REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: A810/2010 2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

23/10/2017 .....
DATE

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SIGNATURE

In the matter between:-

PETRUS MADODA MBATHA Appellant

and

THE STATE Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The appellant was arraigned for trial in the Witbank Regional Court on 8 August 2016, on two charges:

1.1 On count one (1), possession of a firearm, with the offence of contravening the provisions of section 3 read with sections 1, 103, 117, 120(1)(a) and section 121 read with schedule 4 of the Firearms Control Act 60 of 2000, ('the Act'), together with section 250 of the Criminal Procedure Act 51 of 1977, and further read with section 51(2)(a) of Act 105 of 1997, in that:

1.1.1 On or about 10 June 2015, at or near Witbank in the Regional Division of Mpumalanga, the accused unlawfully had in his possession a 9mm Norinco semi-automatic pistol (having serial number 45009157) without holding a licence, permit or authorisation issued in terms of the Act to possess that firearm.

1.2 On count two (2), possession of ammunition, with the offence of contravening the provisions of section 90 read with sections 1, 103, 117, 120(1)(a) and section 121 read with schedule 4 of the Firearms Control Act 60 of 2000, ('the Act'), read further with section 250 of the

Criminal Procedure Act 51 of 1977, and read together with section 51(2)(a) of Act 105 of 1997, in that:

1.2.1 On or about 10 June 2015, at or near Witbank in the Regional Division of Mpumalanga, the appellant unlawfully had in his possession ammunition comprising eight (8) 9mm rounds without being the holder of a licence in respect of a firearm capable of discharging that ammunition, or a permit to possess the ammunition, or a dealer's licence, manufacture's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of the Act, or as otherwise authorised to do so.

[2] The appellant was provided with legal representation at the trial. The minimum sentences attaching to the charges were explained to the appellant who indicated his understanding thereof. The appellant pleaded guilty on both counts in terms of a written plea statement under section 112(2) of Act 51 of 1997.

[3] The appellant's legal representative informed the trial court that the plea of guilty accorded with his instructions. The prosecution accepted the plea and the court pronounced its satisfaction that the appellant admitted all the allegations in the charges against him, pursuant to which the appellant was pronounced guilty as charged.

[4] The state proved two previous convictions of assault during 1988. The appellant confirmed his previous convictions.

[5] In sentencing the appellant, the court a quo took account of a report into the appellant's suitability for correctional supervision/placement in terms of sections 276(A)(1)(a) of Act 51 of 1977, as well as a psychosocial report.

[6] Given the length of time that had passed since the appellant's previous convictions, the court a quo sentenced the appellant as a first offender in respect of crimes of the nature relevant to the matter.

[7] Briefly stated, the court a quo found that the appellant's guilty plea, together with his personal circumstances and lack of previous convictions relevant to the offences at hand, comprised substantial and compelling circumstances that entitled the court to deviate from the prescribed minimum sentences of fifteen (15) and five (5) years imprisonment respectively, on the two counts.

[8] In addition, the court a quo found that the appellant showed remorse given that he pleaded guilty to the charges.

[9] The court a quo weighed the appellant's personal circumstances, the seriousness of the crimes of which the appellant was convicted, the interests of society and the element of mercy that should be shown to all offenders. The additional aims of punishment, being the rehabilitation of the offender, retribution for the victims of crime and society as a whole, as well as deterrence and prevention of crime in general, were similarly considered by the court.

[10] Thus, the court sentenced the appellant to five years imprisonment on count one, and to three years imprisonment on count two, the sentence on count two to run concurrently with the sentence on count one in terms of section 280(2) of Act 51 of 1977, such that the effective term of imprisonment was five years.

[11] No order was made in terms of section 103(1) of the Act, meaning that the appellant was unfit to possess a firearm.

[12] The regional court granted the appellant leave to appeal the sentence. His bail was extended pending finalisation of the appeal. This is that appeal.

[13] Notwithstanding that the trial court found substantial and compelling circumstances sufficient to justify a reduction of ten years imprisonment from the minimum sentence on count one, the appellant argued that the effective custodial sentence of five years was shockingly inappropriate and disproportionate to the facts at hand, justifying interference by this court.

[14] The appellant argued that given the mitigating factors at hand, particularly the appellant's personal circumstances, his effectively clean record and the fact that the weapon was not used in any offence by the appellant, the court *a quo* failed to individualise the sentence sufficiently, and, adopted an approach that served to nullify the exercise by the lower court of its discretion.

