IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG HIGH COURT, PRETORIA)

14/12/2016

Case no: A712/2015

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

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DATE SIGNATURE

In the matter between:

SIBUSISO PETROS XULU Appellant

and

THE STATE Respondent

JUDGMENT

MAGARDIE AJ

1. The appellant herein, an adult male military officer in the South African Defence Force at the time, was convicted on 19 June 2015, before the Gauteng Regional Court after pleading guilty on a charge of theft of an R5 automatic rifle. On 23 July 2015, the appellant was sentenced to four (4) years imprisonment. In addition, the court *a quo* also declared the appellant unfit to possess a firearm in terms of the provisions of section 103(1) of the Firearms Control Act 60 of 2000.

2. The appellant applied before the court *a quo* for leave to appeal against sentence and same was granted on 14 August 2015.

3. The synopsis of the facts that resulted in the appellant's conviction were that, on 30 October 2014, at the Waterkloof Military Base, the appellant unlawfully and intentionally stole one fully automatic R5 rifle which was the lawful property of the South African National Defence Force. When the appellant was confronted by the Military Police, he immediately admitted to the offence and took them to his place of abode where the rifle was kept. The appellant was legally represented throughout the proceedings. On 19 June 2015, the appellant admitted all the elements of the crime and after the court *a quo* was satisfied that the appellant admitted all the elements of the crime of theft, it proceeded to convict him of theft as charged.

4. In mitigation of sentence it was submitted that the appellant was 28 years of age at the time of commission of the crime. The appellant immediately cooperated

with his employer and the rifle was recovered with the appellant's assistance. The appellant pleaded guilty to the crime from the outset and cooperated during the investigation. The appellant was a first offender and had no previous convictions. The appellant had demonstrated remorse from day one. The appellant was the father of a 6 years old daughter who did not stay with the appellant. The appellant was the breadwinner and took care of his family at home. After the incident, the appellant was suspended from employment. During the appellant's suspension, he attended sessions with a social worker at his place of employment. At the time of the incident, the appellant was aware that the rifle could not fire ammunition. The submissions that were made on behalf of the appellant were that the appropriate sentence would be correctional supervision, a fine, alternatively a suspended sentence or a custodial sentence.

5. The aggravating factors that were placed before the court *a quo* was the fact that the firearm that was stolen was a fully automatic rifle that was the property of the SANDF, the appellant's employer. The appellant had planned the incident, he took the rifle home and admitted of wanting to deprive his employer of permanent ownership of the rifle. The problem of illegal firearms that are easily available on the streets was highlighted. The prosecution was in favour of a sentence that would fit the crime.

6. Mr Riaan Roos, a staff sergeant, who is employed at the northern military police regional HQ, at the specialist investigation branch, testified on behalf of the state on the theft of firearms within the SANDF. Roos is not a ballistic expert. He testified that on average, an estimate of 2 firearms get stolen from the

SANDF per month. Also, that military vehicles are used in the commission of crimes. Further, that even though security measures are put in place, soldiers have access to these firearms and theft of firearms still occur. In this particular case, Roos testified that the firearm was issued to the appellant for purposes of a practice session for a parade. The appellant then went to the store men and drew a second rifle which he placed in the boot of his vehicle. The appellant then handed in the initial rifle that was issued to him and made a false entry in the register regarding the second rifle. Roos explained that this specific rifle was used for parades, in which case it would not have any ammunition in it. It would also be impossible to fire live rounds as the firing pin to set off the rounds of ammunition was removed.

7. The court *a quo* requested pre-sentencing reports. The reports by the probation officer and correctional service were handed in as exhibits D and E respectively. The reports are thorough and the underlying cause for the crime can immediately be extrapolated therefrom. It is apparent from the report of Ms Tunzi, that the appellant promised his parents to build them a house the moment he started working. The appellant made loans at Absa bank and Capitec Bank but soon realised that the project was above his means and ended up in financial debt. The appellant could no longer maintain his family, pay for his child's school fees and transport. The appellant then approached a certain Thabang who was a loan shark, and borrowed an amount of R10 000.00. Soon the appellant could also not repay Thabang. Thabang threatened to collect his money from the appellant on a Saturday. It was during this period that the appellant participated in a parade for a certain warrant

