that because of the courts' incidental finding of substantial and compelling circumstances, the appellant should have been sentenced to a term of ten (10) years imprisonment. The concession of a misdirection is correct. However, an imposition of a ten (10) year term of imprisonment remains disproportionate and inappropriate when all the relevant factors are taken into account.The disproportionate sentence, as well as the misdirection, are sufficient grounds to interfere with the sentence.

[20] To use as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust, is an acceptable method.[19] I

[21] In Nyathi v State[20] a very useful summary of the most recent authorities is to be found:

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[19] Please see *S v Malgas,* 2001 (1) SACR 469 (SCA) at 480H-481A.

[20] A81/2018 an unreported judgment of this division.Handed down during September 2018 by Opperman J with whom Mohlale AJ concurred

"16. In the leading case of S v Thembalethu[21] *the appellant was convicted in the regional court on robbery with aggravating circumstances, the unlawful possession of a semi-automatic firearm, unlawful possession of ammunition and attempted murder. The appellant was sentenced to* ***15 years imprisonment*** *for the firearm possession offence. Whilst the total sentence imposed was 36 years and nine months the court ordered that some of the sentences were to run concurrently, with the result that the effective sentence that appellant stood to serve was 25 years' imprisonment. In particular, it was ordered that the sentence for unlawful possession of ammunition and 11 years of the sentence for the firearm offence run concurrently with the sentence for robbery. The result of this was that the appellant would only serve some* ***four years' imprisonment effectively*** *for the firearm possession offence. It was common cause that the appellant was in possession of a semi-automatic pistol when he and others robbed the bank of R64 700. This firearm was also used by him when he shot at the complainant referred to in the attempted murder count. The appellant's sentence of 15 years imprisonment for the unlawful possession of the semi-automatic firearm was confirmed by the Supreme Court of Appeal. The court remarked that the fact that 11 years of the 15-year sentence imposed in respect of the firearm possession offence should run concurrently with the sentence on the count of robbery tempered that which would otherwise have been a very harsh sentence*

17. In S v Sehlabelo[22] *the appellant was aged 24, a first offender who demonstrated remorse by pleading guilty and had spent seven months in prison awaiting trial. The trial court had sentenced him to 15 years' imprisonment. The court on appeal held that it was a misdirection for the trial court not to consider the aforementioned traditional mitigating factors as substantial and compelling, warranting deviation from the prescribed minimum sentence. The appeal against the sentence was upheld and a sentence of* ***5 years imprisonment*** *was imposed on appeal.*

*18.*In S v Asmal[23] *the deceased, an 18 year old boy, was employed by the appellant as a herdsman and also resided on the appellant's property. Certain goods belonging to the appellant went missing and the deceased was suspected*

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[21] 2009 (1) SACR 50 (SCA).

[22] 2013 JDR 0787 (GNP).

[23] 2015 JDR 2004 (SCA).

to have stolen them. The deceased was assaulted by a group of people, including the appellant. On the instructions of the appellant, the deceased was taken to a place where the appellant was employed as a junior manager. He was made to sit there for hours on end until the evening of the same day. On the instructions of the appellant the deceased was questioned by two employees regarding the alleged stolen goods and was simultaneously assaulted to compel him to admit to the theft. The appellant had struck the deceased with a shotgun on the head. He later died of head injuries. The deceased's body was dumped at a beach. On his arrest, the appellant was found in possession of an unlicensed fully automatic rifle (AK47). The appellant was convicted of murder, kidnapping and the unlawful possession of an automatic firearm. The appellant was sentenced to 15 years' imprisonment on this latter charge. The appellant was 42 years old when he was sentenced by the trial court, married with four children and employed at a Hyperstore as a junior manager. His wife was also employed. Although the appellant had previous convictions, for purposes of sentence he was considered a first offender. The previous convictions did not concern firearms and occurred more than ten years before the commission of the offence under discussion. The Supreme Court of Appeal set aside the 15 years' sentence for the possession of the automatic rifle and replaced it with a sentence of ***8 years' imprisonment*** *which was ordered to run concurrently with the sentences imposed for other offences he was also convicted of.*

*19.*In S v Tlale[24] *the accused were convicted of multiple counts of robbery with aggravating circumstances. One of the accused was also convicted of unlawful possession of a semi-automatic firearm. He was 33 years of age, unmarried but a father to a three year-old child. The mother of his child had since deserted him. At the time of the commission of the offences he was 31 years of age. He passed grade 9. He worked as a handyman and earned R4000 per fortnight. The court held that he had not been remorseful. The court imposed the minimum sentence of* ***15 years imprisonment*** *for the aforementioned firearm possession offence.*

20.In S v Swartz[25] *the appellant was convicted of two counts of having been in possession of a semi-automatic firearm as well as two counts of having been in*

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[24] 2015 (1) SACR 88 (GJ).