[15] Furthermore, the sentence was the result of a policy decision previously taken by the trial court to the effect that society will no longer tolerate gun crime and that the courts intended to send out a message accordingly by way of the sentences imposed for such crimes.

[16] Thus, the court a quo's approach amounted effectively to that of *one size fits all,* resulting in a failure to tailor the sentence sufficiently to the appellant personally, a failure to adequately exercise the court's sentencing discretion, and a lapse of effective justice.

[17] The approach to be followed on appeal in respect of sentence is circumscribed.

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. ... (The appellate court) must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'[1]

[18] The appellant argued that a custodial sentence of any length would be disproportionate and unjust, and that a suspended custodial sentence, alternatively a sentence of community service or periodical imprisonment would suffice. The appellant argued further that a sentence that served to exclude any period of imprisonment fell within the framework of the minimum sentencing legislation.

[19] The appellant relied in this regard on a case referred to as *Dos Santos*. The appellant was unable to locate the judgment in the matter and, hence, minimum, if any weight can be attached to the appellant's submissions in regard to the case. The respondent however, drew attention to the advanced age and impaired health of the accused in *Dos Santos*, who was both elderly and sickly, factors that served to distinguish the matter from the appellant before us.

[20] The appellant was not able to refer to any other decision in which a noncustodial sentence was imposed for offences of the nature relevant hereto.

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1 *Hewitt v S* (637/2015) [2016] ZASCA 100 (9 June 2016) footnotes omitted.

[21] Whilst there is a measure of merit in the appellant's arguments, the legislature has determined that crimes involving semi-automatic weapons are serious, and deserving of minimum sentences of imprisonment. Hence, a wholly suspended sentence or one of periodical imprisonment as submitted by the appellant, does not serve to sufficiently reflect the seriousness of the crimes involved or society's interests in prevention, and deterrence of such crimes.

[22] Moreover, some years previously, the appellant held a licenced firearm that became lost. The appellant did not report the firearm as lost. Hence, the appellant was aware, acutely so, of the requirements of a licence and that it was unlawful to be in possession of a firearm (as well as ammunition), without being the holder of a licence in respect of that firearm.

[23] In addition, notwithstanding the appellant's previous experience of licenced weapons, he failed to hand the firearm in question over to the police services, upon finding it in the field. The appellant admitted that he intended keeping the weapon for himself. As a result, the weapon was found hidden in the appellant's jacket. when he was stopped by the police.

[24] However, the length of the period of imprisonment imposed by the court a quo was unjustifiable. The appellant was able to be rehabilitated, had displayed remorse and had personal circumstances of an overwhelmingly mitigating nature.

24.1 The appellant was a middle age man with four children, all living with him. Not only was he responsible for the financial support of his four children, (two of whom were majors and two were minors), but he also supported his mother, his sister and his sister's children.

24.2 The appellant was formally unemployed, surviving off jobs as a mechanic and a relief taxi driver, work that the appellant's two elder children should be able to assume in place of the appellant.

[25] In the circumstances, the effective sentence imposed by the court a quo was wrong, entitling this court to set the sentences aside and impose the sentences we consider appropriate.

[26] In the result, I propose the following order:

26.1 The appeal against the sentence on count one is upheld;

26.2 The appeal against the sentence on count two is upheld;

26.3 The sentences on count one and count two are set aside and replaced with the following:

26.3.1 On count one (1), the appellant is sentenced to five years imprisonment, two years of which is suspended for five years on condition that the appellant is not convicted of a similar offence during the period of suspension;

26.3.2 On count two (2), the appellant is sentenced to two years imprisonment.

26.3.3 The sentence on count two will run concurrently with that on count one, such that the effective term of imprisonment is three years.

26.4 The appellant is ordered to surrender himself to the clerk of the Witbank Magistrates' Court within seventy-two hours of the date of this judgment, in order that effect be given to this sentence.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

V V TLHAPI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

COUNSEL FOR APPELLANT	Mr SW Davies.
INSTRUCTED BY	JW WESSELS & PARTNERS INC.
COUNSEL FOR RESPONDENT	Ms Coetzee.
INSTRUCTED BY	The Director of Public Prosecutions.

DATE OF HEARING 16 October 2017.

DATE OF JUDGMENT 23 October 2017.