



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

Case No: A416/2015

In the matter between:

DEVRON WITBOOI

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 08 DECEMBER 2015

RILEY, AJ

[1] The appellant was charged in the regional court sitting at Parow with contraventions of ss4(1)(f)(iv) and 90, read with ss1, 103, 117, 119, 120(1)(a) and s121 with column two of Schedule 4 of the Firearms Control Act No 60 of 2000, and further read with s250 and 270 of the Criminal Procedure Act, Act 51 of 1977.

[2] On count 1 the state alleged that on the 31st of March 2013 at or near Uitsig, the appellant unlawfully and intentionally possessed a 9mm Parabellum, calibre Pietro Beretta 92 SB semi-automatic pistol of which the serial number had been erased, without being the holder of a licence issued in terms of s17, 19 or 20(1)(b) of the Firearms Control Act.

[3] On count 2 the state alleged that on the same date, time and place, the appellant unlawfully and intentionally had in his possession 12 x 9mm rounds of ammunition.

[4] The appellant who was represented in the court *a quo* pleaded not guilty to both counts on 11 May 2015 and on 18 May 2015 he was convicted on both counts.

[5] On 26 May 2015 the appellant was sentenced to ten (10) years imprisonment on count 1. The court *a quo* suspended two (2) years of the sentence on count 1 on certain conditions. On count 2 the appellant was sentenced to six (6) months imprisonment which was ordered to run concurrently with the sentence imposed on count 1. The appellant was granted leave to appeal to this court in respect of sentence only.

[6] It is trite law that the courts powers to interfere with sentence on appeal are circumscribed and that a court of appeal will only do so if the sentence is vitiated by irregularity, misdirection or if it is so unreasonable that no reasonable court would have

imposed it. See **S v Petkar** 1988 (3) SA 751(A) and **S v Mtungwa and Another** 1992 SACR 1(A).

[7] The facts upon which the conviction is based, is as follows. On 31 March 2013 W/O Denver Dirks of the Flying Squad of the SAPS based at Maitland and Constable Kerwin Engelbrecht who was stationed at Ravensmead SAPS, were on duty at about 00h50 doing crime prevention patrols on Gousblom Road at Uitsig when they observed six (6) male persons moving in their direction across a field adjacent to the local Apostolic Church. They observed the appellant, who was one of the group, turn around and run in the direction that the group had come from. They pursued him on foot and saw that as he was running, he removed the firearm from his tracksuit pants and throw it over the vibracrete wall onto the premises of the Apostolic Church.

[8] They apprehended the appellant and Engelbrecht then went into the church premises and found the firearm. The firearm was identified as a 9mm police issue Parabellum Pietro Beretta, semi-automatic pistol with a wooden grip. The magazine of the firearm contained 12 x 9mm rounds of live ammunition. The appellant was arrested and taken to the Ravensmead SAPS. On examination of the firearm, it was established that the serial numbers of the firearm had been filed off.

[9] S121 of the Firearms Control Act provides that any person convicted of a contravention of or failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding

the period mentioned in Column 2 of that Schedule opposite the number of that section. A maximum penalty of twenty-five (25) years imprisonment is prescribed for the illegal possession of a firearm where the serial number or any other identifying mark has been changed or removed from the firearm without the written permission of the Registrar.

[10] The purpose of the Firearms Control Act 60 of 2000 is *inter alia* to prevent the proliferation of illegally possessed firearms and to prevent crime involving the use of firearms. It is well-known that the unlawful possession of firearms is one of the greatest evils besetting South African society and that the legislature's intention was clearly to spread the net against the unlawful possession as widely as possible. See **S v Mnisi and Another** 1996 (1) SACR 496(T) at 502 b – d. Gun crime is completely out of control in South Africa. In **S v Thembaletu** 2009 (1) SACR 50 (SCA) the appellant challenged the sentence of fifteen (15) years imprisonment in respect of the possession of the unlicensed, semi-automatic firearm on the basis that the provisions of s51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was not applicable. The SCA rejected the appellant's arguments and upheld the sentence of fifteen years imprisonment imposed on him even though he was a first offender. In **S v Madikane** 2011 (2) SACR 11 ECG Plasket J considered a substantial number of cases on sentence for the unlawful possession of automatic firearms (paras 25 – 28) and of semi-automatic pistols (paras 29 -30). In dealing with an appeal against a sentence of fifteen (15) years imprisonment imposed upon the appellant in terms of s51 of the Criminal Law Amendment Act on his conviction for the unlawful possession of a semi-automatic pistol in contravention of s3 of the Firearms Control Act 60 of 2000, the

learned judge observed that he was unable to find any case apart from *S v Tembalethu* (*supra*) either prior to or after the operation of the Criminal Law Amendment Act 1997, in which sentence of fifteen (15) years imprisonment was regarded as appropriate. The learned judge found that *'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 fifteen (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 cases'*. The sentence of fifteen (15) years imprisonment was set aside and replaced with a sentence of seven (7) years imprisonment. In **S v Khoza** [2011] ZAGPJHC 218 (20 November 2011), however, a sentence of fifteen (15) years imprisonment was upheld on appeal for possession of a semi-automatic firearm where the provisions of s51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was applicable. In **Swart v S** (A430/13) [2014] ZAWCHC 113 (4 August 2014) Rodgers J highlights the gravity of unlawful possession of semi-automatic firearms where he states at para [41] that *'unlicensed possession of semi-automatic firearms is a serious matter. Violent crime involving the use of such weapons has not diminished since Tembalethu was decided. I have no doubt that the lawmaker in requiring a minimum sentence of fifteen (15) years imprisonment to be imposed in the absence of substantial and compelling circumstances, had in mind that generally an unlicensed weapon of that kind is possessed for use (whether by the possessor himself or by one to whom he passes the weapon) in other serious crimes such as murder, robbery with aggravating circumstances, hijacking and the like. Very often the*

perpetrators of violent crime are not apprehended'. Our crime statistics indicate that there has been no let-up in the crime pandemic that engulfs our country. The crime situation in our country continues to be alarming. See **S v Matyityi** 2011 (1) SACR 40 (SCA) para 23.

