IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No: AR 612/15

In the matter between:

THULISANI TREVOR MFEKA APPELLANT

And

THE STATE RESPONDENT

Coram : Seegobin, Poyo Dlwati JJ et Hemraj AJ
Heard : 27 May 2016
Delivered : 07 June 2016

ORDER

On appeal from the Durban High Court, Phoswa AJ sitting as a court of first instance:

The appeal against sentence is upheld. The sentence imposed by the court *a quo* is set aside and substituted with the following sentence:

(a) On count 1the accused is sentenced to five years imprisonment.

(b) On count 2 the accused is sentenced to twelve years imprisonment.

(c) The sentence on count 1 is to run concurrently with the sentence in count 2. The sentences are ante dated to 4 June 2010.

JUDGMENT

POYO DLWATI J

[1] The appellant pleaded guilty before Phoswa AJ to one count of theft and one count in contravention of section 31(1), read with sections 1, 103, 120(1)(a) and 121 and Schedule 4 of Act 60 of 2000[1] and with section 94 of Act 51 of 1977[2] (the Act) and with section 51 and Schedule 2 of Act 105 of 1997[3] – unlicensed trading in firearms. He was sentenced to twenty years imprisonment. This appeal comes before us by way of leave to appeal against sentence granted by Balton J.

[2] The facts upon which the appellant pleaded guilty are briefly as follows:

(a) The appellant was employed as an exhibit clerk at the South African Police Service Station in Inanda since November 2002. His duties included the control of the exhibit room where items entered in the SAP13 register at the police station were kept. These included numerous firearms which had been recovered from criminal suspects and / or crime scenes.

(b) During August 2009 and March 2010, the appellant, upon being approached by some police officers began selling some of the firearms that were in the exhibit room. Although he initially sold these firearms to police officers he later also sold them to the members of the public. The prices varied between R800 to

[1] Firearms Control Act 60 of 2000.
[2] Criminal Procedure Act 51 of 1977.
[3] Criminal Law Amendment Act 105 of 1997 also known as the minimum sentencing legislation.

R2500for each firearm sold. In total, 98 firearms were sold during this period.

(c) In his plea explanation, tendered to the court *a quo* in terms of 112(2) of the Act and accepted by the state, he stated that he did this because he wanted to supplement his income which was R2200 per month after deductions. Upon arrest by the police on 25 May 2010 he made a full disclosure and co-operated with the police. He made a confession before a magistrate on 26 May 2010 and on 3 June 2010 he pleaded guilty to the charges.

[3] At issue in this appeal is whether the learned Acting Judge erred in taking the two offences as one for purposes of sentence in view of the fact that count 1 (the theft) did not attract a minimum sentence yet count 2 attracted a minimum sentence. The other issue is whether the learned Acting Judge misdirected himself in failing to pronounce on whether substantial and compelling circumstances existed that justified the imposition of a less severe sentence than the one prescribed.

[4] It is trite that a court of appeal will not readily interfere with the sentence imposed by the court *a quo* unless the sentence is vitiated by misdirection or it is manifestly inappropriate and induces a sense of shock or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed.[4] If there is a misdirection, it must be of such a nature, degree or seriousness, that it shows, directly or inferentially, that that 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.[5]

[4] *S v Kruger* 2012 (1) SACR 369 (SCA) para 8.
[5] *S v Pillay* 1977(4) SA 531 (A) at 535E - F

[5] In sentencing the appellant, the learned Acting Judge did not indicate whether he found or did not find substantial and compelling circumstances that justified the imposition of a lesser sentence than the one prescribed as count 2 attracted a minimum sentence of 15 years imprisonment and a maximum of twenty five years. All that the learned Judge said was:[6]

> 'as a show of mercy, I have decided to treat both counts as one for the purpose of sentence and further, with regard to the conduct of the accused in this matter in the investigations of the matter, a show of remorse, his co-operation with the police which has resulted in some people being arrested, some firearms, about five being recovered, his willingness in future to give evidence against his customers, I've decided not to impose the maximum terms of imprisonment prescribed with regard to the contravention of section 31(1) Act 60 of 2000'.

