IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A631/2017

DATE: 2019-10-15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED ✓
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DATE: 30/11/2019 SIGNATURE

In the matter between

ECKHARDT SMITH Appellant

and

THE STATE Respondent

***EX TEMPORE* J U D G M E N T**

(ON APPEAL SITTING AS COURT OF APPEAL)

CORAM: **Baqwa J and Constantinides AJ**

CONSTANTINIDES, AJ: Aggrieved by the conviction and sentence imposed by the Trial Court, the Appellant is now appealing to the Gauteng Division of the High Court, Pretoria.

The appellant was convicted in the Regional Court, Pretoria on: one count of theft, read with the provisions of

section 51 (2) (a) of Act 105 of 1997 and one count of the contravention of section 3 of 60 of 2000, (unlawful possession of a R5 rifle) read with section 51 (2) of Act 105 of 1997 and was sentenced to 5 years' imprisonment on the theft charge and 8 years' imprisonment on the charge of unlawful possession of the firearm which will be referred to as "the R5".

It was ordered, the sentence in count 1, the theft charge run concurrently with count 2, unlawful possession of the R5 rifle and the appellant was ordered to serve an effective period of 8 years' direct imprisonment. Furthermore, the appellant was declared to be unfit to possess a firearm license in accordance with section 103 of the Firearms Control Act 60 of 2000.

On the 4 April 2016, the appellant filed an application for leave to appeal against his conviction and sentence, which was granted and was afforded bail pending appeal. The appellant was sentenced on the 15 May 2013, and has served 3 years of his sentence up until the 20 May 2016 when he was granted and released on bail pending his appeal.

The appellant has argued that in this matter a duplication of convictions may seriously prejudice him in that he might receive a heavier sentence than one which he would or should have received if a duplication of convictions had not occurred. This was dealt with in the appellants' heads of

argument where he stated that *S v Benjamin en 'n Ander* 1980 (1) SA 950 (A) at, 956E-H. I quote:

> "If the evidence which is necessary to establish one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (*R v Gordon* 1909 EDC 254 at 268 and 269). This can be called the *"same evidence test"*. If there are two acts each of which would constitute an independent defence, but only one intent and both acts are necessary to realise this intent, there is only one offence (*R v Sabuyi* 1905 TS 170). There is a continuous criminal transaction. This test is referred to as *"the single intent test"*. (quoted from appellant's heads of argument paragraph 7.3 page 15.)

It is argued on page 17 of the appellant's heads of argument that:

> "The accused may also be charged with different counts in the alternative. In such a case, however, the accused cannot be convicted of all charges if more than one charge or conviction results from the same criminal act. The reason for this is that conviction on both counts exposes an accused person to being convicted twice in the

same case for the same offence and he could be sentenced more than once for the same offence".

And then further on it is stated:

"It will be the view of the appellant that which is exactly what happened in this matter, amongst others, to which the learned magistrate was alive to and which most probably convinced him to allow and grant the appellant leave to appeal in this matter".

This point and background of the facts in this case was canvassed by Mr. Steenkamp extensively before the Honourable Baqwa and myself.

Background facts:

It is common cause that the appellant, who was a police officer on the 23 September 2009, while he was on leave, arrived at the SAPS Headquarters after 6 00 pm, accompanied by accused No. 2, who was wearing a bullet proof vest provided to him by the appellant to make him look like a member of the SAPS. The appellant entered the main building of the SAPS Headquarters, proceeded to go up to the 8th floor, and removed a R5 rifle and a commissioning stamp from the office of Captain Neethling (hereinafter referred to as "Neethling"). He allegedly utilised a spare key of a safe which was in a drawer of Captain Lottering, (herein referred to as "Lottering"), the appellant attempted to leave

the building with the R5 rifle concealed in a leather or plastic jacket and he subsequently allowed accused No. 2 to retain the rifle at his home.

Accused No. 1 apparently went out to purchase cigarettes in the interim. Much evidence was led relating to the fact that after accused 1 had gone to purchase cigarettes, a certain security guard called for back-up assistance as accused 1 had allegedly stated that someone had been shot. The state witness, Abraham Pretorius Kruger, (hereinafter referred to as "Kruger"), who was employed by Gauteng Provincial Department as an operational man, was dispatched through the control office to attend to the gunshot report and upon arrival he met accused No.1 who allegedly smelled intoxicated and accused No. 1 informed him that someone was shot and that accused No.1 was a police officer. Kruger called sergeant Herbst who eventually arrested accused 1.(see page 846 Volume 5 of the record)

The crux of the matter is that appellant was arrested on that same evening due to the fact that he was found in possession of the certification stamp. He was actually stopped by a security guard while he was exiting the building and he allegedly informed the guard that he was going on a "special operation" and then stated that he had booked the firearm with a colleague from the 8th floor. However, he

never produced the name of who he had booked the firearm with. He refused to enter the firearm into the occurrence book which when requested to do so by the guard. According to the security guard he was clearly hiding the firearm. Lottering gave evidence that he had spare keys for Neethling's safe and when Lottering was away, he gave the keys to captain Fourie "for inspection purposes". That appears on page 856, volume 5 of the record.

