IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A224/2010

DATE: 11 JUNE 2010

In the matter between:

SIWE SILWANE Appellant

and

THE STATE Respondent

J U D G M E N T

FOURIE, J:

Appellant was charged in the Regional Court at Wynberg with one count of attempted murder and one count of possessing a firearm without holding a licence, permit or authorisation in terms of Act 60 of 2000 to possess same. He pleaded not guilty to both charges, but after hearing evidence, the magistrate found him guilty as charged. He was sentenced to ten years imprisonment on count 1 and 14 years imprisonment on count 2. It was ordered that five years of the sentence on count 1 are to run concurrently with the sentence imposed on

count 2. He accordingly has to serve an effective sentence of 19 years imprisonment. He now appeals, with the leave of the court *a quo*, against the sentence only.

The charges against appellant came about as follows: The complainant was on his way to his business at Philippi and hailed a taxi to take him there. The appellant approached him after he had stopped the taxi and fired some shots in the complainant's direction. Thereupon the complainant produced his own firearm and returned fire. This caused appellant to run away, but unfortunately for him there were members of the police on patrol in the vicinity and they apprehended him. Nobody was injured as a consequence of the shooting, and the police confiscated appellant's firearm. At the trial, the magistrate correctly rejected the appellant's exculpatory version.

It is trite that a court of appeal should only interfere with the exercise of the sentencing jurisdiction of a trial court in circumstances where there has been a misdirection on the part of the presiding officer, or where the sentence imposed by the trial court differs substantially from the sentence which the court of appeal would have imposed, had it been the court of first instance.

In view of the fact that the firearm used by appellant is a semi-automatic firearm, the provisions of Act 105 of 1997 come into play. It provides for a minimum sentence of 15 years imprisonment for the unlawful possession of a firearm of this nature, but the court may depart from the prescribed sentence if substantial and compelling circumstances are present, justifying a lesser sentence. The magistrate found that, as appellant was in custody for a period of approximately 11 months awaiting trial, there are substantial and compelling circumstances and accordingly sentenced him to 14 years imprisonment on count 2.

Ms Swart, appearing on behalf of respondent, submitted, fairly and correctly in my view, that the sentence of 14 years imprisonment on count 2 appears, in the circumstances of this case, to be shockingly inappropriate. In particular, it should be borne in mind that, fortunately, no injuries were sustained by anybody as a consequence of appellant's use of the firearm and, as I have already said, the firearm was confiscated by the police. Ms Swart suggested that a sentence of five years imprisonment on count 2 would suffice.

Having regard to the effective sentence of 19 years imprisonment imposed by the magistrate, I agree with the submission on behalf of appellant that the court *a quo* did not

attach sufficient weight to appellant's personal circumstances, in particular the following:

1. Appellant was only 19 years old at the time of the commission of the offence. It is generally accepted that youthfulness and the emotional immaturity that goes with it, often result in irrational behaviour.

2. The appellant is a first offender. Courts generally strive to keep youthful first offenders out of jail, or to incarcerate them for the shortest possible period of time.

3. The fact that appellant is a relatively young first offender, would generally make him a potential candidate for rehabilitation. By imposing an effective sentence of 19 years imprisonment, the prospects of appellant's rehabilitation are drastically diminished.

4. Appellant spent a period of 11 months in custody awaiting trial.

The offences committed are no doubt of a very serious nature, but it has to be borne in mind, as I already mentioned, that fortunately no injuries were caused and the firearm was recovered. I do, however, agree with the magistrate that a

substantial period of imprisonment is called for. Our society is plagued by violent crimes committed with the aid of unlicensed firearms. Discharging a firearm in an urban area in these circumstances, can have tragic consequences. The community is entitled to expect that the courts will impose sentences which would deter others from committing similar crimes.

I conclude, however, that in the circumstances of this case, the effective sentence of 19 years imprisonment induces of a sense of shock. Had I been the court of first instance, I would not have been inclined to impose an effective period of imprisonment in excess of ten years. In the result, I propose that the appeal be upheld; that the sentence imposed by the regional magistrate be set aside and the following be substituted therefor.

1. On count 1 the accused is sentenced to <u>TEN (10) YEARS IMPRISONMENT</u>.

2. On count 2 the accused is sentenced to <u>FIVE (5) IMPRISONMENT</u>.

3. In terms of section 280 of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 2 is to run concurrently with the sentence imposed on

count 1.

4. In terms of section 282 of Act 51 of 1977, the sentences are antedated to 27 July 2007.

MCCLARTY, J: I agree.

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MCCLARTY, J

FOURIE, J: It is ordered accordingly.

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FOURIE, J