[6] In my view, the learned Acting Judge misdirected himself when he did not pronounce whether he found substantial and compelling circumstances justifying the imposition of a less severe sentence. An enquiry as to whether such circumstances exist must be conducted by the court in order to arrive at a just and balanced sentence. As held in *S v Mthethwa* 2015 (1) SACR 302 (GP) at para 15, it is one thing to recite the personal circumstances of an accused but it is another to fuse those circumstances in the consideration of sentence. As a result one is not able to conclude that the learned Acting Judge weighed the personal circumstances against the seriousness of the offence and the interests of society. It seems to me that the learned Acting Judge placed more emphasis on the seriousness of the offence and the interests of society and failed to balance those with the appellant's personal circumstance.

[7] Furthermore, he also misdirected himself when he took the two offences as one for the purpose of sentence. As held in *S v Haymen* 1988 (1) SA 831

[6] Page 37 of the record from line 12 to line 19

(NC), although a magistrate or Judge can, for the purpose of sentence, take charges together, he is not authorised to impose a sentence which is competent in respect of one offence and incompetent in respect of another offence when taking the two together as one offence for the purposes of sentencing. In the present matter, the sentence given to the appellant has the effect of imposing a sentence of 15 or 20 years imprisonment for theft when the offence does not attract a minimum sentence. Our interference is therefore warranted based on these two factors and we are at large to impose a fresh sentence.

[8] The personal circumstances of the appellant were that:

(a) He was 30 years old and had completed a diploma in business management which he obtained in 2003;
(b) He was employed as an administrative clerk by the Inanda SAPS and was earning a salary of R2200 per month which he used to support himself and his family;
(c) He was unmarried but had a girlfriend with whom he had four children. He also had a fifth child from another woman;
(d) He was a first offender;
(e) He was remorseful for his actions, hence he pleaded guilty;
(f) He co-operated with the police on arrest and still intends assisting in any future proceedings relating to the firearms.

[9] It cannot be underestimated that the offences with which the appellant was convicted are very serious. He was in a position of trust as he was in charge of the exhibit room which is very important, not only in the work of the police, but also in the administration of justice. These firearms were illegal and the police were doing their best to ensure that they rid our communities of them. The appellant, however, chose to put them back on the streets, where they may have been used to probably commit even more serious crimes than those they

were initially seized for. He must have known what would happen if caught but he still continued with his dubious deeds and I shudder to think what could have happened if he was not caught. However, I agree with what Leach JA said with regard to sentence in *S v Muller*:[7]

> "When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence. As Nicholas JA observed in *S v Skenjana*:
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> > 'A sentence of 20 years' imprisonment is undoubtedly very severe . . . . My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. 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. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.
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> > . . .
> >
> > Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers must not be

[7] 2012 (2) SACR 545 (SCA) para 9 at 549-550.

visited with punishments to the point of being broken. (*Per* Holmes JA in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G.)"'

[10] In my view the personal circumstances of the appellant taken cumulatively constitute substantial and compelling circumstances that justify the imposition of a less severe sentence than the one prescribed. Furthermore the plea of guilty coupled with the youthfulness of the appellant indicate that the appellant is a good candidate for rehabilitation. Justice will still be served if a sentence of less than 20 years imprisonment is imposed. That sentence will still serve as a deterrent to the appellant and other would be offenders.

[11] Accordingly, I propose the following order:

'The appeal against sentence is upheld. The sentence imposed by the court *a quo* is set aside and substituted with the following sentence:

(a) On count 1 the accused is sentenced to five years imprisonment.

(b) On count 2 the accused is sentenced to twelve years imprisonment.

(c) The sentence on count 1 is to run concurrently with the sentence in count 2. The sentences are ante dated to 4 June 2010.

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POYO DLWATI J

I agree

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SEEGOBIN J **HEMRAJ AJ**

Date of Hearing	: 27 May 2016
Date of Judgment	: 02 June 2016
Counsel for Appellant	: Mr A Matlamela
Instructed by	: Shireen Amod and Company
Counsel for Respondent	: Ms K Essack
Instructed by	: The Director of Public Prosecutions