IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: YES

21 July 2017 .....

CASE NO: A505/2016

In the matter between:

JACOBUS DANIEL VENTER Appellant

and

THE STATE Respondent

JUDGMENT

MUDAU J:

[1] The appellant, Mr Jacobus Daniel Venter, appeared in the Benoni Regional Court charged with contravening s 120 (8) (a) of the Firearms Control Act 60 of 2000 ('the Act') and other relevant provisions as well as the Regulations for failing to lock a firearm away in a prescribed manner. He was ultimately convicted as charged and subsequently

sentenced to pay a fine of R20-000-00 or to serve 12 months imprisonment. A further 12 months imprisonment was imposed but was suspended for five years on customary grounds. In terms of s 103 of the Act, no determination to the contrary was made with result that the appellant remained unfit to possess a firearm. The appeal against conviction, sentence and the resultant order, is with leave of the court *a quo*. The issue in this appeal regarding the merits is whether the State discharged the onus it had in establishing the appellant's guilt as he denied to have had the requisite *dolus* or *culpa* to contravene the relevant provisions of the Act. Added to this is whether the appellant should not have been discharged at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'). Regarding sentence, the question in dispute is whether the sentence imposed (including the order) by the trial court is justified.

[2] The facts on which he was convicted were essentially common cause at the trial, and they may be summarised as follows: The appellant is the licensed owner of a 9 mm CZ pistol which he acquired for purposes of self-defence. On 20 December 2012 between 13h00 and 14h00 he and a friend, Chris Ehlers attended to the Ducks Inn bar. They ordered alcoholic beverages which they imbibed. A few hours later and after several drinks, the appellant approached the bar lady, Ms Oothuizen, to put away his firearm in the presence of Ehlers. It was bothering him as it was pulling down his pants. When the appellant handed over his firearm it was in its holster. She bent down and put the firearm behind a stationary box under the bar counter where it was not readily visible opposite where the appellant sat. Ducks Inn had no safe to keep firearms. Neither was the firearm stored in a strong room or device for safekeeping, an aspect in respect of which there was a formal admission made in terms of s 220 of the CPA. In order to reach the firearm, one would have to get behind the counter, bend down and reach out for it.

[3] At approximately 18:00 to 19:00 hours later that evening, a certain Mr Leon Roos ("the deceased") arrived. A dispute arose between the deceased and Mr Ehlers about money owed between them which resulted into a fist fight. Mr Ehlers went behind the bar counter and took possession of the appellant's firearm. The appellant tried to disarm Mr Ehlers of the firearm but in vain. A struggle ensued; the firearm fell and slid on the floor. Mr Ehlers picked up the firearm and shot the deceased who as a result succumbed to the gunshot wound.

[4] After an unsuccessful application for discharge intended in s 174 of the CPA, the appellant testified that he had control over his firearm from where he sat at the bar. The door leading to the back of the counter was approximately 2 meters from where he was seated. He knew he had an obligation to put the firearm in a safe place. The added reason why he gave his firearm to the bar lady for safekeeping was because he feared that any other person could have taken it from his waist as the holster in which he kept it was a quick draw one. He however conceded during cross examination that there were occasions when he went to the bathroom leaving the firearm where it was, but insisted that he left it under the control of the bar lady. He further conceded knowing the relevant rules attendant with ownership of a firearm.

[5] I find it convenient to deal first with the ground of appeal that the appellant was convicted on his evidence and should have succeeded in an application for discharge in terms of s 174 of the CPA. In support of this contention he relied *upon S v Lubaxa*[1] where the Supreme Court of Appeal found it an unlawful breach of an accused's rights under ss 10 and 12 of the Constitution, 1996, to refuse him a discharge at the end of the State's case if there is no possibility of a conviction except if he testifies and incriminates himself. Reliance on *Lubaxa* given the common cause facts is in my view misplaced. The evidence and admissions before the Court a *quo* at that stage established that the appellant on face value contravened the provisions of the statute and the regulations under consideration.

