



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~Yes~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~Yes~~ / NO
(3) REVISED.
9 March 2017 *Attoluis*
DATE SIGNATURE

CASE NO: A765/2015

DATE OF APPEAL: 31 JANUARY 2017

In the matter between

AARON DINTWE SEKGAPANE
KAGISO DUIKER

First Appellant
Second Appellant

and

THE STATE

Respondent

JUDGMENT

MADIMA, AJ

[1] The appellants were charged with three counts in the Pretoria Regional Court. The first count was one of housebreaking with intent to steal and theft of two R4

Rifles. The rifles were the property of the South African National Defence Force ("SANDF"). The second count related to the contravention of the Firearms Control Act, Act No. 60 of 2000, more specifically trading in the two R4 Rifles without a licence or authority to do so. The third count related to housebreaking with intent to steal and the theft of a Nissan bakkie. The bakkie was also the property of the SANDF.

[2] The appellants were legally represented. They pleaded not guilty to the charges, but were convicted and sentenced on 12 September 2007 to terms of four, fifteen and five years imprisonment in respect of counts one (1), two (2) and three (3) respectively. The sentences were ordered to run concurrently. On 22 October 2007 the appellants were granted leave to appeal against both conviction and sentence. Only the first appellant is before us on appeal. The second appellant has since abandoned his appeal.

Brief background

[3] On 1 February 2004, two R4 rifles went missing from the armory of the SANDF in Pretoria. A year prior to the disappearance of these rifles, the SANDF authorized, in terms of the provisions of s 252A of Act 51 of 1977, an underground operation named "Operation Rifleman". Operation Rifleman was headed by Thokolo Mokoena ("Mokoena"). Its main function was to investigate and curb thefts of armory. Parallel to Operation Rifleman was Operation Violet, another authorized underground structure which focused mainly on vehicle theft syndicates.

[4] Albert Mabutane ("Mabutane") was on duty on 1 February 2004 at the SANDF in Pretoria. He was the person responsible for the safekeeping of the inventory of firearms that are stored in a safe on the premises. The keys to the safe are kept by the officer on duty, which on the day in question, was Mabutane himself. Mabutane went off duty at 24:00 on 1 February 2004. He handed over the keys to the safe to one Sergeant Molegale ("Molegale"). The following morning Molegale was nowhere to be found. Upon inspection of the safe and its contents, Mabutane to his amazement, discovered that two R4 rifles were missing. Molegale has since died.

[5] As at 1 February 2004, the first and second appellants were employees of the SANDF. The first appellant was employed in the capacity of a receptionist. The second was a sentry. Only the first appellant was on duty on the night of 1 February 2004.

[6] The evidence of Mokoena is that he was an Inspector working in the Organised Crime Unit. During 2003 he was involved in Operation Rifleman. This unit specialized in investigation of syndicates and persons involved in the unlawful dealing in unlicensed firearms. Mokoena registered an undercover agent, one Sergeant Malambe (Malambe). On 7 February 2004 Malambe telephoned Mokoena and advised him about a transaction that was to take place in Soshanguve.

[7] Mokoena handed Malambe a sum of R4 000 00 sourced from the project funds of Operation Rifleman. This was the amount that Malambe was advised would be the required as the purchase price for the two R4 rifles. As arranged, Mokoena followed Malambe in a separate vehicle to a BP filling station in Soshanguve. At the filling

station Mokoena observed Malambe talking to the first appellant. Malambe and the first appellant walked towards a Golf VR6 motor vehicle that was parked close by. The first appellant then retrieved a plastic bag from the Golf VR6 and put it into the vehicle driven by Malambe, a blue Hyundai. The first appellant then took off.

[8] Malambe then showed Mokoena the two rifles whose serial numbers matched those of the stolen R4 rifles of the SANDF. It transpired also that during the course of the sale of the R4 to Malambe, first appellant advised him that he could also sell him a bakkie for R5 000.00. Arrangements were made between Malambe and the first appellant that he, Malambe would purchase the bakkie from him. Mokoena again gave Malambe money for the purchase, this time around the amount was R5 000.00. The meeting place was to be Soshanguve. On this occasion the first appellant was in the company of the second appellant. The parties then proceeded to a Total Garage in Rosslyn, Pretoria. In Rosslyn, the second appellant handed over the keys of the Nissan bakkie to Malambe. Malambe was given a R500.00 discount because he was, as the first and second appellants claimed, their customer.

