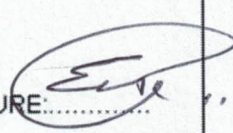


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: A19/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE: 15/05/20 SIGNATURE: 	

In the matter between:

ABIA MATHEBULA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

GAISA AJ

INTRODUCTION

- [1] The appellant appeared in the Limpopo Regional Division regional court, wherein he stood trial on two counts.
- [2] The first count was for unlawful possession of a firearm in contravention of Section 3, read with Sections 1, 103, 117, 120(1)(a); Section 121, read with Schedule 4; and Section 151 of the Firearms Control Act, No 60 of 2000, further read with Section 250 of the Criminal Procedure Act, No 51 of 1977 and Section 51(2) of the Criminal Law Amendment Act of 1997. An alternative count was for being in possession of a defaced or altered firearm in contravention of Section 41(f)(iv), read with Sections 2, 17, 19, 20, 103, 117, 120(1)(a); Section 121, read with Schedule 4; and Section 151 of the Firearms Control Act, further read with Section 250 of the Criminal Procedure Act, and Section 51(2) of the Criminal Law Amendment Act.
- [3] The second count proffered against the appellant was for being in possession of ammunition in contravention of Section 90 of the above Firearms Control Act, read with Sections 1, 103, 117, 120(1)(a); Section 121, read with Schedule 4; and Section 151 of the Firearms Control Act, further read with Section 250 of the Criminal Procedure Act and Section 51(2) of the Criminal Law Amendment Act.

- [4] At the trial, the appellant was represented by Legal Aid South Africa.
- [5] The appellant confirmed that he understood the charges levelled against him by the prosecutor, as well as the explanation of Section 51(2) of the Criminal Law Amendment Act provided him by the court *a quo*.
- [6] The court *a quo* enquired from the appellant's legal representative whether it was explained to the appellant that the charge of possession meant possession in his immediate control, not necessarily mere physical possession. The appellant's legal representative explained this to him and confirmed to the court that he had done so and that his client fully understood the charge.
- [7] The appellant pleaded not guilty to all the charges proffered against him. He denied that he was found in possession of a firearm at all, or (alternatively) that he was found in possession of a defaced or altered firearm. Similarly, the appellant denied that he was found in possession of ammunition as per the second charge.
- [8] The state adduced the evidence of the following witnesses in support of its allegations:

- (a) Samuel Fannie Chauke;
- (b) Patrick Maluzane; and
- (c) Bulani Nomsa Ngobeni.

[9] In his defence, the appellant adduced his own evidence, as well as that of one Anna Mabuza.

[10] The appellant was convicted on 26 September 2016 on both charges and sentenced on 12 October 2016 to fifteen years imprisonment.

[11] The appellant now appeals against the sentence.

BACKGROUND AND RELIEF SOUGHT:

[12] In terms of the appellant's notice, the following are the grounds of appeal:

- (a) That an effective term of imprisonment of fifteen years is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation;

- (b) That the court *a quo* erred in not imposing a lesser sentence, considering the aforesaid mitigating factors, age, and personal circumstances of the appellant; and
- (c) That the Court *a quo* erred in over-emphasising the seriousness and prevalence of the offence, and the retributive element of sentencing.

[13] In argument, counsel for the appellant highlighted that: the court *a quo* only concerned itself with what constituted substantial and compelling circumstances; it misdirected itself in not calling for all of the general or traditional mitigating factors in determining the appropriate sentence; the court *a quo* misdirected itself by directing the defence attorney to address it on what could be regarded as substantial and compelling circumstances; the trial attorney should also have applied to the trial court for an opportunity to present to it all available traditional mitigating factors; as a result of the misdirection, the court *a quo* sentenced the appellant without properly considering mitigating factors, resulting in him being prejudiced by the prescribed minimum sentence of fifteen years imprisonment; and that the court *a quo* did not take into account the purpose of the sentence.

FINDINGS OF THE COURT A QUO IN RESPECT OF SENTENCE:

- [14] Before pronouncing its sentence, the court *a quo* invited the appellant's legal representative to "*address the court on what factors should be taken as substantial and compelling circumstances*". In essence, the court *a quo* wanted to know from the appellant what the defence would "*want the court to consider as substantial and compelling circumstances taking into consideration that the offense was committed while Mr. Mathebula was on parole [while facing] a pending case of robbery*".
- [15] It appears from the record that the appellant has a previous conviction, which sentence was pronounced in 1999. On 27 August 2015, when the appellant was found in possession of the firearm and ammunition for which he was convicted on 26 September 2016, he was on parole in respect of the previous conviction, and he, at that time, had a pending case of robbery against him.
- [16] The appellant's attorney placed before the court *a quo* the following as substantial and compelling reasons why the court *a quo* should deviate from the prescribed fifteen-year sentence and impose a lesser sentence:
- (a) That the appellant is a family man with three children;
 - (b) That the appellant's wife, at the time of his arrest, was unemployed; and

(c) That the appellant was the sole breadwinner in his household.

