IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A233/2012

DATE: 17 AUGUST 2012

In the matter between:

NOMBUYISELO PETSWA Appellant

and

THE STATE Respondent

J U D G M E N T

NYMAN, AJ:

The appellant, Nombuyiselo Petswa, was convicted of two counts of attempted murder and one count of defeating the administration of justice in the Cape Town Regional Court on 20 December 2011. On the same date the appellant was sentenced to eight years imprisonment of which two years imprisonment is suspended for two years, the counts having been taken together as one.

The appellant was convicted in pursuance of a plea of guilty and a written statement made in terms of Subsection 112(2) of

the Criminal Procedure Act, 51 of 1977. Hereinafter, I refer to the written statement as "the statement" and the Criminal Procedure Act as "the Act".

An application for leave to appeal was successfully brought against sentence.

The appellant was represented by an attorney.

The appellant is a police reservist. According to the statement, on 18 January 2011 inside Mr Price store in Adderley Street, Cape Town, the appellant had an argument with Thembelani Isaac Pilani, her former boyfriend. During the course of the argument, Mr Pilani and the appellant struggled for possession of the appellant's firearm. In consequence, the appellant shot and injured Mr Pilani with the firearm and, on this basis, she pleaded guilty to the first count of attempted murder.

The appellant continued to fire more shots and in this process shot and injured another female adult. She therefore pleaded guilty to the second count of attempted murder.

Thereafter, the appellant went to the police station and made a false statement.

In this statement she falsely stated that the complainant wanted to grab her firearm and attack her, in order to implicate him. The complainant pleaded that in this manner, she defeated the administration of justice.

After acceptance of the statement by the prosecution, the trial court indicated that it was satisfied that the appellant had admitted all the elements of the three charges and the appellant was duly convicted.

The prosecution called Mr Pilani as a witness in respect of sentence. In his evidence in chief, Mr Pilani gave evidence concerning the nature and extent of the injuries that he suffered as a result of this shooting. Under cross-examination, Mr Pilani relayed his version of the events that occurred on the day of the shooting. His version contradicted the factual statements recorded in the statement.

In mitigation of sentence, the defence led the evidence of Asanda Kupe, the appellant's friend. Ms Kupe's testimony explained the reasons why the appellant was remorseful and why a sentence of direct imprisonment should not be handed down.

In its deliberation on sentence, the trial court stressed that

what has to be considered is the nature of the crime that the appellant had committed, her personal circumstances and the interest of the community. A balance has to be found between these three factors, all three factors have to be considered when deciding on an appropriate sentence.

In its assessment of the interest of society, the trial court highlighted that when people have personal differences in their relationships, their disputes should not be settled with any form of violence. In a civilised society personal disputes are not solved by people trying to kill one another and if people go beyond these barriers they should know that there are consequences. The trial court took into account the fact that the appellant is a first offender, she is a mother of two children, being a care giver of the one child, in its consideration of the appellant's personal circumstances. However, the trial court pointed out that as a police reservist, even though the appellant knew that her actions were unlawful and would result in certain repercussions, she started shooting "like an American wild west movie" and in the process nearly killed two people.

It was the trial court's opinion that for it to show mercy it had to be satisfied that the remorse that the appellant feels is genuine. A "very big requirement" for genuine remorse is that

the appellant must take full responsibility for her actions. The trial court was not satisfied that the appellant had made a full disclosure regarding the circumstances under which the offence was committed, in what the trial court described as "a selective memory" and therefore it could not be accepted that the appellant was 100 percent remorseful.

Of concern to the trial court was that the appellant stated that the gun accidentally went off, while Mr Pilani had testified that the appellant had chased him around like a hunter. The trial court stressed that the appellant's "vigilante behaviour" cannot be tolerated in a civilised society. Therefore the trial court was of the opinion that a period of direct imprisonment of a relative lengthy time was the only appropriate sentence.

Four grounds of appeal were submitted on behalf of the appellant, which grounds can be summarised as follows:

1. The court failed to take into account the appellant's remorse as a mitigating factor and accord it proper weight. The court failed to take into account, alternatively, accord proper weight for her actions in the Section 112 plea, which was accepted and became binding on the State. Additionally, the constant theme of the reports from the correctional officer and probation

officer was that the appellant was deeply remorseful for her actions.