[9] Malambe's evidence largely corroborated that of Mokoena on both occasions of the sale of the rifles and the bakkie. The same goes for that of Johannes Morane ("Morane"), also involved in Operation Rifleman during the sale of the Nissan bakkie. Importantly he confirmed that the second appellant was with the first appellant during the bakkie transaction. Thomas Mokeana ("Mokeana"), a member of the South African Police Services ("SAPS") also testified about his partial involvement in Operation Rifleman. His placement was in Operation Violet, the vehicle theft unit. He testified that he was in Soshanguve at a hangout of the vehicle theft syndicate. The

second appellant was also present. During a conversation with the second appellant he learned that the second appellant and his friends were in possession of R4 rifles that they were ready to sell them to anyone willing to buy. The first appellant then arrived with a plastic bag carrying the two R4 rifles. Mokeana also confirmed that the appellants were prepared to sell the rifles for R4 000.00. Mokeana advised the appellants that he would connect them with someone willing to buy the rifles from them. Mokeana contacted Malambe and passed on to Malambe, the information he had become privy to. Malambe owned the operation and ran with it.

Grounds of appeal on conviction

[10] I have already stated above only the first appellant is before the Appeal Court. The first appellant submitted as a ground of his appeal that the Court *a quo* erred in convicting him on the evidence that was obtained in terms of s 252A of Act 51 of 1977. His complaint is that the State did not lead any evidence that the trap laid out against him was in compliance with the provisions of the Act. This fact alone, so submitted the first appellant, meant that he was conviction on evidence that was unconstitutionally obtained.

[11] Similarly, it is contended that Mokeana, an operative of Operation Violet had no authority to act for or on behalf of Operation Rifleman. Further, that his interactions with the appellants were not sanctioned in terms of s 252A of the Act. Further, Mabutane's evidence was that he did not know who had stolen the two R4 on the night of 1 February 2004. There is no reference in the record that Mokeana took an active part in Operation Rifleman. Mokeana's only recorded involvement was passing

information about a likely transaction to Malambe. Nothing in law bars Mokeana from sharing information in the manner he did to a fellow law enforcer, Malambe.

[12] The import of s 252A of the Act is that the evidence obtained during an undercover operation such as in the instant case is only admissible if the conduct of the operation does not go beyond providing an opportunity to commit the offence. In the event it did, such evidence may be admitted subject to the provisions of s 252A (3). The question then is, did the actions of the operatives of both Operations Rifleman and Violet go beyond providing an opportunity to commit an offence?

[13] The first and second appellants were not aided by any one of the operatives of Operations Rifleman and Violet in the commission of the thefts. The two R4 rifles and the Nissan bakkie were stolen from the SANDF long before either of the Operations was set upon the appellants. It is therefore inconceivable how either of the operations could be faulted and found wanting with regards to the s 252 A requisites.

[14] On both occasions, the operatives were approached by the appellants post the thefts. Importantly, the provisions of s 252A (6) of the Act are instructive in providing that "If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of admissibility of the evidence." Needless to say, no objection to the evidence of the operatives was raised by the legal representatives of the appellants.

[15] The first appellant also offers no credible defence to the charges. Nowhere does he deny being in possession of the stolen R4 rifles. There is similarly no rebuttal to the evidence regarding their unlawful possession of the Nissan bakkie. A feeble attempt is made in defence that despite the disputed evidence of a telephonic conversation between the appellants, Malambe and Mokoena, same was never proven by way of calling for evidence in that regard during the trial.

[16] I do not think that much would have been achieved by calling in a service provider to corroborate the evidence whether or not there was cellphone communication between the operatives and the appellants. The appellants still need to go past their possession of the R4 rifles and the Nissan bakkie. They are found seriously compromised in this regard.

[17] It is trite law that the guilt of the accused must be proven beyond reasonable doubt. The trial court must weigh up all the elements which point towards the guilt of the accused against all those that are indicative of his innocence. The court must take proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. The court then must decide whether the balance weighs so heavily in favour of the state as to exclude any doubt to the accused. *S v Chabalala 2003 SACR 134 (SCA) 140a-b*. I have little doubt that the court *a quo* was correct in finding that the appellants indeed were guilty as charged. I am mindful of the fact that only the first appellant was on duty on the night of 1 February 2004 and not the second appellant. I make no pronouncement with regard to the latter. He is however caught later in the chain of events that unfolded leading to the sale of the

Nissan bakkie, and his prior knowledge of the intended sale of the R4 rifles that he communicated to Mokeana.

[18] I also am mindful of the restraint this court must exercise in not interfering with the factual findings of the court below. *R v Dhlumayo and Another* 1948 (2) SA 677 (A). The court *a quo*, I find, has not materially misdirected itself in so far as the factual and credibility findings are concerned. In *S v Francis* 1991 (1) SACR 198 (A) the court held thus “The powers of a Court of Appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of a witness’ evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness’ evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in **exceptional cases** that the Court of appeal will be entitled to interfere with a trial Court’s evaluation of oral testimony.” (emphasis added). And in *S v Radebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f the Court emphasized that “...in the absence of **demonstrable** and **material** misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong” (emphasis added). Apart from the feeble submission by the appellants about the unled evidence regarding the cellphone records, which evidence I have already found to be of no real assistance to them, nothing of substance has been offered by the appellants to warrant the setting aside of the findings of the Court *a quo*.