The magistrate took into account the evidence that the ammunition that was confiscated was never tested and therefore he acquitted the appellant and accused 2 in respect of count 3 which was for the unlawful possession of ammunition that appears on page 948, volume 6 of the record. The appellant admitted that he went into the building. He stated that he had taken the stamp to certify a CV for a neighbour but he intended returning it. He denied that he had told the security guard that he was "shot" which triggered the calling of an ambulance and back-up assistance.

The appellant's commander, Captain Neethling, made it clear in evidence that the appellant had no authority to make use of the firearm which is an automatic R5 weapon. The appellant stated that he had removed the R5 rifle "to go and do target practice". The following morning, the appellant took Neethling and SAPS members to the flat of

accused No. 2 and the R5 rifle was retrieved and accused No. 2 was arrested. The accused's explanation to the security guards for hiding the R5 rifle was that he did not want to walk in the street with an R5 rifle exposed to the public.

The argument in the heads of argument on the part of the state is:

> "14: The only inference is that the appellant did not want the guards, Maribeng, to see the firearm because he knew that he did not have the necessary authorization or a transit note to possess and remove same. If he was allowed to take the R5 one would not have expected him to hide it from the security guards. The appellant is a Police Officer, who underwent firearm training and is surely allowed to carry a firearm openly in public provided that everything regarding this possession was above board.
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> 15: It is significant that the appellant never told Maribeng that he wanted to go target shooting with the firearm. It is submitted that this is not the conduct of a person who have the necessary authorization to take the R5 from the office of his Commanding Officer. He also never mentioned to Maribeng that he had authorisation from Neethling

specifically. It was after all Neethling's firearm that was taken".

Maribeng was adamant during cross-examination that the appellant had told him that he and the second accused were going on "a special operation".

Neethling testified that appellant was never ever issued with a R5 rifle or a battle jacket. The only two people that were issued with same, were himself, Neethling and Fourie. He furthermore countered the appellant's evidence that everybody could use the firearms issued to him and Fourie for target practice. The appellant was booked off from 21 September for 5 days and would not have been on duty that entire week. Furthermore, appellant never informed Neethling that he was taking Neethling's firearm from the safe in his office after hours while he was on leave. There was no evidence that appellant had informed Neethling that he had taken the firearm for target practice and that he had been afforded authorisation by someone on the 8th floor. A further problem which the appellant was faced with was the fact that he had handed the firearm to a civilian person, that was the second accused and requested same to keep the firearm on his behalf until he returned from allegedly purchasing cigarettes.

The state submitted that the magistrate was in a better position to observe the witnesses and to draw certain

inferences from their evidence and to decide on the credibility and trustworthiness of the witnesses. Despite minor contradictions between evidence of the security guards at Head Office, Maribeng and Lukele, the magistrate found that these contradictions were only in regard to how accused No. 2 was introduced and he found that was not material as to what happened on the said day.

The magistrate found that the aforesaid contradictions were merely indicative of imperfect recollection, observation and reconstruction. The magistrate considered the submissions of the appellant's legal representatives on theft of the firearm, the stamp and the magazine and the illegal possession of the same firearm and whether it constituted a duplication of convictions and found that theft is a common law continuous offence and that the unlawful possession of the firearm is a statutory offence and that it is separated from count 1, the theft. (That appears on page 885, line 10, volume 5 of the record). The magistrate found that there was no improper duplication of convictions.

It is clear from the evidence that was adduced at the trial that the appellant took the firearm without authorisation and his version that he wanted to go for target practice while he was on sick leave was improbable.

Sentencing:

The appellant quoted *S v Ingram* 1995 (1) SACR 9 (A)

which requires the Court to strike a balance between a harsh and a lenient sentence in order to serve the interests of society. Furthermore, the case of S *v Skenjana* 1985 (3) SA 51 (AD) at 541-55D, Nicholas JA stated that his view was that the public interest is not necessarily best served by the imposition of very long periods of imprisonment. He added that: "So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length". (This quotation is taken from page 20, paragraph 8.2, appellant's heads of argument.)

The Supreme Court of Appeal in the case of *Martha Sussana Broodryk v S* (959/2016 [2017] ZASCA 62, delivered on 29 May 2017), stated the following:

> "[1] It is trite law that sentencing is a matter pre-eminently in the discretion of the trial court and a court of appeal will only interfere with the exercise of such discretion on limited grounds.[4] In S v De Jager & another 1965 (2) SA 616 (A) at 628H-629, Holmes JA made the following observation:
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> 'It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion and a

Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment **is not discretionary but, on the contrary, is very limited**" (emphasis added).

The prescribed minimum sentence on possession of a R5 rifle is one of 15 years' imprisonment. The *court a quo* considered all the mitigating and aggravating circumstances of the appellant and made a finding that there were substantial and compelling circumstances to deviate from this prescribed sentence of 15 years.