officer who was retiring, and decided to take one R5 rifle that he was expected to use during the parade, to protect himself from Thabang over that weekend. Upon his arrival at work the following Monday, the appellant was confronted about the missing R5 rifle. The appellant immediately admitted that he took the rifle home on 30 October 2014. The appellant accompanied the military police to his house where the firearm was kept. The appellant was subsequently suspended from work and had to report his presence to the gate on a daily basis. He was however not allowed to enter the military premises. The appellant also attended three sessions with the social worker at his place of employment who referred the appellant to a debt councillor. The sessions with the debt councillor seems to have yielded a fruitful outcome in that the appellant was in a position to reduce his debt. It was reported that the appellant was very emotional during the interviews and regretted his actions. He described the motive for the offence as a desperate attempt to protect himself. Interviews were also held with the appellant's supervisor who described the appellant as a good, quiet person who enjoyed doing his work and was one of the best employees. The report recommends correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977 (as amended) as an alternative sentence. The report specifically militates against imprisonment even though the appellant committed a serious crime; the reason seems to be that the motive for the offence was self-protection. The appellant was described as confused and scared as a result of his financial crisis.

8. The report by the correctional officer, Ms Matseke, also recommends that the appellant be considered for a sentence in terms of section 176(1)(h) of the Criminal Procedure Act.

9. Notwithstanding the recommendations contained in the pre-sentencing reports, the court *a quo* was of the view that correctional supervision would not be an appropriate sentence. Consequently, the court *a quo* imposed a sentence of 4 years direct imprisonment. It is this sentence that the appellants want this court to set aside.

10. It is trite that sentencing falls primarily within the discretion of the trial court. In considering sentence, the trial court should take into account the crime, the criminal and the interest of society, the one not outweighing the other. The approach of the triad consisting of the crime, the offender and the interest of society was enunciated in **S v Zinn**.[1] The appeal court may only interfere with the sentence when it is demonstrated that the trial court has not properly and reasonably exercised its discretion in imposing sentence. The court of appeal is entitled to interfere with sentence if same is disturbingly inappropriate and so totally out of proportion with the offence or vitiated by misdirection showing that the trial court exercised its discretion unreasonably.[2]

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[1] 1969 (2) SA 537 (A) at 540G

[2] S v Pillay 1977 (4) SA 531 (A) at 535E-G, S v Ncheche 2005 (2) SACR 386 W, S v Salzwedel & Others 1999 (2) SACR 586 SCA

11. In addressing sentence one must also be mindful of the principles as set out in **S v Rabie**[3]:

> *"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."*

12. In **S v Smith**[4] it was held that:

> *"Courts must guard against an over-eager imposition of exemplary sentence and must not over-emphasise the gravity of the offence and the interest of the community at the expense of the interest of the personal circumstances of the particular offender."*

13. In **S v R**[5] Kriegler J said that by introducing correctional supervision, the Legislature had provided a method of imposing finely tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community. At 220 G-H he observed that:

> *"Ons straftoemeting het egter nou 'n heel nuwe fase betree. Korrektiewe toesig is weliswaar 'n as nog-onbeproefde vonnisopsie maar dit blyk reeds uit die magtigende wetgewing dat dit groot potensiaal inhou. Wat veral tref, is die veelsoortigheid daarvan. By nadere ondersoek word dit duidelik dat die benaming "korrektiewe toesig" nie soseer 'n vonnis beskryf nie maar 'n*

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[3] 1975 (4) SA 855 (A) at 862G-H:

[4] 2002 (2) SACR 488 (C) at 490H-J

[5] 1998 (1) SACR 209 (A)

versamelnaam is vir 'n wye verskeidenheid maatreëls waarvan die enkele gemeenskaplike kenmerk is dat hulle buite die gevangenis toegepas word."

14. In S v Samuels[6], Ponnan JA pointed out that:

"An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck."

15. It is without a doubt that the offence of theft of a firearm is on its own a very serious offence. It is even more so when a member of the SANDF is the culprit. Our society is afflicted by violent crimes committed with the use of firearms.

