

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

15/11/2016

Case Number: A745/15

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

15/11/2016
DATE

[Signature]
SIGNATURE

GEORGE MANDLANE

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MOLEFE J

[1] This is an appeal against sentence of the regional court, Benoni. The appellant was on 30 August 2013 found guilty of possession of firearm without a license in contravention of section 3 of the Firearms Control Act 60 of 2000. He was sentenced to 15 years' imprisonment. Leave to appeal was granted by the Court *a quo*.

[2] The appellant pleaded guilty to the charge and in his statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, he admitted all the elements of possession of a firearm without the necessary license. He admitted that he was in possession of a firearm to wit a Berretta pistol when he was arrested on 15 August 2013. A friend gave him the firearm for safe keeping and he put it in the cubbyhole of his vehicle where it was found by the police.

[3] Possession of a semi-automatic firearm falls within the purview of section 51 (2) (a) read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") which prescribes the minimum sentence of 15 years' imprisonment unless there were substantial and compelling circumstances to impose a lesser sentence.

[4] Although section 51 (2) of the CLAA finds application on a charge of possession of a semi-automatic firearm, the appellant *in casu* did not admit that he was in possession of a semi-automatic firearm but pleaded guilty to possession of a Beretta pistol. The prosecutor accepted the plea without submitting any evidentiary documents nor calling any witnesses to verify that the said firearm was indeed a semi-automatic one. The State, in my view, failed to prove that the firearm found in the appellant's possession was a semi-automatic pistol. Therefore, the statutory jurisdictional requirements for the application of section 51 (2) of the CLAA were not met and should not have been invoked.

[5] I have also noted from the record that the appellant was never informed of the applicability of the CLAA and was not warned of being convicted of an offence which might attract the prescribed minimum sentence during the proceedings. There was also no reference made in the charge sheet to a semi-automatic firearm; the only

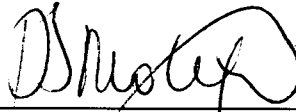
reference was to the penalty clause of a fine or 15 years in terms of the Firearms Control Act (See **S v Peterson 2006 (1) SACR 23 (C)**).

[6] It is well-established that sentencing remains pre-eminently with the discretion of the sentencing court. This salutary principle implies that a court sitting on appeal does not enjoy *carte blanche* to interfere with the discretionary function of the lower court unless the sentence imposed is unjust or unless there has been a gross misdirection. Based on the above-mentioned reasons, I find that the trial court misdirected itself and that this Court is entitled to interfere with the sentence imposed by the trial court.

[7] The appellant *in casu* did not utilize the firearm in the commission of any offence other than just to possess it. I have also taken into account that the appellant was a first offender when the offence was committed, he was 25 years old and that he showed remorse and pleaded guilty. However, it is trite that in addition to deterring accused person from committing the same offence in future, a sentence must also have the effect of deterring like-minded persons.

[8] In the circumstances, I propose the following order:

1. *The appeal against sentence is upheld and the sentence imposed by the court a quo is set aside and substituted with the following order: the appellant is sentenced to three (3) years' imprisonment;*
2. *The sentence is antedated to the date of sentencing, 30 August 2013 in terms of section 282 of the Criminal Procedure Act 51 of 1977;*
3. *The appellant is declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.*

A handwritten signature in black ink, appearing to read 'D S Molefe', written over a horizontal line.

D S MOLEFE

JUDGE OF THE HIGH COURT

A handwritten signature in black ink, appearing to read 'T J Raulinga', written over a horizontal line.

T J RAULINGA

JUDGE OF THE HIGH COURT

I AGREE. AND IT IS SO ORDERED.

APPEARANCES:

Counsel on behalf of Appellant : Ms. M Masete
Instructed by : Legal-aid SA

Counsel on behalf of Respondent : Mr. J Fourie
Instructed by : State Attorneys

Date Heard : 07 November 2016
Date Delivered : 15 November 2016