2. The court failed to accord proper weight to the appellant's personal circumstances, alternatively, misdirected itself by overemphasising the seriousness of the crimes and underemphasising the appellant's personal circumstances.

In considering the grounds of appeal I must have regard to the settled principle that sentencing is a matter for the discretion of the trial court. A court of appeal may only interfere with the sentence imposed in instances where the trial court materially misdirected itself or where the sentence is shockingly inappropriate. (See S v Pillay 1977(4) SA 531(A) at 534H to 535A and S v Kruger 2012(1) SACR 369(SCA) at 8.)

In support of its finding that the appellant's remorse was not genuine, the trial court took into account Mr Pilani's evidence that the appellant "chased him around like a hunter". According to the trial court, this evidence contradicted the appellant's evidence that "the gunshots went off accidentally", when the appellant and Mr Pilani were struggling with the gun.

In S v Moorcroft 1994(1) SACR 317 (T) the court held that, where an accused is convicted on the basis of the facts set out

in his plea explanation in terms of Section 112(1)(b), the court is not entitled to take into account, against such accused, the evidence of co-accused whose evidence contradicts the evidence of the former. Subsection 112(3) may only be used to fill in the detail of the framework and may not be used to contradict the accused's version in material respects.

In S v Martin 1996 (1) SACR 172 (W) at 174b-h it was held that the facts contained in the Section 112 statement are binding on the court "whatever the truth may be and whatever the perception of the relatives of the deceased may be".

While on the facts of the Moorcroft decision the trial court relied on the evidence of a co-accused, I see no reason why this principle cannot be applied to the evidence of a complainant. Furthermore, in terms of the Martin decision, the court is bound by the facts set out in the Section 112(2) statement. Mr Pilani's evidence regarding the events that occurred at the time of the shooting could not be used to contradict the appellant's version set out in the Section 112(2) statement.

In my opinion, if the trial court had duly accepted the facts contained in the Section 112(2) statement it would not have characterised the appellant's conduct as "vigilante behaviour"

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nor that the appellant had chased Mr Pilani around "like a hunter". I therefore find that the trial court materially misdirected itself.

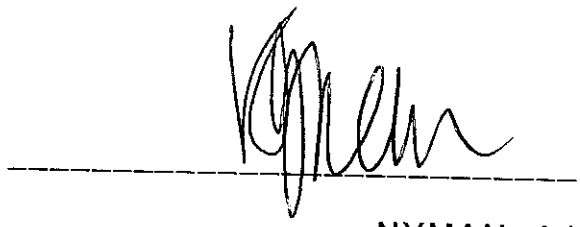
I therefore uphold the grounds of appeal that the trial court failed to take into account and accord weight to the Section 112(2) statement and, in consequence, failed to take into account the appellant's remorse as a mitigating factor and accord it proper weight.

It is my view that as a result of this material misdirection that the trial court erred in overemphasising the seriousness of the offence and underemphasising the appellant's personal circumstances. In these circumstances, it is my opinion that the sentence is too long and that a term of direct imprisonment is not warranted. I am therefore satisfied, having had regard to all the relevant considerations, that an effective sentence of five years imprisonment suspended for five years is fitting in the circumstances of this case.

I therefore propose that the appeal against sentence is upheld and the sentence imposed by the trial court is set aside and replaced as follows:

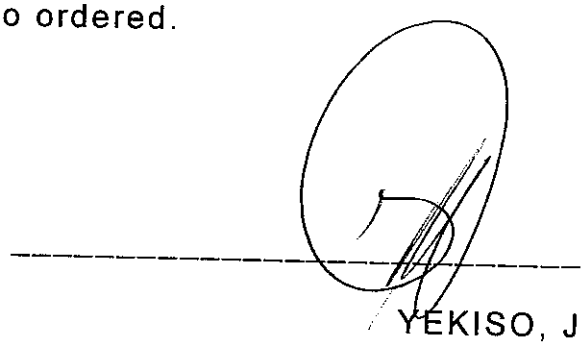
The accused is sentenced to five years imprisonment which is

wholly suspended for a period of five years on condition that the accused is not convicted of attempted murder or assault with the intention to commit grievous bodily harm and sentenced to direct imprisonment without the option of a fine during the period of suspension.



NYMAN, AJ

I agree and it is accordingly so ordered.



YEKISO, J

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