[6] The Legislature has undoubtedly been increasing the stringency of the requirements relating to the safekeeping of firearms over the years. By way of background, in terms of s 7 of the Arms and Ammunition Amendment Act 19 of 1983 the legislature had introduced statutory criminal sanctions for the failure to safeguard a firearm and for the negligent loss of a firearm. This was done by introducing paras (j) and (k) into s 39(1) of the then Arms and Ammunition Act 75 of 1969. In addition by enacting s 23 (a) to (c) of the Arms and Ammunition Amendment Act 60 of 1988, the Legislature created new offences for failure to lock away a firearm in a safe place and for failure to prevent loss or theft of a firearm by amending s 39(1) (j) and (k) of the Arms and Ammunition Act 75 of 1969.

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[1] *S v Lubaxa* 2001 (2) SACR 703 (SCA).

[7] Over an extended period of time, however, it was perceived that the evil of unqualified possessors of firearms required combatting on another front. The Arms and Ammunition Act has since been repealed and replaced by the Act the provisions of which are the subject matter in this appeal. Quite clearly the degree of care and responsibility that the Legislature has intended a firearm owner to take when the firearm is not in his or her person or under his or her direct control evolved overtime from there being no law in that regard, to a requirement to safeguarding or taking reasonable steps to safeguard, and lately to ensuring that it is kept in a prescribed safe, strong room or other device for safekeeping.

[8] Section 120 (8) of the Act provides that A person is guilty of an offence if he or she-

(a) fails to lock away his or her firearm or a firearm in his or her possession in a prescribed safe, strong-room or device for the safe-keeping when such firearm is not carried on his or her person or is not under his or her direct control; or

(b) loses a firearm, or is otherwise dispossessed of a firearm owing to that person's failure to-

(i) lock the firearm away in a prescribed safe, strong-room or device for the safekeeping of a firearm;

(ii) take reasonable steps to prevent the loss or theft of the firearm while the firearm was on his or her person or under his or her direct control; or

(iii) keep the keys to such safe, strong-room or device in safe custody.

[9] Regulation 86 (Firearms Control Regualtions-2004 GN R345 of 2004) to the Act deals with safes and safe custody of firearms. Regulation 86 (1) provides that:

> "When a firearm [or muzzle loading firearm] is not under the direct personal and physical control of a holder of a licence, authorisation or permit to possess the firearm [or muzzle loading firearm], the firearm [or muzzle loading firearm] and its ammunition must be stored in a safe or strongroom that conforms to the prescripts of SABS Standard 953-1 and 953- 2, unless otherwise specifically provided in these Regulations".

Regulation 86 (4) (a) also provides that:

"A person who holds a licence to possess a firearm [or is a holder of a competency certificate in respect of a muzzle loading firearm], may store a firearm [or muzzle loading firearm] in respect of which he or she does not hold a licence or competency certificate, if-

(i) he or she is in possession of a written authorisation given by the person who holds a licence, permit or authorisation to possess that firearm [or competency certificate in respect of a muzzle loading firearm] and which authorisation is endorsed by a relevant Designated Firearms Officer; and

(ii) the firearm [or muzzle loading firearm] is stored in a prescribed safe at the place mentioned in the authorisation contemplated in subparagraph (i)".

[10] It seems clear in the light of the foregoing that there was evidence upon which a court acting carefully, could properly find it was proved that appellant contravened s 120 (8) (a) of the Act as the firearm was not stored in a prescribed safe nor under his direct control (by his own admission) at times when he had to use the toilet. Plainly, the court *a quo* did not in my view fail to properly consider the evidence at the end of the State's case or wrongly exercise its discretion. It was observed in *S v Nkosi and Another*[2], that the question whether a trial court should discharge such an accused is not one that can be answered in the abstract. In any event the appellant who enjoyed legal representation in this case had no obligation to testify and give self-incriminating evidence as he remained protected by the Bill of Rights as provided for in 35 (3) (h) and (i).