Sentence

[19] The appellants were sentenced to an effective term of 15 years imprisonment. Is this sentence justified and appropriate in the circumstance? I am mindful yet

once more of the principle that punishment is a matter for the discretion of the trial Court. This court ought not to erode that discretion unless justified to do so. I am further mindful of the fact that this court can only alter the trial court's sentence if, for example, there was an irregularity that occurred during the trial, or if the trial Court misdirected itself in the imposition of the sentence, or the sentence imposed by the trial Court is disturbingly or shockingly inappropriate. *S v De Jager and Another* 1965 (2) SA 616 (A), *S V Rabie* 1975 (4) SA 855 (A) and *S V Petkar* 1988 (3) SA 571. See also *Rafatlema v The State* Case No. A627/2015, Gauteng Division, Pretoria, at p11, para 21.

[20] The first appellant further complains that the charge sheet did not refer to the applicability of the minimum sentence with regard to count 2 which falls squarely within the ambit of Part 11 of Schedule 2 of Act 1205 of 1997. He further submitted that he was not warned that the State would be seeking a minimum sentence with regard to that charge.

[21] In mitigation of sentence the first appellant submitted that he was 40 years old, married with no children. His father has died whilst in he was in Standard 6 (Grade 4). He had to drop out of school. He was earning R3 319.43 at the time of his arrest. He has been HIV positive since 2000. Importantly he is a first offender. The Court *a quo* is further criticized by the first appellant for over-emphasising the interest of the community, the seriousness as well as the prevalence of the offences committed. In doing so, so the first appellant

submitted, the Court under-emphasised his personal circumstances. It was submitted that each case be treated according to its own merits and sentencing should be blended with mercy. In *S v Phulwane and Others 2003 (1) SACR 631 (T)* the Court held that "The principle of sentencing is that each case be treated on its own merits. A sentencing officer must never allow the seriousness of the offence and the interest of the community to receive undue weight at the expense of the personal circumstances of the accused. This will lead to a sentence which is flawed. See also *S v Mhlakaza 1997 (1) SACR 515 (SCA)* and *S v Vilakazi 2009 (1) SACR 552 (SCA)*.

[22] I agree with the submissions by the first appellant's counsel that the minimum sentence provisions with regard to all counts, do not apply. The Court a quo erred in applying the minimum sentence legislation. The penal provision set out in Schedule 4 of the Firearms Control Act, Act 60 of 2000 provides for a maximum period of imprisonment of 25 years in respect of contravention of section 31(1) of Act 60 of 2000. This Act applies the maximum sentence regime which the Court a quo should have applied.

[23] They appellants were employees of the SANDF. They basically stole from their employer. It does not get more serious than that. The first appellant submitted further in mitigation that the firearms and the motor vehicle were subsequently recovered. He has also lost his job. His family has been left destitute. I find this akin to killing one's parents and lamenting the fact that one is orphaned. The first appellant is of the view that he still can be rehabilitated.

[24] A sentencing court must take into account all of the personal circumstances of the accused and blend that with elements of mercy. *S v Khumalo* 1973 (3) SA 697. I agree. However this Court takes a dim view of the crimes committed by the appellants. The R4 rifles, had they not been recovered could have been used in robberies where life would likely be lost.

[25] The courts have on numerous occasions held that the imposition of a sentence on accused persons is always in the discretion of the trial court. A Court of appeal may only interfere if it finds that the sentence has not been judicially and properly exercised. See *S v Rabie supra*; *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

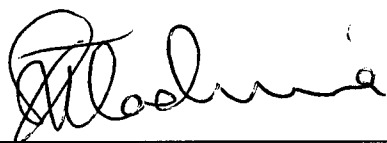
[26] I do not find the 15 years imprisonment sentence imposed on the first appellant to be inducing a sense of shock, or disproportionate to the offences. I am equally satisfied that the Court *a quo* took all of the personal circumstances of the first appellant into account when it imposed the sentence.

[27] There is no one size fits all. Each case must be evaluated according to its own peculiarities. I hold the view that the seriousness of the offences of which appellant has been convicted; still makes him a candidate for a long sentence of imprisonment, even in this instance where the minimum sentence legislation does not apply.

[27] I therefore find that there was no misdirection by the Court *a quo* regarding conviction and sentence.

I accordingly make the following order.

(a) The appeal against conviction and sentence is refused.



TS MADIMA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I Concur



S P MOTHLE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

It is so ordered

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Dates of Hearing:
Date of Judgment:

31 January 2017