

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A209/2015

In the appeal between:-

MANDLA DLODLO

Appellant

and

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* REINDERS, J

HEARD ON: 15 FEBRUARY 2016

JUDGMENT: REINDERS, J

DELIVERED ON: 18 FEBRUARY 2016

- [1] The appellant was convicted on 24 November 2014 in the Regional Court for the Free State Division (held at Welkom) of contraventions of Sections 3 and 90 of the Firearms Control Act 60 of 2000, in that he was in unlawful possession of a firearm (Count 3: 9mm Parabellum Vector Semi-Auto) and ammunition (Count 4: five 9mm Parabellum Cartridges). Subsequently appellant was sentenced on 1 December 2014 to respectively nine and three years' imprisonment for unlawful possession of a firearm and ammunition. It was ordered that two years of the latter sentence would run

concurrently with the sentence of nine years, totalling an effective sentence of ten years imprisonment. Appellant was granted leave to appeal against his sentence by the court *a quo*.

[2] The attack on the sentences imposed may be summarized as follows:

2.1 The effective term of ten years imprisonment is strikingly inappropriate and out of proportion to the totality of accepted facts in mitigation and it disregards the time period of 29 months that appellant had spent in custody awaiting trial;

2.2 The court *a quo* had erred by not imposing a shorter term of imprisonment due to the absence of previous convictions, the absence of planning, appellant's age and personal circumstances and "other" mitigating factors;

2.3 The court *a quo* over emphasized the seriousness of the offence, the interest of society and the prevalence of the offence;

2.4 The court *a quo* erred in not sufficiently taking into account that the appellant was a first offender caring for his five children residing with their grandmother.

- [3] The sentence imposed was supported by Mr Hoffman on behalf of the state who submitted that the court *a quo* correctly balanced the triad of factors and even showed mercy by deviating from the prescribed minimum sentence. According to him the trial court considered the following mitigating factors: The appellant was 28 years of age and had a grade 12 qualification. He was unmarried and had five children. He was unemployed but did casual jobs prior to his arrest. Of specific importance is that he was a first offender and incarcerated for two years and five months awaiting finalisation of the case.
- [4] He pointed out the aggravating circumstances taken into account by the court *a quo*, viz a lack of remorse; the availability of illegal firearms; that the recovery of the firearms were not due to the assistance of the appellant but to the police investigating a charge of robbery; that the public need to feel safe and that a minimum sentence is prescribed for the unlawful possession of a semi-automatic firearm.
- [5] The Supreme Court of Appeal ruled in **S v Thembaletshu** [2008] 3 All SA 417 (SCA) that conviction on the unlawful possession of a semi-automatic firearm invoked the prescribed minimum sentences as envisaged in Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 read with Part 11 of Schedule 2. From the record it appears that Mr Du Toit on behalf of appellant pressed hard upon the learned regional magistrate to deviate from the prescribed minimum sentence of fifteen years, referring her to **S v**

Malgas 2001 (2) SA 1222 (SCA) at 1235F – 1236C. Although no specific mention is made by the trial court in handing down sentencing that substantial and compelling circumstances were found by her to exist and thus warranted a deviation from the prescribed minimum of fifteen years imprisonment, it appears from the lesser sentence of nine years imposed that such circumstances were indeed found by her.

- [6] When it comes to interfering with the sentence imposed by the Court *a quo*, it is trite law that the jurisdiction of the Court of Appeal is not discretionary and in fact very limited, as was stated in **S v Matlala** 2003 (1) SACR 80 SCA at 83e-f. The discretion in imposing a sentence lies with the trial court. In determining if a sentence is unreasonable, the court of appeal asks itself which sentence it would have imposed as original sentencing court. If the difference between its sentence and that actually imposed is so great that the inference can be drawn that the trial court acted unreasonably, the sentence will be replaced with a lighter one.

See: **S v Wilken** 1971 (3) SA 488 (A).

- [7] Should it be found that there is a striking disparity in the sentence imposed by the trial court and that which the court of appeal would have imposed, the latter has the power, and duty, to interfere with the sentence.