[11] It was contended on behalf of the appellant before the court *a quo* and in this court that "under direct control" is not physical possession as envisaged by the words "on his/her person", in the subsection. Counsel for the appellant argued that "an arm's length is sufficient constitute possession for the purposes of the Act". Counsel was however constrained to concede that each time that the appellant left the bar to use the bathroom; he had relinquished direct control of his firearm. The concise Oxford Dictionary defines the word "direct" thus:

"1. control the operations of", 2. "aim something in a particular direction" 3. Give an order or authoritative instructions to".

Control is defined as "to have control or command of" or "to regulate".

[2] 2011 (2) SACR 482 (SCA) at para 21.

[12] From a proper reading of the words "direct control" within the context of the statute and the Regulations, it is accordingly clear to me that if a firearm is not on the person of an authorised person or locked away in a prescribed manner, the control is restricted by law to circumstances where such control is directly exercised by such authorised person and not through a third party. Any other interpretation would in my view defeat the intention of the Legislature in this regard.

[13] From the facts of this case it would seem that the person with direct control of the firearm was the bar lady since the appellant could not see where the firearm was placed under the counter out of his sight. To make matters worse, the request to put away the firearm was made in the presence of his friend who later took advantage of the situation by retrieving the firearm in plain view of the bar lady which he used with fatal consequences. In any event the request by the appellant to the bar lady fell afoul of Regulation 86 (4) (a) as he clearly did not establish whether she had a licence for a firearm. The appeal against conviction is clearly without merit and stands to be dismissed.

[14] I turn to deal with the sentence and the resultant order. The law is settled on when an appeal court may interfere with a sentence imposed by a lower court. It can only do so when there is a material misdirection by the sentencing court. An appeal court may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appeal court would have imposed, had it been the trial court is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'. Marais JA stated the test in *S v Sadler*[3] as follows:

> '(I)t is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail.'

[3] 2000 (1) SACR 331 (SCA) para 10

[15] Before being sentenced, the following personal factors of the appellant were placed before the court *a quo*. The appellant was at that time a 26 years old married business man and a father of 2 minor children. He had a staff compliment of about 120 employees and also owned a game farm of international repute with accommodation valued at about R10 million rands. From his business interests he drew a monthly salary of R60-000-00. The appellant admitted to a record of a previous conviction emanating from a drunken driving charge which was disregarded by the court for purposes of sentence as the appellant was considered a first offender. He is a licenced holder of two hunting rifles.

[16] The court *a quo* was of the view that the offence committed was a serious one. In this regard that approach was and remains correct. The appellant was clearly in a position to pay the fine as he did. Firearms are by their very nature lethal, more especially so in the hands of the unskilled, irresponsible, or, worse, the criminal as borne out by the tragic facts in this case. Stolen or lost firearms end up in the possession of persons who have not passed through the administrative screening procedure designed to ensure that only the qualified and responsible are entrusted with the care and control of lethal weapons (*S v Robson*; *S v Hattingh*[4]). In my view the sentence imposed was not visited by any misdirection.

[17] However, the effect of the order regarding s 103 of the Act, in essence rendered the appellant unfit to possess any arm, entailing in turn, forfeiture of all other firearms in his possession. Regard being had to the various relevant factors indicated above as well as the approach in the classical case of S v Zinn[5], the interest of the appellant was not properly evaluated given the nature of his business; and relatively large personnel in a game farm, in a country with heightened crime rate. In argument before us, counsel for the respondent readily conceded this aspect. The consequence is that the order made is liable to be set aside.

[18] In light of the conclusions reached, the following order is made:

1. The appeal against conviction and sentence is dismissed.

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[4] 1991 (3) SA p322 (W) 331 F.
[5] 1969 (2) SA 537 (A).

2. The order of the court below in respect of the appellant's unfitness to possess a firearm is set aside and substituted as follows:

> 'In terms of section 103 of the Firearms Control Act 60 of 2000 the accused is fit to possess a firearm.'

TP MUDAU

JUDGE OF THE HIGH COURT

I agree

MB MOKOENA

ACTING JUDGE OF THE HIGH COURT

Date of Hearing:	08 June 2017
Judgment Delivered:	21 July 2017
APPEARANCES	
For The Appellant:	Adv E Killian (SC)
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For The Respondent:	Adv S Mahomed
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