[11] There can be no doubt that the introduction of minimum sentence legislation in respect of the illegal possession of automatic or semi-automatic firearms and the enhanced sentencing regime provided for, for a contravention of s4(1)(f)(iv) read with column two of Schedule 4 of the Firearms Control Act, is directly related to the frequency with which illegal firearms have been used in perpetrating violent crimes. In relation to the unlicensed possession of an automatic firearm, the Firearms Control Act places a cap on the higher sentences which may be imposed and at the same time gives expression to the legislature's view of the severity of the offence. Considering the approach adopted by the courts in Tembalethu (*supra*), Khoza (*supra*) and Swart (*supra*) the overwhelming view appears to be that our courts will not hesitate to impose the sentences as prescribed by the legislature in cases relating to the unlawful possession of automatic and semi-automatic firearms.

[12] It was *inter alia* submitted on behalf of the appellant that the trial court did not have a proper regard to the rehabilitative element of sentence, that the court *a quo* had erred in not taking into account that the appellant did not commit any crime with the firearm nor was evidence led that he intended to use the firearm to commit an offence.

It was further submitted that although the serial number was removed, there was no evidence that the appellant was the individual that removed the serial number.

[13] On a consideration of the record I am satisfied that when the trial magistrate considered sentence, that he took into account the appellants personal circumstances, the offence of which he was convicted and the interest of society. See **S v Zinn** 1969 (2) SA 537. The trial magistrate in addition had regard to the element of mercy and the appellant's rehabilitation prospects. At the time of sentence the appellant was twenty-eight (28) years old. He was unmarried with no children. He had three siblings. He had advanced to grade 9 at school. During the period 2004 to 2005 he was employed with Mario Movers and in 2006 he worked as a labourer for Richard Cottle Repairs. At the time of his arrest, he did casual work as a '*sliding door operator*' on the taxis. Although he was on bail, it was withdrawn due his failure to appear in court and because he was arrested for another matter he was held in custody, pending the finalisation of the matter. The appellant had previous convictions for housebreaking with intent to steal, theft and for possession of drugs.

[14] In his judgment on sentence the trial magistrate correctly expressed concern that '*this area is troubled by unlicensed firearms. There are a number of murders occurring in this area where perpetrators are not found and they are using unlicensed firearms. Police are trying their best to try and trap these type of offences, but it appears they are fighting a losing battle*'. The trial magistrate found as aggravating the fact that:

1. The offence was serious and prevalent within the court's jurisdiction.
2. The firearm had its serial number erased which is indicative of mischievous use.
3. That appellant was not remorseful and that although he had no similar previous convictions, he was not a first offender.

[15] It is clear from his judgment that the trial magistrate did indeed consider the rehabilitative element of sentence and that he considered that the sentence should be blended with a measure of mercy. It is not unreasonable to conclude that the reason why the serial number was filed off, or erased from the firearm was due to the fact that the firearm must have been acquired in an illegal manner. It is a well-known fact that serial numbers are filed off and/or erased from firearms by criminals so that the firearms cannot be traced back to their lawful registered owners and also in an attempt to frustrate the attempts of the law enforcement agencies to link or connect the firearms with the commission of other crimes. In my view it makes no difference whether the appellant was responsible for filing off or erasing the serial number, or whether someone else did so. The argument that there was no evidence that he committed an offence with the firearm, is non sensical. His unlawful possession of the firearm constitutes a very serious offence. Fortunately he was arrested before the firearm was used in a crime. Considering the circumstances under which appellant was arrested, it is not unreasonable to conclude that he was in possession of this firearm for nefarious purposes. The submissions made on behalf of the appellant must therefore be dismissed.

[16] In the present matter the appellant denied that he possessed the firearm. His denial was correctly rejected as false. Accordingly there is no evidence before us as to how the appellant came to be in possession of the firearm and why he had it in his possession at the time that he was apprehended. No mitigating circumstances can therefore be inferred in relation to his possession of the firearm nor are there factors or circumstances to place his unlawful possession in a less serious light. It is so that it is incumbent upon the court in every case, before it imposes a prescribed sentence, whether it be maximum or minimum, to assess upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportional to the particular offence. Although the trial magistrate did not impose the maximum sentence in the present matter, it is necessary to emphasise that in matters such as the present, offenders must accept that courts will impose the maximum prescribed sentence unless there are truly convincing reasons why they should be departed from. In crimes like the present, punishment and deterrence are factors that stand out in determining an appropriate sentence.

[17] I am satisfied that in his well-motivated and balanced judgment, the trial magistrate properly took into account all the relevant factors that he was required to, in arriving at the sentence that he imposed. The fact that the sentence may at first glance appear to be on the steep side does not mean that we are entitled to interfere, or that the trial magistrate misdirected himself by not exercising his sentencing discretion properly. In any event I am further not persuaded that the sentence is unduly harsh or startlingly inappropriate nor does it induce a sense of shock.

[18] In the result the appeal against sentence must fail.

[19] I therefore propose the following order:

The appeal against sentence is dismissed.

RILEY, AJ

I agree and it is so ordered.

DOLAMO, J