



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A32/2017

In the matter between:

THABO SIEFIED MOKHOBO

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J et MHLAMBI, J

HEARD ON: 12 JUNE 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 15 JUNE 2017

Summary: Criminal Procedure and Minimum Sentences Act- Appeal against sentences. No cause shown to interfere with sentences imposed. Trial court finding cause to depart from prescribed minimum sentence but not entering

such cause, in the form of substantial and compelling circumstances, on record. The requirement to specify and record such circumstances reiterated with reference to section 51(3)(a) of Act 105 of 1997. Appeal dismissed.

- [1] On 2 December 2014 the appellant, who was legally represented, appeared before the regional court at Welkom on 1 count of theft, 1 count of unlawful possession of semi-automatic pistol and 1 count of possession of ten rounds of ammunition as charges 1, 2 and 3 respectively. He was found guilty on all counts in accordance with his plea of guilty and was, on 10 December 2014, sentenced to an effective 12 years imprisonment with the 2 year sentence on charge 3 being directed to run concurrently with the 10 year sentence on charge 2, while 3 years of the 5 year sentence on charge 1 being conditionally suspended. He feels aggrieved by the effective sentence and now approaches us on appeal against the same with leave granted by this court on petition.
- [2] On imposing the impugned sentences the court below, *inter alia*, found that the appellant stole from his employer, who also happened to be his mother's employer. The trial court, further, inferred from the foregoing fact that the appellant's mother probably lost her employment as a result of, *inter alia*, the appellant's conduct. The court *a quo*, further, observed that there was no evidence that the relevant firearm was used to commit any violent crimes. In conclusion the trial court relied on **State v Madikane** 2011 (2) SACR 11 (ECG) where the accused was sentenced to 7 years imprisonment on appeal for unlawful possession of semi-automatic firearm.

- [3] On the papers and in argument before us the appellant, through Mr Reyneke appearing for Mr Van der Merwe, effectively contends, *inter alia*, to the effect that the trial court failed to strike a healthy balance between his personal circumstances as a 35 year old terminally ill first offender who was staying with and supporting a 13 year old child together with his mother, the crimes he committed and the interests of society. In his view the fact that he was remorseful also turned the scales in favour of a far lesser effective sentence. In his opinion the trial court erred in failing to direct that all the sentences should run concurrently regard being had to the fact that the crimes were closely related in both time and place and that they flowed from the same action. He concludes that 5 years imprisonment is appropriate as effective sentence in the circumstances of this matter.
- [4] The state, through Mr Simpson, on its part supports the sentences and submits, *inter alia*, that the trial court correctly found that substantial and compelling circumstances existed to justify a lesser sentence and gave due emphasis to the elements of punishment.
- [5] Sentencing is pre-eminently the duty of the sentencing court and the powers of the court of appeal to interfere with a sentence are limited. It can only interfere if the sentencing court did not exercise its discretion properly or at all by failing to strike a balance between the triad consisting of the personal circumstances of the accused, the nature of the crime committed and the interests of society. (See **S v Pieters** 1987 (3) SA 717 (A))

- [6] Where the provisions of Criminal Law Amendment Act 105/1977 as amended (the Minimum Sentences Act) are applicable the court can only depart from prescribed minimum sentences if legal cause, in the form of substantial circumstances compelling such a deviation, exists. The test applicable being whether or not the cumulative impact of mitigating factors on aggravating circumstances, inclusive of the interests of society, renders such a prescribed minimum sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 (SCA)).
- [7] In the event of the sentencing court finding such a cause to deviate from prescribed minimum sentences, such court is required to enter substantial and compelling circumstances it found to exist on record insofar as courts are not to deviate from prescribed minimum sentences lightly and on flimsy reasons. (See **S v Malgas** (*supra*) at *par* [9] and section 51(3)(a) of Minimum Sentences Act).
- [8] In the instant matter the trial court apparently found reason to deviate from the prescribed minimum sentence of 15 years imprisonment for unlawful possession of semi-automatic firearm but did not specifically record its reasons for so doing. It can, however, be inferred from the decision the court below relied upon that the reason for the departure is the fact that there was no evidence that the firearm was used to commit any violent crimes whilst in the appellant's possession. In my view had the firearm been used to commit such crimes the appellant, as the accused,

would, most probably, have been charged for those crimes and, if convicted, been sentenced accordingly. On a charge and conviction of unlawful possession of a firearm the accused gets sentenced for possession as convicted and nothing else.

- [9] The fact of the matter in the instant case is that the trial court deviated from applicable prescribed minimum sentence and had his reason to do so. It must, however, be emphasized that sentencing courts are obliged to record the relevant grounds compelling them to deviate from such prescribed sentences so that same can be seen to exist.
- [10] There exists nothing before us to suggest that the trial court did not exercise its discretion properly or at all insofar as he tempered the cumulative effect of the sentences by suspending part of the sentence in the theft charge and directing sentences on counts 2 and 3 to run concurrently because the appellant was, *inter alia*, found to have shown remorse by pleading guilty. The parties were correctly in agreement that the crimes were serious.
- [11] The learned Acting Regional Magistrate is urged to have regard to the relevant provisions of Minimum Sentences Act in future and to ensure that the substantial and compelling circumstances found are, at the very least, seen to exist on record.

ORDER

[12] In the result the appeal fails.

[13] The convictions and sentences are confirmed.

LJ LEKALE, J

I concur

JJ MHLAMBI, J

On behalf of appellant:
Instructed by: MR JD Reyneke
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:
Instructed by: Mr A Simpson
Office of Director of Public Prosecutions
Bloemfontein