[17] The court *a quo* was aware of, and correctly referred to, the leading cases of the Supreme Court of Appeal ("the SCA"), in *S v Malgas 2001 (1) SACR 469* (SCA), where the court held that:

*"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."*¹

[18] When the record of the proceedings is considered, there is no suggestion that the personal circumstances of the appellant were not taken into account by the court *a quo*. The record supports the following statement by the court *a quo*:

"I have carefully applied my mind to the submission from both the prosecution and the defence. I have weight [sic] all the factors one against the other in order to determine whether substantial and

¹ At para [25]

compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence.

I have also considered that Mr. Mathebula has [a] previous conviction. Mr. Mathebula has previous convictions of possession of unlicensed firearm, committed or convicted in 1999."

[19] The court *a quo* further stated that:

"I have carefully applied my mind to the submission that the court should find that the fact that Mr. Mathebula is a family man constitute substantial and compelling circumstances justifying the imposition of a lesser sentence than the mandatory sentence of 15 years imprisonment."

[20] The court *a quo* then proceeded:

"... to endorse [the] record that the court finds that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence than the mandatory sentence of imprisonment of not less than 15 years.

I will therefore proceed to take into consideration to determine an appropriate sentence and when determining an appropriate sentence the

court will take into consideration the traditional aims and purpose of sentence, which are deterrence, rehabilitation, prevention and retribution.

The court will strive to achieve a balance between... the crime, the offender and the interests of the society.

Punishment must fit the offender as well as the crime, be fair to the society and be blended with a measure of mercy, mercy is the hallmark of justice."

[21] In dealing with the interests of society, the court *a quo* stated that society demands that serious offences be severely punished – if the court imposes lenient sentences in serious crimes, the administration of justice falls into disrepute. This in turn leads society to lose trust in the criminal justice system and take the law into their own hands. The court *a quo* also considered that society's interests are not served by a sentence which is out of proportion to the seriousness of the crime.

[22] Being persuaded by the appellant's legal representative, the court *a quo* "decided to treat Mr. Mathebula as a first offender" and sentenced him to fifteen years' imprisonment in respect of the first count, and five years'

imprisonment in respect of the second count. Ultimately, the court *a quo* exercised mercy towards the appellant by treating him as a first-time offender, when in fact he had a previous conviction and committed the acts of which he was convicted herein during the time he was on parole in respect of the previous conviction.

CONCLUSION:

[23] In *S v Matyityi* (659/09) [2010] ZASCA 127 (30 September 2020), approximately nine years after *S v Malgas supra*, the SCA noted that criminality is still on the rise, despite the imposition of minimum sentences. It stressed the relevance of legislation as follows:

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive

*their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."*²

[24] It is against the above background that the present appeal should be considered.

[25] In *Booyesen v S* 2011 (1) SACR 448 (SCA),³ the SCA, regarding whether the personal circumstances of the accused were taken into account by the trial court, stated that the "*personal circumstances of the appellant cannot be*

² At para [23]

³ At para [11]

viewed in isolation. They have to be weighed against the aggravating circumstances of the offence”.

[26] The manner in which the court *a quo* handled the sentencing in this matter can be compared to *Booyesen v S* where the SCA stated that:

“[21] Not having found substantial or compelling circumstances to be present, the trial court found no justification to depart from the prescribed minimum sentence. Clearly there are none. To find otherwise would be to fall into the trap of doing so for “flimsy reasons” and “speculative hypothesis favourable to the offender” as was cautioned against in *Malgas*. This the trial judge did not do, and consequently did not err in that regard. It follows that the appeal must fail.”

[27] In this matter too, the appeal must fail.

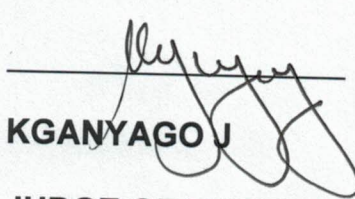
[28] In the result, the appeal is dismissed.

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GAISA AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE**

I concur:


KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCE

COUNSEL FOR APPELLANT : MR MOKGOTHO

INSTRUCTED BY : LEGAL AID SOUTH AFRICA

COUNSEL FOR RESPONDENT: ADV N.MATHABATHA

INSTRUCTED BY : DPP LIMPOPO POLOKWANE

DATE OF HEARING : 6TH DECEMBER 2019

DATE OF JUDGMENT : 15/05/20