The magistrate ordered that the sentences of count 1 and 2 would run concurrently and that a sentence of 8 years' imprisonment under the circumstances would be appropriate. The appellant was in fact afforded the benefit of 7 years off his sentence by the learned magistrate. His reasons were summarised in the state's heads of argument

as follows:

"39.1 The offences, especially the possession of the firearm, are very serious and the sentence imposed should be proportionate to the offence committed.

39.2 It is clear that a whole lot of planning went into the removal of the firearm. The appellant went into the building and came back with a bullet proof vest and gave it to accused No. 2 to wear to create the impression that he is also a member of the SAPS and they were authorised to take a firearm.

39.3 The appellant was in a position of trust. He was working in that office. He knew that he must have had authorization from Neethling specially to take the firearm. He knew where the keys were kept. However, he went after hours, took the key from Lottering's desk and then refused to make an entry into the occurrence book. It is clear that they wanted to use the firearm for their own "special operation"

39.4 It is obvious that a whole lot of planning was necessary to commit this offence.

39.5 The firearm could easily have landed in the wrong hands that could have led to very serious

crimes being committed. The appellant was lucky that the firearm was retrieved during the same night.

39.6 No remorse was shown by the appellant during the trial. He persisted that he only took the firearm for target practice. He never took the Court into his confidence and explained the real reason why the firearm was taken.

39.7 Theft of firearms especially Police issued firearms are very prevalent in the jurisdiction area of the Court as well as the whole of South Africa. Most crimes where firearms are involved is committed with unlicensed or stolen firearms.

39.8 This is not an ordinary firearm that was taken but a fully automatic firearm.

39.9 The effective sentence of 8 years does not only fit the two offences committed but under the circumstances are fair to the society.

39.10 The Court, in deviating from prescribed minimum sentence and in ordering that the sentences should run concurrently, blended the sentence with a measure of mercy", (pages 15 to 16 - state's heads of argument).

The state in the heads of argument submitted that there was no misdirection committed by the trial judge during

the sentencing phase and submitted further that the sentence imposed does not induce a sense of shock and that there is no reason for the Court of Appeal or any other Court should impose a different sentence under the same circumstances and therefore the sentences should be confirmed.

The appellant in the heads of argument argued that on taking the totality of the evidence into consideration as it was evaluated, that the conviction on the merits of the matter is not sustainable and that the appellant's appeal should succeed. Furthermore, it was submitted that the learned magistrate erred in not having due regard to the personal circumstances of the appellant as they were placed before the Court. This was once again repeated in argument in Court today including his personal circumstances and the fact that the appellant has been out on bail and that it was not his fault that the system has now placed him at a disadvantage that he had to wait for 3 years for this matter to be heard.

It was furthermore placed on record that the Court should consider section 276A where an application was made from the bar without any substantial reasons or any substantial affidavit that the Court should apply a sentence under supervision.

The appellant furthermore stated the magistrate

disregarded the aspect of rehabilitation having regard to the personal circumstances of the appellant at the time and the consequences that it would have on the livelihood of the appellant and that it was not properly considered. The appellant submitted that on both the conviction and sentence, the learned magistrate "fundamentally erred and misdirected himself in adjudication of this matter".

Now I refer to case law. In the case of *Van Nieuwenhuizen v S*, this was delivered on the 29 May 2015 and the reference is 20339/14 [2015] ZACSA 90 and I quote what the Honourable Shongwe J stated:

> "It is settled law that an appeal court will not interfere on appeal with a sentence imposed, unless the trial court materially misdirected itself or the sentence is shockingly inappropriate. A trial court exercises its judicial discretion depending on the facts of each particular case. Each and every case must be judged on its own merits. Should the appeal court find that the discretion was not judicially exercised it will be at large to interfere. (See *S v Mitchele & another* 2010 (1) SACR 131 (SCA). An appeal court may also consider the trial court's discretion to have been unreasonably exercised if the disparity between the trial court's sentence and that which the

appellate court would have imposed is 'strikingly' or 'startlingly' or 'disturbingly' inappropriate. However, if it is not so inappropriate the appellate court will not be justified to interfere with the sentence.

(*S v Malgas* 2001 (1) SACR 469 para 12. Marais, JA held:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the

sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

Having considered the matter as the detailed judgment of the magistrate, and having heard all the parties in this Court, it could not be said that the learned magistrate misdirected himself or that the sentence is shockingly inappropriate. Furthermore, the appellant's persistence in the defence that he was entitled to remove such a high caliber weapon without prior authorisation, without any evidence to support that contention, was an indication of no remorse for his actions.

Consequently, the order we make is as follows:

ORDER

The appeal against conviction and sentence is dismissed.

BAQWA, J: I agree, and it is so ordered.

BAQWA, J

JUDGE OF THE GAUTENG HIGH COURT

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CONSTANTINIDES, AJ

JUDGE OF THE GAUTENG HIGH COURT

DATE: 26 November 2019

APPEARANCES:

For the Appellant:	Andre Steenkamp
Instructed by:	
For the Respondent:	J J Jacobs
Instructed by: Director of Public Prosecutions Pretoria	