[25] 2016 (2) SACR 268 (WCC).

possession of ammunition. The offences arose from two separate incidents. The appellant was 39 when he perpetrated the crimes to which counts 1 and 2 related, and 40 when he perpetrated the other two crimes. The appellant had attained a standard 4 level of education. He lived with his mother. He had four children, of whom the youngest two stayed with him and his mother. The appellant was a bricklayer who earned R200 per day when he had work. He was the family's sole breadwinner. The court held that the appellant's prior convictions constituted an aggravating consideration. The appellant had multiple previous convictions, many which were indeed relevant. The court held that there were no substantial and compelling circumstances to depart from the minimum sentence of ***15 years' imprisonment*** *where the appellant had offered a denial which was found to be false. On the other hand, the court held that in the second count of unlawful possession of a firearm where the State had accepted the appellant's plea that the appellant fortuitously came across the firearm at a rubbish dump and was apprehended the same a just sentence would be* ***7 years' imprisonment.***

21.In S v Dlodlo[26] *the appellant had been 28 years of age and had a grade 12 qualification. He was unmarried and had five children. He was unemployed but did casual jobs prior to his arrest. He was a first offender and had been incarcerated for two years and five months awaiting finalisation of the case. The trial court had sentenced the appellant to 10 years imprisonment. On appeal it was held that the sentence imposed by the court a quo was too harsh and was strikingly inappropriate. The court on appeal held that the court a quo had placed too much reliance on the prevalence of the crime, the interests of society and the seriousness of the crime. The court on appeal held that the personal circumstances of the appellant as a first offender, having spent a lengthy time in prison and the circumstances of the crime as eluded to above, warranted a sentence of* ***6 years imprisonment.***

22.In S v Pillay[27] *the accused was charged with murder and unlawful possession of a firearm. The accused pleaded guilty. The accused had been in a 10 year relationship with the deceased which had ended shortly before the murder. The*

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[26] 2016 JDR 0808 (FB).

[27] 2018 (2) SACR 192 (KZD).

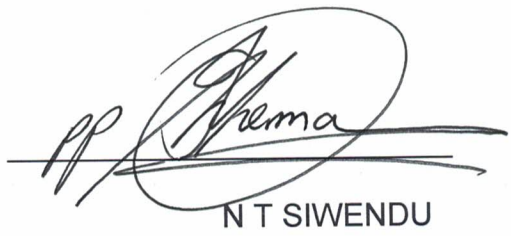
accused is a 32-year-old unmarried man with no children. He completed grade 11, but was unable to further his studies due to financial constraints. The accused was employed earning R3500 per month, together with additional cash incentives which he received from call-outs. The accused had no relevant previous convictions and was a first offender in respect of the offences. The court held that there was no indication that he has the propensity to perpetrate violent crimes. The accused had been in custody for approximately a year and a half. A sentence of ***5 years imprisonment*** *was imposed for the firearms charge".*

[22] Having regard to the sentencing pattern, which emerges from the cases quoted hereinbefore, I am driven to conclude that the sentence imposed by the court a quo, was unjust. In my view, the peculiarities of this case do not warrant a deviation from the general imposition of between 6 to 8 years imprisonment for the possession of the semi-automatic fire-arm. Having regard to all the circumstances of this case, including the fact that the appellant had spent 29 months in prison before sentencing, his personal circumstances, is a first offender and all other factors to which the learned magistrate had regard, I would consider an effective term of 6 years imprisonment appropriate.

[23] The appeal against sentence is accordingly upheld and the order of the trial court is set aside and substituted for the following order, which order is to be effective from 29 February 2016:

1. The appellant is sentenced to six years imprisonment.

2. The Appellant remains unfit to possess a firearm in terms of the provisions of section 103 of the Firearms Control Act 60 of 2000.

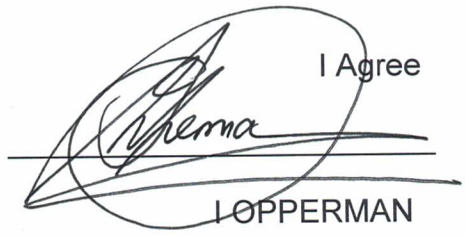


N T SIWENDU

Judge of the High Court

Gauteng Local Division,Johannesburg

I Agree



I OPPERMAN

Judge of the High Court

Gauteng Local Division,Johannesburg

Heard : 05 February 2019
Judgment delivered : 21 February 2019
Appearances:
For Appellant: Adv. T.D Tshisonga
Instructed by: Legal Aid South Africa
For Respondent: Adv D Van Wyk
Instructed by:Director of Public Prosecutions