

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

CASE NO: AR203/16

In the matter between:

QALOKUSHA DLADLA

Appellant

vs

THE STATE

Respondent

APPEAL JUDGMENT

Delivered: 25 August 2016

MBATHA J:

[1] The appellant was convicted of one count of unlawful possession of a prohibited firearm, to wit, a semi-automatic rifle with the serial number obliterated in contravention of section 4 of the Firearms Control Act,¹ read with section 250 of the Criminal Procedure Act² and further read with section 51 of the Criminal Law Amendment Act³ as well as the count of possession of 30 live rounds of ammunition in contravention of sections 1, 103, 117, 120(1), 121 and schedule 4 of the Firearms Control Act read further with section 250 of the Criminal Procedure. He was sentenced to undergo 15 years' imprisonment in respect of both counts.

¹ Act 60 of 2000

² Act 51 of 1977

³ Act 105 of 1997 as amended

[2] With leave of the court *a quo* the appellant appeals against sentence.

[3] Counsel for the appellant has made the following submissions:

- (a) That the learned magistrate misdirected himself in finding that there exists no substantial and compelling circumstances which permitted the imposition of a lesser sentence;
- (b) That there was no evidence to the effect that the firearm in question was used in the commission of the offence or that it was indeed to be used in the commission of an offence;
- (c) That the appellant did not waste the court's time in that he made formal admissions in that he possessed the firearm and ammunition and accepted the ballistic report;
- (d) That the learned magistrate failed to take into account the personal circumstances of the appellant; which are persuasive to his prospects of rehabilitation;
- (e) That he over emphasised the prevalence of the offence in the area where the applicant is resident; and
- (f) That the sentence imposed was so severe that it induces a sense of shock.

[4] The state is opposing the appeal on the basis that the appellant did not take the court into his confidence, instead he tried to shift the blame to someone else, that the Msinga area is an area fraught with faction fighting and that the appellant had failed to prove any substantial and compelling circumstances.

[5] It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself when passing the sentence. Moreover, a misdirection alone does not suffice for a court of appeal to interfere as expressed by Trollip JA in *S v Pillay*⁴ where the court stated as follows:

‘it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the 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. That is obviously the kind of misdirection predicated in the [*dictum* of *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A-B which states that] “the dictates of justice” clearly entitle the Appeal Court “to consider the sentence afresh”.’

[6] It is common cause that count 1, the possession of a prohibited semi-automatic firearm, should be read with the relevant provision of section 51 of the Criminal Law Amendment Act 105 of 1997. Section 51(2) of the Amended Act reads as follows:

‘Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, shall sentence a person who has been convicted of an offence referred to in -

- (a) Part II of Schedule 2 in the case of –
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - ...’

⁴ 1977 (4) SA 531 (A) at 535F-G.

Part II of Schedule 2 in turn provides as follows:

‘Any offence relating to –

(a) ...;

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.’

[7] These provisions brought the unlawful possession of an unlicensed semi-automatic firearm within the ambit of the minimum sentence legislation. In *Thembaletu v The State*,⁵ the SCA in reference to section 51(2) of the Amended Act, stated as follows:

‘In my view properly construed the above provisions mean that a court convicting an accused person of any offence referred to therein is obliged to impose a sentence of 15 years’ imprisonment unless such court finds that substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one are present. The prescribed minimum sentence of 15 years’ imprisonment applies to first offenders only. The phrase “Notwithstanding any other law” in the section (ie s 51(2)) clearly indicates that the provisions supersede all other laws on sentence and apply to all offences listed in Part II of Schedule 2. That list includes an offence referred to as of the possession of “a semi-automatic firearm”.’

This put paid to the maximum penalties set for unlawful possession of a firearm in terms of the Arms and Ammunition Act,⁶ whereby for the first offender the sentence was three years’ imprisonment and five years’ for repeat offenders.

⁵ 2009 (1) SACR 50 (SCA) para 6

⁶ Act 75 of 1969

[8] The Firearms Control Act sets out in section 2 the purpose of the Act as follows:

- (a) enhance the constitutional rights to life and bodily integrity;
- (b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms
- (c) enable the State to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;
- (d) establish a comprehensive and effective system of firearm control and management; and
- (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms.

It is also important that I should make a distinction between the unlawful possession of a firearm, in this case a semi-automatic firearm, and a prohibited firearm in terms of sentence. The former attracts a minimum sentence of 15 years' and the latter 25 years' imprisonment.