16. When sentencing, courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons

[6] 2011(1) SACR 9 (SCA) para 9-10

convicted of serious offences. As already stated elsewhere herein above, it is required of the court to strike a balance between the interest of society, the seriousness of the offence and the personal circumstance of the accused.

17. As pointed out by Kriegler J as he then was in ***S v R*** above, the introduction of correctional supervision ushered in a new phase in our criminal justice system, clearly distinguishing between those offenders who ought to be removed from society by being incarcerated and those who, even though deserving of punishment, should not be removed. The appellant's circumstances provide a compelling case for a non-custodial sentence.

18. I am inclined to agree with the submissions of the appellant's counsel that the sentence imposed by the court *a quo* is severe and consequently disproportionate when regard is had to the offence at issue herein. However, this should not be understood to be downplaying the serious of the actions of the appellant. As already stated, the act of theft of the firearm that the appellant admitted is indeed very serious.

19. I am not swayed that, given the circumstances traversed above, the court *a quo* exercised its discretion judicially. I am of the view that the sentence imposed is not only harsh, but also strikes one with a sense of shock to conclude that it is disproportionate. Having arrived at this conclusion, it follows that I am entitled to interfere with the sentence of the court *a quo*. I have considered the fact that the firearm was not only recovered, but also that it was not used in any act of further crime and in any event it was not capable of

firing any ammunition even at the time of theft. The appellant was a first offender, he pleaded guilty from the very beginning. It is against the consideration of the forgoing factors and circumstances that the sentence of direct imprisonment is not appropriate.

20. In the result, the following order is made:

20.1 The appeal against sentence is upheld.

20.2 The sentence imposed by the trial court is set aside and substituted by the following sentence:

20.3 In terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977, the accused is sentenced to three (3) years correctional supervision, on the following conditions:

20.3.1 That the accused be placed under HOUSE ARREST to such an extent that he can be controlled and therefore, as far as possible, not be of any danger to the community, provided that, depending on his behaviour, the conditions of the HOUSE ARREST can be relieved to some extent, but that HOUSE ARREST will apply for the duration of the sentence,

From 17:00pm to 06:30am on workdays, and

From 15:00pm to 06:30am on days when he is not working.

Provided that HOUSE ARREST will not be applicable during the following period:

(i) Community Service: will consist of cleaning at Tshepong Hospital (TB) Hospital in Atteridgeville on Saturdays from 08:00am until 16:00pm, and

(ii) Programmes: which will be Self-Image Behavioural conduct relating to self-conduct programmes, Responsibility Acceptance Programmes, as well as Life Proficiency Programmes are recommended.

20.3.2 That the accused shall perform 16 HOURS COMMUNITY SERVICE for every month of sentence to comply with the community expectations in terms of retribution and compensation of the crime with the provision that a part (maximum a third) could be suspended if he gives co-operation and if his behaviour justifies it. Furthermore, that the Commissioner may give him 1 HOUR ADDITIONAL COMMUNITY SERVICE for every hour that he fails to do community service.

20.3.3 That the accused shall subject himself to treatment programmes as determined by the Commissioner of

Correctional Services, which are applicable to his specific needs and programmes, with the aim of rehabilitating the accused and to better prepare him to accept his responsibilities as a member of the community.

20.3.4 That the accused may NOT CHANGE his RESIDENTIAL OR WORK ADDRESS without prior notification to the Commissioner of Correctional Services.

20.3.5 That the accused shall, for the full duration of the sentence, refrain from the USE/ABUSE OF ALCOHOL OR THE USE OF DRUGS other than on prescription by a medical practitioner.

20.3.6 That the accused shall subject himself to the monitoring agency by the Commissioner of Correctional Services and shall comply with all reasonable directives issued by the Commissioner regarding the execution and administration of his sentence.

20.3.7 To control and discourage chemical dependency, the accused must declare himself to be willing to undergo tests at his own cost, if at all possible.

20.4 The declaration that the accused, in terms of section 103(1) of Act 60 of 2000, is unfit to possess a firearm remains intact.

20.5 In terms of section 282 of Act 51 of 1977, the sentence imposed by this court is antedated to 23 July 2015.

MAGARDIE AJ

I agree and it is so ordered.

RABIE J