See: **S v Giannoulis** 1975 (4) SA 867 (A).

The essential question to be determined remains whether the trial court could reasonably have imposed the sentence it did.

See: **S v Pieters** 1987 (3) SA 717 (A) at 734C-H.

- [9] Mr van der Merwe on behalf of appellant, even though not referring us to any case law in respect of appropriate sentences for conviction of illegal possession of a semi-automatic firearm and ammunition, indicated that in his experience, much more lenient custodial sentences are the practise in all divisions.

- [10] In **S v Madikane** 2011 (2) SACR 11 (ECG) Plasket J did a thorough search on cases on sentence for the unlawful possession of semi-automatic pistols and concluded that apart from **Thembaletu** *supra* he could find no reported decisions in which an accused was sentenced to more than three years' imprisonment. Although dismissing the appeal, he found the sentence imposed by the court *a quo* of five years (unlawful possession of semi-automatic weapon) and three years (unlawful possession of ammunition) running concurrently, to be just.

- [11] On counts of murder and unlawful possession of a firearm and ammunition Spilg J recently took the convictions for unlawful possession of a semi-automatic firearm and ammunition together for sentencing purposes and imposed a sentence of six years imprisonment, half of which were suspended on conditions.

See: **S v Motlounq** 2015 (1) SACR 310 (GP).

[10] I am bound by the Supreme Court of Appeal's ruling in **Thembaletu** *supra*. However, in **S v Malgas** *supra* it was stressed by Marais JA that Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Schedule 2. In determining whether the sentence imposed by the trial court is proportionate to the offence, I am taking all of the factors as mentioned above into consideration.

[11] Appellant was acquitted on a charge of robbery with aggravating circumstances and unlawful possession of four 9mm Parabellum cartridges. The facts on which appellant was convicted on Counts 3 and 4 entailed the following: On 12 June 2012 he was approached by a police officer whilst standing about a hundred metres from a Uno vehicle on the road between Wesselsbron and Odendaalsrus. A Vector Z88 9mm semi-automatic pistol was found hidden in his pants. One cartridge was still in the chamber and four in the magazine of the pistol. On these facts it cannot be said that this is a particularly serious case such as those for instance where a murder was committed with the unlawfully possessed semi-automatic firearm.

[12] In determining the proportionality of the length of a sentence to the offence, all relevant circumstances which could have a bearing on the offender should be considered.

In **S v Dodo** 2001 (1) SACR 594 (CC) Ackerman J held as follows at paragraph [38]:

“To attempt to justify any period of penal incarceration...without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity”.

[11] I am of the view that the sentence imposed by the court *a quo* was too harsh and is strikingly inappropriate. Even though the learned regional magistrate indicated that she had balanced all of these factors in arriving at an appropriate sentence, there is a striking disparity in the effective sentence of ten years imprisonment imposed and the sentence that I would have imposed. In my view too much reliance was placed on the prevalence of the crime, the interests of society and seriousness of the crime in question in relation to the personal circumstances of the appellant as a first offender, having spent a lengthy time in prison and the circumstances of the crime as eluded to above. This culminated in a sentence that was too harsh in the circumstances, rendering the imposed sentence unjust.

[12] To my mind a sentence of six years imprisonment on count three and two years' imprisonment on count four is one that would be proportionate to the crime, the criminal and the legitimate needs of society, and I would have imposed it as such. I would have ordered it to run concurrently. The effective sentence by the trial court is ten years

imprisonment. The disparity between these sentences is accordingly of such a nature that the sentence imposed by the trial court stands to be set aside and replaced with the sentence of this court.

[13] In the result, the appeal is upheld and the sentences on Counts 3 and 4 set aside and replaced with the following order:

1. Count 3: six years imprisonment.
2. Count 4: two years imprisonment.
3. The sentence imposed on Count 4 shall run concurrently with that in Count 3.

[14] This sentence should be deemed to have been imposed on 1 December 2014.

C. REINDERS, J

I agree.

C.H.G. VAN DER MERWE, J

On behalf of appellant:

Mr P van der Merwe
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv R Hoffman
Instructed by:
Director of Public Prosecutions
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