[9] In summary, the facts in this case are that Crime Intelligence Unit of the SAPS received information that the appellant was in possession of an illegal firearm. He was subsequently arrested by two officers at his place of residence. The firearm was found behind a wardrobe, wrapped in a cloth, coil and plastic. Thirty rounds of live

ammunition and a magazine were found together with the firearm. The forensic result proved that it was a 7.62 X 51mm Calibre F.N. semi-automatic rifle with obliterated serial number and one magazine. It was found to be functioning normally without any obvious defects. Even after the application of the electro-magnetic process, the serial number of the rifle could not be determined.

[10] Firstly, the appellant did not hold any licence to possess a semi-automatic rifle and lastly its serial number is obliterated which makes it a prohibited firearm. Therefore it could not be traced to its previous owner. In that regard the history of its origin remains a mystery. The appellant did not take the court into his confidence as to how he acquired the rifle, nor did he disclose why he kept such a dangerous weapon at his home.

[11] One has to bear these facts in mind as it has been advanced that the sentence is shockingly inappropriate for the appellant when one considers his personal circumstances. The appellant was 45 years old at the time of sentencing, is a family man and a breadwinner. He is married and has an undisclosed number of children. He was gainfully employed at the time of his arrest, earning R8 500 per month and is a first offender.

[12] The facts of this case are slightly different to the *Asmal v S* 2015 (SCA) case number 20465/14 delivered by the SCA 17 September 2015, where the firearm was found when the accused was already incarcerated, the firearm was not loaded, no ammunition had been found and had not been used in the commission of the offences that he was arrested for. In this case the firearm has an obliterated serial

number, it was found in the appellant's possession with 30 live rounds of ammunition. However, no crimes can be linked to it.

[13] This takes me back to the purpose of the enactment of the Firearms Control Act, the first one being to enhance the constitutional rights to life and bodily integrity; and to ensure firearms control in general. The appellant was aware of all these objectives, as he tried to convince the court that the firearm belonged to an elderly aunt who requested him to hand it over to the police in line with Operation Fiela. It is important that irrespective that no crimes can be linked to the firearm, the courts must ensure that the Firearms Control Act must be enforced in line with its objectives.

[14] It has been submitted on behalf of the appellant that the learned magistrate had a duty to call for a pre-sentencing report to enable her to exercise a proper judicial discretion. In *S v Siebert*⁷ the court stated as follows:

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

It is our view that answers to questions as to how he acquired the firearm, for what purpose and what was he going to do with thirty 30 rounds of live ammunition, were

⁷ 1998 (1) SACR 554 (SCA)

to be given by the defence. He had a duty to advance mitigating factors in his favour and not the court. The magistrate could have enquired about those issues only if he was unrepresented or he was a youthful offender or where it was in the interest of justice to do so.

[15] In *S v Malgas*⁸ courts are urged not to depart lightly from imposing the prescribed minimum sentences. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imposing first offenders and other factors are to be excluded in the determination of sentence falling under the provision of the minimum sentence legislative. However, the court has to cumulatively consider all the facts placed before it, before determining the appropriate sentence. In this case the trial court ought to have taken into account the advanced age of the appellant, his marital status, family, circumstances, that he is a first offender and that no crimes are linked to the firearm.

[16] Irrespective that the offences that the appellant was convicted of are of a serious nature, the court accepts that he is a candidate for rehabilitation as he has had no brushes with the law at the age of 45 years and his personal circumstances are conducive to his rehabilitation. We are therefore of the view that the sentence imposed by the learned magistrate be set aside. The appeal is upheld.

[17] In the light thereof the following order is made:

- (1) The appeal against sentences imposed by the trial court in respect of counts 1 and 2 is upheld.

⁸ 2001 (1) SACR 469 (SCA)

(2) That the sentence of fifteen (15) years imprisonment imposed by the trial court is set aside and replaced with the following:

“The accused is sentenced to five (5) years imprisonment in respect of count 1 and 2 of which two (2) years is suspended for a period of five (5) years on condition that the accused is not convicted during the period of suspension of being found in possession of an unlicensed or prohibited firearm and ammunition without being a holder of a licence for such a firearm or ammunition. The sentence is antedated to 16 October 2015.”

MBATHA J

I agree,

VAHED J

Date of Hearing: 23 August 2016

Date of Judgment: 25 August 2016

Appearances

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