IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A916/2013

Date: 16 September 2014

Not reportable

Not of interest to other judges

In the matter between:

MANDISA EMMANUEL SUKAZI APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

Delivered on: September 2014

Heard on: 1 September 2014

HUGHES J

[1] The appellant was charged with contravening Section 3 of the Firearms Control Act 60 of 2000, unlawful possession of a firearm. On 12 June 2012 in the Regional Court, Piet Retief he was convicted and sentenced to fifteen (15) years imprisonment and declared unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000.

[2] During the entire court proceedings, the appellant had been legally represented. He applied for leave to appeal and having failed in attaining leave, he petitioned the Judge President of this Honourable Court. On 1 October 2013, leave to appeal was granted in respect of both conviction and sentence.

[3] Constable Mduduzi Henry Kathide ("Kathide"), the arresting officer, was the only witness who testified on behalf of the state. His testimony is that on the day in question he and his colleagues were patrolling the area doing crime prevention duties. They saw two boys and decided to search them. On approaching the

boys, they ran. He and his colleague gave chase. He managed to catch the one that was closest to him, handed him over to his colleague, and pursued the other boy, being the appellant.

[4] When he was approximately three (3) meters away from the appellant, he saw the appellant throw something into a nearby yard. Kathide apprehended the appellant and thereafter went to the yard into which the appellant had thrown the object. He discovered that the object was a firearm.

[5] The appellant denied that the firearm belonged to him. However, searching the appellant, Kathide recovered the safety pin for the firearm in his trouser pocket.

[6] The appellant's version is that the firearm did not belong to him but to his friend Tammy. In fact, his testimony was to the effect that Tammy was the one who threw the firearm in the yard. As regards the arrest, the appellant states that he and Tammy were just walking when the police for no apparent reason apprehended them.

[7] During cross examination of Kathide it was put to him that the appellant would say that:

> "He *(sic)* was *saying that you searched him when you were already at the police station and then it is when you find (sic) a safety pin from him..."* Kathide's answer was:
>
> "*Correct'*.

[8] Now in light of the above statement it is evident that Kathide's version that the safety pin was found on the appellant's person is correct. If so, this is contrary to the appellant's version that the firearm was not in his possession and that Tammy was the one who threw the firearm in the yard.

[9] Based on the evidence cumulatively before the *court a qou,* in my view, the court was correct in rejecting the appellant's version as improbable, especially since he had admitted that the pin was on his person.

[10] I am unable to fault the finding of the trial court even though Kathide was a single witness. A court can convict on the evidence of a single witness especially so, in this case where the witness was credible and had created a good impression on the court.

[11] In the circumstances, the appeal against conviction should fail.

[12] I turn to deal with sentence. The respondent has conceded that even though the minimum sentence in terms of the provisions of Act 105 of 1997 were imposed, it does induce a sense of shock and is startlingly inappropriate in the circumstances.

[13] The aspect of ensuring that the prescribed sentence imposed for an offence has been a cause of disagreement in numerous cases. In issue, is the fact that a sentence imposed should be in proportion to the offence. **Nugent JA** dealt with this in **S v Vilakasi 2009 (1) SACR 552 (SCA) at para [15].** He stated that when one reads the cases of **S v Malgas 2001 (1) SACR 469 (SCA)** and **S v Dodo 2001 (1) SACR 594 (CC)** it is clear that:

> "*[15] It is clear from the terms in which the test* was *framed in **Malgas** and endorsed in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. ... If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. ..."*

[14] In this case the firearm in question was sent to the forensic laboratory for ballistic evaluation and it was established that the firearm was a 9x18mm calibre Norinco model 59 a semi-automatic pistol with a magazine; serial number BT6307. This evidence was not disputed and formed part of the section 212(4) (a) of Act 51 of 1977 evidence.

[15] Counsel for the appellant, when the appeal was argued, advanced a theory that the firearm was not capable of discharging ammunition or bullets and that as such, ought to be considered a mitigation factor.

[16] He further submitted that the facts that make up the general factors of mitigation in respect of the appellant are :

> "*the fact that the appellant was a first offender, there were prospects of rehabilitation, he had two minor children, was gainfully employed, relatively young, as regards the firearm it had not been linked to any further crimes and was incapable of immediate unlawful use. These factors as mentioned above together should amount to mitigating factors that vitiated the imposition of the minimum sentence in the circumstances."*

[17] Counsel for the respondent on the other hand, argued that as per the section 212 evidence, no weight ought to be attributed to the fact that the firearm had no ammunition or bullets, could not discharge and had not been involved in the commission of an offence after it had been stolen in Johannesburg.

[18] The appellant's counsel argued that the trial court erred in over emphasising the seriousness of the offence and the interest of society at the expense of the personal circumstances of the appellant.

[19] **Ponnan JA** in **S v Samuels's** 2011 (1) **SA** 9 **(SCA) at para** [15**]** dealt with how the court ought to deal

with factors relating to mitigation of sentence:

> "*[15] What one sees here is excessive devotion to the furtherance of the of the cause of deterrence and the proportion of the public interest, but insufficient weight to other factors that may lessen the gravity of the offence in the circumstances of this particular case. Thus no or insufficient consideration* was *given to the following factors: that he* was a *first offender; that the firearm, given its state when found, could not have been put to any immediate unlawful use; that he became so frightened upon seeing the police that he immediately attempted to dispose of the firearm; that following upon his arrest he made a full confession to the police; that he fully co-operated and demonstrated his remorse by pleading guilty at the first available opportunity; and most importantly, as I have stated, that he did not retain the firearm for any other nefarious purpose. All of those were weighty factors and undoubtedly served to lessen the gravity of the offence in regard to the appellant on the facts of this case. And yet none of them either individually or cumulatively received due recognition in the determination of an appropriate sentence. The result was the imposition of punishment that was grossly disproportionate to what could be considered fair in the circumstances of this case."*

[20] **Holmes J in R v Kahn 1957(4) SA 558 (N) at 59C-E** stated that "*unlawful possession of a firearm is a serious offence''* when he addressed the issue of the increase in the maximum penalty for such an offence. This is emphasised in **S v Bhadu 2011(1) SACR 487(ECG)** and **Madikane v The State 2011(2) SACR 11 (ECG) at para 23** and the cases mentioned therein.

[21] In **Madikane v The State 2011(2) SACR 11 (ECG) Plasket J** deals with an appeal where the court below imposed the minimum sentence for the same offence as is in the present case and at **para 31 and 32** states:

> "*[31] I am mindful of the fact that, at least in some of the cases, the sentence imposed resulted from the erroneous interpretation of the relevant item of Part II of Schedule 2 to the Criminal Law Amendment Act, that was adopted in* ***Sukwazi*** *and applied in a number of other cases: as a result, a maximum sentence of three years' imprisonment was held in these cases to apply. It seems to me that this incorrect interpretation was, however, resorted to because of a sense of disquiet as to the proportionality of a sentence of 15 years' imprisonment for the unlawful possession of a pistol, albeit one that was a semi-automatic (as most pistols are). In any event, as the cases that I have listed above show, in most cases, the sentences imposed tended to be in the region of two years' imprisonment. Even if allowance is made for the imposition of more severe sentences for the offence of the unlawful possession of a firearm that is automatic or semi-automatic, as a result of the application of the Criminal Law Amendment Act, it seems to me that a sentence of 15 years' imprisonment is unlikely to*

be proportional to the crime, the criminal and the legitimate needs of society, in all but the most serious of cases.

[32] In this case there are no factors personal to the appellant that stand out as mitigating, as I have indicated above. Most are neutral and all that can othenwise be said in his favour is that the firearm was not proved to have been used in the commission of any offence. /As *against this, the appellant's three previous convictions for housebreaking with intent to steal and theft are aggravating. When all of the appellant's personal circumstances are taken into account, along with the nature and seriousness of the offence and the interests of society, it cannot be said that the imposition of the prescribed sentence of 15 years' imprisonment would be just. This fact, in itself, constitutes a substantial and compelling circumstance justifying and requiring this court to impose a less severe sentence than the prescribed sentence. I am of the view that a sentence of seven years' imprisonment is one that is, indeed, proportionate to the crime, the criminal and the legitimate needs of society."*

[21] I have considered the case law mentioned above and taken into account all the evidence and factors relevant to sentencing in this case. I am of the view that an appropriate sentence in the circumstances of this case will be a sentence of six (6) years imprisonment. Such a sentence will bring home to the appellant the seriousness of the offence he committed and act as a deterrent to other would be offenders.

[22] The appeal against sentence, in my view, should succeed.

[23] The following order is made:

[23.1] the appeal against conviction is dismissed;

[23.2] the appeal against sentence is upheld;

[23.3] the sentence imposed by the trial court is set aside and substituted by the following sentence:

“the accused is sentenced to six (6) years imprisonment.”

[23.4] the sentence is antedated to 12 June 2012;

[23.5] the declaration that the accused, in terms of Section 103(1) of Act 60 of 2000 is unfit to possess a firearm remains intact.

W. Hughes

Judge of the High Court

I Agree

M. W. Msimeki

Judge of the High Court

Delivered on: 16 September 2014

Heard on: 1 September 2014

Attorney for the Appellant:

PRETORIA JUSTICE CENTRE

2nd Floor FNB Building

Church Square

PRETORIA

Tel: 012 401 92000

Ref:

Attorney for the Respondent:

THHE DIRCTOR PUBLIC PROSECUTIONS

PRETORIA

Tel: 012 351 6700

Ref: MA 93/2013 (5/5/PWC)