

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: A08/2012

In the matter between:

JOHN JONATHAN ADAMS

Appellant

and

THE STATE

Respondent

CORAM: Zondi J et Van Staden AJ
DATE OF HEARING: 20 February 2014
DATE OF JUDGMENT: 24 March 2014

JUDGMENT

1. The appellant was charged in the Mitchells Plain regional court on one count of culpable homicide (Count 1), and two further counts of the possession of an unlicensed firearm and one round of ammunition. (Counts 2 & 3)
2. The appellant, who at that time was out on bail awaiting trial, pleaded guilty to these charges in relation to these offences allegedly committed on Christmas day in 2010. He was sentenced on 6 November 2012 to five years imprisonment in terms of Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of Count 1 and to six years imprisonment, four of which were to run concurrently with Count 1, in respect of Counts 2 and 3.
3. The appellant filed an application for leave to appeal and was granted leave as well as bail pending the outcome of this appeal against sentence.

4. The factual background accepted by the State upon which appellant pleaded guilty are that he was in possession of a loaded revolver which a friend had asked him to keep. He had this revolver in his car and would have returned it on the very same Christmas day when the incident occurred. There was one bullet in the revolver of which appellant was not aware. The appellant who was not well versed in firearms was fooling around and jokingly pointed the firearm at the 18 year old deceased. The deceased touched the firearm, the appellant pulled back and the firearm fired off in the process with fatal consequences.

5. As far as sentence is concerned the following factors are relevant:

5.1 The appellant pleaded guilty and expressed remorse and sympathy for the family of the deceased. He offered to pay the funeral expenses and is employing a brother of the deceased.

5.2 The personal circumstances of the appellant is mitigating. He is a 33 year old self-employed barber employing three other employees. He has one child of nine years old and is the main breadwinner of his family.

5.3 The appellant must be regarded as a first offender. His one previous conviction is not relevant. The evidence established that the appellant has the support of his family, neighbours and friends and thirty three testimonials to his character were handed to the court. There is no

question of the family of the deceased or the community insisting on direct imprisonment being imposed.

5.4 Pre-sentence reports in respect of the appellant were obtained from both a probation officer as well as a correctional supervision officer. Both concluded that he was a suitable candidate for correctional supervision. The probation officer specifically recommended that appellant be sentenced to correctional supervision.

5.5 The State did not challenge the evidence in mitigation and did not find it necessary to adduce evidence in aggravation of sentence.

6 Ms Ajam, counsel for the State, pointed out that there is no indication in appellant's plea explanation as to when he came into possession of the firearm, how long he had it in his possession and why precisely he was carrying the loaded firearm on his person at that moment. The fact of the matter however is that the magistrate directed certain questions at the appellant in respect of his plea of guilty. She specifically enquired about the time when he came into possession of the firearm and he indicated that it was a few days before the incident. She did not however ask him for how long he had it in his possession and why precisely he was carrying the firearm on his person at that time. The report of the probation officer further deals with the circumstances under which he came into possession of this firearm.

- 7 The seriousness of the crime can not be underestimated. Counsel for the State is obviously correct in submitting that the 'blissfully arrogant toying about with an illegal firearm' caused the death of a 18 year old boy and that such actions can not be condoned by imposing too light a sentence.
- 8 The question that should be asked is whether this court is entitled to interfere with the magistrate's sentence. The power of a court to interfere with a sentence imposed by a lower court is limited.¹ The court can only interfere if the sentence imposed is vitiated by misdirection or irregularity or is one to which no reasonable court could have come.
- 9 In my view the trial magistrate erred in the following respects:
- 9.1 She over-emphasising the seriousness of the possession of the firearm considering the basis upon which the appellant pleaded guilty.
- 9.2 She did not sufficiently take the cumulative effect of the sentences into account.²
- 9.3 By imposing an effective sentence of two years imprisonment in respect of the possession of a firearm the magistrate counter-acted the rehabilitative effect of the imposed sentence in terms of Section 276(1)(i). I initially had reservations about the competence of the

¹ S v Kibido 1998 (2) SACR 213 (SCA) at 216 G-H; S v Pieters 1987 (3) SA 717 (A) at 734

² S v Dlamini 2012 (2) SACR 1 (SCA) at para 33 p 9d-g and S v Fourie 2001 (2) SACR 118 (SCA) para 20

imposition of a sentence of imprisonment in respect of other offences together with imposition of a term of imprisonment in terms of Section 276(1)(i). *S v Gouws*³ deals with these reservations and it is clear that the magistrate was technically competent to impose these sentences as she did.

10 In respect of correctional supervision reference is made to the fact that the legislator by making provision for such a sentence differentiated between two types of offenders - those that should be removed from society by incarceration and those although they should be punished should not be so removed.⁴

11 The interest of the appellant's family, more particularly his 9 year old child, will also be taken into account properly if such a correctional supervision sentence is imposed.⁵

12 In considering all the facts of this matter and the personal circumstances of the appellant I believe that a sentence in terms of Section 276(1)(h) will be a suitable sentence.⁶

13 I would therefore set aside the sentences imposed and substitute it for the following:

³ 1995 (1) SACR 342 (T)

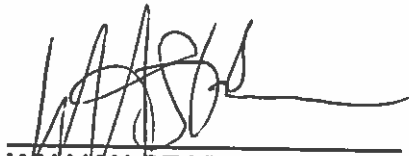
⁴ *S v Bergh* 2006 (2) SACR 225 n at 235 e; Commentary on the Criminal Procedure Act, Du Toit en Others, p 28-10 E

⁵ *S v M* (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC)

⁶ *S v Keulder* 1994 (1) SACR 91 a; *S v Naicker* 1996 (2) SACR 557 a; *S v Omar* 1993 (2) SACR 5 (c)

13.1 Three years imprisonment in terms of Section 276(1)(h) of the CPA in respect of Count 1, subject to the provisions of "The Recommendations for Sentence" annexed to the report of the correctional official Mr N Tobey, dated 19 March 2014.

13.2 In respect of Counts 2 and 3, taken together for the purpose of sentence, three years imprisonment suspended for three years, on condition that appellant is not found guilty of any offence under the Firearms Control Act No 60 of 2000 during the period of suspension.



WH VAN STADEN
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered, subject to paragraph 3(a) of the Recommendations for Sentence referred to above being amended as follows : "Report to the correctional officer at the Magistrate Court, Mitchells Plain on 25th March 2014 at 09h00".



DH ZONDI
JUDGE OF THE HIGH COURT