IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***

Date: ***4th September 2020*** Signature: _____

APPEAL CASE NO: A17/2017

COURT *A QUO* CASE NO: RC230/2011

DATE: 4th September 2020

In the matter between:

M: S Appellant

- and -

THE STATE Respondent

Coram: Adams J *et* Millar AJ

Heard on: 03 September 2020 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 04 September 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 04 September 2020.

Summary: Criminal law and procedure – sentence of an effective fifteen years' imprisonment – being in possession of stolen property – unlawful possession of an unlicensed AK47 semi-automatic firearm – sentence not disturbingly inappropriate – no misdirection – appeal dismissed.

ORDER

On appeal from: The Randburg Regional Court (Regional Magistrate Mudau sitting as Court of first instance):

(1) The appellant's appeal against his sentence is dismissed.

(2) The appellant's sentence by the Randburg Regional Court be and is hereby confirmed.

JUDGMENT

Millar AJ (Adams J concurring):

[1]. The appellant was convicted of a contravention of Section 36 of Act 62 of 1955 – being in possession of stolen property – count 1, as well as contravening Section 4(1)(a) of the Firearms Act 60 of 2000 – possession of an unlicensed AK47 semi-automatic firearm – count 2.

[2]. On 20 February 2014, the appellant was sentenced to six years imprisonment in respect of count 1 and to fifteen years imprisonment in respect of count 2, the sentence in respect of this count being the prescribed minimum sentence in terms of Section 51(2) of the Criminal Law Amendment Act[1]. The court imposing sentence ordered that both sentences were to run concurrently[2], thus imposing an effective sentence of fifteen years direct imprisonment.

[3]. The present appeal is against the sentences imposed; leave having been granted by the court *a quo*.

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[1] 105 of 1997, Section 52(1)(a)(i), read together with Part II of Schedule 2.

[2] In terms of s 280(2) of the Criminal Procedure Act 51 of 1977

[4]. The appellant was legally represented throughout the proceedings. He pleaded not guilty to the charges. After conviction, there was no evidence led either in aggravation or mitigation of sentence. Furthermore, no pre-sentence reports were placed before the court *a quo* for consideration.

[5]. It was submitted in mitigation that the appellant is an unmarried 36-year old man with three minor children aged 14, 9 and 5. The appellant lived with the mother of the two older children and his youngest child also lived with them. The appellant completed school to standard 8 (grade 10). He reportedly operated a Spaza shop earning R500 per week from which he supported himself as well as his partner and the three minor children. The appellant was arrested and taken into custody on 22 May 2011 and had remained in custody from then for a period of just under three years until the time of his conviction and sentence.

[6]. The sentence imposed on count 1 carries no minimum sentence whereas the sentence imposed in count 2 does.

[7]. Notwithstanding that there is a minimum sentence in respect of count 2, sub-section (3)(a) of the Act, provides as follows:

'(3) (a) If any Court referred to in sub-section (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those sub-sections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[8]. The appellant therefore falls within the ambit of sub-section (1) of the Act unless he can prove the existence of substantial and compelling circumstances. The legislature has not defined substantial and compelling circumstances. These are circumstances which are material to the offence, the interests of society and the personal circumstances of the appellant[3].

[9]. 'Compelling' can also be defined as convincing, in other words circumstances which convince the Court that facts or circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence[4].

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[3] Du Toit, Commentary on the Criminal Procedure Act, Juta 1999 28-16C

[4] Du Toit, *supra*, 28-16C

[10]. If the statutory prescribed sentence differs to such an extent from the sentence which otherwise would be regarded as appropriate, the imposition of such a statutory prescribed sentence would lead to a shocking injustice to the appellant[5].

[11]. The Court therefore has a wide discretion in imposing a lesser sentence than that which is statutorily prescribed in cases where the existence of substantial and compelling circumstances is proved. The case law makes it clear that it would be manifestly unjust to assume that the legislature's intention was to completely negate the Court's discretion by compelling it to summarily impose a specific sentence without due regard to the normal and well-established sentencing criteria[6].

[12]. In his judgment on sentence the learned Magistrate took cognizance of the nature and seriousness of the offences, the community's interests as well as all the appellant's personal circumstances – referred to in paragraph [5] above.

[13]. On consideration of the matter as a whole the court found that there were no 'substantial and compelling circumstances' to deviate from the imposition of the minimum sentence in respect of count 2. The sentences imposed were however mitigated by the court's order that these run concurrently[7].

[14]. The test to be applied, when considering sentence on appeal is set out in S v Kgosimore[8] – 'It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same thing; *viz* whether there was a proper and

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[5] Du Toit, *supra*, 28-16D

[6] *S v Malgas* 2001 (1) SACR 469 at 472 H-I; *S v Homareda* 1999 (2) SACR 319 (W).

[7] *S v Kumalo* 1973 (3) SA 697 (AD) at 697B-C

[8] 1999 (2) SACR 238 (SCA) at paragraph 10

reasonable exercise of the discretion bestowed upon the court imposing sentence.'

[15]. Having considered all the evidence led at the trial as well as the arguments advanced in respect of both mitigation and aggravation of sentence, I am unable to find that the Court *a quo* failed to properly consider all the personal circumstances of the appellant and to properly and justly weigh these against the interests of society and the community in which the offences occurred.

[16]. I am of the view that the sentence imposed in respect of count 1 was appropriate and that in respect of count 2, similarly, the imposition of the minimum sentence was also appropriate. There is no basis for this court to interfere with the sentence imposed.

Order

In the circumstances, I propose the following order:-

(1) The appellant's appeal against his sentence is dismissed.

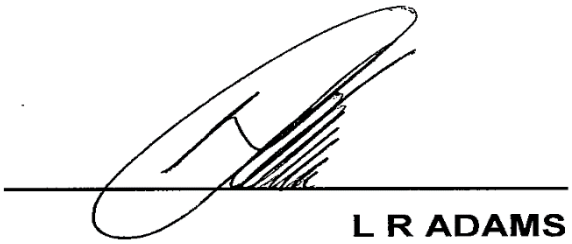
(2) The sentence imposed by the Randburg Regional Court be and is hereby confirmed.

A MILLAR

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree, and it is so ordered,



L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	3rd September 2020 – no oral hearing.
DATE OF JUDGMENT:	4th September 2020 – Judgment handed down electronically.
FOR THE APPELLANT:	Advocate Riaan Greyling
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv Riana Williams
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg

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