REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A162/2018

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

13/06/2019
DATE

SIGNATURE

In the appeal between -

SIBUSISO MCHUNU Appellant

and

THE STATE Respondent

JUDGMENT

STRYDOM AJ

[1] This is an appeal against the sentence imposed by the Regional Court Magistrate ("the Magistrate") on the accused after he was convicted of one count of being in possession of a firearm and one count of being in possession

of ammunition in contravention of sections 3 and 90 of the *Firearms Control Act 60 of 2000 ("the Act")*.

[2] On count 1, the illegal possession of a firearm, the appellant was sentenced to six years imprisonment and on count 2, the illegal possession of ammunition, the accused was sentenced to one year's imprisonment. The Magistrate ordered that the sentence on count 2 should be served concurrently with the sentence on count 1.

[3] On behalf of the appellant, an application was made for leave to appeal against his sentence only. The Magistrate granted the appellant leave to appeal against the sentence and made the following finding:

> *"The court therefore found that maybe I was too lenient in your sentence therefore your application for leave to sentence is granted."*

[4] When this finding is considered it appears as if the magistrate granted leave to appeal on sentence on the basis that the sentence which was imposed was too lenient. It is unclear to this court on what basis this statement was made. If this statement was sarcastically made, it is unjudicial and unfortunate. Magistrates should refrain from commentary of this nature especially as a part of its order. It confuses the issue for consideration by a court of appeal as, if the Magistrate was of the view that the sentence was too lenient, then the Magistrate should not have granted leave to appeal. The test to be applied is whether there is a reasonable prospect of success on appeal from the appellant's point of view. If the sentence, according to the Magistrate, is too lenient, leave should not have been granted.

[5] As part of the heads of argument filed on behalf of the appellant, Mr Van As, appearing on behalf of the appellant, took a point *in limine*. This point pertains to count 2, the possession of ammunition. In the appellant's heads of argument, it was submitted that the trial court erroneously convicted the appellant on count 2 as the State failed to prove that the ammunition found in the possession of the appellant was indeed ammunition as defined in the Act. This point taken as a point *in limine* is nothing less than an attempt to broaden this appeal to include an appeal against the conviction. Without leave to appeal being granted either by the Magistrate or on petition there is no appeal on conviction before this court. Accordingly, this court will not consider this appeal against the conviction of the appellant on count 2. That leaves the appeal against sentence to be considered.

[6] It was argued that the sentence imposed by the Magistrate was shockingly harsh and inappropriate and that this court is entitled to intervene by setting the sentence aside and to replace it with a suitable sentence. The sentence, so it was argued, should take into consideration the expectations of the community and the seriousness of the offence committed, as well as the appellant's personal circumstances.

[7] It is trite that a court of appeal can only interfere with a discretionary sentence imposed by a lower court if the lower court misdirected itself and/or if the sentence imposed induces a sense of shock. This appeal against sentence was argued on the basis of the sentence being harsh and shockingly inappropriate.

[8] The circumstances under which the appellant was arrested should first be

considered.

[9] The appellant, together with three others, was in a vehicle which was stopped by the police. The police searched the vehicle and found the firearm on the back seat of the vehicle. Later on the appellant admitted that the firearm belonged to him and he informed the police that he was in fact on his way to the police station to hand in the firearm. He said that he earlier picked the firearm up at a rubbish site. This version of the appellant was in my view correctly rejected by the Magistrate and the appellant was found guilty on the two counts mentioned hereinabove.

[10] In terms of section 121 of the Act, when read with schedule 4 thereto, it provides for a maximum sentence of 15 years imprisonment for anyone who unlawfully possesses a firearm. This will include the firearm in relation to which the appellant was convicted. The fact that a maximum sentence is prescribed does not mean that a convicted accused should be sentenced to such a long term imprisonment. Each case should be considered on its own merits, including whether the firearm was automatic, semi-automatic or a revolver as is the case *in casu*. Also of importance is whether it has been proven if this firearm was used in criminal activity.

[11] On behalf of the appellant, Mr van As referred the court to the judgment of *S v Madikane 2011 (2) SACR 11 (ECG) par. [29] + [30]*. In this matter the court examined sentences imposed by other courts for possession of firearms. The court acknowledged that the facts of all these matters referred to may differ, but concluded that a pattern emerged indicating that sentences are in the region of

two years imprisonment for possession of a firearm. The court does not intend to refer to all of these judgments but on a consideration thereof, it is clear that the sentence imposed by the magistrate *in casu* is an extraordinary long sentence for being in possession of a revolver.

[12] On behalf of the State it was argued that the sentence was not shockingly inappropriate, and that the Magistrate was in the best position to consider the sentence. It was argued that the prevalence of the illegal possession of firearms is a scourge in society and is on the increase. The court will take this into consideration.

[13] The appellant is a first offender and 27 years old. From this it can be concluded that the appellant does not have the propensity to commit criminal offences and is therefore a good candidate for rehabilitation. Although it remains unclear why the appellant possessed the firearm, the only reasonable inference to be drawn from the circumstances of this case is not that the appellant was going to use this firearm to commit a criminal deed. There may be a suspicion in this regard but a mere suspicion is not enough to conclude that this is the situation. In my view, the magistrate over-emphasised the interests and the expectations of the community as to what an appropriate sentence should be. This the Magistrate did at the cost of considering the personal circumstances of the appellant, and the fact that he is a first offender.

[14] This court is of the view that the direct imprisonment of six years for possession of a firearm in the circumstances of this case is shockingly inappropriate and disproportionate to sentences for similar convictions as reported in our law

reports.

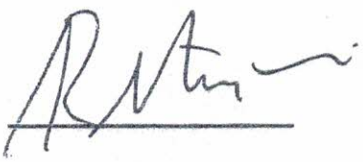
[15] The possession of a firearm remains a serious offence and the sentence imposed by this court will hopefully deter others from doing so.

[16] This court is of the view that a sentence of three years imprisonment on count 1 would be the appropriate sentence. The sentence on count 2 should not be interfered with, but this court will also order that the sentence of one year imprisonment should be served concurrently with the three year sentence on count 1.

[17] The following order is made:

(1) The Magistrate's sentence of six years imprisonment in relation to count 1 is set aside and replaced with a sentence of three years imprisonment, backdated to 6 February 2018.

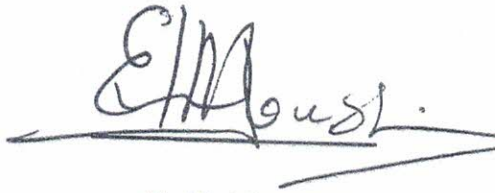
(2) The sentence of one year imprisonment on count 2 will stand and it is ordered that this sentence should be served concurrently with the sentence on count 1.



R. STRYDOM

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I concur and it is so ordered



E. M. KUBUSHI

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA